

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OTTAWA

**ADREA HILL and
LUKE SANNER,**

Case No: 24-8010-CZ

Plaintiffs,

Hon. Margaret Z. Bakker
Sitting by SCAO Assignment

v.

**OTTAWA COUNTY and
OTTAWA COUNTY BOARD
OF COMMISSIONERS,**

**ORAL ARGUMENT
REQUESTED**

Defendants.

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR DISQUALIFICATION

Plaintiffs, Adrea Hill and Luke Sanner, filed suit after Defendants, Ottawa County and its Board of Commissioners, denied their FOIA requests. The parties filed cross-motions for summary disposition asserting competing arguments about whether communications about County business on public officials' personal devices were subject to FOIA. The Court held a hearing on those motions and indicated that it was inclined to reject Plaintiffs' arguments.

Following that hearing, Plaintiff's Counsel learned that the Court had previously had her own communications made public through FOIA, and that those communications had been used as part of a political campaign. The publication of those communications had also resulted in a complaint against the Court to the

Judicial Tenure Commission and a rebuke by the Michigan Supreme Court. Because members of the public might question the Court's ability to decide the issues in this case impartially in light of the Court's personal experience, Plaintiffs request that the Court disqualify itself pursuant to MCR 2.003(C)(1)(b).

BACKGROUND

Plaintiffs filed a complaint against Defendants, Ottawa County and the Ottawa County Board of Commissioners, after Defendants refused to produce documents in response to Plaintiff's FOIA requests. In particular, Defendants refused to produce text messages and emails related to County business stored on the personal cell phone of Lynn Janson, a member of the Ottawa County Officers' Compensation Commission. Defendants further refused to produce instant messaging communications related to County business stored on the personal devices of members of the Ottawa County Commission. Both requests sought communications which occurred during public meetings of those bodies.

Plaintiffs filed a motion for summary disposition, asserting that communications that would otherwise meet the definition of a public record are subject to FOIA regardless of whether they are stored on a public official's personal device. Defendants subsequently filed a cross-motion for summary disposition, arguing that communications on a public official's personal device or in a personal account are not subject to FOIA. On February 3, 2025, the Court heard oral argument on the parties' cross-motions.

At oral argument, the Court made clear its view that it was not inclined to accept Plaintiffs' argument. (2/17/24 Hrg. Tr. at 5-7; 10-11.) The Court's comments indicated that it was concerned about the implications of requiring public officials to turn over records on their personal devices. (*Id.* at 11.) Although Plaintiff's Counsel explained that the FOIA requests sought only public records on personal devices—and not a public official's private communications – the Court repeatedly asserted that Plaintiffs were attempting to look through private communications. *Id.* at 7 (questioning whether it made sense “to invade someone's private communications to the extent of a blanket FOIA request that wants to see everything that was in those instant messages or texts or emails.”). See also *id.* at 11 (stating that Plaintiffs would be “opening up someone's entire email and text history for [Plaintiffs'] review, which could include some very personal things and things that are totally unrelated.”). While the Court did not issue an order at the hearing, the Court appeared inclined to rule in Defendants' favor. (*Id.* at 28.)

After the oral argument, Plaintiff's Counsel learned this Court had previously had her own communications made public in response to a FOIA request, and that those emails had been well-publicized as part of the 2020 campaign for Allegan County prosecutor. The challenger to then-incumbent Myrene Koch, Mike Villar, had filed a FOIA request that revealed that the Court had *ex parte* communications with Koch during a criminal trial. Villar was publicly critical of the Court's conduct, and the emails made public through FOIA garnered significant media attention. Villar also filed a complaint with the Judicial Tenure Commission.

The FOIA request also led to further legal proceedings. The criminal defendant whose case was at issue in the *ex parte* communications appealed his conviction on the basis of those communications. In 2024, the Michigan Supreme Court issued a scathing rebuke of the trial court’s actions. Although the Supreme Court rejected the defendant’s request to have his conviction overturned, it made clear its view that the trial court had violated the Judicial Code of Ethics and that the actions fell short of the ethical standards for judges.

Following the hearing on the motions in this case, various members of the bar contacted Plaintiff’s Counsel to question whether the Court could be impartial in determining the scope of FOIA in light of the Court’s personal history, recognizing similarities with the instant case. The hearing also garnered media attention that highlighted the Court’s previous experience with FOIA. One press report titled “Judge signals that officials’ private devices exempt from FOIA requests,” detailed the 2020 FOIA request and its aftermath at some length. (Ex. A.)

ARGUMENT

The Michigan Court Rules list several grounds that warrant disqualification of a judge, including actual bias or the risk of bias against a party or attorney. MCR 2.003. In 2009, the Michigan Supreme Court amended the relevant rule to add the “appearance of impropriety” as a ground for disqualification. Under the amended rule, disqualification of a judge is warranted if “[t]he judge, based on objective and reasonable perceptions . . . has failed to adhere to the appearance of impropriety

standard set forth in Canon 2 of the Michigan Code of Judicial Conduct.” MCR 2.003(C)(1)(b). Canon 2 of the Michigan Code of Judicial Conduct states, in relevant part:

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

Mich. Code of Judicial Conduct, Canon 2(A).

“Under MCR 2.003(C)(1)(b), the test for determining whether there is an appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.” *Kern v Kern-Koskela*, 320 Mich App 212, 232 (2017) (quotation marks and citations omitted). “To decide whether a judge has failed to avoid the appearance of impropriety,” Michigan courts “consider whether the judge’s conduct would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.” *People v Loew*, ___ Mich ___, 2024 Mich. LEXIS 1286, at *27 (2024) (quotation marks and citation omitted). In other words, courts “consider whether an ordinary person might reasonably question the judge’s integrity, impartiality, or competence on the basis of the judge’s observable conduct.” *Id.*

In this case, an ordinary person could reasonably question the Court’s ability to decide the merits of Plaintiff’s claim in light of past circumstances. The Court’s emails that were made public by the 2020 FOIA request garnered significant public

attention as part of that year's election cycle. Public attention again focused on the Court's conduct when the Michigan Supreme Court issued its opinion in the criminal appeal. Now that the Court is faced with the FOIA question in this case, members of the media and the public have again focused on the Court's own experience with FOIA.

The question before the Court is not whether it could be impartial in deciding this case, but rather whether an ordinary person might reasonably question the Court's impartiality on the issues before it. Given the public nature of the Court's own experience with FOIA, reasonable members of the public might reasonably raise such questions. For that reason, the Court should disqualify itself.

CONCLUSION

For the reasons stated, Plaintiffs respectfully request that the Court disqualify itself from this case pursuant to MCR 2.003(C)(1)(b).

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