

IN THE SUPREME COURT OF OHIO

Amanda Brandt,	:	
	:	
Appellant,	:	Case No. 2021-0497
	:	
v.	:	On appeal from the Cuyahoga County
	:	Court of Appeals, Eighth District
Roy Pompa,	:	
	:	
Appellee.	:	Court of Appeals
	:	Case No. CA 20 109517
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**AFFIDAVIT OF JOHN W. ZEIGER**

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**AFFIDAVIT OF JOHN W. ZEIGER**

STATE OF OHIO                   :  
  :  
  :  
COUNTY OF FRANKLIN        :

John W. Zeiger, first being duly sworn according to law, deposes and states that he has personal knowledge of matters set forth herein except as specifically noted otherwise, and further states as follows:

1. My name is John W. Zeiger. I am one of the attorneys for the Appellee in the above-captioned action.

**A. Notice Of The Court’s Merit Decision.**

2. Typically the Court issues its decisions at approximately at 9:00 a.m. each day and the Clerk’s Office posts a Daily Case Announcements & Opinions summarizing the Court’s decisions. Some exceptions exist, such as in election cases, but this is otherwise the approach typically followed for the issuance of merit decisions.

3. I have been advised that when the Court originally issued its first case announcement notice for December 16, 2022 at approximately 9:00 a.m., a reference was included to the Court’s slip opinion reversing the Eighth District Court of Appeals’ Decision (“Decision”) but then the announcement was amended and the notice of the Decision removed from the public record.

4. On the same day, at 4:06 p.m., I received an Ohio Supreme Court case activity notification email advising the Decision had been filed. A review of the docket and the Supreme Court website revealed the Decision as well as a second Case Announcement reporting the issuance of the Decision. See 12/16/2022 Case Announcements #2, 2022-Ohio-4546.

**B. Justice Fischer's Disclosure Of The Court's Non-Compliance With Its Internal Rules In Considering And Issuing The Decision.**

5. Irrespective of the circumstances of the Decision's issuance, Affiant began his review of the Decision, and became concerned after reviewing the disclosures made by Justice Fischer in his Dissent. Specifically, in paragraph 132, Justice Fischer wrote:

In addition, over my objection, the court did not follow the regular and orderly internal rules of operation and practice in this case due to others' seeming concerns about voting on any motion for reconsideration. Hence, my time on this case was aberrantly and improperly limited. Thus, I most humbly apologize to the citizens of Ohio that my individual dissent is not of the quality that I have come to deliver and that the public expects. This case involves many constitutional issues that deserve to be more completely analyzed and debated so that they may be resolved appropriately. The litigants deserve full and fair consideration of their case, which has been shortchanged here. We should do better.

6. The Supreme Court's internal rules of operation and practice are not publicly published, but are understood to set forth an orderly process for the preparation and vetting of opinions, concurrences and dissents. The process, as understood, is designed to ensure that complicated legal issues of public import are completely analyzed and debated, with the hope of having these issues appropriately resolved and vetted.

7. Justice Fischer's dissent states that the Court's internal rules of operation and practice were not followed. And he offers as an explanation that others, which I understand to mean other Justices of this Court, elected to proceed in violation of these rules of operation and practice as part of a concerted effort to control or dictate the manner by which the Appellee would be able to exercise its right to file its motion for reconsideration, have it fully briefed, and due consideration provided thereof.

**C. It Is Common For Motions For Reconsideration To Be Filed, Fully Briefed, Or Considered In A Subsequent Court Term, Even Where The Composition Of The Court Changes.**

8. Upon learning of this disclosure, the undersigned directed others to review this Court's prior decisions. Although the Court's procedural orders on this issue are not easily searchable, our research revealed that it is common for a motion for reconsideration to be filed, or otherwise fully briefed, and reconsidered in a subsequent term of the Court, even where the composition of the Court changes. A change of composition can occur as a result of a retirement, election, or an appointment.

9. Some examples of cases wherein a newly-composed Court ruled on a motion for reconsideration and reversed the Court's prior decision include:

- City of Rocky River v. State Emp. Rels. Bd. ("Rocky River I"), 40 Ohio St. 3d 606, 539 N.E.2d 103 (1988), vacated upon reconsideration, City of Rocky River v. State Emp. Rels. Bd. ("Rocky River II"), 43 Ohio St. 3d 1, 539 N.E.2d 103 (1989).
- Johnson v. Adm'r, Ohio Bureau of Emp. Servs. ("Johnson I"), 40 Ohio St. 3d 365, 533 N.E.2d 757 (1988), reversed on rehearing and reconsideration, Johnson v. Administrator ("Johnson III"), Ohio Bureau of Employment Services, 48 Ohio St. 3d 67, 549 N.E.2d 153 (1990).
- State v. Gonzales ("Gonzales I"), 150 Ohio St. 3d 261, 2016-Ohio-8319, 81 N.E.3d 405, reconsideration granted, decision vacated, State v. Gonzales ("Gonzales II"), 150 Ohio St. 3d 276, 2017-Ohio-777, 81 N.E.3d 419.
- State v. Aalim ("Aalim I"), 150 Ohio St. 3d 463, 2016-Ohio-8278, 83 N.E.3d 862 reconsideration granted, decision vacated, State v. Aalim ("Aalim II"), 150 Ohio St. 3d 489, 2017-Ohio-2956, 83 N.E.3d 883.
- State v. Braden ("Braden I"), 158 Ohio St. 3d 452, 2018-Ohio-5079, 145 N.E.3d 226, opinion vacated on reconsideration, State v. Braden ("Braden II"), 158 Ohio St. 3d 462, 2019-Ohio-4204, 145 N.E.3d 235.

Some example cases wherein a newly-appointed Justice voted to grant or deny a motion for reconsideration include:

- See Braden II, 2019-Ohio-4204 at ¶ 31 (Justices Donnelly and Stewart, having joined the Court in 2019, concurring).
- See Gonzales II, 2017-Ohio-777 at ¶¶ 24-29 (Fischer, J., concurring in part and dissenting in part) (noting that as a recently-elected member of the Court, the timing of the motions for reconsideration put Justice Fischer “in the shoes of the previous court to determine whether that court erred in its deliberations to the extent that its decisions need to be corrected”).
- See Aalim II, 2017-Ohio-2956, ¶¶ 39, 51 (DeWine, J., concurring), (Fischer, J., concurring in part and dissenting in part) (Justices DeWine and Fischer participating in the decision to grant reconsideration).
- See Cap. Care Network of Toledo v. Dep’t of Health, No. 2016-1348, 04/25/2018 Case Announcements, 2018-Ohio-1600 (denying motion for reconsideration with Justice DeGenaro participating, although her predecessor, Justice O’Neill, participated in rendering the underlying decision in Cap. Care Network of Toledo v. Ohio Dep’t of Health, 153 Ohio St. 3d 362, 2018-Ohio-440, 106 N.E.3d 1209).
- Johnson v. Adm'r, Ohio Bureau of Emp. Servs. (“Johnson II”), 42 Ohio St. 3d 601, 601, 536 N.E.2d 647 (1989) (Mem) (granting reconsideration with Justice Resnick concurring).

**D. The Supreme Court’s Rules of Practice Set Forth The Manner And Timing For The Filing Of A Motion For Reconsideration And Opposition Thereto.**

10. This Court’s published Rules of Practice are clear as to the time frame for the filing of a motion for reconsideration, as well as the time frame for the filing of any opposition. The Court’s established rules contain no mechanism or, more specifically, an exception that limits a party’s time for filing a motion for reconsideration, the time for the opposition, or the process for the consideration of the motion once fully briefed because of a change in Justices or a new term of the Court.

**E. Overview of The Ohio Cannons of Judicial Conduct.**

11. The preamble to the Ohio Code of Judicial Conduct provides in, relevant part:

[1] An independent, fair, and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret

and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law. Inherent in all the rules contained in this code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.

[2] *Judges should maintain the dignity of judicial office at all times and avoid both impropriety and the appearance of impropriety in their professional* and personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence.

(Emphasis added.)

12. Rule 1.2 of the Ohio Code of Judicial Conduct provides: “A judge shall act at all times in a manner that promotes public confidence in the *independence, integrity, and impartiality* of the judiciary, and shall avoid *impropriety* and the appearance of *impropriety*.” (Emphasis in original.)

13. Comment 5 to Rule 1.2 indicates that “[a]ctual improprieties include violations of law, court rules, or provisions of [the Ohio Code of Judicial Conduct].” The comment further provides that: “[t]he test for appearance of impropriety is an objective standard that focuses on whether [the challenged conduct] would create, in reasonable minds, a perception that the judge violated this code, engaged in conduct that is prejudicial to public confidence in the judiciary, or engaged in other conduct that reflects adversely on the judge’s honesty, impartiality, temperament, or fitness to serve as a judge.”

14. Rule 2.5(b) of the Ohio Code of Judicial Conduct provides: “[a] judge shall cooperate with other judges and court officials in the administration of court business.” Comment 5 to this rule provides: “[i]n discharging the obligation to cooperate with other judges

and court officials in the performance of administrative duties, a judge must place the public's interest in an efficient and well-run court system above any personal or partisan interests. . . .”

15. Rule 2.6 of the Ohio Code of Judicial Conduct provides that: “[a] judge shall accord to every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard according to *law*.” (Emphasis in original.) Comment 1 then provides: “[t]he right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed.”

16. Under Rule 2.11 of the Ohio Code of Judicial Conduct: “[a] judge shall disqualify himself or herself in any proceeding in which the judge’s *impartiality* might reasonably be questioned. . . .” (Emphasis in original.) As stated in Comment 1, “[a] judge is disqualified whenever the judge’s impartiality might reasonably be questioned. . . .”

17. The Ohio Code of Judicial Conduct provides definitions for certain terms. For example, the term “ ‘law’ encompasses court rules, including [the Ohio Code of Judicial Conduct] and the Ohio Rules of Professional Conduct, statutes, constitutional provisions, and decisional law.” “ ‘Impropriety’ includes conduct that violates the law, court rules, or provisions of [the Ohio Code of Judicial Conduct] and conduct that undermines a judge’s independence, integrity or impartiality.” “ ‘Impartial,’ ‘impartiality,’ and ‘impartially’ mean absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge.”

**F. Application Of The Canons Of Judicial Conduct To The Decision.**

18. Given the foregoing, it is beyond peradventure that an “[a]n independent, fair, and impartial judiciary” is “indispensable to our system of justice.” In re Judicial Campaign Complaint Against O’Toole, 141 Ohio St.3d 355, 2014-Ohio-4046, ¶ 23. Accord: Bridges v.

State of Cal., 314 U.S. 252, 282, 62 S.Ct. 190 86 L.Ed. 192 (1941) (“The administration of justice by an impartial judiciary has been basic to our conception of freedom ever since Magna Carta”). As a matter of policy, “Ohio [must] strive[] to ensure ‘the greatest possible public confidence in [the] independence, impartiality, integrity, and competence’ of judges.” O’Toole at ¶ 23.

19. Impartiality is of such weighty importance that “[t]he law requires not only an impartial judge but also one who appears to the parties and the public to be impartial.” In re Disqualification of Corrigan, 110 Ohio St.3d 1217, 2005-Ohio-7153, ¶ 11 (disqualifying all common pleas judges in Cuyahoga County from suit in which county officeholder was a litigant because of an appearance of impropriety). In Corrigan, the former chief justice Thomas J. Moyer emphasized “the importance of avoiding ‘even an appearance of bias, prejudice, or impropriety’ and the need to ‘ensure the parties, their counsel, and the public the unquestioned neutrality of an impartial judge.’” *Id.* at ¶ 5 (emphasis added). “[E]ven in cases where no evidence of actual personal bias or prejudice is apparent, ‘disqualification is appropriate when the public’s confidence in the integrity of the judicial system is at stake.’” In re Disqualification of Sheward, 136 Ohio St.3d 1256, 2013-Ohio-3643, ¶ 13 (judge who openly criticized litigant during a hearing was disqualified so as “to avoid an appearance of partiality”).

20. Accord: In re Disqualification of Winkler, 135 Ohio St.3d 1271, 2013-Ohio-890, ¶ 4 (disqualifying judge, who made harsh comments during a sentencing hearing, was “necessary to ‘avoid even an appearance of bias, prejudice, or impropriety, and to ensure the parties, their counsel, and the public the neutrality of an impartial judge’”); In re Disqualification of Burge, 138 Ohio St.3d 1271, 2014-Ohio-1458, ¶ 9 (“[a]n appearance of bias can be just as damaging to public confidence as actual bias” and “disqualification is appropriate when ... the public’s

confidence in the integrity of the judicial system is at stake”); In re Disqualification of Crawford, 110 Ohio St.3d 1223, 2005-Ohio-7156, ¶ 4 (judge disqualified because his request for sanctions against litigant’s attorneys who had sought a writ of prohibition “might reasonably cause an objective observer to harbor serious doubts about the judge’s ability to weigh fairly and impartially any additional arguments that those same attorneys might offer”).

21. “The proper test for determining whether a judge’s participation in a case presents an appearance of impropriety is ... an objective one. A judge should step aside or be removed if a reasonable and objective observer would harbor serious doubts about the judge’s impartiality.” Corrigan, at ¶ 8.

22. As noted above, “impropriety,” as defined by Ohio’s Code of Judicial Conduct, means “conduct that *violates the law, court rules, or provisions of this code*, and conduct that undermines a judge’s independence, integrity, or impartiality.” Terminology of the Code of Judicial Conduct. (Emphasis added.) “Impartiality” is the “absence of bias or prejudice in favor of, or against, particular parties or classes of parties, *as well as maintenance of an open mind in considering issues that may come before a judge.*” Id. (Emphasis added.)<sup>1</sup>

23. And so it follows that members of this Court who circumvent “the regular and orderly internal rules of operation and practice” in an effort to control the outcome of an anticipated filing ought to recuse themselves from deciding such filing. In his dissent, Justice Fischer reveals certain members of this Court did just that when they “aberrantly and improperly limited” his time spent on this case in an apparent attempt to impact the voting on any motion for reconsideration. Id. Intentionally limiting analysis and debate on important constitutional issues

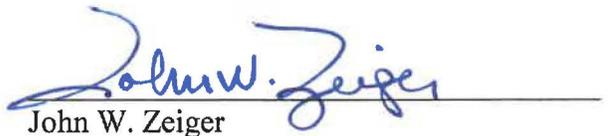
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<sup>1</sup> See also Winkler, 135 Ohio St.3d 1271, 2013-Ohio-890 at ¶ 4 (a judge who “has reached a ‘fixed anticipatory judgment’ that will prevent the judge from hearing the case with an ‘open state of mind’ governed by the law and the facts ... should not remain on the case”).

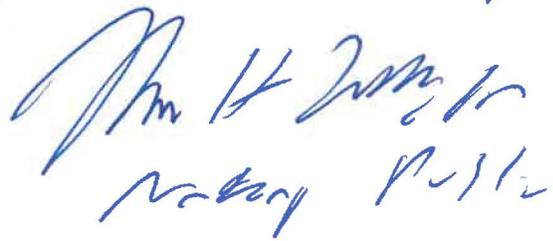
– contrary to the Court’s own rules – in a bid to control the consideration or outcome of a motion for reconsideration is the antithesis of maintaining an open mind in considering issues. Violating internal rules and cutting short the deliberation period creates a distinct appearance of impropriety and partiality undermining the integrity of this Court..

24. Based upon Justice Fischer’s disclosure in paragraph 132 of his Dissent and his conclusion that “fair consideration” of our client’s case “has been shortchanged,” I do not believe that movant will receive a fair hearing on his motion for reconsideration absent recusal of the Justices in question. What’s more, the revelation that members of this Court engaged in stratagems to achieve a particular result is sure to weaken public trust in the judiciary. “[D]isqualification is appropriate when, as here, the public’s confidence in the integrity of the judicial system is at stake.” Burge, 138 Ohio St.3d 1271, 2014-Ohio-1458 at ¶ 9. Accordingly, the Justices who engaged in violations of this Court’s internal rules for operation and procedure should be recused from deciding the motion for reconsideration.

Further Affiant sayeth naught.

  
John W. Zeiger

*Sworn to and subscribed in my presence  
this 27th day of February, 2022.*

  
Notary Public



MARION H. LITTLE, JR., Attorney At Law  
NOTARY PUBLIC - STATE OF OHIO  
My commission has no expiration date  
Sec. 147.03 R.C.