

No. 100954

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

[REDACTED]
Petitioner-Appellant,

v.

[REDACTED]
Respondent-Appellee

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF
JOHNSON COUNTY, KANSAS
HONORABLE THOMAS FOSTER, JUDGE,
DISTRICT COURT CASE NO. [REDACTED]

[REDACTED]
[REDACTED]
Olathe, Kansas **[REDACTED]**

[REDACTED]
[REDACTED]
Petitioner / Appellant / Pro Se

TABLE OF CONTENTS AND AUTHORITIES

	PAGE
TABLE OF CONTENTS AND AUTHORITIES.....	2
TABLE OF AUTHORITIES.....	4
NATURE OF THE CASE.....	5
ISSUES ON APPEAL.....	6
STATEMENT OF FACTS.....	7
STANDARD OF REVIEW.....	10
ARGUMENTS AND AUTHORITIES.....	11
A District Court judge can reconsider an order previously granted by another judge.	
USA v. O’Keefe, 169 F.3d 281.....	11, 15
A District Court judge can reconsider an order previously granted by another judge.	
TCF Film Corp. v. Gourley, 240 F.2d 711, 714 (3 rd Cir. 1957).....	11
A successor judge has the same discretion to reconsider an order as would the first judge.	
Abshire v. Seacoast Products, 668 F.2d 832, 838 (5 th Cir. 1982).....	11
Under the law of the case doctrine, a second court should follow a ruling made by an earlier court unless the prior decision was erroneous, is no longer sound, or would create injustice.	
Loumar, Inc v. Smith, 698 F.2d 759, 762-63 (5 th Cir. 1983).....	11
Kansas Code of Judicial Conduct, Supreme Court Rule 601A.....	12
Judge erred in vacating recusal order after recusing herself.	
Doddy v. Oxy USA, Inc. 101 F.3d 448, 457 (5 th Cir. 1996).....	13, 15
Judge may only perform the "housekeeping" duties necessary to transfer a case to another judge after recusing himself from a proceeding.	
Moody v. Simmons, 858 F.2d 137, 143 (3 rd Cir. 1988).....	13

Describes a ministerial duty as one in which "the obligation to act [is] peremptory, and plainly defined". United States ex rel. McLennan v. Wilbur, 283 U.S. 414, 420, 51 S. Ct. 502, 504, 75 L.Ed.2d 1148 (1931).....	13
K.S.A 20-311d.....	14, 18
Harmless error standard. Liljeberg v. Health Serv. Acquisition Corp., 486 U.S. 847, 862, 108 S. Ct. 2194, 2203, 100 L.Ed.2d 855 (1988).....	15
28 U.S.C. § 455.....	15
Harmless error standard. El Fenix de Puerto Rico v. The M/Y Johanny, 36F.3d 136, 142 (1 st Cir. 1994).....	15
Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. U.S. v. Sanchez, 88 F.3d 1243 (D.C.Cir. 1996).....	17
Orderly rules of procedure do not require sacrifice of the rules of fundamental justice. Hormel v. Helvering, 312 U.S. 552. 557 (1941).....	17
Orderly rules of procedure do not require sacrifice of the rules of fundamental justice. Haines v. Kerner, 404 U.S. 519 (1972).....	17
CONCLUSION	21
CERTIFICATE OF SERVICE.....	22

TABLE OF AUTHORITIES

	PAGE
Tucker v. Hugoton Energy Corp., 253 Kan. 373, 377, 855 P.2d 929 (1993)	10
USA v. O’Keefe, 169 F.3d 281	11, 15
TCF Film Corp. v. Gourley, 240 F.2d 711, 714 (3 rd Cir. 1957)	11
Abshire v. Seacoast Products, 668 F.2d 832, 838 (5 th Cir. 1982)	11
Loumar, Inc v. Smith, 698 F.2d 759, 762-63 (5 th Cir. 1982)	11
Kansas Code of Judicial Conduct, Supreme Court Rule 601A	12
Doddy v. Oxy USA, Inc. 101 F.3d 448, 457 (5th Cir. 1996)	13, 15
Moody v. Simmons, 858 F.2d 137, 143 (3rd Cir. 1988)	13
United States ex rel. McLennan v. Wilbur, 283 U.S. 414, 420, 51 S. Ct. 502, 504, 75 L.Ed.2d 1148 (1931)	13
K.S.A 20-311d	14, 18
Liljeberg v. Health Serv. Acquisition Corp., 486 U.S. 847, 862, 108 S. Ct. 2194, 2203, 100 L.Ed.2d 855 (1988)	15
28 U.S.C. § 455	15
El Fenix de Puerto Rico v. The M/Y Johanny, 36F.3d 136, 142 (1 st Cir. 1994)	15
U.S. v. Sanchez, 88 F.3d 1243 (D.C.Cir. 1996)	17
Hormel v. Helvering, 312 U.S. 552. 557 (1941)	17
Haines v. Kerner, 404 U.S. 519 (1972)	17

NATURE OF THE CASE

This appeal involves the dismissal of Appellant's Motion to Reconsider Motion to Enforce Recusal by Division 12 of the Johnson County, Kansas, District Court, Civil Division. Appellant properly perfected this appeal.

ISSUES ON APPEAL

- I. Did the District Court Err when it found that it did not have jurisdiction to reconsider Appellant's Motion to Enforce Recusal from the previous Court?
- II. Did the District Court Err when it found that Judge Janice Russell, Division 7, transferred Appellant's divorce case instead of recusing herself from said case?

STATEMENT OF FACTS

The parties, [REDACTED] Appellant (hereinafter "Petitioner") and [REDACTED] Appellee (hereinafter "Respondent") were divorced on December 3, 2003. (V. I p. 42) Custody of the minor child was decided on June 23, 2004 and Petitioner was designated as the residential parent. (V. I p. 139) Since the divorce, there has been considerable litigation concerning the care and well being of the parties' minor child.

Around September of 2006, Petitioner's attorney informally requested this divorce case be transferred to the Johnson County Family Court, since Judge Janice Russell was not a Family Court Judge. The Family Court was created in Johnson County to effectively deal with divorce cases involving children, and these judges receive special training. The request to transfer this case was denied.

On August 7, 2007, pursuant to K.S.A. 20-311d (a), Petitioner filed a requested for a Change of Judge with The Honorable Janice D. Russell, Johnson County District Court, Division 7, due to Petitioner's belief that Judge Russell was bias and prejudice against Petitioner. (V. I p.189) An informal hearing was held on August 16, 2007, at which time Judge Janice Russell refused to disqualify herself. (V. I p. 190)

Pursuant to K.S.A. 20-311d (b), Petitioner filed an Affidavit for Change of Judge on August 21, 2007. (V. I p. 192) The Affidavit was assigned to The Honorable Gerald T. Elliot, Johnson County District Court, Division 4, to

determine its legal sufficiency. On August 30, 2007, Judge Elliot found Petitioner's Affidavit to be legally insufficient. (V. I p. 82)

On November 5, 2007, Petitioner petitioned the Supreme Court of The State of Kansas for the issuance of a Writ of Mandamus to disqualify The Honorable Janice D. Russell from any further participation in the hearing of said case. (Supreme Court Case No. 07-99517) On December 18, 2007, the Supreme Court denied Petitioner's Writ of Mandamus. (Id.)

On January 4, 2008, Judge Janice Russell informed the parties by letter that she would recuse herself from further proceedings in Johnson County case number [REDACTED] after she heard and decided Petitioner's pending Motion for a New Trial or to Alter or Amend Judgment. (V. I p. 185, V. I p. 217) Due to the unusual provision to Judge Russell's recusal, to stay on the case and continue to make further material decisions about said case, as stated in her letter, Petitioner filed a Motion to Enforce Recusal on January 30, 2008. (V. I p.215)

On March 27, 2008 Judge Janice Russell, against Petitioner's objections, denied Petitioner's Motion to Enforce Recusal and proceeded to make decisions on Petitioner's Motion for New Trial or to Alter or Amend Judgment and Respondent's Motion for Attorney's Fees. (V. I p. 176) Also on this date, the case was re-assigned to The Honorable Thomas E. Foster, Family Judge of Johnson County District Court, Division 12.

On May 2, 2008, believing that the Court erred, Petitioner filed a Motion to Reconsider Motion to Enforce Recusal. (V. I p.217) Note: At some time between March 27, 2008 and June 23, 2008 Judge Janice Russell retired.

On June 23, 2008, a hearing was held on the issue of Petitioner's Motion to Reconsider Motion to Enforce Recusal before The Honorable Thomas E. Foster. Petitioner stated he believed Judge Russell erred when she did not recuse herself immediately after stating her intention to recuse in her letter dated January 4, 2008, and argument was also heard from opposing counsel, J. Roy Holliday. (V. XI p. 4-17) At the conclusion of said hearing, Judge Foster ruled that Judge Russell intended to transfer the case rather than recuse herself, but nevertheless he could not overrule another District Court Judge's decision because he was not an Appeals Court. (V. XI p. 17-18, V. I p.179)

STANDARD OF REVIEW

The standard of review for this appeal is whether the district court's determination that it lacked jurisdiction to hear Petitioner's Motion to Reconsider Motion to Enforce Recusal and that Judge Janice Russell transferred Petitioner's divorce case rather than recusing from said case was supported by substantial competent evidence.

- I. Where the district court has made findings of fact and conclusions of law, the function of an appellate court is to determine whether the findings are supported by substantial competent evidence and whether the findings are sufficient to support the trial court's conclusions of law. Substantial evidence is evidence which possesses both relevance and substance and which furnishes a substantial basis of fact from which the issues can reasonably be resolved. Stated in another way, substantial evidence is such legal and relevant evidence as a reasonable person might accept as being sufficient to support a conclusion. *Tucker v. Hugoton Energy Corp.*, 253 Kan. 373, 377, 855 P.2d 929 (1993).

ARGUMENTS AND AUTHORITIES

Did the District Court Err when it found it did not have jurisdiction to reconsider Petitioner's Motion to Enforce Recusal from another Court?

Judge Russell transferred this case to Judge Foster, Division 12, immediately after the hearing on March 27, 2008, and she retired sometime before the hearing on June 23, 2008.

At the hearing on June 23, 2008, to consider Petitioner's Motion to Reconsider Motion to Enforce Recusal, Judge Foster stated, *"This Court is not an appeals court, doesn't set over Division 7, and decide whether Division 7 made correct or incorrect rulings, and therefore, the Court will not act as an appeals court over Division 11 (sic)".* (V. XI p. 18)

USA v. O'Keefe, 169 F.3d 281 states, "This argument ignores the many instances in which one district court judge must reconsider an order previously granted by another judge because of the first judge's death, illness, or disqualification. See *TCF Film Corp. v. Gourley*, 240 F.2d 711, 714 (3rd Cir. 1957). It also overlooks the law of the case doctrine, which encompasses situations in which one judge has rendered an order or judgment and the case is then transferred to another judge. See *Abshire v. Seacoast Products*, 668 F.2d 832, 838 (5th Cir. 1982). Under the law of case doctrine and general principles of comity, a successor judge has the same discretion to reconsider an order as would the first judge, but should not overrule the earlier judge's order or judgment merely because the later judge might have decided matters differently. See *Loumar, Inc v. Smith*,

698 F.2d 759, 762-63 (5th Cir. 1983) (stating that under the law of the case doctrine, a second court should follow a ruling made by an earlier court unless the prior decision was erroneous, is no longer sound, or would create injustice).”

By reason of the foregoing, Petitioner does not believe Judge Foster’s finding that he could not reconsider a decision of another District Court was based upon substantial competent evidence.

Nevertheless, Judge Foster did express an opinion with regard to Judge Russell’s decision, so remanding the issue of recusal back to the District Court would likely produce a similar opinion and another appeal. (V. XI p. 17-18)

Did the District Court Err when it found that Judge Janice Russell, Division 7, transferred Appellant’s divorce case instead of recusing herself from said case?

On January 4, 2008, Judge Janice Russell wrote both parties stating, *“After this issue has been heard, considered and decided, I will recuse myself from further proceedings in this matter, and another judge will be assigned.”* (V. I p. 221) Judge Russell clearly stated she was recusing herself from this case, but she added a unique provision to her recusal of staying on the case and continuing to make further material decisions. (Id.)

Under the Kansas Code of Judicial Conduct, Supreme Court Rule 601A, Canon 3, (E)(1)(a) being: “A judge shall disqualify himself or herself in a proceeding in which the judge’s 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, or personal knowledge of disputed evidentiary facts concerning the proceeding:” Kansas Supreme Court Rule 601A does not allow for a Judge to continue making decisions on a case for a period of time, after that Judge has decided to recuse them self from a case.

Courts have almost without exception held that once a judge recuses himself from a case, the judge may take no action other than the ministerial acts necessary to transfer the case to another judge, even when recusal is improvidently decided. See *Doddy v. Oxy USA, Inc.* 101 F.3d 448, 457 (5th Cir. 1996) (holding that judge erred in vacating recusal order after recusing herself); *Moody v. Simmons* , 858 F.2d 137, 143 (3rd Cir. 1988) (stating that judge may only perform the "housekeeping" duties necessary to transfer a case to another judge after recusing himself from a proceeding). A ministerial act is usually defined as an act that is essentially clerical and does not involve the exercise of discretion or judgment. See *United States ex rel. McLennan v. Wilbur* , 283 U.S. 414, 420 , 51 S. Ct. 502, 504, 75 L.Ed.2d 1148 (1931) (describing a ministerial duty as one in which "the obligation to act [is] peremptory, and plainly defined"); *Moody* , 858 F.2d at 143 (holding that orders converting Chapter 11 bankruptcy to Chapter 7 bankruptcy, disqualifying counsel, vacating a contingent fee agreement, and making findings attacking counsel exceeded "housekeeping" orders).

There was a great deal of animosity between Judge Russell and the Petitioner centered on the well-being of the parties’ minor child. Around

September of 2006, Judge Russell had refused a request by the Petitioner's attorney to transfer this case to Family Court; Judge Russell was not a Family Court Judge. Starting on August 7, 2007, Petitioner filed under all available provisions of K.S.A 20-311d for a Change of Judge, due to his belief that Judge Russell was bias and prejudice. (Id.) On March 27, 2008, almost two months after her letter stating her intention to recuse, Judge Russell stated that she had misused the word "recuse" when she really intended to transfer this case.

(V. X p. 5) With all due respect to Judge Russell, Petitioner does not think it is reasonable to conclude that a Judge of 23 years would confuse the words "recuse" and "transfer". Recusal is not something that most Judges like to do. Petitioner believes it is more likely that Judge Russell changed her mind; so essentially, Judge Russell was vacating her own recusal.

Therefore, orders related to a Motion for a New Trial or to Alter or Amend Judgment and a finding assessing attorney fees exceeded "housekeeping" orders. (Id.)

Although the purpose of this appeal is not to decide if grounds for recusal existed, Petitioner thinks it is worthy to point to a statement Judge Russell made referring to the Petitioner, *"you think that anybody that doesn't agree with you is biased and prejudiced, and that is really not true"*. (V. X p. 5) The Court's statement is not supported by any evidence in the record, and it is one of numerous prejudicial statements made by the Court attacking the Petitioner. Petitioner had only asked that the Court enforce its own orders, therefore the Court was in conflict with itself. (V. XI p.17)

By reason of the foregoing, the decision of the District Court should be reversed.

Were the decisions Judge Russell made after she should have recused, “harmless errors”?

If this Court finds that Judge Russell should have recused, it will likely use the “harmless error” standard to determine if orders issued after Judge Russell should have recused on January 4, 2008, must be vacated.

USA v. O’Keefe, 169 F.3d 281 states, “The “harmless error” standard is used to determine whether orders that a judge issues after the judge has, or should have, recused himself must be vacated. See *Liljeberg v. Health Serv. Acquisition Corp.*, 486 U.S. 847, 862, 108 S. Ct. 2194, 2203, 100 L.Ed.2d 855 (1988); *Doddy*, 101 F.3d at 458; *El Fenix de Puerto Rico v. The M/Y Johanny*, 36F.3d 136, 142 (1st Cir. 1994) (concluding that “the need for finality and a common-sense aversion to frittering away scarce judicial resources militate against an inflexible rule invalidating all prior actions of a judge disqualified under § 455(a)”) Under the “harmless error” test, we examine: (1) the risk of injustice to the parties in this particular case, (2) the risk that denial of relief will produce injustice in other cases, and (3) the risk of undermining the public’s confidence in the judicial process. See *Liljeberg*, 486 U.S. at 864, 108 S. Ct. at 2205; *Doddy*, 101 F.3d at 458.

Using the three-part harmless error test, first, Petitioner believes there is significant risk of injustice to the parties from not vacating the denial of the Motion for New Trial or to Alter or Amend Judgment and remanding for reconsideration by Judge Foster.

On September 25, 2007, Judge Russell stated, *“Well, Mr. Holliday, if the depositions are being taken in order to prove false testimony was given at the hearing, then I think they will - - probably would be admissible. I can’t think of any reason why they wouldn’t be.”* (V. X p.3) Judge Russell indicated multiple times at the hearing on September 25, 2007, that the depositions should be admissible. (V. X p.3 & 6) Note: Around October 2007, the Petitioner requested transcripts for the hearings held on September 25, 2007 and October 1, 2007, from the Division 7 Court Reporter. The Petitioner continued to make multiple requests for these transcripts and was repeatedly promised that they would be delivered. Only after contacting the Freedom of Information Officer for the Kansas Supreme Court and the Freedom of Information Officer for the Johnson County District Courts in November 2008, these transcripts were finally delivered on December 19, 2008. Therefore, statements from these transcripts could not be presented at the March 27, 2008 or the June 23, 2008 hearings.

On March 27, 2008, contrary to Judge Russell’s previous statements on the admissibility of the depositions, she denied the admission of this evidence due to a minor procedural error by the Petitioner, a Pro se litigant. (V. X p.10) This evidence would have proved that the Court orders of May 31, 2007, were based on false evidence, due to serious wrong doing (a felony) by an officer of

the Court, during the hearing held on May 31, 2007. (V. X p. 6-11, V. XI p. 14-15)
This wrong doing corrupted the truth-seeking function of the hearing process.

Judge Russell stated that she was holding Petitioner to exactly the same standards as an attorney. (V. X p. 10) Petitioner believes that the evidence of wrong doing could, and should have been admitted in the interest of justice. It is widely held that the Courts will go to particular pains to protect Pro se litigants against the consequences of technical errors if injustice would otherwise result. *U.S. v. Sanchez*, 88 F.3d 1243 (D.C.Cir. 1996). Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice. *Hormel v. Helvering*, 312 U.S. 552. 557 (1941); *Haines v. Kerner*, 404 U.S. 519 (1972)

Petitioner is Pro Se, whereas claiming a Pro Se status is not normally an excuse for ignorance or misunderstanding of the law, in this unique circumstance it should be considered to prevent a greater injustice and continuing corruption in the Courts.

The most significant injustice would be to the parties' minor child. Decisions made by the Court on May 31, 2007, were based on false testimony and therefore contrary to the best interests of the minor child. (Id.)

On the issue of attorney's fees, there is also significant risk of injustice to the parties from not vacating the judgment imposing attorney's fees and remanding for reconsideration by Judge Foster.

Judge Russell stated that *"the hearings have been set fairly even between the Petitioner and the Respondent, but most of those hearings I know, because I recall this, and because I could see by looking back at the motions that are filed, are filed because Mr. [REDACTED] does not want Mrs. [REDACTED] to spend any substantial amount of time with the child. He has been very persistent in this position on that point."* (V. X p. 28, V. XI p.10) These statements by Judge Russell are not accurate and were the basis for awarding attorney's fees.

Technically Judge Russell's statement about the hearings being set fairly evenly is correct, but in the context she used this information, Petitioner believes it is misleading for the following reasons:

- Many of the Petitioner's filing were directly related to the Change of Judge process pursuant to K.S.A. 20-311d, and not directed at the Respondent. (Id.)
- Other filings were directly related to the Respondent's continuing refusal to follow the Court's orders with respect to medical and dental reimbursement owed the Petitioner, and the Respondent's refusal to pay the Court's judgment against her for one half of the expenses for the first psychological evaluation. (V. I p. 142, V. I p. 148, V. I p. 139, V. I p. 154)

Nevertheless, Judge Russell's own statement that *"the hearings have been set fairly even between the Petitioner and the Respondent"* clearly indicate that the Petitioner was not anymore responsible for litigation then the Respondent (Id.)

Judge Russell's statement that the Petitioner (Mr. [REDACTED]) did not want the Respondent (Mrs. [REDACTED]) to spend any substantial amount of time with the child is not accurate and is not supported by the record or Judge Russell's own orders. (Id.)

- Judge Russell ordered a psychological evaluation. (V. I p. 36)
- Judge Russell ordered the recommendations of the Court ordered psychological evaluation by Dr. [REDACTED] implemented. (V. I p. 139)
- Dr. [REDACTED] testified that his recommendations were not followed (V. VIII p. 24)
- Dr. [REDACTED] testified that the Respondent's behavior negatively affects the minor child. (V. VIII p. 20 - 23)

The Court had ordered limited parenting time for the Respondent and the minor child by implementing the recommendations of Dr. [REDACTED]'s psychological evaluation. (Id.) Petitioner had only asked that the Court follow its own orders for the well-being of the minor child.

At the hearing on September 25, 2007, Judge Russell indicated that the deposition evidence proving that Diane Lund, the Court appointed case manager, testified falsely at the May 31, 2007 hearing could be admitted. (Id.) But then on March 27, 2008, the Court denied admission of this evidence of serious wrong

doing on a technicality, and punished Petitioner for trying to introduce the evidence by awarding the Respondent attorney's fees. (V. X p. 9-10, V. I p. 173)

Second, Petitioner believes there is a very strong possibility that denial of relief will likely produce injustice in other cases, because the individual(s) responsible for corrupting this case have not been brought to justice and are still working in the Johnson County District Court system on other cases. (Id.)

Finally, the risk of undermining the public's confidence in the judicial system is difficult to assess. The "public" is defined in Webster's Dictionary as "affecting the people or community as a whole". In a "low profile" case such as this one, details or facts are not published to the "public". If details of this case were somehow brought to the public's attention, Petitioner believes that any reasonable person knowing the facts of this case would have serious questions about the overall truth seeking process, especially since this involved the best interests of a minor child.

By reason of the foregoing Petitioner believes that the Court's decisions made after January 4, 2008, were not "harmless errors" and therefore, it is necessary to vacate all orders issued after Judge Russell's letter stating that she intended to recuse from this case, and remand for Judge Foster to rule on the Petitioner's Motion to Reconsider Motion for New Trial or to Alter or Amend Judgment and Respondent's Motion for Attorney Fees.

CONCLUSION

For the reasons stated herein Petitioner, [REDACTED] respectfully requests that the lower court's order on the recusal of The Honorable Janice Russell be reversed and that all decisions made after January 4, 2008, be remanded back to the Family Court for a hearing on the issues of Petitioner's Motion for a New Trial or to Alter or Amend Judgment and Respondent's Motion for Attorney Fees.

As I am pro se / pro per / sui juris litigant and not trained as an officer of the courts, if any part of my brief is unclear, I will be happy to make myself available for a hearing to answer specific questions for the purpose of clarifying the brief facts and issues.

Respectfully Submitted:

[REDACTED]

CERTIFICATE OF SERVICE

I hereby certify that two (2) true and correct copies of the above and foregoing **Brief of Appellant** was placed in the United States Mail, postage paid, on the 13th day of January, 2009, to: [REDACTED]

[REDACTED] Attorney for Appellee.

[REDACTED]