

Opinion Issued May 23, 2022



DOCKET NO. SCR 20-0007
SPECIAL COURT OF REVIEW¹
IN RE INQUIRY CONCERNING HONORABLE KEN MOLBERG
CJC No. 19-0583

OPINION

The Supreme Court of Texas has convened this Special Court of Review under Texas Government Code Section 33.034 to review the public warning of Justice Ken Molberg by the State Commission on Judicial Conduct. This matter arises from a door hanger prepared, printed, and circulated by the Dallas County Democratic Party's political action committee without the awareness of the judge. Following a trial, on de novo review, we vacate the sanctions levied by the Commission.

¹ The Special Court of Review consists of The Honorable Sarah Beth Landau, Justice of the First Court of Appeals, presiding by appointment; The Honorable Richard Hightower, Justice of the First Court of Appeals, participating by appointment; and The Honorable Mike Wallach, Justice of the Second Court of Appeals, participating by appointment.

I. Background

During the 2018 election cycle, the political action committee of the Dallas County Democratic Party designed, produced, and distributed roughly 200,000 pieces of campaign literature in Dallas County. One get-out-the-vote item was a door hanger featuring a cross-section of candidates seeking offices. At the top left of the door hanger was a text bubble offering to remind voters to vote if they texted VOTE2018 to a phone number. On the right was a reminder of early voting dates and the date of the November 6, 2018 election. Below the voting reminder and information was a banner reading, “We VOTE. We WIN! 2018 is Our Chance for Positive Change.”

The name, likeness, campaign logo, and biography of Justice Molberg, then the judge of the 95th Civil District Court, appeared on the door hanger with those of four other candidates. The four other candidates were running for non-judicial offices: John Creuzot, candidate for Dallas County District Attorney; Marian Brown, candidate for Dallas County Sheriff; Nathan Johnson, candidate for Texas State Senate; and John Turner, candidate for the Texas House of Representatives. On the front, state legislative candidates Nathan Johnson and John Turner appeared under the voting reminders and dates and the banner about the 2018 election. On the back, then-Judge Molberg’s information appeared above that of candidates for district attorney and sheriff. Toward the bottom of the back of the door hanger was another narrow banner listing early voting and election days. Below the banner was another text-for-voting-reminder message and a list of the candidates names, positions sought, and their websites and social media. An individual campaign disclaimer, “Pol. Adv. Paid by [candidate’s] campaign” appeared under each candidate’s picture on the door hanger. The door hanger did not identify the Dallas County Democratic Party as the entity that had created and distributed it.

Justice Molberg was unaware the door hanger existed until he received notice of a judicial conduct complaint based on it. As part of the coordinated campaign that the Dallas County Democratic Party ran, Justice Molberg contributed money to the party to support its PAC's promotion of his campaign for office and authorized the party to use his name, title, and likeness to appear in political advertisements. The Commission finds fault in Justice Molberg's failure to limit the party's use of his name, biography, and likeness to judicial candidates only.

The Commission concluded that by failing to limit the party's use of his information, Justice Molberg violated two canons of the Texas Code of Judicial Conduct. First, that he had lent the prestige of his judicial office to advance the private interests of others. TEX. CODE JUD. CONDUCT, Canon 2B. Second, that he authorized the public use of his name to endorse another candidate for non-judicial public office. TEX. CODE JUD. CONDUCT, Canon 5(2).

II. Burden of Proof and Standard of Review

The Commission has the burden of proving a willful violation of the Code of Judicial Conduct by a preponderance of the evidence. *In re Hecht*, 213 S.W.3d 547, 560 (Tex. Spec. Ct. Rev. 2006). "Willful conduct requires a showing of intentional or grossly indifferent misuse of judicial office, involving more than an error of judgment or lack of diligence." *In re Slaughter*, 480 S.W.3d 842, 848 (Tex. Spec. Ct. Rev. 2015). This Court reviews a sanction by trial de novo. TEX. GOV'T CODE § 33.034(e)(2).

III. Legal Analysis

Canon 2B: Lending the prestige of judicial office to advance the private interests of others

The party, not the candidates, created the door hanger. Thus, the conduct at issue is mainly that of the party. Though he did not approve the door hanger, Justice Molberg admitted he knew his name, biography, and likeness could appear with non-judicial candidates. The Commission relies on Justice Molberg's failure to restrict the party's use of his information to advance the private interests of others to justify the sanction. Specifically, the Commission argues that by contributing money to the party, Justice Molberg authorized the PAC to "use his name, image bio, and/or judicial title" on printed materials promoting the campaigns of candidates for "*non-judicial* public office . . . directly involved in the criminal justice system over which [Justice Molberg] would exercise appellate jurisdiction" if elected. (Commission Pretrial Mem. at 6, emphasis in original). And, by failing to restrict how the party used his information, the Commission argues that Justice Molberg has violated Canon 2B.

At trial, the Commission argued that the disclaimer appearing under Justice Molberg's photo, "Pol. Adv. Pd. By Ken Molberg Campaign," was insufficient to separate his advertisement from those of the other candidates. Instead, the Commission argued, the proximity of a judge's photo to other advertisements could be mistaken for lending the prestige of his office, despite the "fine print" of the disclaimer. In their briefing, the Commission suggested that the inclusion of the disclaimer was to let the voter know that the judge, and no one else, was making the advertisement.

This focus on a potential voter's possible perception of an advertisement of a subset of a party's candidates obscures the Commission's burden here. Violation of a canon requires willful conduct. *In re Slaughter*, 480 S.W.3d at 848. What the Commission has alleged is not willful conduct on Justice Molberg's part but on the PAC's part, coupled with the judge's failure to act, or his mere negligence in failing to curtail the conduct of others. *See id.* (willful conduct requires a showing of "intentional or grossly indifferent" conduct, not merely "an error of judgment or lack

of diligence”). There is no evidence that Justice Molberg himself intended to engage in the communication at issue. *See In re Sharp*, 480 S.W.3d 829, 834 (Tex. Spec. Ct. Rev. 2013) (calls, voicemails, and texts identifying the caller as a justice on the court of appeals to various county officials and demanding the release of a friend’s detained child constituted willful conduct).

The Commission’s allegations raise two questions in the judicial disciplinary setting: (1) Can a judge be vicariously liable for someone else’s conduct? And (2) can a failure to act or a failure to take sufficient action constitute willful conduct? The Commission could not locate any cases affirming a sanction where the sanctions were based on the actions of others. Nor could they identify any cases affirming a sanction based on a failure to act. Neither could we.

Absent authority extending the Commission’s reach to vicarious liability or omissions, we decline to read the canon expansively. *See In re Hecht*, 213 S.W.3d at 572 (reasoning that strict construction is appropriate for statutes that authorize a penalty). The Commission has not met their burden to establish by a preponderance of the evidence that Justice Molberg willfully violated Canon 2B by lending the prestige of his judicial office to advance the private interests of others. Because we find that the Commission did not sustain its burden to prove that Justice Molberg willfully lent the prestige of his judicial office to the other candidates on the door hanger, we do not reach whether the advertisement “advance[d] the private interests of others.”

Canon 5(2): Authorizing the public use of a judge’s name to endorse another candidate for a non-judicial public office

This charge suffers from similar problems as the Canon 2B allegations. It is undisputed that Justice Molberg did not specifically authorize this mailing with the photos placed in the way that the Commission contends is an endorsement. Unhelpfully, the canons do not define “authorizing” or “endorse.” But we are not the only Special Court of Review panel to grapple with the definition of “authorize.” Another panel concluded that a judge being able to anticipate that an

entity would use a judge's name and likeness in a news story could not support a charge of "authorizing" the public use of a judge's name to endorse another candidate for office. *In re Hecht*, 213 S.W.3d at 567–68. The same panel analyzed what the term "endorse" meant and concluded, after a survey of state ethics codes, that it meant something more than support or spoken praise. *Id.* at 573. While the call to action in the door hanger here was to vote for the featured candidates, the speaker is unidentified. There simply is not enough evidence to permit a conclusion that Justice Molberg authorized this use of his name, biography, and likeness to endorse others, or that the mere positioning of his information next to others constituted an "endorsement" by him.

There is also the problem of the disclaimer. While the Commission may be correct that a reader might construe the disclaimer under each photo as proof that the featured candidate was "speaking," it is just as plausible, if not more, that the disclaimer cordoned off each candidate from the others. A reader could just as easily conclude that Justice Molberg was urging voters to vote for him only, not urging that voters support the other three candidates. In the face of such equivocal evidence, we cannot say that the Commission sustained its burden of proof to show by a preponderance of the evidence that Justice Molberg willfully authorized the public use of his name to endorse non-judicial candidates for office. *Cf. In re Ginsberg*, 630 S.W.3d 1, 7 (Tex. Spec. Ct. Rev. 2018) (noting that willfulness means "the improper or wrongful use of the power of his office by a judge acting intentionally or with gross indifference to his conduct" with "gross indifference" being "indifference that is flagrant, shameful and beyond all measure and allowance.") (further citation omitted).

Thus, we reverse the Commission's public admonition of the Honorable Ken Molberg and dismiss the charges against him without sanction.

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