

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MIDLAND**

HERON COVE ASSOCIATION, et al,

Case No. 24-2751-AA

Appellants,

Hon. Stephen P. Carras

v.

MIDLAND COUNTY BOARD OF
COMMISSIONERS, and GLADWIN
COUNTY BOARD OF COMMISSIONERS,
and FOUR LAKES TASK FORCE,

Appellees.

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**BRIEF IN SUPPORT OF APPELLEES MIDLAND COUNTY BOARD OF
COMMISSIONERS, GLADWIN COUNTY BOARD OF COMMISSIONERS AND FOUR
LAKES TASK FORCE'S RESPONSE IN OPPOSITION TO APPELLANTS' HERON
COVE ASSOCIATION, ET AL'S. MOTION TO DISQUALIFY JUDGE CARRAS**

INTRODUCTION

This administrative appeal arises out of the lake level special assessment rolls prepared by the Appellee, Four Lakes Task Force ("FLTF") and approved by Appellees, Gladwin and Midland County Board of Commissioners (the "Counties"), pursuant to Part 307 "Inland Lakes Levels" of the Michigan

Natural Resources and Environmental Protection Act (“Part 307”)¹ to cover the administrative, operation, maintenance, repair, replacement and improvements costs to four high hazard dams required to maintain the lake levels of Smallwood, Secord, Wixom and Sanford Lakes located in Gladwin and Midland Counties (the “Four Lakes”). Appellant, Heron Cove Association and each person listed individually in the caption on appeal (collectively, “Appellants”) filed their Claim of Appeal on or about February 20, 2024, seeking to set aside the Counties’ decision approving the lake level special assessment rolls.

On March 13, 2024, Appellants filed their Motion for Disqualification of Judge Stephen P. Carras. (“DQ Motion”). Appellants’ sole basis for their DQ Motion contends that Judge Carras should be disqualified because he served (and currently serves) as a trustee of the Herbert H. and Grace A. Dow Foundation (the “Dow Foundation”) and because the Dow Foundation previously donated \$1M in charitable funds to FLTF, a 501(c)(3) nonprofit organization, which also serves as the “Delegated Authority” for Midland and Gladwin counties to administer and oversee the administration, operation, maintenance, repair, replacement and improvements to the four dams and Four Lakes. Appellants also contend, falsely, that Appellees have “publicly denounced” the appeal. Appellants suggest that false claim, coupled with Judge Carras’s role as 1 of 15 trustees of the Dow Foundation, somehow warrants disqualification on the grounds that there is an “objective and reasonable perception” that Judge Carras has a serious risk of actual bias and has a duty to protect the integrity of the judiciary by avoiding even the appearance of impropriety. (Appellants Br p 7). Not so.

Rather, it is highly unlikely that not a single person listed in the caption of the Claim of Appeal, was not aware of Judge Carras’s serving as a trustee of the Foundation until March 7,

¹ 1994 PA 451, as amended, MCL 324.30701 et seq.

2024, where it is widely known and readily available information. For this reason, Appellees maintain that Appellants' DQ Motion is untimely under MCR 2.003(D)(1) and should be denied.

Additionally, Appellants' unsupported accusation of a lack of impartiality presents, at most, a tenuous allegation of suggested bias and tenuous allegations cannot overcome the heavy presumption of impartiality. *Armstrong v Ypsilanti Charter Twp.*, 248 Mich App 573, 600; 640 NW2d 321 (2001). In this case, the Dow Foundation's donation was awarded over three years ago. Those funds were restricted and *could not be used* to construct or restore the Four Lakes. Moreover, Judge Carras' is only one of 15 trustees and officers of the Dow Foundation. And, from an ethical perspective, there is absolutely nothing inappropriate about a judge serving on the board of a charitable organization. See Canon 4(c), Mich Code of Judicial Conduct. Thus, it is entirely speculative that the Dow Foundation has any interest whatsoever in the amount of the Lake Level capital special assessment or the operation and maintenance special assessment approved by the Appellees.

Finally, the public statements of Appellees do not support Appellants' assertion that Appellees "have issued numerous public statements denouncing the appeal." (Appellee Br., p6.) Indeed, the statements made by Appellants clearly indicate that the landowners have a right to appeal while providing factual information to the public of the status of the Lake Level Project, which cannot move forward until the appeal in this case is resolved. That is no denunciation of the appeal. It merely restates a fact as a result of finance law. Municipal financing (*i.e.*, municipal bonds) cannot be issued until and unless the security for such financing, namely, lake level special assessments, is "final." That cannot happen until this appeal is resolved.²

² For that reason, Appellees have moved to expedite the resolution of this appeal, seeking to reconcile Appellants' right to this hearing with the need to move the project forward.

In short, Appellants are not entitled to disqualify Judge Carras. There are no valid grounds presented that require disqualification.

STATEMENT OF FACTS

Secord, Smallwood, Wixom and Sanford Lakes are located in Midland and Gladwin Counties (State of Michigan) and were originally created by the impoundment of the Tittabawassee and Tobacco rivers by four privately owned hydroelectric dams.

In 2018, and in accordance with Part 307, the Counties adopted resolutions finding that in “order to protect the public’s health, safety and welfare, to best preserve the natural resources of the state, and to preserve and protect the value of property around the lakes” that it was necessary to establish the normal (legal) levels for all Four Lakes. (Record, Tab #1, Gladwin County Resolution p5; Midland County Resolution, p 12.) In addition, the resolutions provided that all costs in connection with the maintenance of the normal levels of the Four Lakes “shall be defrayed by special assessments for the benefits derived against privately owned parcels of land, political subdivisions of the state, and state-owned lands.” (*Id.*) The FLTF (formerly known as the Sanford Lake Preservation Association) was appointed as the Counties’ delegated authority, and to serve as the counties’ agent to oversee the lake level project, to prepare a special assessment district and special assessment roll(s), and to “take all other actions as necessary and required by the delegated authority as provided in Part 307.” (*Id.*)

In 2019, the Counties filed petitions in the Midland circuit court to establish normal levels of the Four Lakes and confirm the boundaries of the Four Lakes Special Assessment District (“FLSAD”). On May 28, 2019, following notice to all interested parties and hearing, this Court entered a Lake Level Order and confirmed the boundaries and parcels of the FLSAD. (Record,

Tab #2, Lake Level Order). Pursuant to Section 30707(5) of Part 307 (MCL 324.30707(5)) and the 2019 Lake Level Order this Court has continuing jurisdiction. (Record Tab #2).

Thereafter, the Counties, through their delegated authority (*i.e.*, FLTF) sought to obtain property rights in the dams and bottomlands from the private dam owner, Boyce Hydro. Before the transaction could be completed, however, an embankment on the Edenville Dam tragically failed on May 19, 2020, and several hours later, excess water from the Edenville Dam failure caused the Sanford Dam to breach. (Record, Tab #4A, Amendment 1 to County/FLTF Interlocal Agreement, pp 2–3.) Through the flood, the upstream dams at Secord and Smallwood lakes were also damaged. Thousands of homes, properties, businesses and public infrastructure were damaged or destroyed during this catastrophic flood event. And the region was declared a national disaster area.

In the days following, a strategy was needed to address the immediate recovery efforts and coordinate with federal, state and local agencies. In June 2020, the Counties appointed FLTF as the lead local agency in coordinating the funding, administration, design, improvement, repairs and replacement of the dams, including funding with Federal, State and local agencies. (*Id.*) In the aftermath of the flooding, the initial focus of Appellees, and in particular, FLTF was to address the removal of substantial debris (*i.e.*, damaged boats, docks, rocks and sediment) that washed downstream) as well as emergency stabilization of existing dam structures and shoreline restoration (hereinafter, the “Recovery”). (**Ex. A**, Affidavit David Kepler.)

FLTF sought funding through state and federal sources, as well as private donations, including donations from the Dow Foundation, to assist with costs needed for the Recovery. *Id.* FLTF secured more than \$50 million in public grants and donations to assist with the Recovery. *Id.* No special assessment revenue was used or was necessary for the Recovery. *Id.* In accordance

with its authority and utilizing federal and state grants, FLTF proceeded with debris removal, shoreline restoration and stabilization of the existing dam structures in 2019 through 2022. *Id.* The focus on restoration of the Four Lakes began following an extensive feasibility study and working with state, federal and local officials and stakeholders. *Id.*

The Dow Foundation was established for religious, charitable, scientific, literary, or educational purposes for the public benefaction of the inhabitants of the City of Midland and of the people of the State of Michigan. See <https://hhgadowfdn.org/> The Dow Foundation has 15 trustees and officers which according to its Articles serve as the Board of Directors of the Foundation, of which Judge Carras is listed as one of the trustees. *Id.* On November 13, 2020, the Dow Foundation awarded the FLTF (formerly known as the Sanford Lake Preservation Association), \$1 Million “payable over two years (2021-2022).” (**Ex. B**, November 13, 2020 Dow Foundation Letter.) The grant restricted the use of funds to “[...]general operating support, or for flood and/or feasibility studies.” *Id.* In addition, the grant prohibited the use of the grant “directly associated with the restoration or construction of dams, or lake restoration.” *Id.* According to its website, since its inception, the Dow Foundation has given over \$667 million in charitable grants making this grant far from the central purpose of the Dow Foundation. See <https://hhgadowfdn.org/>.

In 2022, FLTF obtained grants from both the federal and State of Michigan in excess of \$200,000,000 to assist in the design, permitting and construction of the Lake Level Project (“Lake Level Project”). (Record, Tab #6, 2022 Public Act 53, p.23.) In accordance with its authority and utilizing federal and state grants, FLTF proceeded to design, obtain necessary permits and construct the Lake Level Project which, due to the complexity and state dam safety requirements, was to be completed in phases over multiple years. (**Ex. A**, Affidavit David Kepler.)

The total cost of the Lake Level Project with contingency is \$399,700,000. (Record Tab #10, p4; #11, p4.) After receiving bids and computing the final costs of the project (*i.e.*, Computation of Costs”), FLTF prepared a capital special assessment roll levying approximately 55% of the costs (or \$217,700,000) of the project to the property owners in the Four Lakes Special Assessment District in order to “defray” the capital costs of the Lake Level Project. (Record Tab #10, p4; Tab #11, p 4; Tab #12, January 2024 Apportionment Methodology, pp 2-10; Tab #36 Capital Assessment Roll.) The plan of financing called for spreading the lake level capital special assessments via annual installments not to exceed 40 years. (Record Tab #10, p 9.) In addition, FLTF prepared a separate operation and maintenance special assessment roll for the years 2025 through 2029 to cover the expenses required to administer, operate and maintain the Four Lakes system during construction. (Record Tab #9 p1-5; Tab #34, 5-Year Operation and Maintenance Special Assessment Roll.)

On January 15, 2024, FLTF held the required public hearing in connection with the Computation of Costs and lake level special assessment rolls and received objections and comments from property owners within the FLSAD. (Record Tab #17 p1; Tab #18 Minutes pp 1-3; Tab #19 Hearing Transcript; Tab #20, List of Attendees at hearing, and Tab #21, Written Objections). On February 6, in a joint meeting of the Counties’ respective board of commissioners, the Counties approved the Computation of Costs, the lake level operation and maintenance special assessment roll, and the capital improvement special assessment roll. (Record Tab #9 through Tab #12; Tab #22; Tab #25; Tab #26; Tab #32 through Tab #37). In addition, the Counties approved the financing plan for the Lake Level Project that will provide long-term financing in the aggregate principal amount not to exceed \$217,700,000 to be secured by and payable from the collection of lake level special assessments against properties in the FLSAD. (Record Tabs #30-31.) The FLSAD consists of 8,170 parcels, with

6,278 parcels having direct waterfront access and 1,892 parcels having deeded private access to the waterfront (backlots). (Record Tab #12, p1.)

On or about February 20, Appellants filed their original Claim of Appeal, which was amended on February 21. Appellees filed the Record on Appeal and served Appellants' counsel on February 26, 2024. FLTF issued a press release that day, titled: "FLTF Response to Heron Cove Appeal." (See Ex. C.) Subsequently, on March 4, FLTF issued a press release: "Dam Restoration Suspension Timeline", and on March 7, issued a press release in response to comments made by the Heron Cove Association's legal counsel. None of the press releases condemn the administrative appeal, rather FLTF response clearly indicated that property owners have a right to appeal the assessment rolls. *Id.* Appellees moved to expedite the Administrative Appeal on March 11, 2024. Two days later, Appellees filed this motion to disqualify Judge Carras.

ARGUMENT

I. Appellants Are Not Entitled to Disqualification of Judge Carras As Their Motion Is Untimely And There Are No Valid Grounds Under Applicable Law.

A. Appellants Motion to Disqualify Judge Carras Was Not Timely Filed.

MCR 2.003(D)(1)(a) provides that a party must file a motion for disqualification within 14 days of learning of the grounds for disqualification, and the failure to file such motion within 14 days constitutes a waiver of the issue. *Wayne County Jail Inmates v Wayne County Chief Executive Officer*, 178 Mich App 634, 444 NW2d 549 (1989); *Reno v Gale*, 165 Mich App 86; 418 NW2d 434 (1987). Here, the DQ Motion is untimely because it falls outside the period of time for filing a motion for disqualification. The Claim of Appeal was filed on February 21, 2024, and this motion was not filed until March 13.

It was well known that the Claim of Appeal would be assigned to Judge Carras since this Court has continuing jurisdiction (See Record Tab #13 "Notice of Four Lakes Special Assessment

Hearing). Further, information was readily available showing that Judge Carras was one of 15 trustees and officers on the Dow Foundation board of directors. It is thus highly doubtful that none of the named Appellants listed in the caption for this administrative appeal were unaware of Judge Carras' role as a trustee on the Dow Foundation board of directors at (or well before) the time they filed their appeal. For that reason, Appellants' DQ Motion is untimely, and it should be denied.

B. There Are No Grounds For Calling For The Disqualification of Judge Carras In This Matter And Appellants Cannot Overcome the Heavy Presumption of Impartiality.

On the merits, Appellants contend that Judge Carras should be disqualified because Judge Carras serves as a trustee of the Dow Foundation and because the Foundation previously donated \$1M in charitable funds to FLTF. Appellants claim, that under MCR 2.003(C)(1)(b), disqualification is warranted because: "The judge, based on objective and reasonable perceptions, has either (i) a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v Massey*, 556 US 868; 129 S Ct 2252; 173 L Ed 2d 1208 (2009), or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct." MCR 2.003(C)(1)(b). (Appellants Br, p5). Both of Appellants' related arguments fail factually and legally.

First, Appellants claim, "[I]f this appeal were to be successful, the Foundation's donation could be wasted, or the Foundation may be pressured by even the existence of the appeal . . . to donate further funds to the project" and that Judge Carras will have a role in the decision-making on these matters as a fiduciary of the Dow Foundation. (Appellants' Br, p7). Secondly, Appellants contend that because Judge Carras's role as a trustee on the board of the Dow Foundation coupled with purported public statements of the FLTF, and the "weighty questions of constitutional rights," "even hypothetically" "creates an objective and reasonable *perception* of impropriety or bias against Appellants." (Appellants Br, p7-8.)

Ethically, there is nothing inappropriate about a judge serving on the board of a charitable organization. Canon 4(c) of the Michigan Code of Judicial Conduct provides that:

A judge may participate in civic and charitable activities that do not reflect adversely upon the judge's impartiality or interfere with the performance of judicial duties. A judge may serve and be listed as an officer, director, trustee, or nonlegal advisor of a bona fide educational, religious, charitable, fraternal, or civic organization. A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be regularly engaged in adversary proceedings in any court. [*Id.*]

Here, the Dow Foundation is not engaged in any proceeding before Judge Carras. It merely made a charitable grant several years ago before the administrative appeal that is before the Court even rose. The phrase "engaged in proceedings" has been interpreted to mean "testimony or documentary evidence to the court or participating in case status conferences in certain types of cases on a regular basis." MI Eth. Op. JI-139 (Mich. Prof. Jud. Eth., Oct. 21, 2013). That is absolutely not the case here.

As noted, Appellants' have cited to Cannon 2 of the Michigan Code of Judicial Conduct which states that "[a] judge must avoid all impropriety and the appearance of impropriety." To assess the appearance of impropriety, courts consider whether a reasonable person informed of all the facts and circumstances would perceive the judge's ability to be impartial to be impaired. *Kern v Kern-Koskela*, 320 Mich App 212, 232; 905 NW2d 453 (2017), citing *People v Aceval*, 486 Mich 887, 889; 781 NW2d 779 (2010). Here, Appellants' unsupported accusation of a lack of impartiality is tenuous, and tenuous allegations do not overcome the heavy presumption of impartiality. *Armstrong v Ypsilanti Charter Twp*, 248 Mich. App 573, 600; 640 NW2d 321, 336 (2001). "Where a party relies on alleged prejudice or bias of the trial judge in seeking his disqualification, the prejudice or bias must be shown." *McKain v Moore*, 172 Mich App 243, 256;

431 NW2d 470, 476 (1988), citing *MacDonald v Ford Motor Co*, 117 Mich App 538, 542; 324 NW2d 489 (1982), lv den 417 Mich 970 (1983).

In *People v Espie*, unpublished per curiam decision of the Michigan Court of Appeals issued Dec. 21, 2021 (Docket No. 355920), 2021 WL 6066787, at *3, for example, the Court of Appeals found that a sentencing judge's position on the board of the "Nathan Nover Memorial Scholarship Fund" did not create the appearance of impropriety in sentencing the Defendant who murdered Nathan Nover for reason that the judge's connection to the deceased was only ancillary to that matter.

Applying the applicable standard and precedent to the issues presented demonstrates that Appellants' DQ Motion is without merit. The Dow Foundation was established for religious, charitable, scientific, literary, or educational purposes for the public benefaction of the inhabitants of the City of Midland and of the people of the State of Michigan. The Foundation has 15 trustees and officers that serve as the board of directors of the Dow Foundation. The donation from the Dow Foundation was awarded on November 13, 2020, over 3 years ago following the dam failures, and the use of the funds were restricted to "[] . . . general operating support, or for flood and/or feasibility studies." (**Ex. B.**) In addition, the grant prohibited the use of the grant "directly associated with the restoration or construction of dams, or lake restoration." *Id.* Nowhere is it stated whether Judge Carras even voted on the grant to FLTF. Moreover, by virtue of its governing documents and grant guidelines, it seems entirely speculative that the Dow Foundation has any interest whatsoever in the amount of the capital assessment or other subjects of this administrative appeal.

Appellants cannot overcome the presumption of impartiality. Judge Carras' role in connection with Dow Foundation donations does not fall outside the range of reasonable and

principled outcomes. His role was clearly ancillary. Appellants cannot overcome the presumption of impartiality. *Armstrong*, supra. Accordingly, this Court should deny Appellants' DQ motion.

In furtherance of its DQ Motion, Appellants' claim that FLTF has made public statements "denouncing the appeal". Appellees dispute that claim, and in fact, note, that it has repeatedly stated that property owners have a right to their administrative appeal. At the same time, Appellees maintain that they have a duty to inform the public regarding potential outcomes and impact should this administrative appeal be delayed or should the Appellants' sustained their burden.

Finally, in their brief in connection with their DQ Motion, Appellants claim that the motion was filed without intent to delay the proceedings before this Court. (Appellants' Br., p5.) However, according to a February 6 public statement on Facebook from property owner Jan Colton, who, upon information and belief, is the President of the Heron Cove Association, it was stated: "The longer this is tied up in court, the more it will force FLTF to seek out alternatives" See **Ex. D**. This statement and reference to Appellants' counsel meeting with certain landowners, suggests there is a strategy to delay legal proceedings, and if that is the case, we maintain that sanctions are warranted.

WHEREFORE, for the reasons stated forth herein, Appellees maintain that Appellants have failed to carry their burden of persuasion that disqualification is necessary or appropriate, the DQ Motion should be denied, and sanctions and costs should be awarded to Appellees for having to defend this motion.

Respectfully submitted,

CLARK HILL PLC

/s/ Joseph W. Colaianne

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Gladwin County Board of Commissioners, and
Four Lakes Task Force*

Dated: March 18, 2024

EXHIBIT A

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MIDLAND**

HERON COVE ASSOCIATION, et al,

Case No. 24-2751-AA

Appellants,

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MIDLAND COUNTY BOARD OF
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lburton@clarkhill.com

**AFFIDAVIT OF DAVID E. KEPLER REGARDING THE FOUR LAKES TASK FORCE
AND FOUR LAKES LAKE LEVEL PROJECT**

STATE OF MICHIGAN)
)ss
COUNTY OF MIDLAND)

David Kepler, being first duly sworn, deposes and says:

1. I am over the age of eighteen and have personal knowledge of the facts stated in this Affidavit. If sworn as a witness, I am competent to testify to these facts.

2. The Four Lakes Task Force (“FLTF”) is a Michigan non-profit IRS 501(c)(3) organization.

3. The FLTF board of directors is comprised of representatives from Midland and Gladwin counties, and property owners from Smallwood Lake, Secord Lake, Wixom Lake and Sanford Lake (the “Four Lakes”).

4. The Four Lakes are located in Midland and Gladwin counties created by the impoundment of the Tittabawassee and Tobacco Rivers by dams previously owned and operated by Boyce Hydro Power, LLC and owned by BHP LLC’s affiliated limited liability companies. (collectively “Boyce Hydro”)

5. The FLTF is organized exclusively for charitable, educational and scientific purposes as described in Section 501(c)(3) of the Internal Revenue Code (the “Code”), including lessening the burdens of government by serving as the county delegated authority under Part 307 “Inland Lake Levels” of the Michigan Natural Resources and Environmental Protection Act, MCL 324.30701 et seq. (“Part 307”) for the purpose of maintaining the inland lake water levels and dams of the Four Lakes, so as to preserve the environment, promote the welfare and safety of the public, and enhance the recreational and health benefits arising from the Four Lakes; and, to conduct all activities incidental or necessary to accomplishing the foregoing purposes or as otherwise permitted by Section 501(c)(3) of the Internal Revenue Code.

6. In 2019, the Midland and Gladwin county board of commissioners, and in accordance with Part 307 petitioned the Midland and Gladwin Circuit Court to establish the normal (or legal) levels for Wixom, Sanford, Smallwood and Secord Lakes and to establish the Four Lakes Special Assessment District (“FLSAD”) to defray all costs associated with the acquisition, design, construction, improvement, repair, replacement, operation and maintenance of the four dams.

7. On May 28, 2019 following notice to all property owners within the proposed FLSAD and hearing, the Midland County Circuit Court entered an order establishing the lake levels for the Four Lakes and approved confirmed the boundaries of the FLSAD.

8. The FLSAD is a special purpose public body established in accordance with the Lake Level Order and provisions of Part 307 and is comprised of 8,170 parcels, with 6,278 parcels having direct waterfront access and 1,892 parcels having deeded private access to the waterfront (backlots).

9. The primary source of funding the acquisition, operation, maintenance, repair, replacement and improvement of all four dams was from special assessments to all the waterfront properties and backlot properties with dedicated lake access easements within the FLSAD.

10. On May 19, 2020 the Edenville dam failed, which in turn resulted in the failure of the Sanford Lake dam, the loss of both lakes, and catastrophic flooding in Midland and Gladwin counties.

11. In June 2020, the counties of Midland and Gladwin appointed the FLTF as the lead local agency in coordinating the funding, administration, design, improvement, repairs and replacement of the dams, including funding with Federal, State and local agencies.

12. In the days following the disaster, a strategy was needed to address the immediate recovery efforts and coordinate with federal, state and local agencies.

13. In June 2020, the counties of Midland and Gladwin adopted resolutions to condemn the properties under the control of the prior owner (i.e. Boyce Hydro Power) in order to maintain the lake levels in accordance with Part 307.

14. In the aftermath of the flooding, the initial focus of Appellees, and in particular, FLTF was to address the removal of substantial debris (i.e damaged boats, docks, rocks and

sediment) that washed downstream) as well as emergency stabilization of existing dam structures and shoreline restoration (hereinafter referred to as the “Recovery”).

15. FLTF sought funding through state and federal sources, as well as private donations, including donations from the Dow Foundation, to assist with costs needed for the Recovery. *Id.* FLTF secured more than \$50 million in public grants and donations to assist with the Recovery.

16. No special assessment revenue was used or was necessary for the Recovery.

17. In accordance with its authority and utilizing federal and state grants, FLTF proceeded with debris removal, shoreline restoration and stabilization of the existing dam structures in 2019 through 2022

18. FLTF obtained grants from both the federal and state of Michigan in excess of \$200,000,000 to assist in the design, permitting and construction of the Lake Level Project.

19. The focus on restoration of the Four Lakes began following an extensive feasibility study and working with state, federal and local officials and stakeholders.

20. All four high hazard dams are in dire need of repairs and improvements, and in the case of the Edenville (Wixom Lake) dam and Sanford Dam, require replacement in order to comply with state of Michigan’s dam safety requirements (“Lake Level Project”).

21. In accordance with its authority and utilizing federal and state grants, FLTF proceeded to design, obtain necessary permits and construct the Lake Level Project which, due to the complexity and state dam safety requirements, was to be completed in phases over multiple years.

22. The total cost of the Lake Level Project with contingency is \$399,700,000.

23. After receiving bids and computing the final costs of the project, FLTF prepared a capital special assessment roll levying approximately 55% of the costs (or \$217,700,000) of the project


to the property owners in the Four Lakes Special Assessment District in order to “defray” the capital costs of the Lake Level Project.

24. The plan of financing called for spreading the lake level capital special assessments via annual installments not to exceed 40 years.


25. In addition, FLTF prepared a separate operation and maintenance special assessment roll for the years 2025 through 2029 to cover the expenses required to administer, operate and maintain the Four Lakes system during construction.

26. Until the Court’s final determination of Appellants’ appeal, FLTF cannot proceed with financing and completion of the final phase of the Lake Level Project and the current construction affecting each of the Four Lakes will be suspended over the next several months, resulting in significantly higher construction costs due to missed construction seasons, delayed financing, legal fees and additional staff costs.

I DECLARE THE ABOVE STATEMENTS TO BE TRUE TO THE BEST OF MY KNOWLEDGE, INFORMATION, AND BELIEF.

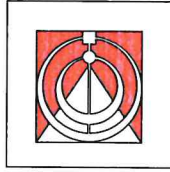

David E. Kepler II
President & Chairman, Four Lakes Task Force

Subscribed and sworn to before me
this 18th day of March, 2024.


_____, Notary Public
_____ County, Michigan
My Commission expires: _____
Acting in the county of _____

MICHELLE A MORRIS
NOTARY PUBLIC - STATE OF MICHIGAN
COUNTY OF GRATIOT
My Commission Expires December 29, 2029
Acting in the County of Midland

EXHIBIT B



THE HERBERT H. AND GRACE A. DOW FOUNDATION

November 13, 2020

Mr. David Kepler
President
Four Lakes Task Force
233 E. Larkin Street Suite 2
Midland, MI 48640

Dear Dave:

The Trustees of The Herbert H. and Grace A. Dow Foundation met on November 11, 2020. This letter is to inform you that the Sanford Lake Preservation Association (dba Four Lakes Task Force) has been awarded a grant in the total amount of \$1,000,000, payable over two years (2021-2022). Funds are designated for Four Lakes Task Force general operating support, or for flood and/or feasibility studies. Projects exempt from funding support are those directly associated with the restoration or construction of dams, or lake restoration. Trustees expressed an interest in receiving monthly progress updates.

Your payment schedule is as follows:

| | | |
|---------------|-----------|-----------|
| December 2021 | \$500,000 | Scheduled |
| December 2022 | \$500,000 | Scheduled |

If this payment schedule does not meet your needs, please send a letter requesting your preferred payment schedule, and we will try to accommodate your request.

If you choose to generate an announcement of this grant, please email it to Carrie Nielsen, Grants Administrator, at nielsen@hhgdowfdn.org for approval before issuing the press release.

Please provide the information needed on the enclosed schedule of reports due and return them as soon as possible. Thank you in advance for your assistance with our record keeping.

Sincerely,

Ruth Alden Doan
President and Trustee

Encl.

EXHIBIT C



February 26, 2024

FLTF Response to Heron Cove Association Appeal

A claim of appeal was filed in Midland Circuit Court challenging the Gladwin and Midland County Boards of Commissioners' approval of the special assessment rolls required to restore Smallwood, Secord, Wixom, and Sanford lakes. The claim of appeal was submitted to the circuit court by the Heron Cove Association which seeks on behalf of its members to set aside the special assessment roll.

What will it mean if the Four Lakes Capital Special Assessment roll is set aside? **Short answer: There will be insufficient funding to complete the Four Lakes project and restore the lakes.**

While we respect landowners' rights to appeal the assessment rolls, it is important to understand the implications.

- If the special assessment roll is set aside by the circuit court, the Four Lakes Special Assessment District will not be able to issue the bonds required to complete the Four Lakes project.
 - On February 6, 2024, the Counties approved a normal (legal) legal lake level special assessment roll and plan of financing to fund the capital improvements required to complete the project. The proposed financing will include the issuance of municipal bonds secured by special assessment revenue.
- This appeal is already impacting the financing plan.

- As May approaches, if there is no funding certainty construction will continue until State of Michigan funds are depleted. With public safety being a key factor in dam construction, each dam will be brought to a point where we can ensure stability and safety and then construction will pause. This means no dam would be fully restored and the lakes would not return until the future of the restoration financing is determined.
- Time is of the essence.
 - Legal counsel for FLTF advised that it is optimistic to have the appeal matter closed by the end of April. If just a few months are added to the project timeline, there will be cost and timeline consequences.

I believe the restoration of the Four Lakes is in the best interests of the property owners for the quality of life in our community, as well as the environment. I believe our community needs certainty.

With the approved plan of financing, the community had a certain path forward to restore all four lakes. No outcome of this appeal will be more painful for the community than finding itself in 2025, five years after the lakes were lost, looking at dams sitting idle, with no construction underway and no clear path forward.

Four Lakes Task Force will do all it can to fulfill its obligations and restore the lakes and fight to keep the project on track. We will need your help.

Dave Kepler

President, Four Lakes Task Force

Click the button below to read FAQs related to this topic:

1. What happens next with the appeal?
2. What's the history of the assessment?
3. What is EGLE's expectation if the normal (legal) lake levels are not restored?
- 4.

[Read Statement](#)



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March 4, 2024

Dams Restoration Suspension Timeline

Today Four Lakes Task Force (FLTF), the Delegated Authority for restoring the four lakes and dams in Midland and Gladwin counties, announced the Schedule for suspending restoration construction work in the coming months on Secord, Smallwood, Edenville and Sanford dams, and that the start of Edenville Dam's final phase of construction will be delayed.

On February 21, 2024, Heron Cove Association (HCA) filed a claim of appeal in Midland Circuit Court requesting that the lake level special assessments be set aside. The process for appeal could take several months. FLTF is not able to issue bonds in June as planned to finance the completion of the Four Lakes dam reconstruction final project phases. Additional unnecessary costs are now accruing that will impact the community with an uncertain outcome.

"This appeal has impacted FLTF's plan to acquire financing in June, and it is uncertain when or if we can issue bonds required to proceed with the construction to complete the project," said Dave Kepler, president and chairperson of Four Lakes Task Force. "While we respect peoples' right to appeal, it is a setback and disappointing considering the progress we have made as a community to restore our lakes. The appeal puts us in a position where we are limited to use only State of Michigan grant funds and must ration the work that can take place."

With uncertainty regarding funding for the lakes' restoration, no dam can be fully restored unless this issue of the appeal is resolved. Certain items of the project now underway must be completed on each of the dams with the remaining approximately

\$100 million of available State of Michigan funds to ensure dam safety requirements are met.

The Edenville embankment upgrades, auxiliary spillways on Secord and Smallwood, and certain phases of construction on the east side of the Sanford Dam will be finished. The Edenville restoration construction final phase, currently awaiting a final permit, will not start as planned. The restoration projects on the other dams will be halted once the current phase of work is completed.

"We hope to have clarity before September on funding for the capital improvements and operations and maintenance of the dams," Kepler said. "With that, we can move forward. Without it, we are on hold for the foreseeable future on if and when the lakes will be restored."

| Anticipated Work Suspension Schedule | |
|---|--|
| Secord Dam | June 2024 Shortly after the completion of the auxiliary spillway |
| Smallwood Dam | August 2024 After auxiliary spillway is complete and the low flow outlet is stabilized |
| Edenville Dam | May 2024 The final phase of the Edenville Dam, planned to start by May (pending permit), is now delayed until financing September 2024 The completion of the current embankment improvement project |
| Sanford Dam | December 2024 Completion of the current east side work |

The Four Lakes restoration project is operated and financed as one project in phases. This Schedule assumes an inability to proceed with financing before September 2024 for the final phases of the lakes' restoration. With this schedule, \$162 million of the \$180 million of state funding being applied to the dams' restoration will be spent by

the end of 2024, assuming FLTF is unable to obtain financing before September 2024. Anticipated expenditures by dam by the end of 2024 using State of Michigan funds for this schedule will be:

- Secord \$53 million
- Smallwood \$35 million
- Edenville \$30 million
- Sanford \$39 million
- All Dams \$5 million (work not tracked to a specific dam, applies to all four)

The remaining \$18 million is reserved for contingency to carry out the suspension work, as well as to ensure there are maintenance funds going into 2025 and 2026. The FLTF dam safety engineers have been engaged in determining the safest pause points given the resource constraints. The Michigan Department of Environment, Great Lakes, and Energy has been notified and discussions are in place to finalize these plans.

Note: A three-month delay to the project will have a cost increase impact of \$1.5-\$3 million. This increase assumes certainty on financing before September 2024. Should the pause extend further, the cost increase will be greater.



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March 7, 2024

The Heron Cove Attorney's Statements this Week

While we respect the right of a property owner to appeal the assessment rolls, the counties followed the laws and regulations of the State. Appeal attorney, Michael Homier's comments to the Midland Daily News that the counties "jumped the gun" reflects a profound misunderstanding of four years of community work requiring over 40 state permits to comply with state regulatory requirements and get to the final construction phase of the project. Standing still and doing nothing was not an option and not in the best interest of the Four Lakes community.

History of FLTF

"The gun" went off on May 19, 2020, when the privately owned dams collapsed, and a presidential disaster was declared. EGLE (i.e. the State of Michigan's environmental regulatory agency), through its emergency authority, initially assumed control of the Edenville Dam, and subsequently the counties stepped in and took the properties through condemnation from Boyce Hydro to protect the health and welfare of the community. Four Lakes Task Force (FLTF), acting as the delegated authority for Gladwin and Midland counties, began coordinating and implementing recovery efforts and the counties reconfirmed their commitment to restoring Smallwood, Secord, Wixom and Sanford lake levels.

Since 2020, FLTF, with the support of the community and funding from the state and federal government and private donations has received \$247 million. FLTF, along with hundreds of volunteers, stabilized the shorelines, removed debris and secured the unstable High-hazard dams. FLTF conducted studies, design engineering efforts, and environmental permitting and undertook construction in phases to comply with the

State of Michigan's dam safety requirements and grant funding requirements - all before the final phase of the construction projects could begin and before financing would be needed. All the projects were bid out, the public hearing took place, and the counties approved the final phase of the project. The lake level project can be stopped without assessing property owners. Delays associated with the Heron Cove Association's appeal will undoubtedly lead to higher costs - which in turn will increase the amount to be assessed to property owners in the Four Lakes Special Assessment District.

Restoration Responsibility


Mr. Homier is also quoted in the article saying that in his opinion the State of Michigan should be on the hook for the costs of restoring the dams - without stating a plan on how to get there. The Heron Cove Association's claim of appeal even challenges the assessment roll for ongoing maintenance costs. EGLE states there are 2,500 dams in Michigan. 813 are regulated under Part 315, Dam Safety, of the Natural Resources and Environmental Protection Act (NREPA). Part 307, Inland Lake Levels, of NREPA is utilized to maintain lake levels and construct and repair dams in the state. Throughout Michigan, costs in connection with recreational lake level projects are defrayed by lake level special assessments to property owners. With the Four Lakes Project, the counties approved a lake level capital assessment representing approximately 55% of the cost of the project. The state and federal governments cover the remaining approximately 45%. The Heron Cove Association plan is for free dams and recreational lakes from the state with no local accountability for any costs or maintenance. Really?

Let's call it like it is. If the Heron Cove Association's appeal is successful all progress on restoring these lakes will halt. This could forever change the quality of life for those of us who want to live in a lake community. It took the community four difficult years to get back on track, and no one "jumped the gun." What a lousy metaphor for this situation. A more appropriate metaphor, given this story started almost four years ago, would be the Heron Cove Association's appeal is now standing in the way of our community getting to the finish line.

FLTF Continues to Seek Additional Funding Opportunities

FLTF continues to seek additional state and federal funding to reduce the overall cost of the project. Moreover, FLTF committed in 2021 to seek private and public funding to assist senior property owners with circumstances affecting their ability to pay the special assessment.

Since the dam failure in 2020, FLTF has received \$247 million in grants and donations. Look at the table below.

|  Four Lakes Task Force | |
|--|--------------------------|
| Funding Sources - Post May 2020 | |
| State of Michigan | |
| SOM \$15M Interim | \$ 15,000,000.00 |
| SOM \$2.5M Interim | \$ 2,500,000.00 |
| EGLE Funds | \$ 3,000,000.00 |
| \$200M Restoration | \$ 200,000,000.00 |
| USDA NRCS | |
| EWP Grants | \$ 20,413,449.62 |
| FEMA HHPD | |
| FY '21 & FY '22 | \$ 702,615.00 |
| USDA Community Facilities | |
| Boom Grant | \$ 795,000.00 |
| Private Donations | |
| Just under \$5 million in private donations raised | |
| Total | \$ 247,411,064.62 |

FLTF is always looking for funding opportunities to lessen the financial burden for property owners and the counties. The following are grants currently in the application review process:

- \$5M - FEMA's (Federal Emergency Management Agency) Rehabilitation of High Hazard Potential Dams
- \$10-\$20M - EPA's (Environmental Protection Agency) Environmental and Climate Justice Program
- \$5-\$10M - Private and public grants for environmental mitigation projects

We are also engaged with the offices of our senators and congressional representatives where we have submitted appropriation applications to be included in the upcoming state and federal budget allocations.

FLTF's Private Fundraising Goal

We have a **goal to raise an additional \$5 million in private donations** to ensure we have funds available to address costs, provide support to property owners, and address environmental issues such as an environmental improvement study - needs not legally covered by the special assessment.



Donations help offset costs and lessen the burden on property owners. The lakes are the heart of our communities. We have made unprecedented progress over the past four years to bring them back. Every donation will help us restore the lakes and dams so please consider donating today by clicking the button below.

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March 12, 2024

FLTF Files to Expedite Appeal Process

Four Lakes Task Force and Gladwin and Midland counties filed a motion in Midland Circuit Court to expedite the administrative appeal and shorten the time for filing briefs and scheduling oral arguments. FLTF filed the motion and obtained the date for the hearing (March 21) from the court, or soon thereafter. The hearing is to review the motion to expedite the appeal process.

The motion and brief can be found in the FLTF document library.

[Read Documents](#)

Public Informational Webinar Wednesday, 13th

It's not too late to register for an informational webinar taking place this Wednesday, March 13th from 5:00-7:00 p.m. Presenters will provide permit status updates, the construction suspension plan for each dam, financing timing estimates, a summary of critical issues, and expectations for the future of the four lakes.

[Register](#)



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EXHIBIT D



Four Lakes Property Owners Stand Strong



Jan Colton · Feb 5 · 

Our attorney is Michael Homier from the law firm Foster Swift. He is very much experienced in the area of municipal financing, special assessment districts, and Part 307 orders.

We had our preliminary meeting at 11:00 this morning. He was as stymied by some of their thinking as the rest of us.

We had been feed quite enough misinformation by FLTF in an effort to discourage us from a formal legal appeal. But that is the only avenue available to us. We need to file our appeal in court no later than February 22, 2024.

The path forward starts in Midland County with Judge Carras again. But it does not necessarily end there. It will likely go to the court of appeals and potentially the Michigan Supreme Court.

Our first hope is an injunction to stay implementation of the 2025 special assessment while our case is heard.

The longer this is tied up in court, the more it will force FLTF to search out alternatives, such as municipal bonds. The irony in that is they can sell them, we can buy them and they take the money from one pocket and pay it back to us with interest.

We have to come up with a name for our association and create a membership roster. We only ask for a \$100 membership fee to join the appeal as a member of this association. The more people who join, the more likely we are to never need more money from



Write a comment...



APPENDIX A

2021 WL 6066787

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellee,

v.

John Ronald ESPIE, Defendant-Appellant.

No. 355920

|

December 21, 2021

Shiawassee Circuit Court, LC No. 99-002999-FC

Before: [Stephens, P.J.](#), and [Borrello](#) and [O'Brien, JJ.](#)

Opinion

Per Curiam.

*1 Defendant appeals as on leave granted¹ the order of the Chief Judge of the Shiawassee Circuit Court denying his motion to disqualify his sentencing judge from resentencing him under [MCL 769.25a](#) for a murder defendant committed when he was 16 years old. We affirm.

I. BACKGROUND

In 1998, defendant killed 71-year-old Nathan Nover, a civilian transportation officer who was driving defendant from a juvenile detention facility to a psychological evaluation. At the time of the murder, defendant was 16 years old. Defendant was tried as an adult for first-degree premeditated murder and first-degree felony murder, and after his jury-trial convictions, his sentence of life in prison without the possibility of parole was mandatory.

After Nover's death, the Family Division of the Shiawassee Circuit Court created a Nathan Nover Memorial Scholarship Fund. A second, separate scholarship fund was created by contributions from family and colleagues. At the time of defendant's motion to disqualify his sentencing judge, these scholarships were administered by the Shiawassee

Community Foundation, of which the sentencing judge was a board member.

After defendant was sentenced, the United States Supreme Court in *Miller v Alabama*, 567 U.S. 460, 477-478, 132 S Ct 2455, 183 L Ed 2d 407 (2012), held that it was cruel and unusual punishment to automatically sentence juveniles to mandatory life in prison without the possibility of parole. In response, our Legislature passed [MCL 769.25a](#), which, in the event that *Miller* was ever ruled to be retroactive, established procedures for resentencing juveniles sentenced to mandatory life in prison without the possibility of parole before *Miller* was decided. Thereafter, in *Montgomery v Louisiana*, 577 U.S. 190, 206, 136 S Ct 718, 193 L Ed 2d 599 (2016), the United States Supreme Court ruled that *Miller* applied retroactively. As a result, defendant was eligible for resentencing under [MCL 769.25a](#). Defendant was appointed counsel to represent him in the ensuing proceedings.

Before defendant's resentencing, his counsel learned that the sentencing judge oversaw the scholarships given in Nover's name through the judge's work on the board of the Shiawassee Community Foundation. Upon learning this information, defendant, through his counsel, moved to disqualify the sentencing judge. Both the sentencing judge and the Chief Judge denied defendant's motion to disqualify, determining that the sentencing judge's connection to Nover was too attenuated to support disqualification.

After filing his initial application for leave to appeal, defendant moved to expand his application for leave to address issues related to events that occurred at subsequent hearings. This Court allowed defendant to expand his application but denied leave to appeal. *People v Espie*, unpublished order of the Court of Appeals, entered February 16, 2021 (Docket No. 355920). The Michigan Supreme Court then remanded for this Court to consider the application as on leave granted. *People v. Espie*, — Mich. —, 954 N.W.2d 518, 518 (2021).

II. MOTION FOR DISQUALIFICATION

*2 On appeal, defendant reasserts the arguments that he made before the sentencing judge and Chief Judge—that his right to due process will be violated if the sentencing judge is allowed to preside over his resentencing hearing because the judge's doing so would create an appearance of impropriety. We disagree.

A. STANDARD OF REVIEW & ISSUE PRESERVATION

To preserve an issue of judicial bias, a party must raise the claim before the trial court within 14 days of discovering the grounds for disqualification. See *People v Jackson*, 292 Mich App 583, 597, 808 N.W.2d 541 (2011); MCR 2.003(D)(1)(a). Defense counsel learned of the scholarship funds on August 28, 2020, learned of the sentencing judge's membership on the board of the Shiawassee Community Foundation administering the scholarships on September 1, 2020, and filed defendant's motion for disqualification within 14 days of discovering the connection between the judge and the scholarships. While the prosecution is correct that, more than 14 days before filing his motion, defendant knew both that Nover was a court employee and that there were scholarships given in Nover's name, defendant learned of his sentencing judge's connection to Nover and the scholarships (i.e., the judge's position as a member of the board overseeing the Nover scholarships) less than 14 days before he filed his motion. We therefore conclude that the issue was timely raised and is properly preserved.

For preserved issues concerning judicial disqualification, this Court reviews for an abuse of discretion the factual findings made by a chief judge, but reviews de novo the application of those facts to the law. *Cain v Dep't of Corrections*, 451 Mich. 470, 503, 503 n 38, 548 N.W.2d 210 (1996). A court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Duncan*, 494 Mich. 713, 722-723, 835 N.W.2d 399 (2013).

B. ANALYSIS

“A criminal defendant is entitled to a neutral and detached magistrate.” *Jackson*, 292 Mich App at 598, 808 N.W.2d 541 (quotation marks and citation omitted). While there is a heavy presumption in favor of judicial impartiality, *id.*, a judge must be disqualified if the defendant can establish that the judge cannot hear a case impartially, see *Cain*, 451 Mich. at 494-495, 548 N.W.2d 210. To do this, a defendant need not establish that the judge is actually partial; a judge may be disqualified based upon the mere appearance of impropriety. Under MCR 2.003(C)(1)(b)(ii), disqualification is warranted if a judge “has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct.” This Canon

provides in pertinent parts that “[a] judge must avoid all impropriety and appearance of impropriety,” that “[a] judge should not allow family, social, or other relationships to influence judicial conduct or judgment,” and that “[a] judge should not allow activity as a member of an organization to cast doubt on the judge's ability to perform the function of the office” Code of Judicial Conduct, Canon 2(A), (C), and (D). To assess the appearance of impropriety, courts consider whether a reasonable person informed of all the facts and circumstances would perceive the judge's ability to be impartial to be impaired. *Kern v Kern-Koskela*, 320 Mich App 212, 232, 905 N.W.2d 453 (2017), citing *People v Aceval*, 486 Mich. 887, 889, 781 N.W.2d 779 (2010) (statement by HATHAWAY, J.)

*3 Nover was employed by the Shiawassee County Probate Court (not the circuit court) until 1998 when he was killed. The sentencing judge did not become a judge of the circuit court until 20 years after Nover's death, in 2018. Nothing in the record suggests that the sentencing judge had either a personal or professional relationship with Nover, and the Chief Judge did not abuse his discretion by finding that the sentencing judge had never employed Nover.² A reasonable person would not believe that the sentencing judge's ability to be impartial would be impaired by Nover's employment with the court more than 20 years before the judge was even part of the court.

Further, we agree with the Chief Judge that the sentencing judge's connection with Nover through the scholarships was ancillary. In arguing that the sentencing judge's actions and connections created an appearance of impropriety, defendant pointed not to only the judge's position as a member of the board that oversaw the scholarships given in Nover's name, but also to the fact that the sentencing judge was a keynote speaker at an event attended by recipients of scholarships from the Shiawassee Community Foundation. The Chief Judge's finding that the sentencing judge had only an ancillary connection to Nover and the scholarships did not fall outside the range of reasonable and principled outcomes. Accordingly, defendant cannot overcome the presumption of impartiality because the connection between the sentencing judge and the case at hand was too tenuous. Accord *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 600, 640 N.W.2d 321 (2001).

III. RULINGS AFTER APPEAL WAS FILED

Defendant also argues that the sentencing judge's statements at hearings following defendant's motion for disqualification demonstrated actual bias or the appearance of impropriety sufficient to warrant disqualifying the judge. We disagree.

A. STANDARD OF REVIEW & ISSUE PRESERVATION

Defendant did not raise this issue in the trial court, so it is unpreserved. See *Jackson*, 292 Mich App at 597, 808 N.W.2d 541. However, “this Court may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented.” *Smith v Foerster-Bolser Const, Inc*, 269 Mich App 424, 427, 711 N.W.2d 421 (2006). The facts underlying defendant's argument are largely uncontested, and at issue on appeal is solely whether those facts warrant judicial disqualification. Moreover, this Court granted defendant's motion to expand his application for leave to appeal to include this issue, *People v Espie*, unpublished order of the Court of Appeals, entered February 16, 2021 (Docket No. 355920), and the arguments made on appeal relate to events that took place during or after the trial court denied defendant's motion to disqualify. Under these circumstances, we choose to exercise our discretion and treat the issue as preserved.

Whether the facts underlying defendant's motion warrant disqualification is a question of law reviewed de novo. *Cain*, 451 Mich. at 503 n 38, 548 N.W.2d 210.

B. ANALYSIS

*4 In addition to the appearance of impropriety discussed in Section II.B., disqualification is warranted when “[t]he judge is biased or prejudiced against a party or attorney.” MCR 2.003(C)(1)(a). To establish judicial bias, a party must demonstrate that the judge is unable to make fair rulings, or has a hostility or deep-seated antagonism toward the party. *Jackson*, 292 Mich App at 598, 808 N.W.2d 541; *Cain*, 451 Mich. at 495 n 29, 548 N.W.2d 210.

1. RESIGNATION FROM BOARD

After the trial court denied defendant's motion for disqualification, which was based in part on the sentencing

judge's position on the board of the Shiawassee Community Foundation, the sentencing judge disclosed to the parties that he had received an email concerning one of the Nover scholarships, and “[r]ather than abstaining or requesting to be isolated from discussion of the scholarship, [he] resigned [his] position on the board.” Defendant argues that this decision “implies actual bias because, in the process of acknowledging a potential conflict, [the sentencing judge] ignored the guidance of the Canons [of the Michigan Code of Judicial Conduct] and court rules which prefer disqualification.”

First, we note that defendant does not cite any authority in support of his assertion that “the Canons and court rules ... prefer disqualification.” Both merely set out the circumstances in which disqualification is necessary. This in no way means that they “prefer disqualification.”

Second, defendant appears to be simply rehashing his argument that the sentencing judge's position on the board created an appearance of impropriety. He argues, in effect, that he was correct that the sentencing judge's position on the board created an appearance of impropriety, and that is why the sentencing judge resigned. However, for the reasons previously explained, the sentencing judge's position on the board did not create an appearance of impropriety, and the judge's decision to resign from the board is of no consequence.

Third, the sentencing judge acknowledged alternatives that would have allowed him to stay on the board and be uninvolved with the Nover scholarships—such as abstaining from voting on the issue concerning the Nover scholarship and asking to be isolated from discussion related to the Nover scholarships—but chose instead to resign. We fail to see how the judge's choice to resign demonstrates actual bias any more than any of the alternatives would.

Finally, defendant appears to assert that the sentencing judge's decision to resign from the board rather than recuse himself from this case demonstrates actual bias because recusal only requires filing a form, and hundreds of judges recuse from cases every year. We fail to see how either fact—that recusal is a simple process or that numerous judges use this process—in any way demonstrates that a judge's decision to not recuse him or herself from a given case is evidence of actual bias. Regardless, it is certainly not evidence of actual bias in this case. Accordingly, defendant's argument that the sentencing judge demonstrated actual bias by resigning from the Shiawassee Community Foundation is without merit.

2. USE OF LOADED TERMS

Next, defendant argues that the sentencing judge used loaded terms when ruling that defendant should have raised the issue of judicial bias earlier. As relevant to this argument, the sentencing judge ruled that, although it was possible that defendant's current counsel did not discover the ground for disqualification until August 2020, “[defendant] knew, and the Court declines to let him restart the clock by concealing this information from his attorney only to deploy it for tactical advantage.” Defendant takes issue with the sentencing judge's assertion that defendant was “concealing this information” and using “it for tactical advantage,” but judicial rulings almost never constitute a valid basis for a finding of bias, even if the judge's language was critical of a defendant. *Jackson*, 292 Mich App at 598, 808 N.W.2d 541. A judge's ruling is only grounds for disqualification if the ruling displays “a deep-seated favoritism or antagonism that would make fair judgment impossible.” *Id.* The sentencing judge's ruling here did not display a deep-seated favoritism or antagonism towards defendant that would make fair judgment impossible. We therefore conclude that the ruling pointed out by defendant does not require disqualification.

3. MOTION TO ADJOURN AND COVID PROTOCOLS

*5 Defendant lastly argues that the sentencing judge's decision to grant a joint request for adjournment because the victims' families had not been contacted, the judge's later decision to deny a second request for adjournment, and the judge's decision to allow Nover's family to attend defendant's resentencing allegedly in violation of the Covid-19 safety protocols in place at the time, when taken together, “imply actual bias in their imbalance, and that violates due process.”

With respect to defendant's argument that the sentencing judge demonstrated bias by granting the parties' joint motion for adjournment, we find the argument meritless. In its order, the court stated that it was granting the motion to adjourn “because the parties agree that the presentence investigation report (PSIR) is incomplete[.]” While the sentencing judge stated at the hearing on the motion that the failure to contact Nover's family for the PSIR carried “great weight” with him, those oral statements did not display deep-seated bias in favor of Nover's family or against defendant. Moreover, defendant requested the adjournment, and we fail to see how the

sentencing judge agreeing with defendant that adjournment was appropriate demonstrates that the sentencing judge was biased against defendant.

Turning to defendant's argument that the sentencing judge's decision to deny his later request for an adjournment demonstrated actual bias or created the appearance of impropriety, we find this issue to be meritless as well. In support of this argument, defendant simply rehashes his motion for adjournment, apparently arguing that the sentencing judge's decision to deny his motion in light of these arguments demonstrates that the sentencing judge was actually biased. As previously explained, however, a judge's ruling is not a ground for alleging bias unless the ruling displayed a deep-seated favoritism or antagonism against a party such that the exercise of fair judgment is impossible, *Jackson*, 292 Mich App at 598, 808 N.W.2d 541, and simply ruling against a party does not meet this high bar. Moreover, the sentencing judge gave a detailed opinion spanning six pages of transcript in which the judge carefully explained why he was denying defendant's motion. Defendant fails to grapple with the judge's ruling on appeal, and instead merely asserts that the sentencing judge must have been actually biased because he ruled against defendant. There is no legal basis for granting defendant the relief he requests on the basis of such an argument.

Finally, with respect to defendant's argument that the sentencing judge demonstrated bias by allowing Nover's family to attend the resentencing hearing in supposed contravention of COVID-19 safety protocols, we find that this issue, too, is completely meritless. Defendant testified that he believed it was “vitaly important” for Nover's family to be able to attend the hearing in person. In light of this testimony, it is disingenuous for defendant to now argue that the sentencing judge's decision to allow Nover's family at the resentencing demonstrated bias against defendant or the appearance of impropriety.

Accordingly, we disagree with defendant that any of these decisions by his sentencing judge support disqualification.

Affirmed.

All Citations

Not Reported in N.W. Rptr., 2021 WL 6066787

Footnotes

- 1 This Court initially denied defendant's application for leave to appeal, see *People v Espie*, unpublished order of the Court of Appeals, entered February 16, 2021 (Docket No. 355920), but our Supreme Court subsequently remanded “for consideration as on leave granted,” *People v. Espie*, — Mich. —, 954 N.W.2d 518, 518 (2021).
- 2 Defendant's assertion that Nover was an employee of the trial court is not supported by the ethics opinion that he has provided on appeal. The opinion addresses an inquiry from a probate judge considering whether to employ a court lawyer to represent indigent parties, and states that “the county treats the chief judge of the probate court as the employer of all persons working for the court.” Ethics Op. JI.-050 p. 1 (1992). The Ethics Opinion does not stand for the proposition that all court workers are necessarily employees of all judges in the court as a matter of law.