IN RE DISQUALIFICATION OF FALKOWSKI.

SHAVEL *v.* SHAVEL.

[Cite as *In re Disqualification of Falkowski*, 164 Ohio St.3d 1215, 2021-Ohio-1665.]

Judges—Affidavits of disqualification—R.C. 2701.03—Affiant failed to demonstrate bias, prejudice, or appearance of impropriety or that judge was deprived of authority to preside over matter after announcing recusal that was later rescinded—Disqualification denied.

(No. 21-AP-019—Decided March 29, 2021.)

ON AFFIDAVIT OF DISQUALIFICATION in Lake County Court of Common Pleas, Domestic Relations Division, Case No. 19DR000216.

O'CONNOR, C.J.

{¶ 1} Kenneth J. Cahill, counsel for the plaintiff, has filed an affidavit pursuant to R.C. 2701.03 and Article IV, Section 5(C) of the Ohio Constitution seeking to disqualify Judge Colleen A. Falkowski from the above-referenced divorce case.

Background

{¶ 2} During the plaintiff's cross-examination on the first day of trial, Mr. Cahill objected to two comments made by Judge Falkowski. Mr. Cahill suggested that the judge had prejudged the credibility of the plaintiff and another potential witness. Judge Falkowski interpreted Mr. Cahill's objections as attacks on the integrity and fairness of the court and therefore halted the trial and announced that she was recusing herself. However, Judge Falkowski later issued an entry stating that she had acted in haste in declaring her recusal and that recusal was not warranted and would be "in fact unfair to both parties causing them to incur

additional attorney fees and trial delays." According to the judge, her "passing observation" about evidence in the record did not amount to prejudgment of the plaintiff or the potential witness. She also noted that a new trial before a new judge would give the plaintiff and Mr. Cahill "a second bite of the apple" in preparing the plaintiff's case. Judge Falkowski stated that she had fairly and impartially presided over the matter and would continue to do so.

{¶ 3} Mr. Cahill thereafter filed this affidavit of disqualification. He argues that Judge Falkowski's comments during trial and in her subsequent judgment entry show bias against the plaintiff. For example, Mr. Cahill asserts that during trial, the judge improperly described the plaintiff's testimony as "contradictory," even though the plaintiff had not yet completed his testimony on cross-examination or had the opportunity for redirect. And the judge's "second bite" comment, Mr. Cahill avers, shows that she is more concerned about the plaintiff's trial strategy going forward than "the propriety of her reentry into the case." Mr. Cahill also argues that even if Judge Falkowski's comments do not prove bias, the judge's recusal and subsequent reentry into the case at least created the perception of bias.

{¶ 4} Judge Falkowski submitted a response to the affidavit and requests that it be denied. The judge notes that the wiser course of action would have been to conclude trial for the day and take Mr. Cahill's objections under advisement. But she states that after serious reflection, she decided to remain on the case because she harbors no bias against anyone and can continue to impartially hear the matter.

Merits of the affidavit of disqualification

{¶ 5} When an affidavit of disqualification "is filed after commencement of a trial and presentation of evidence, a judge should be disqualified only when the record 'clearly and unquestionably demonstrates a "fixed anticipatory judgment" that undermines the absolute confidence of the public in the fairness and integrity of the proceedings.' " *In re Disqualification of Fuhry*, 145 Ohio St.3d 1253, 2015-Ohio-5684, 49 N.E.3d 1305, ¶ 4, quoting *In re Disqualification of Kate*, 88 Ohio

St.3d 1208, 1209, 723 N.E.2d 1098 (1999), quoting *State ex rel. Pratt v. Weygandt*, 164 Ohio St. 463, 469, 132 N.E.2d 191 (1956). Considering that the trial in the underlying case has already commenced, Mr. Cahill has not met his heavy burden to establish that disqualification is warranted.

{¶ 6} Judge Falkowski's trial comments do not show that she has formed a fixed anticipatory judgment. A review of the trial transcript indicates that the judge did not predetermine the potential witness's credibility and that regardless, the judge agreed to strike her first comment after Mr. Cahill objected to it. Similarly, the judge's offhand statement about the plaintiff's "contradictory" testimony does not necessitate removal. " '[A] judge, like any trier of fact, is expected to assess a witness's character and credibility. And when a judge's opinion regarding a party's credibility is formed on the basis of evidence presented during the course of the proceedings, that opinion is not deemed to be the product of bias or prejudice.' " *In re Disqualification of Swenski*, 160 Ohio St.3d 1274, 2020-Ohio-3850, 158 N.E.3d 628, ¶ 6, quoting *In re Disqualification of Baronzzi*, 138 Ohio St.3d 1210, 2013-Ohio-5899, 3 N.E.3d 1196, ¶ 9. Judge Falkowski recognizes that the plaintiff's testimony is not yet complete and that he may clarify his testimony on redirect examination.

{¶ 7} In addition, Mr. Cahill has not established that Judge Falkowski's continued participation in the case is improper, creates an appearance of impropriety, or would undermine the integrity of the proceedings. It does not appear that Judge Falkowski journalized an entry recusing herself, nor was another judge assigned to the case. Mr. Cahill has not established that Judge Falkowski was deprived of authority to preside over the matter after announcing her recusal. *See Wiltz v. Clark Schaefer Hackett & Co.*, 10th Dist. Franklin Nos. 11AP-64 and 11AP-282, 2011-Ohio-5616, ¶ 20 ("The assigned judge retains authority over a case until the recusal and transfer of a case to another judge is journalized on the record"); *State v. Aderhold*, 9th Dist. Medina No. 07CA0047-M, 2008-Ohio-1772,

¶ 6-13 (a judge does not formally recuse until he issues a journal entry recusing himself); Flamm, *Judicial Disqualification*, Section 22.2, at 651 (2d Ed.2007, Supp.2016) (identifying decisions holding that as long as a case has not yet been transferred to another judge, a judge's decision to recuse may be reconsidered or vacated, at least for a certain period of time); *United States v. Lauersen*, 348 F.3d 329, 338 (2d Cir.2003) ("There is no reason to prohibit a judge from reconsidering a recusal decision, at least in the absence of transfer of the case to another judge").

{¶ 8} Judge Falkowski was under no obligation to announce her recusal during trial, and she later recognized that she had acted in haste by doing so. The judge therefore issued an entry thoroughly explaining why recusal was not warranted and would be unfair to both parties. Based on this record, an objective observer, fully informed of all relevant facts in the record, would not harbor serious doubts about Judge Falkowski's impartiality or question the fairness or integrity of the proceedings. *See In re Disqualification of Lewis*, 117 Ohio St.3d 1227, 2004-Ohio-7359, 884 N.E.2d 1082, ¶ 8 (defining the test for determining whether a judge's participation in a case presents an appearance of impropriety).

{¶ 9} The affidavit of disqualification is denied. The case may proceed before Judge Falkowski.
