

IN RE DISQUALIFICATION OF CLARK.

THE ESTATE OF WELCH ET AL. v. TAYLOR ET AL.

[Cite as *In re Disqualification of Clark*, 2023-Ohio-4774.]

Judges—Affidavits of disqualification—R.C. 2101.39—R.C. 2701.03—Affiants alleged facts, including judge’s exclusion of lead plaintiff from hearings in underlying case and judge’s failure to allow plaintiffs opportunity to respond to defendant’s motions, that would cause an objective observer to harbor serious doubts about judge’s impartiality, and judge failed to respond to affiants’ specific allegations—Disqualification granted.

(No. 23-AP-081—Decided October 13, 2023.)

ON AFFIDAVIT OF DISQUALIFICATION in Clinton County Court of Common Pleas,
Probate and Juvenile Division, Case No. 2017-4001.

KENNEDY, C.J.

{¶ 1} Craig T. Matthews, counsel for the plaintiffs in the underlying probate action, has filed an affidavit of disqualification pursuant to R.C. 2101.39 and 2701.03 seeking to disqualify Judge Margaret A. Clark, a retired judge of the Brown County Court of Common Pleas, Probate and Juvenile Division, sitting by assignment in the Clinton County Court of Common Pleas, Probate and Juvenile Division, from presiding over the case. To support the affidavit of disqualification, Matthews filed an affidavit from the lead plaintiff, Sherry McCauley. Judge Clark filed a response to the affidavit of disqualification.

{¶ 2} This is the second affidavit of disqualification Matthews has filed against Judge Clark regarding the underlying case. The first affidavit was denied on April 27, 2022. *See In re Disqualification of Clark*, 168 Ohio St.3d 1207, 2022-Ohio-2120, 196 N.E.3d 865.

{¶ 3} As explained below, Matthews has alleged facts that would cause an objective observer fully informed of all relevant facts to harbor serious doubts about Judge Clark’s impartiality. To allay any concerns about the fairness and integrity of the proceedings and to ensure to the parties and the public the unquestioned neutrality of the trial judge, the affidavit of disqualification is granted. An assigned judge will be appointed to preside over the probate case.

Trial-Court Proceedings

{¶ 4} The plaintiffs are the next of kin of Francis M. Welch, who died in 2015. Before he died, Welch made several inter vivos transfers to his neighbor Thelma Taylor, including real property and interests in bank accounts. Within weeks of Welch’s death, Taylor allegedly collected the proceeds of Welch’s life-insurance policies, wrote checks from his accounts, and withdrew sizable amounts of money from them. Taylor allegedly acquired at least \$500,000 from Welch, and Matthews claims that Taylor received nearly \$700,000 of Welch’s assets. *See Estate of Welch v. Taylor*, 12th Dist. Clinton No. CA2017-11-021, 2018-Ohio-4558, ¶ 3-4 (“*Welch I*”).

{¶ 5} Taylor was appointed the executor of Welch’s estate. Administration of the estate concluded with the approval of a final and distributive account approximately a year after Welch’s death. Each of Welch’s nieces and nephews—the plaintiffs in the underlying case—received about \$40,000 from the estate. *Id.* at ¶ 5.

{¶ 6} On October 10, 2016, the plaintiffs filed a complaint in the Clinton County Court of Common Pleas, General Division, alleging that Taylor exercised undue influence over Welch before he died. The general-division court dismissed the case by granting Taylor’s motion for judgment on the pleadings, concluding that the probate court had jurisdiction over the matter. *Id.*

{¶ 7} On April 6, 2017, the plaintiffs filed the underlying case in the probate court, alleging that the inter vivos transfers from Welch to Taylor were predicated

on undue influence and that Taylor was liable for conversion and unjust enrichment. The plaintiffs served Taylor with discovery requests. Taylor filed an answer, a motion for summary judgment and for sanctions, and a motion to stay discovery until the probate court ruled on the motion for summary judgment. The plaintiffs opposed the motion for summary judgment, arguing that Taylor's motion was premature given that no discovery had occurred. The plaintiffs also opposed the motion to stay discovery and filed a motion to compel, claiming that Taylor had blocked all discovery. Judge Clark was appointed to the case on August 23 and held a hearing on September 8. *Id.*, 2018-Ohio-4558, at ¶ 7-9.

{¶ 8} On October 19, Judge Clark issued an entry dismissing the plaintiffs' complaint. In summarizing the proceedings, Judge Clark explained that the plaintiffs had never contested the validity of Welch's will and had consented to the final account and inventory in the separate estate case. Judge Clark stated: "[T]he court must wonder if this is not a will contest then what it is. The courts are not the proper forum for metaphysical queries; hence the court will attempt none, but will proceed on the factual and legal evidence before it."

{¶ 9} Judge Clark then referred to the arguments in Taylor's motion for judgment on the pleadings filed in the general-division court. The judge purported to grant that motion, even though Taylor had not filed a motion for judgment on the pleadings in the probate case and the case in which it was filed had already been dismissed. *Id.* at ¶ 8-9.

{¶ 10} The plaintiffs appealed, and on November 13, 2018, the Twelfth District Court of Appeals in *Welch I* reversed and remanded. The court of appeals noted that the only motions pending before Judge Clark in the probate case were Taylor's motions for summary judgment and to stay discovery and the plaintiffs' motion to compel. Therefore, the court of appeals determined, Judge Clark's decision dismissing the complaint by granting judgment on the pleadings "was a nullity." *Id.*, 2018-Ohio-4558, at ¶ 9. The court of appeals pointed out that Judge

Clark had not merely made a typographical error or incorrectly referred to the caption of the motion, and it noted that the judge’s decision specifically relied on the arguments in Taylor’s motion for judgment on the pleadings. The court of appeals concluded that Judge Clark had “ruled on a motion that was never before [her], and one that had been decided by a different court,” and it remanded the case for her “to rule upon the proper motions.” *Id.* at ¶ 12.

{¶ 11} The Twelfth District also noted—presumably in response to other language in Judge Clark’s dismissal entry—that the plaintiffs’ complaint alleged causes of action that were specific to the inter vivos transfers from Welch to Taylor and that “[n]ot all of [the] Plaintiffs’ arguments involved [Welch’s] will or estate, and not all implicate bequeaths paid by [Welch’s] estate after his death.” *Id.* at ¶ 15. And in a footnote, the Twelfth District stated that “[w]hile Civ.R. 56(b) provides that a party against whom a claim is asserted * * * ‘may, at any time, move with or without supporting affidavits for a summary judgment,’ it is wise to permit discovery given that a motion for summary judgment must be supported by facts.” *Id.* at ¶ 12, fn. 3, quoting *Dresher v. Burt*, 75 Ohio St.3d 280, 281, 662 N.E.2d 264 (1996).

{¶ 12} On remand, on March 28, 2019, Judge Clark issued an entry granting Taylor’s motion for summary judgment on the plaintiffs’ claims. The judge concluded: “[I]t is clear that what the Plaintiffs intended to do was to file a will contest, but that must fail because it should have been filed in this court, which it was not, and filed by October 1, 2015, which it clearly was not.” The judge further stated that the plaintiffs’ complaint must fail because under R.C. 2109.35, an order of the probate court settling a fiduciary’s account has the effect of a judgment and may be vacated only for fraud, which the plaintiffs had not alleged. The plaintiffs’ lawsuit, the judge found, was “simply too late and done improperly.” Judge Clark also stated that Taylor’s original request for sanctions pursuant to R.C. 2323.51 would be addressed at a later hearing.

{¶ 13} Judge Clark held the sanctions hearing on November 8, and on March 4, 2020, the judge issued an entry finding that the plaintiffs’ claims were frivolous and granting Taylor attorney fees in the amount requested, \$63,789.

{¶ 14} The plaintiffs appealed, and on December 28, the Twelfth District reversed Judge Clark’s summary-judgment decision and remanded the matter for further proceedings. *Estate of Welch v. Taylor*, 12th Dist. Clinton No. CA2020-03-004, 2020-Ohio-6909, ¶ 21 (“*Welch II*”). The court of appeals concluded that Judge Clark had abused her discretion in precluding the plaintiffs from conducting or obtaining discovery prior to granting summary judgment in favor of Taylor. *Id.* The court noted that despite the number of claims raised by the plaintiffs, the record did not appear to include much discovery—likely because Judge Clark had found that the plaintiffs had filed a will contest. *Id.* at ¶ 23. But upon review of the record, the Twelfth District found that the plaintiffs had “not contested the validity of the will” but had filed “an action to recover assets that were allegedly transferred from the estate by its fiduciary to herself both before and after the decedent’s death.” *Id.* at ¶ 24.

{¶ 15} The court of appeals further determined:

To the extent that a vacation or order of settlement of account under R.C. 2109.35 requires a showing of fraud be presented within one year of the discovery of the fraud, we note that [the] Plaintiffs’ complaint falls well within one year of the account approval and alleges, inter alia, serious concerns of undue influence, conversion, and unjust enrichment, yet the Plaintiffs have been prevented from the discovery of information not in their possession, but which may be in the possession of [Taylor] * * *. While [the] Plaintiffs have yet to ask for [Taylor] to be replaced with an independent fiduciary,

their discovery, once received, may reveal the need for such a replacement.

Id. at ¶ 31. The Twelfth District concluded that by granting summary judgment in Taylor’s favor, Judge Clark had “extinguished [the] Plaintiffs’ right to discovery, denied them a meaningful opportunity to oppose the motion for summary judgment, and abused [her] discretion.” *Id.* at ¶ 32. Because the court of appeals sustained the plaintiffs’ assignments of error, the court also vacated the award of attorney fees to Taylor. *Id.* at ¶ 40.

{¶ 16} Taylor filed a discretionary appeal in this court, but the court declined to exercise jurisdiction on August 3, 2021. *Estate of Welch v. Taylor*, 163 Ohio St.3d 1516, 2021-Ohio-2615, 171 N.E.3d 349.

{¶ 17} On August 25, the plaintiffs filed a motion to compel, arguing that Taylor had not provided the discovery the plaintiffs requested in 2017. During a November 19 status conference, Matthews reported to Judge Clark that Taylor had finally produced some records but that Taylor’s responses to the plaintiffs’ discovery requests were incomplete. Matthews alleged that Taylor had produced only 72 pages of Welch’s and her own financial records, even though Matthews believed that Taylor necessarily would have been in possession of more records, including bank statements. In response, Judge Clark stated that Matthews was speculating and that “[s]ome people are sloppy record keepers.” The judge also questioned why Matthews did not subpoena Taylor’s financial institutions if Matthews believed that Taylor was not producing the relevant records. Therefore, Judge Clark denied the motion to compel.

{¶ 18} The plaintiffs thereafter noticed Taylor for a deposition on December 20, 2021. The deposition did not go forward, however, because counsel had a dispute about the plaintiffs’ responses to Taylor’s discovery requests, which Taylor submitted in October 2021. The plaintiffs filed a motion for sanctions

against Taylor, and Taylor filed a motion for a protective order. After a January 28, 2022 hearing, Judge Clark denied the plaintiffs' motion for sanctions, granted Taylor's motion for a protective order, and prohibited the plaintiffs from proceeding with Taylor's deposition until they provided complete responses to Taylor's interrogatories and produced documents in response to her document requests.

{¶ 19} On February 25, Matthews filed an affidavit of disqualification against Judge Clark alleging that the judge was biased against the plaintiffs and him. In support of disqualification, Matthews primarily argued that the judge had misunderstood or misconstrued the nature of the parties' discovery disputes and, as a result, had unfairly prevented the plaintiffs from conducting meaningful discovery and had "upended the mandate from the court of appeals." Matthews also alleged that the judge had advocated for Taylor. On April 27, the former chief justice denied the affidavit of disqualification. *Clark*, 168 Ohio St.3d 1207, 2022-Ohio-2120, 196 N.E.3d 865.

{¶ 20} Judge Clark held a hearing on June 17, 2022. According to Matthews and McCauley (the lead plaintiff), immediately before the hearing commenced, Judge Clark's bailiff left the courtroom for the judge's chambers and when the bailiff returned, he requested that only counsel remain in the courtroom. Therefore, McCauley, who appears to have been one of the few parties who regularly attended hearings and who was sitting at counsel's table waiting for the hearing to commence, left the courtroom and waited in the hallway during the hearing in her own case.

{¶ 21} On June 23, the judge issued an entry that, among other things, granted Taylor's request for attorney fees relating to a motion to compel discovery. On August 4, Taylor filed a fee petition in response to the June 23 entry. On August 8—before the plaintiffs had sufficient opportunity to respond to the fee petition—

Judge Clark issued an entry finding that Taylor's calculation was reasonable and awarding her the requested fees.

{¶ 22} On September 23, Judge Clark held another hearing in the probate case on various motions, including the plaintiffs' motion to compel Taylor to produce additional discoverable information. According to Matthews, before commencement of the hearing but after all counsel had arrived, the bailiff left the courtroom and when he returned, he shut the courtroom doors. When McCauley appeared for the hearing more than ten minutes before it was scheduled to begin, the courtroom doors were already shut. McCauley states that because the judge had previously asked the parties to leave the courtroom, McCauley was hesitant to enter and therefore decided to sit in the hallway again. When the hearing commenced, Matthews asked Judge Clark for permission for McCauley to enter the courtroom. The judge stated that she was inclined to allow only counsel to be present for the hearing, but the judge eventually permitted McCauley to enter. Judge Clark initially directed McCauley to sit in the back of the courtroom rather than next to Matthews at counsel's table, where she had been seated at prior hearings.

{¶ 23} During the hearing, Judge Clark said that she would deny the plaintiffs' motion to compel, explaining:

I, too, question what we are doing here, why did I schedule a hearing. I could have ruled on this without a hearing, and maybe I should have. Well, here we are.

So it seems to me that in this case the same argument has been made over and over and over. No, but I really want it. We don't have it. No, I really, really want it. We don't have it, et cetera, et cetera, et cetera.

I'm tempted to make an analogy that I won't make about dealing with children, but asking over and over for something doesn't change the answer, and that's what's happening in this case.

* * * I'm also denying the motion to compel because frankly, I do think it's what I just said, asking over and over and over for something that Miss Taylor doesn't have, and there's just no point in asking repeatedly, and frankly running—I've already awarded attorney fees last month. I don't know what's happened with that, but I ordered \$12,803.

We don't have anything before the Court, I don't think, at the moment, an actual amount for attorney fees, but I would be disposed to order it again.

I just don't understand why [the] Plaintiffs are beating this drum, but I'm hereby * * * denying the motion to compel and I will entertain a motion for attorney fees.

{¶ 24} On October 6, Judge Clark granted an October 5 motion by Taylor to quash a subpoena without giving the plaintiffs an opportunity to respond.

{¶ 25} On October 31, McCauley filed an application in the separate estate case for authority to administer Welch's estate. According to Matthews, because Judge Clark had refused to order Taylor to release some of Welch's records to the plaintiffs in the underlying case, McCauley applied to become the estate administrator to obtain access to those records. In November, the former chief justice assigned Judge Clark to preside over the separate estate case.

{¶ 26} On November 21, Judge Clark granted a motion for a protective order approximately two hours after it was filed, again without providing the plaintiffs an opportunity to respond.

{¶ 27} On January 13, 2023, Judge Clark held another hearing in the underlying case. Matthews and McCauley claim that before the hearing commenced, the bailiff left the courtroom for the area near the judge’s chambers and that when the bailiff returned, he requested that only counsel remain in the courtroom. Therefore, McCauley left the courtroom. When the hearing commenced, the plaintiffs’ counsel again had to request permission for McCauley to enter the courtroom, and the judge allowed her to do so.

{¶ 28} At one point during the hearing, Judge Clark allowed the plaintiffs’ attorneys to step into the hallway to discuss a matter. The judge indicated that she would remain on the record, and while the plaintiffs’ attorneys were in the hallway, she asked an attorney for the date that she had filed a certain motion, explaining: “I don’t want to make everybody just sit there staring at each other, although we’re all good looking people and I’m sure staring at each other is [a] wonderful thing to do * * *.”

{¶ 29} On January 30, 2023, Judge Clark denied McCauley’s application to become Welch’s estate administrator in the separate estate case. McCauley filed an appeal.

{¶ 30} On March 3, the plaintiffs filed a motion to stay the underlying case pending McCauley’s appeal in the separate estate case. On April 10, the plaintiffs filed a “Rule 56(F) Motion” in the underlying case.

{¶ 31} On June 5, Matthews filed the pending affidavit of disqualification against Judge Clark.

Affidavit-of-Disqualification Proceedings

{¶ 32} Matthews argues that Judge Clark is biased and prejudiced against the plaintiffs and their counsel. Matthews admits that no single event establishes the judge’s bias; rather, he claims, “bias is demonstrated in a consistent pattern of conduct on the part of Judge Clark.”

{¶ 33} In support of the allegation, Matthews repeats many of the facts he alleged in support of the first affidavit of disqualification, including that Judge Clark misunderstood the issues before the court, refused to allow the plaintiffs to conduct meaningful discovery, and acted contrary to the Twelfth District’s mandate.

{¶ 34} But Matthews also points to specific actions of Judge Clark that have occurred since the denial of the first affidavit of disqualification. Those actions include removing McCauley from hearings, ruling on motions without giving the plaintiffs an opportunity to respond, predetermining issues in the underlying case, and making belittling comments.

{¶ 35} Matthews asserts that since the denial of the first affidavit of disqualification, Judge Clark “began to display heightened and particularly troubling conduct specifically directed toward Mrs. McCauley.” Specifically, he asserts that Judge Clark either required McCauley to leave the courtroom or had her barred from the courtroom for the hearings held on June 17 and September 23, 2022, and January 13, 2023. Matthews further points to the sarcastic comment that the judge made about “staring at each other” during the January 13 hearing. McCauley avers that the judge made the comment while staring directly at her, making her feel embarrassed and awkward. Matthews explains that “[c]oming from a judge who had kept [McCauley] out of a public courtroom, Mrs. McCauley reasonably did not take the remark as intended to be humorous.”

{¶ 36} Matthews also points to Judge Clark’s summarily granting motions favorable to Taylor without providing the plaintiffs an opportunity to respond. As examples, Matthews points out that Taylor filed a fee petition on August 4, 2022, and that Judge Clark granted it four days later. Then, on October 5, one of Taylor’s former attorneys filed a motion to quash a subpoena issued by the plaintiffs, and Judge Clark granted the motion the following day. And on November 21, Taylor’s

former attorney filed a motion for a protective order, and Judge Clark granted the motion later that same day.

{¶ 37} Matthews also believes that the judge has “openly signaled that she has prejudged various issues rather than allow evidence to be adduced.” As examples, Matthews claims that during the September 23, 2022 hearing, Judge Clark stated that there was enough evidence to deny the plaintiffs’ motion for a protective order, even though Matthews had another witness to call. During the January 13, 2023 hearing, the judge commented that she would be surprised if Taylor did not file a motion for summary judgment, and the judge refused to allow the plaintiffs to depose Taylor’s former attorney.

{¶ 38} Matthews states that Judge Clark’s “belittling comments” directed at him on the record are evidence that the judge is biased and prejudiced. For example, during the September 23, 2022 hearing, Judge Clark suggested that Matthews’s argument was one that a child might make. And during the January 13, 2023 hearing, defense counsel challenged Matthews’s professionalism in a personal attack but the judge “simply sat there, nodded with approval, and made no effort to maintain civility in the courtroom.”

{¶ 39} Matthews also points to the judge’s “unduly delayed ruling on” the plaintiffs’ March 3, 2023 motion to stay the underlying proceeding pending the plaintiffs’ appeal in the separate estate case and the plaintiffs’ April 10 “Rule 56(F) Motion.” Matthews asserts that the plaintiffs “are in jeopardy of receiving another adverse ruling before the court of appeals has an opportunity to rule in [their] favor.”

{¶ 40} Judge Clark filed a brief response to the pending affidavit of disqualification and denies any bias against Matthews or the plaintiffs. The judge claims that discovery in the underlying case has been difficult, that she has issued rulings against the plaintiffs, and that Matthews is merely dissatisfied with those rulings. Judge Clark did not, however, directly respond to or specifically deny most

of Matthews’s and McCauley’s allegations, and “statements [alleging bias] sworn to by the affiant, and unchallenged by the judge, could suggest to a reasonable person the appearance of impropriety,” *In re Disqualification of Floyd*, 101 Ohio St.3d 1215, 2003-Ohio-7354, 803 N.E.2d 816, ¶ 9; *see also In re Disqualification of Corrigan*, 94 Ohio St.3d 1234, 1235, 763 N.E.2d 602 (2001) (“a judge’s failure to respond to allegations of bias and prejudice may result in the judge’s disqualification to avoid the appearance of impropriety”).

Disqualification of a Common-Pleas-Court Judge

{¶ 41} R.C. 2701.03(A) provides that if a judge of a court of common pleas “allegedly is interested in a proceeding pending before the court, allegedly is related to or has a bias or prejudice for or against a party to a proceeding pending before the court or a party’s counsel, or allegedly otherwise is disqualified to preside in a proceeding pending before the court,” then that party or counsel may file an affidavit of disqualification with the clerk of this court. *Accord* R.C. 2101.39. Granting or denying the affidavit of disqualification turns on whether the chief justice determines that the allegations of interest, bias, prejudice, or disqualification alleged in the affidavit exist. R.C. 2101.39 and 2701.03(E).

{¶ 42} In affidavit-of-disqualification proceedings, the burden falls on the affiant to submit “specific allegations on which the claim of interest, bias, prejudice, or disqualification is based and the facts to support each of those allegations.” R.C. 2701.03(B)(1). Therefore, “[a]n affidavit must describe with specificity and particularity those facts alleged to support the claim of bias or prejudice.” *In re Disqualification of Mitrovich*, 101 Ohio St.3d 1214, 2003-Ohio-7358, 803 N.E.2d 816, ¶ 4. Vague and unsubstantiated allegations “are insufficient on their face for a finding of bias or prejudice.” *In re Disqualification of Walker*, 36 Ohio St.3d 606, 522 N.E.2d 460 (1988).

{¶ 43} “The term ‘bias or prejudice’ ‘implies a hostile feeling or spirit of ill-will or undue friendship or favoritism toward one of the litigants or his attorney,

with the formation of a fixed anticipatory judgment on the part of the judge, as contradistinguished from an open state of mind which will be governed by the law and the facts.’ ” *In re Disqualification of O’Neill*, 100 Ohio St.3d 1232, 2002-Ohio-7479, 798 N.E.2d 17, ¶ 14, quoting *State ex rel. Pratt v. Weygandt*, 164 Ohio St. 463, 132 N.E.2d 191 (1956), paragraph four of the syllabus.

{¶ 44} A judge is accorded a “presumption of impartiality” in an affidavit-of-disqualification proceeding. *In re Disqualification of Celebrezze*, 101 Ohio St.3d 1224, 2003-Ohio-7352, 803 N.E.2d 823, ¶ 7. “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.” *In re Disqualification of Lewis*, 117 Ohio St.3d 1227, 2004-Ohio-7359, 884 N.E.2d 1082, ¶ 8.

Analysis

{¶ 45} As set forth above, Matthews alleges that Judge Clark is biased and prejudiced against the plaintiffs and their counsel. This is the second affidavit of disqualification that Matthews has filed regarding the underlying case. While a second affidavit of disqualification may not be used to reargue points that were unsuccessfully made in a prior affidavit of disqualification, *see, e.g., In re Disqualification of Schweikert*, 158 Ohio St.3d 1211, 2019-Ohio-5487, 141 N.E.3d 258, ¶ 2, Matthews is not merely repeating prior allegations and evidence cited in support of those allegations here, but rather, he builds on them as evidence of a pattern of conduct that shows bias.

{¶ 46} At the outset, however, it is important to consider whether precedent controls the disposition of this case. There is precedent that stands for the proposition that “absent extraordinary circumstances, a judge will not be disqualified after having presided over lengthy proceedings in a pending case.” *In re Disqualification of Floyd*, 135 Ohio St.3d 1204, 2012-Ohio-6353, 985 N.E.2d

488, ¶ 16. Despite the use of the phrase “absent extraordinary circumstances,” the focus of a disqualification proceeding is on whether the allegations of interest, bias, prejudice, or disqualification in the affidavit are true. If so, the judge should be removed from the case, regardless of whether he or she has presided over lengthy proceedings in the case.

{¶ 47} As stated above, “[t]he term ‘bias or prejudice’ ‘implies a hostile feeling or spirit of ill-will or undue friendship or favoritism toward one of the litigants or his attorney, with the formation of a fixed anticipatory judgment on the part of the judge, as contradistinguished from an open state of mind which will be governed by the law and the facts.’ ” *O’Neill*, 100 Ohio St.3d 1232, 2002-Ohio-7479, 798 N.E.2d 17, at ¶ 14, quoting *State ex rel. Pratt*, 164 Ohio St. 463, 132 N.E.2d 191, at paragraph four of the syllabus. A judge’s subjective bias, however, is not easy to discern. The United States Supreme Court has recognized that “[t]o establish an enforceable and workable framework, the Court’s precedents [also] apply an objective standard that, in the usual case, avoids having to determine whether actual bias is present.” *Williams v. Pennsylvania*, 579 U.S. 1, 8, 136 S.Ct. 1899, 195 L.Ed.2d 132 (2016).

{¶ 48} In Ohio, a judge may be disqualified when the judge subjectively harbors hostility or animosity toward a litigant or counsel or shows a fixed anticipatory judgment. A judge may also be disqualified under an objective appearance-of-bias or impropriety standard: when “a reasonable and objective observer would harbor serious doubts about the judge’s impartiality.” *Lewis*, 117 Ohio St.3d 1227, 2004-Ohio-7359, 884 N.E.2d 1082, at ¶ 8; *accord* Jud.Cond.R. 2.11(A). “The reasonable observer is presumed to be fully informed of all the relevant facts in the record—not isolated facts divorced from their larger context.” *In re Disqualification of Gall*, 135 Ohio St.3d 1283, 2013-Ohio-1319, 986 N.E.2d 1005, ¶ 6.

{¶ 49} Judge Clark has been reversed twice by the court of appeals in the underlying case. The judge inexplicably ruled on a motion that was filed in and had been ruled on by a different court. After the first remand, the judge granted summary judgment without allowing the parties to engage in discovery, even though the court of appeals had telegraphed in its first opinion that she should permit discovery. *Welch I*, 2018-Ohio-4558, at ¶ 12, fn. 3. Matthews maintains that although the underlying case was filed in 2017, the plaintiffs have not yet been able to engage in meaningful discovery.

{¶ 50} And while the court of appeals clarified that not all the claims alleged in the complaint involved Welch’s will or estate, Judge Clark disregarded this statement and continued to treat the action as a will contest. According to the court of appeals, the judge incorrectly determined that the action was untimely, she abused her discretion in precluding the plaintiffs from obtaining discovery and denying them a meaningful opportunity to respond to Taylor’s motion for summary judgment, and the judge erred in deciding that the action was barred by res judicata when it had not been dismissed by the general division on the merits. Having misconstrued the nature of the action a second time, Judge Clark then declared it to be frivolous and sanctioned the plaintiffs by awarding Taylor \$63,789 in attorney fees.

{¶ 51} A judge may continue presiding over a case when the judge’s rulings of law are reversed on appeal, even in a critical opinion issued by the court of appeals. *See In re Disqualification of Floyd*, 135 Ohio St.3d 1249, 2012-Ohio-6336, 986 N.E.2d 10, ¶ 10. And it is well established that “[a]dverse rulings, without more, are not evidence that a judge is biased or prejudiced.” *In re Disqualification of Russo*, 110 Ohio St.3d 1208, 2005-Ohio-7146, 850 N.E.2d 713, ¶ 5. Yet it has also been recognized that “a judge could be disqualified if his or her adverse rulings were accompanied by words or conduct that call into question the manner in which the proceedings are being conducted.” *In re Disqualification of*

Knece, 138 Ohio St.3d 1274, 2014-Ohio-1414, 7 N.E.3d 1213, ¶ 10. Here, the affidavit of disqualification does not depend solely on the rulings that Judge Clark has issued against the plaintiffs.

{¶ 52} Matthew alleges that after the former chief justice denied his first affidavit of disqualification, Judge Clark took actions that created the appearance of bias. Those alleged actions—removing McCauley, a party, from public hearings when she was not being disruptive and without a closure motion or hearing, ruling on motions without giving the plaintiffs an opportunity to respond, and making inappropriate comments from the bench—provide evidence in support of disqualification.

{¶ 53} The record here shows that twice—before the June 17, 2022 hearing and before the January 13, 2023 hearing—the judge’s bailiff entered the judge’s chambers and upon his return asked that only counsel remain in the courtroom for the hearing. McCauley was excluded from the courtroom both times.

{¶ 54} “[T]he Free Speech and Free Press Clauses of the First Amendment to the United States Constitution, the analogous provisions of Section 11, Article I of the Ohio Constitution, and the ‘open courts’ provision of Section 16, Article I of the Ohio Constitution create a qualified right of public access to proceedings which have historically been open to the public and in which public access plays a significantly positive role.” *State ex rel. Scripps Howard Broadcasting Co. v. Cuyahoga Cty. Court of Common Pleas, Juvenile Div.*, 73 Ohio St.3d 19, 20, 652 N.E.2d 179 (1995). This court has noted that the “ ‘guarantee of a public trial is a cornerstone of our democracy which should not be circumvented unless there are extreme overriding circumstances.’ ” *State ex rel. Dispatch Printing Co. v. Lias*, 68 Ohio St.3d 497, 502, 628 N.E.2d 1368 (1994), quoting *State v. Lane*, 60 Ohio St.2d 112, 119, 397 N.E.2d 1338 (1979). The decision to close a courtroom is not up to “the personal predilections of the judge,” *State ex rel. Plain Dealer Publishing Co. v. Geauga Cty. Court of Common Pleas, Juvenile Div.*, 90 Ohio St.3d 79, 87,

734 N.E.2d 1214 (2000), and closure is not proper if the judge does not first conduct an evidentiary hearing, *see State ex rel. WBNS 10-TV, Inc. v. Hawkins*, 156 Ohio St.3d 573, 2019-Ohio-2500, 130 N.E.3d 281, ¶ 5.

{¶ 55} Moreover, “[t]he right of a natural party to be present in the courtroom when her case is being tried is deeply rooted in the law of this Nation.” *Kesterson v. Jarrett*, 291 Ga. 380, 384, 728 S.E.2d 557 (2012). As the United States Court of Appeals for the Sixth Circuit has recognized, “a court may not exclude arbitrarily a party who desires to be present merely because he is represented by counsel,” *Helminski v. Ayerst Laboratories*, 766 F.2d 208, 213 (6th Cir.1985), and “a plaintiff who can comprehend the proceedings and aid counsel may not be excluded from any portion of the proceedings absent disruptive behavior or a knowing and voluntary waiver,” *id.* at 216-217.

{¶ 56} While some statutes require or permit the closure of probate hearings—for example, certain hearings related to adoptions, *see* R.C. 3107.17(A), and with limited exceptions, hearings related to hospitalizing mentally ill persons, *see* R.C. 5122.15(A)(5), and hearings related to institutionalizing persons with intellectual disabilities, *see* R.C. 5123.76(A)(5)—probate hearings are generally open to the public. McCauley therefore had the right to be present during the hearings in her case. There was no motion to close the proceedings to the public and no evidentiary hearing was held, and even if a motion and hearing had occurred, closure would not extend to a nondisruptive party. There is nothing in the record that justified excluding McCauley from the hearings—for example, there is no evidence that she had previously disrupted the proceedings—and Judge Clark failed to respond to the specific allegations and explain why it was appropriate to hold a hearing with only counsel present when a party was present and wanted to attend. Nor does the judge explain why she at one point directed McCauley to sit in the rear of the courtroom rather than at counsel’s table with Matthews, where McCauley had been seated at prior hearings.

{¶ 57} Additionally, after the first affidavit of disqualification was denied, Judge Clark began ruling on Taylor’s motions without allowing the plaintiffs an opportunity to respond. Although Judge Clark had said that she was “loathe to impose sanctions” when the plaintiffs merely were seeking an order to compel discovery responses, she granted Taylor’s attorney-fee petition four days after it was filed without waiting for the plaintiffs to submit their response. This violated Civ.R. 37(A)(5)(a), which requires a court that has granted a motion to compel discovery to provide an opportunity to be heard before ordering the nonmovant to pay the movant’s reasonable expenses, including attorney fees, incurred in making the motion. Judge Clark ruled on other motions without allowing time for the plaintiffs to be heard, granting a motion to quash a subpoena the day after it was filed and granting a motion for a protective order the same day it was filed.

{¶ 58} In addition, Matthews and McCauley aver that Judge Clark’s demeanor has created the appearance of bias against them. For example, during the September 23, 2022 hearing, Matthews’s attempts to obtain certain documents from Taylor prompted the judge to make an analogy about “dealing with children.” McCauley states that Judge Clark “frequently glares at [Matthews] with an angry, disapproving expression on her face and addresses him in a condescending, dismissive tone” whereas she speaks to Taylor’s attorneys in “a pleasant, cordial tone.” McCauley also points to the September 23, 2022 incident when the bailiff closed the doors to the courtroom, excluding her, and says that when she entered the courtroom after the doors were reopened, the judge spoke to her in “a rude tone.” And according to McCauley, when Judge Clark made the comment about people staring at each other while the plaintiffs’ attorneys were conferring outside the courtroom, the judge’s tone was sarcastic and “[h]er look was unpleasant.” This conduct runs counter to the admonition that “notwithstanding the conduct of litigants or counsel, a judge ‘has an ethical obligation to conduct himself or herself in a courteous and dignified manner that does not convey the appearance of bias or

prejudice toward litigants or their attorneys,’ ” *In re Disqualification of Swenski*, 140 Ohio St.3d 1208, 2014-Ohio-3299, 15 N.E.3d 859, ¶ 6, quoting *In re Disqualification of Cleary*, 88 Ohio St.3d 1220, 1222-1223, 723 N.E.2d 1106 (2000).

{¶ 59} The judge maintains that she is not biased against the plaintiffs or Matthews, which may be true. But “[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, 850 N.E.2d 720, ¶ 11. There is little doubt that Matthews and the plaintiffs no longer believe that they will receive a fair trial before Judge Clark, and a well-informed objective observer who has fully reviewed this record would agree. “Preservation of public confidence in the integrity of the judicial system is vitally important, and judicial decisions must be rendered in a manner that does not create a perception of partiality. An appearance of bias can be just as damaging to public confidence as actual bias.” *In re Disqualification of Murphy*, 110 Ohio St.3d 1206, 2005-Ohio-7148, 850 N.E.2d 712, ¶ 6.

{¶ 60} Therefore, to allay any concerns about the fairness and integrity of the proceedings and to ensure to the parties and the public the unquestioned neutrality of the trial judge, Judge Clark is disqualified.

Conclusion

{¶ 61} Matthews’s and McCauley’s affidavits include facts that would cause an objective observer to harbor serious doubts about Judge Clark’s impartiality. Matthews’s affidavit of disqualification is granted. The appointment of an assigned judge to preside over the probate case will be addressed in a separate entry.