

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CONNIE C. RESHARD,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	NO. 02-1787
	:	
MAIN LINE HOSPITAL, INC. d/b/a THE	:	
LANKENAU HOSPITAL a.k.a. MAIN	:	
LINE HEALTH, et al.,	:	
	:	
Defendants.	:	

MEMORANDUM

ROBERT F. KELLY, Sr. J.

APRIL 16, 2003

Presently before this Court is the Motion for Reconsideration to Disqualify Senior Judge Robert F. Kelly Under 28 USC § 144 and 28 USC § 455 and Points and Authorities. (Doc. No. 119). This *pro se* personal injury action is based upon alleged medical malpractice by the following Defendants: Main Line Hospitals, Inc., d/b/a/ and a/k/a Main Line Health and The Lankenau Hospital and its employees, Dr. Kimberly Lenhardt; Dr. Michael Glassner; Dr. Thomas Meyer; Dr. Mark Scott; Dr. John Schilling and Dr. Geoffrey Tremblay.¹ The instant action was filed on April 2, 2002. For the past year, the Court has attempted to conduct this action as efficiently as possible. The Court's efforts have resulted in numerous hearings, telephone conferences, motions and orders, requiring the Court's attention on a daily basis. The culmination of the Court's substantial efforts has resulted in, among other things, the filing of three motions by Plaintiff seeking my disqualification from the action, a Writ of Mandamus and

¹ The Court has jurisdiction over this action based upon diversity. See 28 U.S.C.A. § 1332.

an appeal.² For the reasons that follow, the Motion will be denied.³

I. STANDARD

A motion for reconsideration is appropriate only where: (1) there has been an intervening change in controlling law; (2) new evidence is available; or (3) there is need to correct a clear

² Plaintiff's first Motion to Disqualify Senior Judge Robert F. Kelly was denied by an Order dated March 28, 2003. (Doc. No. 116). Plaintiff filed her Motion for Reconsideration of my denial of her Motion for Disqualification on March 31, 2003. (Doc. No. 119). Also, on March 31, 2003, Plaintiff filed an identical Motion to Disqualify Senior Judge Robert F. Kelly Under 28 USC § 144 and 28 USC § 455. (Doc. No. 122). All three motions are materially identical to one another.

³ As an initial matter, the issue of jurisdiction must be addressed. Review of the Docket in this matter shows that Plaintiff filed the instant Motion for Reconsideration to Disqualify Senior Judge Robert F. Kelly on March 31, 2003. (Doc. No. 119). Additionally, on March 31, 2003, Plaintiff filed a Notice of Appeal. (Doc. No. 120). Thus, Plaintiff filed her Motion for Reconsideration and Notice of Appeal on the same day. "It is well established that '[t]he filing of a notice of appeal . . . confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.'" Sheet Metal Workers' Intern. Ass'n Local 19 v. Herre Bros., Inc., 198 F.3d 391, 394 (3d Cir. 1999)(citing Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982))(footnote omitted). Plaintiff's Notice of Appeal states that she is appealing "the Order entered in this action on the 27th day of March 2003, and certain other collateral orders on the 27th and 28th days of March 2003." (Doc. No. 120). Plaintiff's Notice of Appeal is unclear about whether she is appealing the Court's March 28, 2003 Order denying her Motion for Disqualification. However, the Court retains jurisdiction whether or not Plaintiff has appealed the Court's March 28, 2003 Order. In the case where Plaintiff's appeal includes the Court's Order regarding disqualification, Plaintiff's Motion for Reconsideration allows for this Court to retain jurisdiction. Where any motion for reconsideration is filed prior to the filing of a notice of appeal, "jurisdiction remains in this Court until all Motions for Reconsideration are decided." Greene v. London Harness & Cable, No. 99-3807, 2001 WL 359838, at *1 (E.D. Pa. Apr. 3, 2001); see also Vaidya v. Xerox Corp., No. 97-547, 1997 WL 732464, at *2 (E.D. Pa. Nov. 25, 1997); Fed. R. App. P. 4(a)("A notice of appeal filed . . . before deposition of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal until the entry of the order disposing of the last such motion outstanding."). In the case where Plaintiff's appeal does not include the Court's March 28, 2003 Order denying Plaintiff's Motion for Disqualification, the Court has jurisdiction over the instant motion because the motion involves aspects of the case that are not involved in the appeal.

error of law or prevent manifest injustice. N. River Ins. Co. v. Cigna Reinsurance Co., 52 F.3d 1194, 1218 (3d Cir. 1995). However, such motions should only be granted sparingly. Armstrong v. Reisman, No. 99-4188, 2000 WL 288243, at *2 (E.D. Pa. Mar. 7, 2000).

II. DISCUSSION

a. Recusal Under 28 U.S.C. §§ 144 and 455

Plaintiff requests my disqualification pursuant to sections 144 and 455 of Title 28 of the United States Code. Section 144 provides:

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C. § 144. As a initial matter, “[a] judge is not automatically required to recuse himself or herself upon the filing of a motion under [Section] 144.” Schreiber v. Kellogg, 838 F. Supp. 998, 1003 (E.D. Pa. 1993). “He or she must first pass on the legal and factual sufficiency of the motion and ascertain whether the facts alleged fairly support a charge of bias.” Id. (citing Mims v. Shapp, 541 F.2d 415 (3d Cir.1976)). Thus, “[i]t is the duty of the judge against whom a [S]ection 144 affidavit is filed to pass upon the legal sufficiency of the facts alleged.” United States v. Enigwe, 155 F. Supp.2d 365, 369 (E.D. Pa. 2001)(quoting United States v. Townsend,

478 F.2d 1072, 1073 (3d Cir. 1973))(quotation marks and citation omitted). “The mere filing of an affidavit, however, does not automatically disqualify a judge.” Id. (citing Townsend, 478 F.2d at 1073). “Disqualification results only from the filing of a timely and sufficient affidavit.” Id. (quoting Townsend, 478 F.2d at 1073)(quotation marks omitted).

“In evaluating a motion brought under [Section] 144, the ‘test is whether, assuming the truth of the facts alleged, a reasonable person would conclude that a personal as distinguished from a judicial bias exists.’” Id. (quoting Mims, 541 F.2d at 417). “As a rule, only allegations of personal bias and prejudice will suffice and the bias or prejudice must stem from an extrajudicial source.”⁴ Id. (citations omitted). “Extrajudicial bias is ‘bias not derived from the evidence or conduct of the parties that the judge observes in the course of the proceedings.’” Schreiber, 838 F. Supp. at 1003 (quoting Johnson v. Trueblood, 629 F.2d 287, 291 (3d Cir. 1980), cert. denied, 450 U.S. 999 (1981))(citations omitted). When examining the allegations, “[n]either the truth of the allegations nor the good faith of the pleader may be questioned, regardless of the judge’s personal knowledge to the contrary.” Enigwe, 155 F. Supp.2d at 370 (quoting Mims, 541 F.2d at 417)(quotation marks and citation omitted).

Section 455, provides, in pertinent part:

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

⁴ A “rarely invoked” exception to the requirement that bias must stem from an extrajudicial source “requires disqualification when a judge displays ‘pervasive bias’ towards [the party seeking recusal] regardless of the source of the bias.” United States v. Rosenberg, 806 F.2d 1169, 1174 (3d Cir. 1986), cert. denied, 481 U.S. 1070 (1987). Upon examination of Plaintiff’s allegations, the Court does not believe the allegations prove any bias against Plaintiff, much less the pervasive bias necessary to invoke the pervasive bias exception. Thus, the Court’s actions do not provide a basis for the operation of the pervasive bias exception.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

28 U.S.C. § 455. Under Section 455, “[t]he applicable inquiry is whether a reasonable [person] knowing all the circumstances would harbor doubts concerning the judge’s impartiality.” United States v. Vespe, 868 F.2d 1328, 1341 (3d Cir. 1989)(citations omitted); see also United States v. Dalfonso, 707 F.2d 757, 760 (3d Cir. 1983). “This rule is limited by the ‘extrajudicial source’ doctrine, which warrants a judge’s disqualification where the source of the partiality lies in knowledge gained outside the course of judicial proceedings.” Viola v. United States, No. 99-586, 2003 WL 147779, at *1 (E.D. Pa. Jan 21, 2003)(citing Liteky v. United States, 510 U.S. 540, 554-56 (1994)).

b. Plaintiff’s Motion⁵

In her motion for disqualification, Plaintiff alleges that the record displays a pattern of partiality against her and in favor of Defendants. In support of Plaintiff’s claims, she asserts various instances which allegedly show partiality. The instances upon which Plaintiff relies are the following: allegedly biased rulings made by the Court pertaining to numerous discovery issues; a March 6, 2003 telephone conference, where Judge Kelly allegedly advised

⁵ Both Plaintiff’s Motion for Reconsideration and her original Motion to Disqualify do not contain an affidavit, but include a “Verification in Lieu of an Affidavit.” (See Doc. Nos. 109 and 119). Plaintiff’s “Verification” does not appear to be either witnessed or notarized. (Id.). In both motions, Plaintiff’s verification states that her attached motion is asserted in good faith and contains information which demonstrates Judge Kelly’s bias in favor of Defendants. (Id.). Therefore, instead of a separate affidavit, Plaintiff relies upon the allegations and conclusions contained within her motions to support her argument. (Id.). As a result of Plaintiff’s election not to attach a separate affidavit, the Court considers the allegations asserted in Plaintiff’s motions to support her claims of bias as if they have been alleged within a separate affidavit.

Defendant Michael Glassner to file a Motion for Sanctions regarding the Plaintiff's deposition scheduled for February 27, 2003; an allegation that Judge Kelly scheduled a telephone conference in this case on February 26, 2003 at 4:30 p.m., after Plaintiff had called the Judge's chambers that morning and left a voice message that she was having a medical emergency; and an allegation that Judge Kelly's prior rulings regarding Plaintiff's use of counsel has improperly denied assistance of counsel to Plaintiff. (See Pl.'s Mot. to Disqualify Senior Judge Robert F. Kelly Under 28 USC §144 and 28 USC § 455; Pl.'s Mot. for Reconsideration; Pl.'s Mot. to Disqualify Senior Judge Robert F. Kelly Under 28 USC § 144 and 28 USC § 455).

The Court finds that the allegations in support of Plaintiff's motion calling for my disqualification are insufficient to support her claims of bias. Mindful of the rule that the allegations contained in Plaintiff's motion must be accepted as true, the Court finds that Plaintiff's allegations are insufficient as a matter of law. Assuming Plaintiff's allegations are true, there are no statements or allegations based upon personal, or extrajudicial, bias. Thus, Plaintiff fails to offer any facts or allegations that the Court harbors personal or extrajudicial bias against her. Plaintiff's allegations relate to prior rulings and actions taken by the Court in the course of its participation in this case. In addition, Plaintiff's motion contains conclusory allegations and opinions which need not be accepted as true. Consequently, the Court finds that no reasonable person, knowing all the circumstances, would harbor doubts concerning the Court's impartiality. As a result of Plaintiff's failure to allege sufficient facts to prove that the Court has a personal bias or prejudice against her, I properly denied Plaintiff's original motion seeking my disqualification on March 28, 2003. Plaintiff's instant Motion for Reconsideration is based upon the ground that my denial was improper. Since I properly denied Plaintiff's motion

based upon the legal insufficiency of her allegations, Plaintiff's Motion for Reconsideration is denied.

c. Voluntary Recusal

Although I stand behind my denial of Plaintiff's motion for my disqualification, and vehemently oppose any allegations of prejudice or bias, I conclude that recusal of myself from this action is necessary. In view of Plaintiff's irrational fixation on my alleged bias, her personal attacks on my presence in this action are hindering, rather than facilitating, the conclusion of this case. As an illustration of the aforementioned, Plaintiff has filed three motions seeking my disqualification from the action. (See Doc. Nos. 109, 119 and 122). The motions include allegations against me from the beginning stages of the case until the present time. In support of her argument seeking my disqualification, Plaintiff focuses upon virtually all my actions and decisions, especially my decisions pertaining to discovery. Plaintiff's various motions and issues regarding her disagreement with my decisions has aided in rendering this action over one year old with the filing of over 120 documents and motions. Additionally, Plaintiff has filed a Writ of Mandamus and a separate appeal concerning decisions that I made regarding discovery and the assistance of counsel. As a result, Plaintiff's numerous issues with my decisions not only involves this Court, but has expanded to include the involvement of the Court of Appeals for the Third Circuit.

In this action, I have tried my best to move the case along as efficiently and expeditiously as possible. Even with my best efforts, Plaintiff has not engaged in any meaningful discovery despite the fact that discovery is scheduled to conclude on April 30, 2003. It appears that Plaintiff has mistakenly interpreted my efforts to efficiently advance this litigation as some

sort of prejudice or bias against her. My efforts in advancing this action are not based upon prejudice or bias, but are premised upon judicial economy, saving the parties valuable time and expense, and in the interest of allowing this action to come to a just conclusion. At this stage of the case, in light of Plaintiff's recent filings, it appears that Plaintiff is now shifting her litigation and disdain towards the Court. An example of this shifting of priorities can be found in many recent filings by Plaintiff which include personal allegations against me and my management of the case.

As a result of the aforementioned, it is clear to me that my involvement in this action has turned into an impediment. Currently, the case is at a virtual standstill due to the present motions for my disqualification, the two existing appellate motions and Plaintiff's Emergency Motion for Stay Pending Appeal and Writ of Mandamus. Thus, in an attempt to move this action forward, I conclude that my voluntary removal is necessary. As a result, in the interest of judicial economy, I hereby voluntarily recuse myself from this action.

III. CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Reconsideration is denied. The Court's March 28, 2003 denial of Plaintiff's Motion to Disqualify Senior Judge Robert F. Kelly is appropriate because Plaintiff's motion is legally insufficient. Since Plaintiff has not presented an intervening change in controlling law or newly available evidence, and in the absence of a need to correct a clear error or prevent manifest injustice, the Court denies Plaintiff's Motion for Reconsideration. Although Plaintiff's Motion for Reconsideration is denied, I voluntarily recuse myself from the action. I deny any claims of prejudice or bias, however, I find that my recusal is necessary for the reasons enumerated above.

ADDENDUM⁶

The Court recognizes that it is unnecessary to explain any of the allegations made by Plaintiff in her motion. However, in an attempt to set the record straight and make this opinion complete, the Court will attempt to clarify some of the allegations made by Plaintiff. By clarifying some of Plaintiff's allegations, the Court is able to show that there has not been any bias or prejudice against Plaintiff in favor of Defendants.

Plaintiff's declaration that I advised Defendant Michael Glassner to file a motion for sanctions during a March 6, 2003 telephone conference is inaccurate. On March 6, 2003, the Court held a telephone conference regarding discovery and the scheduling of depositions. Towards the conclusion of the telephone conference, counsel for Defendant Dr. Michael Glassner stated that he was considering filing a motion for sanctions against Plaintiff for her failure to appear at her deposition. Counsel asked me if I would like to address the issue during the telephone conference or if I would prefer to address the issue in a motion. I stated that if counsel was planning on filing a motion then it would be better to file a motion rather than raise the issue over the phone.

By offering an accurate account of events and, more importantly, placing them properly within context, it is evident that Plaintiff has proffered a distorted rendition of what really occurred. By presenting what was said out of context, Plaintiff has made an innocent and

⁶ In various motions throughout this case, Plaintiff has included her version of events pertaining to the Court's actions. As a result, Plaintiff's version of events regarding the Court's actions has been repeatedly asserted and maintained without correction. The Court uses this Addendum as a means of clarifying and setting the record straight regarding what actually occurred. The Court, however, notes that its decision denying Plaintiff's Motions for Disqualification and Reconsideration are not based upon what is set forth in the Addendum.

impartial exchange between myself and Dr. Glassner's counsel out to be an improper and prejudicial instruction to counsel to file a motion for sanctions against Plaintiff. The true and accurate account of what occurred shows that Plaintiff's use of this instance as an example of impartiality is without merit.

As for Plaintiff's allegation that I scheduled a telephone conference in this case on February 26, 2003 at 4:30 p.m. after she left a voice message in the morning stating that she was having a medical emergency, it is false. Prior to February 26, 2003, upon a request by defense counsel, the Court scheduled a 4:30 p.m. telephone conference for Wednesday, February 26, 2003. Before scheduling the telephone conference, the Court inquired of the availability of all counsel, including Plaintiff. Upon receiving a convenient date for all involved, the Court scheduled the conference call for 4:30 p.m. on February 26, 2003. Before business hours on February 26, 2003, at approximately 8:30 a.m., Plaintiff left a voice message with my chambers stating that she was having a medical emergency and to give her a call back. The Court notes that Plaintiff's message stated only that she was having a medical emergency and to call her back and did not state anything else. At approximately 8:45 a.m., my law clerk attempted to contact Plaintiff. Unable to personally speak with Plaintiff, my law clerk left a message on Plaintiff's voice mail instructing Plaintiff to get in touch with chambers. Throughout the day, mindful of the 4:30 p.m. telephone conference, my law clerk left several messages on Plaintiff's voice mail. At approximately 4:30 p.m., in a last attempt to salvage the telephone conference, my law clerk called Plaintiff and left a final message on Plaintiff's voice mail stating that the 4:30 p.m. telephone conference had been canceled due to Plaintiff's absence. The voice mail message also instructed Plaintiff to contact chambers in order to re-schedule the conference. Unable to reach

Plaintiff, my law clerk then immediately called all relevant defense counsel and informed them that the telephone conference was canceled due to Plaintiff's medical emergency. My law clerk also instructed defense counsel that the telephone conference would be re-scheduled.

On Thursday, February 27, 2003, Plaintiff called chambers in the afternoon and spoke with my law clerk. Plaintiff explained to my clerk that she had been in the emergency room and was unable to telephone the Court. My law clerk told Plaintiff that the telephone conference would be re-scheduled upon the availability of Plaintiff and defense counsel. My law clerk learned of the availability of all involved, including Plaintiff, and re-scheduled the February 26, 2003 telephone conference for March 6, 2003 at 8:45 a.m. The re-scheduled telephone conference occurred on March 6, 2003 and included Plaintiff.

As evidenced by the true and accurate account of what occurred in relation to the February 26, 2003 telephone conference, Plaintiff's account of events is incomplete and patently untrue. The Court accommodated Plaintiff, without issue, by canceling the original telephone conference and re-scheduling it. At no time did the Court ever have a telephone conference regarding this action without the inclusion of Plaintiff. Plaintiff's contention otherwise is not a distortion of the facts, but is completely false.

Lastly, Plaintiff mistakenly alleges that I have improperly denied her the assistance of counsel. I have not improperly denied Plaintiff the assistance of counsel. Plaintiff, who is a licensed attorney in the Commonwealth of Pennsylvania, has represented herself since the inception of this action. Almost one year into the action, at the March 20, 2003 deposition of Dr. Lenhardt, Plaintiff attended the deposition with a man named Bashiru Jimod. Mr. Jimod, who apparently is an attorney, has never entered his appearance on behalf of Plaintiff as counsel

of record. In addition, there has never been any motion for *pro hac vice* admission regarding Mr. Jimod. In fact, it was at Dr. Lenhardt's deposition where the Court and defense counsel first learned of Mr. Jimod's existence. At the deposition, defense counsel objected to Mr. Jimod's presence and, by telephone, I permitted Mr. Jimod to be present for the sole purpose of conferring with Plaintiff regarding the asking of questions.

On March 25, 2003, six days before Plaintiff's scheduled deposition, Plaintiff filed an Emergency Motion Requesting Clarification and Authorization for Use of Counsel at Plaintiff's Deposition. (Doc. No. 107). This motion, as its name implies, was a motion requesting clarification and authorization by the Court for Plaintiff's use of counsel at her own deposition. The motion was neither an entry of appearance nor a *pro hac vice* motion. The motion was deficient in that it failed, among other things, to identify the attorney Plaintiff wished to have assist her and did not provide any information whatsoever about the undetermined attorney. On March 27, 2003, after considering Plaintiff's motion, I issued an order denying the motion. (Doc. No. 111). In an attempt to offer Plaintiff some guidance, and to help ensure the taking of Plaintiff's deposition on March 31, 2003, the Court's March 27, 2003 Order included the following language:

It is further ORDERED that no counsel, who has not been admitted to practice before this Court pursuant to Rule 83.5 of the Local Rules of Civil Procedure for the United States District Court for the Eastern District of Pennsylvania, shall take part in any way in the deposition of Plaintiff, Connie C. Reshard, or any other deposition in this action. See Local R. Civ. P. 83.5; 83.5.2; Hearst/ABC-Viacom Entertainment Services v. Goodway Marketing, Inc., 145 F.R.D. 59, 63-64 (E.D. Pa. 1992).

(Doc. No. 111 (Court's March 27, 2003 Order)).

Thus, through this Order, I attempted to assist Plaintiff by providing the appropriate rules and relevant precedent regarding *pro hac vice* admission.

Apparently, on March 31, 2003, Plaintiff attended her deposition by herself. Plaintiff put a statement on the record that she had filed a notice of appeal appealing my March 27, 2003 Order pertaining to Plaintiff's request for authorization to secure the assistance of associate counsel at her deposition. Plaintiff refused to continue her deposition fearful that she may suffer prejudice if she was made to continue with the deposition without the assistance of counsel. Also, on March 31, 2003, Plaintiff filed an application for Hughie Hunt, Esq. to appear *pro hac vice* pursuant to Rule 83.5.2(b) of the Local Rules of Civil Procedure for the United States District Court for the Eastern District of Pennsylvania. (Doc. No. 123). Prior to March 31, 2003, on Friday, March 28, 2003, at approximately 4:55 p.m., Plaintiff called my chambers and asked my law clerk if she had received Plaintiff's expedited *pro hac vice* motion which was filed that afternoon. My clerk informed Mrs. Reshard that she had not seen the motion. The Court tried in vain to locate Plaintiff's *pro hac vice* motion prior to the commencement of her deposition at 10:00 a.m. on Monday, March 31, 2003 in order to ensure that nothing would delay the taking of Plaintiff's deposition. However, after viewing the application and the attached cashier's receipt, it appears that the Court was unable to locate Plaintiff's motion because it had not been filed until the afternoon of March 31, 2003.

As a result of the aforementioned, I did not, and never intended, to prevent Plaintiff from having the assistance of counsel. However, as an officer of the Court, I have required that Plaintiff appropriately comply with applicable rules of civil procedure, federal and local, pertaining to the assistance of outside counsel. Upon viewing an accurate account of what

happened in regard to Plaintiff's assistance of counsel claims, there is absolutely no bias or partiality to be found.

