IN THE MISSOURI SUPREME COURT
EN BANC

STATE EX REL. KENNETH BAUMRUK,	)	
	)	
RELATOR,	)	
	)	
VS.	)	NO. SC86040
	)	
THE HON. MARK SEIGEL,	)	
	)	
RESPONDENT.	)	

ON PRELIMINARY WRIT OF PROHIBITION
FROM THE SUPREME COURT OF MISSOURI, EN BANC
TO THE HON. MARK SEIGEL, CIRCUIT JUDGE OF ST. LOUIS COUNTY. TWENTY-FIRST JUDICIAL CIRCUIT, STATE OF MISSOURI

BRIEF OF RESPONDENT

JOHN R. LASATER MBE NO. 38905
OFFICE OF THE PROSECUTING ATTORNEY
100 S. Central
ST. LOUIS, MISSOURI 63105
(314) 615-2600 – TELEPHONE
(314) 615-2611 – FACSIMILE
ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

Table of Authorities **3**

Jurisdictional Statement **5**

Statement of Facts **6**

Points Relied On **19**

Point One *19*

Relator is not entitled to a writ of prohibition ordering Respondent to take no further action and cease participating as a judge in the underlying criminal case, State v. Baumruk because prohibition is inappropriate for a discretionary act and Judge Seigel has the discretion to remain the judge on the case after granting a change of venue under Rule 32.04. 19

Point Two *20*

Relator is not entitled to a writ of prohibition because Judge Seigel did not go beyond the record in finding punitive damages

in Nicolay v. Baumruk and because Judge Seigel has no disqualifying bias. 20

Argument **21**

Point One *21*

Point Two *26*

Conclusion **35**

Certificate of Compliance and Service **36**

Appendix to Respondent's Brief **37**

TABLE OF AUTHORITIES

Cases

Bakker v. Employee Savings Plan of McDonnell Douglas Corp., 919 S.W.2d 16 (Mo. App. 1996) 8

Haynes v. State, 937 S.W.2d 199 (Mo.banc 1996) 27, 33

Johnson v. State, 796 S.W.2d 662 (Mo. App. 1990) 28, 30, 33

State ex rel Kinder v. McShane, 87 S.W.3d 256 (Mo. banc 2002) 21, 25

State ex rel. Leigh v. Dierker, 974 S.W.2d 505 (Mo. banc 1998) 24

State ex rel. McCulloch v. Drumm, 984 S.W.2d 555 (Mo.App. ED 1999) 28, 29, 30

State ex rel. Schnuck Markets v. Koehr, 859 S.W.2d 696 (Mo. banc 1993) 24

State ex rel. Wesolich v. Goeke, 794 S.W.2d 692 (Mo. App. 1990) 29, 30

State v. Baumruk, 85 S.W.3d 644 (Mo. banc 2002) 15, 22

State v. Cooper, 811 S.W.2d 786 (Mo.App. 1991) 28

State v. Jones, 979 S.W.2d 171 (Mo. banc 1998) 27

State v. Simmons, 955 S.W.2d 729 (Mo.banc 1997) 28, 30

Williams v. Reed, 6 S.W.3d 916 (Mo. App. 1999) 28

Rules

Rule 32.02.....23

Rule 32.03.....23

Rule 32.04.....22, 23, 24, 26

Rule 32.07.....23

Rule 32.08.....22, 23, 24

Rule 32.09.....23, 26

Rule 32.10.....23

Rule 51.02.....24

Rule 51.03.....24

Rule 51.04.....24

Rule 51.14.....24

JURISDICTIONAL STATEMENT

Respondent is satisfied with Relator's jurisdictional statement.

STATEMENT OF FACTS

On May 5, 1992, Lisa Bakker accompanied her mother, Mary, to the St. Louis County Courthouse to attend a hearing in the divorce case between Mary and Kenneth Baumruk. In the midst of the hearing, Kenneth Baumruk shot Mary in the courtroom as Lisa Bakker watched from the gallery a few feet away. Baumruk then shot his lawyer and her lawyer as they tried to get away from the counsel table. Baumruk exited the courtroom to the back hallway of the courthouse where the offices of the clerks and judges for the various divisions on that floor are located.

Confusion reigned in the courthouse in the moments after the first shot was fired as police and security personnel worked to figure out who and where the shooter was. Bailiff Fred Nicolay had just closed the door to the chambers of Judge Daniel O'Toole to secure the judge and others inside when Kenneth Baumruk approached him. Baumruk fired one shot into Nicolay's shoulder before he fled down the hallway. Baumruk fired at police and investigators who pursued or confronted him in the back hallways of the courthouse. Baumruk emerged into the main hallway of the second floor and fired a shot that struck a security officer in the leg. Other officers in the main hallway

returned fire on Baumruk and struck him nine times, including two shots that struck his head. Baumruk survived.

This statement of facts is divided amongst the three cases that are pertinent to this Court's inquiry and disposition of this writ. Those cases are Bakker v. McDonnell Douglas, Nicolay v. Baumruk, and State v. Baumruk, which is the case underlying this writ.

Bakker v. McDonnell Douglas

Lisa Bakker became the personal representative of her mother's estate. Lisa Bakker motioned to intervene in the divorce case of Mary Baumruk v. Kenneth Baumruk, cause number 614551 in her role as personal representative. (Resp. Ex. 14, p. 3). In July, 1992, Judge Larry L. Kendrick of Division 17 granted the request and Lisa Bakker was substituted for Mary Baumruk in the divorce case. There had been no order dissolving the marriage of Kenneth and Mary Baumruk or any order dividing any of the marital property prior to the murder of Mary Baumruk. Nevertheless, a trial of the divorce case with the substituted petitioner was held on January 8, 1993 before Judge Robert G. Hoester. (Resp. Ex. 14, p. 3).

On January 11, 1993, Judge Hoester entered a decree and order dissolving the marriage and dividing the property in cause 614551. The decree included an award of 100% of Baumruk's pension plans from his former

employer McDonnell Douglas Corporation (MDC) to Lisa Bakker as personal representative of the estate of Mary Baumruk. (Resp. Ex 14, pp 4-5). The court issued Qualified Domestic Relations Orders (QDRO's) to McDonnell Douglas. The estate filed a garnishment action to enforce the decree, but MDC objected.

The garnishment case was consolidated under cause G-93286 and was assigned to Judge Mark D. Seigel of Division 3 of the Circuit Court of St. Louis County. Judge Seigel determined the case upon stipulated facts submitted by the parties on May 15, 1995. (Resp. Ex. 12, 13). The stipulation included the following language that Baumruk "intentionally shot and killed Mary Louise Baumruk without legal justification. Kenneth Baumruk also subsequently shot and wounded several other individuals at the Courthouse on this same date." Judge Seigel quashed the garnishments, ruling that Judge Hoester was without jurisdiction to enter the QDRO's against MDC and the orders were void. (Resp. Ex 12).

The estate appealed to the Missouri Court of Appeals, which affirmed Judge Seigel's judgment. Bakker v. Employee Savings Plan of McDonnell Douglas Corp., 919 S.W.2d 16 (Mo. App. 1996). The Court of Appeals held that the dissolution action was abated with the death of Mary Baumruk and Judge Hoester was without further jurisdiction to act. Id. at 18.

Nicolay v. Baumruk

Fred Nicolay, the bailiff shot by Baumruk on May 5, 1992 filed a cause of action against Baumruk on August 12, 1992. This case was assigned cause number 641138 and was eventually assigned to Judge Mark D. Seigel for determination. Among the six counts filed in his petition, Nicolay alleged that Baumruk intentionally shot Nicolay and that such conduct was "extreme, outrageous, intentional and reflected a reckless disregard to the rights of others.." and entitled Nicolay to punitive damages. (Resp. Ex. 9).

Baumruk had an insurance policy with State Farm Fire & Casualty Company. In April, 1995, State Farm filed a declaratory judgment action in St. Louis County Circuit Court to declare there was no coverage for the May 5, 1992 shooting because it was an intentional act by Baumruk. In May, 1997, a jury agreed with State Farm and declared the shooting was an intentional act in cause number 674810. (Resp. Supp. Ex 15, 16). Included with Baumruk as a defendant in cause 674810 was Fred Nicolay.

On November 1, 1997, a hearing was held before Judge Mark D. Seigel in the case of Nicolay v. Baumruk. Previously, State Farm had requested that a defendant ad litem be appointed for Baumruk based on the findings in the Macon County criminal proceedings that he was incompetent to proceed. Judge Seigel appointed Martin Barnholtz as defendant ad litem with the consent of the

parties. At the November 1 hearing, the parties stipulated that Baumruk shot Fred Nicolay and referred to off the record discussions that occurred prior to the hearing. In addition, the court took judicial notice of cause 674810, State Farm v. Baumruk, and the verdict that the shooting was intentional. The parties agreed that there was liability on the part of Baumruk and the hearing was to determine Fred Nicolay's damages.

At the conclusion of the hearing, Judge Seigel entered a judgment for Fred Nicolay against Kenneth Baumruk for $75,000.00 in actual damages and $25,000.00 in punitive damages.

State v. Kenneth Baumruk

The St. Louis County Prosecutor's Office charged Baumruk in St. Louis County cause 92CR-2946 with one count of murder in the first degree, eight counts of assault in the first degree and nine counts of armed criminal action. Baumruk's attorneys filed a motion for a change of judge and change of venue. St. Louis County Circuit Judge Harry J. Stussie disqualified himself from the case and assigned the case to the Hon. Ronald Belt of Macon County to rule on the change of venue. Judge Belt granted the change of venue and transferred the case to Macon County where the case was assigned CR193-10FX.

The brain injuries caused during the shootout with police on May 5,

along with the subsequent medical intervention raised questions of whether Relator was competent to proceed. Relator was examined by a number of doctors on behalf of the court and the defense. Judge Belt held a hearing on Relator's competency in January, 1994 and again in June, 1995. Judge Belt found Relator lacked fitness to proceed and was unlikely to be restored to competency in the near future under §552.020 and ordered him committed to the Department of Mental Health.

The Department of Mental Health (DMH) filed proceedings to establish a guardianship over Relator under Chapter 475 RSMo. in the Circuit Court of Callaway County. Relator's public defender in the criminal case, Patrick Berrigan, entered as counsel for relator in the guardianship proceeding, requested a jury trial and contested the evidence of the DMH that a guardian should be appointed. In 1997, a Callaway County jury agreed that Relator did not need a guardian.

Mr. Berrigan returned to the Circuit Court of Macon County and filed for a dismissal of the indictment and the release of Relator because §552.020 specified that the charges shall be dismissed at the conclusion of the proceedings under Chapter 475. Judge Belt refused to dismiss the indictment and Relator sought a writ of mandamus. The Missouri Supreme Court granted the writ of mandamus and ordered Judge Belt to dismiss the charges in State ex

rel. Baumruk v. Belt, 964 S.W.2d 443 (Mo. Banc 1998). Judge Belt complied with the mandate and dismissed the indictment.

The St. Louis County Prosecutor's Office filed a new indictment with the St. Louis County Circuit Court charging relator with murder in the first degree, eight counts of assault in the first degree and nine counts of armed criminal action in the present cause, 98CR-1736. Cause 98CR-1736 was originally assigned to the Hon. Phillip J. Sweeney of Division 18 of the St. Louis County Circuit Court. Baumruk had new counsel, Joseph Green and Larry Bagsby, representing him in cause 98CR-1736. On April 13, 1998, Relator through counsel filed his first application for a change of judge and a change of venue requesting the Honorable Phillip Sweeney of Division 18 to recuse himself and appoint a judge outside of the Twenty-First Judicial Circuit. On April 24, 1998, Judge Sweeney granted Relator's motion for change of judge. Pursuant to local court rules, the cause was assigned to the Honorable Mark D. Seigel of Division 3 for further proceedings. (Rel. Ex. 10).

On August 3, 1998, Judge Seigel held a hearing on Defendant's Motion for Change of Judge and Change of Venue. Relator's counsel stated that he had no evidence of bias on the part of Judge Seigel. After hearing evidence and arguments from the parties, Judge Seigel stated the following:

"THE COURT: All right. I have considered the motion, I will note that Judge Sweeney did sign the change of judge on April 24th of 1998. As you related, Mr. Green, I looked over the list of witnesses.

While I'm acquainted with some of them, as lawyers, I do not have a close personal relationship with any of them.

With respect to Mr. Nicolay, who is a bailiff in this courthouse, I did have the civil case that he had filed against Mr. Baumruk, which ultimately got settled.

If memory serves me correctly, I heard no evidence in the case that I recall, and I - - I know so far I've seen nothing that would in any way cause me to feel uncomfortable about hearing this case or presiding over this case.

Therefore, I'm going to deny your motions."

(Rel. Ex. 12, p. 10). Thereafter, Relator filed a Motion for Change of Judge for Cause and Suggestions in Support of Defendant's Motion for Change of Judge for Cause on August 2, 1999. (Rel. Ex. 18). Judge Seigel set Relator's motion for disqualification of judge on October 6, 1999.

On September 29, 1999, defense counsel filed Defendant's Objection to

the Honorable Mark D. Seigel Presiding over Defendant's Motion for Change of Judge in the Above-Styled Cause and Request that Presiding Judge Preside and Rule on Defendant's Motion for Change of Judge. (Rel. Ex. 20). This motion was directed to the Presiding Judge, The Honorable Robert Cohen, in Division 1 of the St. Louis County Circuit Court. Judge Cohen sustained Relator's request that the Motion for a Change of Judge be heard by him. (Rel. Ex. 21).

On December 10, 1999, the parties appeared before Judge Cohen. Judge Cohen took judicial notice of St. Louis County Circuit Court files Bakker v. Employee Savings Plan of McDonnell Douglas , cause number G93-286, and Nicolay v. Baumruk, cause number 641138, and heard arguments. (Rel. Ex. 23, pp. 6-8). Relator presented no witnesses at the hearing. At the conclusion of the hearing, Judge Cohen denied Relator's motion and declined to remove Judge Seigel for cause. (Rel. Ex. 23, p. 29).

Relator filed a Petition for a Writ of Prohibition in the Missouri Court of Appeals, Eastern District claiming Respondent had a "disqualifying bias." (Rel. Ex. 25). The Court of Appeals denied the petition in an order dated January 5, 2000. (Rel. Ex. 26).

Relator filed the same Petition for a Writ of Prohibition in the Supreme Court of Missouri on January 18, 2000. (Rel. Ex. 27). The Supreme Court of

Missouri denied the petition in an order dated February 15, 2000. (Rel. Ex. 29).

A hearing was held on Relator's competency to proceed pursuant to §552.020 in Fall, 2000. Respondent found Baumruk's condition to have significantly improved and found him competent to proceed in December, 2000. (Rel. Ex. 30) Thereafter, trial was held in this cause in May, 2001. A jury was impaneled and Relator was found guilty as charged. After a penalty phase, the jury recommended a sentence of death. On June 18, 2001, Respondent imposed the sentence of death recommended by the jury.

Relator filed a direct appeal to the Supreme Court of Missouri. A brief filed on behalf of Relator raised 17 points of error. (Resp. Ex. 2). Among the points of error raised were claims that Respondent had a disqualifying bias and the judges of the 21st judicial circuit could not be fair. (Resp. Ex. 2, pp 61-74). The Supreme Court of Missouri reversed the judgment and sentence of the trial court and found the trial court erred in denying Relator's Motion for Change of Venue because under Rule 32.04(a) a change of venue may be ordered for the reason that "the inhabitants of the county are prejudiced against the defendant." State v. Baumruk, 85 S.W.3d 644, 647 (Mo. banc 2002). This Court took issue with the trial being conducted in the same courthouse where the shooting had occurred, stating, "Baumruk can be tried on the charges for which he has again been indicted. But he should not be tried where those shootings occurred." Id.

at 651. This Court remanded the case to the trial court to "grant the change of venue." Id. at 651.

This Court's opinion addressed only one other point of error raised by defendant's appeal -- the question of defendant's competency to stand trial. The court held the prior finding of incompetency by Judge Belt was not binding on Judge Seigel and that Baumruk's claims of amnesia about the events of the day of the shooting were not a bar to his prosecution. Id. at 648. This Court's opinion did not address the other claims of error raised by defendant including the claim that Judge Seigel had a disqualifying bias or that the judges of the 21st Circuit could not be fair to Relator.

This Court drew a number of conclusions about the facts and evidence of the shooting and the trial in deciding the case. This Court's opinion stated, "There is no question, based on the evidence at trial, that Baumruk shot and killed his wife." Id. at 650-51. The court further noted that there was "overwhelming evidence of Baumruk's guilt in committing the shootings." Id. at 651. The court described Relator's actions on May 5, 1992 as a "reign of terror." Id.

After remand, Joseph Green and Larry Bagsby withdrew as counsel for Relator. David Kenyon and Teoffice Cooper of the capital litigation office of the Missouri Public Defender entered their appearances for Relator on

December 23, 2002. (Resp. Ex. 3). Between the time of their entry and April 30, 2004, Messrs. Kenyon and Cooper participated in a number of scheduling conferences and informal matters to obtain records and permit experts to examine Relator. (Resp. Ex. 4-8). During this period, Judge Seigel held informal discussions with the parties about the change of venue and potential locations for the trial. At all times, Judge Seigel indicated his intention to remain the judge in the case wherever the trial would be held. At no time did Relator make a request that Judge Seigel issue a written order granting the change of venue or memorializing the informal discussions.

At a February 5, 2004 scheduling conference with the attorneys, Judge Seigel set the case for a new competency hearing on May 17, 2004. (Rel. Ex. 7). In the same scheduling conference order, the parties agreed on a trial date for September 13, 2004. (Rel. Ex. 7).

On May 5, 2004, over fifteen (15) months after the entry of appearance of Messrs. Kenyon and Cooper in this matter, Relator filed a Motion for Change of Judge or in the Alternative for the Judge to Recuse Himself and an additional Rule 32.08 Motion for Recusal of Judge. (Rel. Ex. 1 and 2). The State filed a response and on May 14, 2004, Judge Seigel heard the argument of the parties and denied Relator's motion for recusal. At that same meeting, Judge Seigel told the parties that he would grant the change of venue to the 11th Judicial

Circuit in St. Charles County and issued a written order to that effect on the same day. Relator did not object in any manner to the order granting the change of venue.

Relator thereafter filed an application for a writ of prohibition in the Missouri Court of Appeals for the Eastern District. The Court of Appeals denied the application. Relator then applied for a writ of prohibition in this Court. This Court granted a preliminary writ.

POINTS RELIED ON

Point One

Relator is not entitled to a writ of prohibition ordering Respondent to take no further action and cease participating as a judge in the underlying criminal case, State v. Baumruk because prohibition is inappropriate for a discretionary act and Judge Seigel has the discretion to remain the judge on the case after granting a change of venue under Rule 32.04.

State v. Baumruk, 85 S.W.3d 644, 647 (Mo. banc 2002);

State ex rel Kinder v. McShane, 87 S.W.3d 256 (Mo. banc 2002);

Missouri Supreme Court Rule 32;

Missouri Supreme Court Rule 51.

Point Two

Relator is not entitled to a writ of prohibition because Judge Seigel did not go beyond the record in finding punitive damages in Nicolay v. Baumruk and because Judge Seigel has no disqualifying bias.

Haynes v. State, 937 S.W.2d 199, (Mo.banc 1996);

State v. Jones, 979 S.W.2d 171, (Mo. banc 1998);

State v. Simmons, 955 S.W.2d 729, (Mo.banc 1997);

State ex rel. Wesolich v. Goeke, 794 S.W.2d 692, (Mo. App. 1990).

ARGUMENT

Point One

Relator is not entitled to a writ of prohibition ordering Respondent to take no further action and cease participating as a judge in the underlying criminal case, State v. Baumruk because prohibition is inappropriate for a discretionary act and Judge Seigel has the discretion to remain the judge on the case after granting a change of venue under Rule 32.04.

In State ex rel Kinder v. McShane, 87 S.W.3d 256 (Mo. banc 2002), this court set out the standard of review to be applied to this case, "Prohibition is a discretionary writ that lies only to prevent 'an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent exercise of extra- jurisdictional power.'" 87 S.W.3d at 260, *quoting* State ex rel. Linthicum v. Calvin, 57 S.W. 3d 855, 857 (Mo. banc 2001). The Kinder court further stated, "The general rule is that, if a court is 'entitled to exercise discretion in the matter before it, a writ of prohibition cannot prevent or control the manner of its exercise, so long as the exercise is within the jurisdiction of the court.'" 87 S.W.3d at 260, *quoting* State ex rel. K-Mart Corp. v. Holliger, 986 S.W.2d 165, 169 (Mo. banc 1999). Rule 32.04(e) gives Judge Seigel the discretion to remain the trial judge on the case after granting a change of venue.

Rule 32.04 provides for the procedure for a defendant to request and be granted a change of venue for cause because the inhabitants of the county are prejudiced against him. The mandate of this Court in State v. Baumruk, 85 S.W.3d 644, 647 (Mo. banc 2002), ordered Respondent to grant the change of venue requested under Rule 32.04. Rule 32.04(e) provides in part,

> "If the issues are determined in favor of the defendant…a change of venue shall be ordered to some other county convenient to the parties and where the reason or reasons do not exist….In lieu of transferring the case to another county, the court may secure a jury from another county as provided by law."

Respondent discussed various venues with the parties and indicated his intention to remain the trial judge on the case.

On May 11, 2004, Respondent granted the change of venue pursuant to Rule 32.04 as ordered by this Court. Pursuant to Rule 32.04(e), Respondent intends to remain the trial judge on this case. Respondent has taken no further action since May 11, 2004 because of these pending writ proceedings.

Relator argues that under a joint motion for change of judge and change of venue filed under Rule 32.08 that the trial court may not remain with the case. The language of Rule 32.08 does not specifically prohibit Respondent from remaining on the case after granting a change of venue, which Relator

concedes in his brief. Relator argues that it is implicit in the language of Rule 32.08(e) that the newly assigned judge can not remain on the case after the change of venue is granted.

Relator's argument that the language is implied is wrong. The language of Rule 32.08 does not list the grounds for which a change of judge or a change of venue must be granted. Those grounds are found in Rules 32.02, .03 and .04 for a change of venue and 32.07 for a change of judge. Rule 32.08(a) specifically exempts a change of judge prior to a preliminary examination, under Rule 32.06, and when a judge recuses himself or herself under Rule 32.09(c) or Rule 32.10. There are no substantive grounds for a change of venue in Rule 32.08. A defendant must refer to Rule 32.02 – change of venue by stipulation; Rule 32.03 – change of venue as a matter of right in certain counties; and Rule 32.04 – change of venue from inhabitants for cause; to find the substantive grounds on which to base a motion for change of venue. Rules 32.02, .03 and .04 all provide the trial court with the ability to secure a jury from another county in lieu of transferring the case to another county.

While Rules 32.02, .03 and .04 provide the substantive grounds for a change of venue, Rule 32.08 is merely procedural. Rule 32.08 provides a procedure for courts to follow when a defendant seeks a motion for change of judge and change of venue at the same time. The rule is logical and fair. In

Missouri, a change of judge is automatic and the party seeking it does not need to give a reason under Rule 32.07. Thus, under Rule 32.08, the motion for change of judge is granted before a motion for change of venue is considered so that a "newly assigned" judge considers the venue motion. Without Rule 32.08, a judge who is unacceptable to the defendant could consider and deny a change of venue before granting a change of judge – thus denying a defendant an impartial judge to consider a change of venue.

Relator asks this Court to compare Rule 32.08 with Rule 51.14 for change of judge and venue in civil cases and rely on court cases that have interpreted Rule 51.14. Relator's argument is misplaced. The rules which provide for a change of venue in civil cases -- Rules 51.02 – by agreement of the parties; 51.03 – as a matter of right in certain counties; and 51.04 – change of venue from inhabitants for cause – do not give a judge in a civil proceeding the option to remain with the case after granting a change of venue. Relator cites State ex rel. Leigh v. Dierker, 974 S.W.2d 505 (Mo. banc 1998) and State ex rel. Schnuck Markets v. Koehr, 859 S.W.2d 696 (Mo. banc 1993) for the proposition that once a trial court grants a change of venue it is without further jurisdiction to act. Both cases were civil actions where the trial court tried to act after granting a change of venue, and in both cases the court issued a writ prohibiting further action. However, the application of these cases to this

action is wrong because this is a criminal case and the rules providing for a change of venue – 32.02, .03, and .04 – allow a court to retain jurisdiction and secure a jury from another county after granting the change of venue.

Respondent is well within his discretion under Rule 32.04(e) in deciding to remain the judge on the case after granting a change of venue and securing a jury from another county. A writ of prohibition is not appropriate to remedy an exercise of discretion within the jurisdiction of the trial court. Kinder, 87 S.W.3d at 260. Accordingly, a writ of prohibition should not issue.

Point Two

Relator is not entitled to a writ of prohibition because Judge Seigel did not go beyond the record in finding punitive damages in Nicolay v. Baumruk and because Judge Seigel has no disqualifying bias.

The issue before this court is whether Judge Seigel should be disqualified for cause. Relator claims that Judge Seigel is biased against Relator because of his prior rulings against Relator. Relator has already exercised a change of judge in this case pursuant to Rule 32.07 in removing Judge Phillip J. Sweeney in April, 1998. Relator is prohibited from obtaining a second change of judge in this cause under Rule 32.09 unless fundamental fairness requires a change of judge. Should Judge Seigel be disqualified for cause, then prohibition would be the proper remedy. However, nothing in the record supports relator's claim, and the writ of prohibition should not be granted.

The issue of a disqualifying bias on the part of Judge Seigel has been raised seven times in these proceedings: first, when Judge Seigel ruled on it at a hearing on a Motion for Change of Judge and Venue in August, 1998; and second, when Judge Cohen ruled on it in December, 1999; third and fourth, in peremptory writ applications before the Court of Appeals and the Supreme Court in 2000; fifth, on direct appeal of the verdict in the Supreme Court; sixth, in a motion filed in May, 2004 and seventh, in a application for a peremptory

writ before the Court of Appeals. In essence, this Court is being asked to issue a writ based on the record and rulings after repeated litigation.

Judge Seigel does not have a disqualifying bias.

In a case of a disqualification of a judge for cause, the standard to be applied comes from the code of judicial conduct, which requires a judge to recuse himself in cases where the judge's impartiality might reasonably be questioned. State v. Jones, 979 S.W.2d 171, 178 (Mo. banc 1998). The test applied is whether a reasonable person would have a factual basis to find an appearance of impropriety and thereby doubt the impartiality of the court. Id. The questioned judge is in the best position to decide whether recusal is necessary, and it is presumed that a judge will not undertake to preside in a proceeding where he cannot be impartial. Id. To be a disqualifying bias, the bias must come from an extrajudicial source that results in the judge forming an opinion on the merits based on something other than what the judge has learned from participation in the case. Id.

In Haynes v. State, 937 S.W.2d 199, 203 (Mo.banc 1996) this Court held that a reasonable person is not ignorant of what has gone on in the courtroom before the judge, but knows all that has been said and done before the judge. The key to the Haynes holding is that the disqualifying bias must come from an extrajudicial source. "The judge's bias or prejudice must be personal, rather

than judicial, and must be 'to such an extent so as to evince a fixed prejudgment and to preclude a fair weighing of the evidence'" Williams v. Reed, 6 S.W.3d 916, 921 (Mo. App. 1999)(*quoting* State ex rel. Wesolich v. Goeke, 794 S.W.2d 692, 697-98 (Mo. App. 1990).

The fact that a trial judge has ruled against a defendant in a related case is not a disqualifying bias. State v. Simmons, 955 S.W.2d 729, 744 (Mo.banc 1997). "Mere adverse rulings and previous contacts in other litigated matters do not form the basis for claims of bias." Johnson v. State, 796 S.W.2d 662, 664 (Mo. App. 1990). In State v. Cooper, 811 S.W.2d 786, 790 (Mo.App. 1991), the court rejected the claim of bias on the part of the trial judge based on the fact that judge sentenced defendant to consecutive sentences in a prior matter. In Simmons, the defendant sought to have the trial judge disqualified from hearing the post-conviction motions because of comments the judge made agreeing with the jury's punishment at the sentencing hearing. 955 S.W.2d at 744. The court found there was no disqualifying bias in the trial court expressing its agreement with the jury's decision or upholding the trial court's decisions in remaining on the post-conviction case. Id.

Two cases where the court granted a writ of prohibition because of a disqualifying bias are State ex rel. McCulloch v. Drumm, 984 S.W.2d 555 (Mo.App. ED 1999) and State ex rel. Wesolich v. Goeke, 794 S.W.2d 692, 697-

98 (Mo. App. 1990). In Drumm, the trial judge expressed his opinion at sentencing after a jury trial that he would have ruled differently than the jury had there been a bench trial. On remand after a successful appeal, the defendant in Drumm asked for a bench trial, which the trial court granted, and the state applied for a writ. The Court of Appeals granted the writ because of an appearance of impropriety in the comments made at sentencing could either 1) cause defendant to employ a strategy for the retrial based on the comments or 2) cause the judge to rule a particular way at the retrial because of the comments. 984 S.W.2d at 557. Either way, the court found that the judge's statements at sentencing committing to a position created an appearance of impropriety when the statement wasn't necessary for the disposition of the case.

In the Goeke case, the trial court referred to his own dissolution of marriage case during settlement negotiations with counsel in a dissolution case he presided over. The judge indicated that if the case went to trial, he might give the party the same disposition he received in his case. Goeke, 794 S.W.2d at 694. The court noted that it was impossible for a trial judge to ever be free from preconceptions or prejudices, stating "the human mind is no blank piece of paper." Id. at 697. However, the court held that justice could not tolerate idiosyncratic or personal prejudice directed towards a party. Id The court held disqualification was necessary because the trial court brought his personal

feelings from his own dissolution into the matter before him and indicated a predisposition to rule in the same way his divorce was resolved. Id. at 698.

The holdings of the Drumm and Goeke cases show that a disqualifying bias is one where the court has a personal bias against the party or a predisposition to rule in one particular way. The source of the bias must be from an extrajudicial source. In addition, the Jones, Simmons, and Johnson cases hold that prior adverse rulings in previously litigated matters do not rise to the level of a disqualifying bias.

Relator's factual claims of a disqualifying bias on the part of Judge Seigel are unsupported by the record.

Relator claims that Judge Seigel's award of punitive damages and finding that relator's conduct was "outrageous" in Nicolay v. Baumruk was unsupported by the evidence. Nicolay's petition sought punitive damages in counts IV and V. (Relator's Appendix A30-34). In count V of the petition, it states:

> "2. That Defendant's conduct as described herein was extreme, **outrageous**, intentional and reflected a reckless disregard to the rights of others, all entitling Plaintiff to punitive damages as is reasonable [sic] determined by a jury."

(Rel. Appendix A35)[emphasis added]. Thus it was necessary to the

disposition of the civil suit for Judge Seigel to make a ruling on the question of whether the conduct of Baumruk was outrageous. The evidence of the outrageous conduct by Baumruk was based on the testimony of the plaintiff Fred Nicolay, the stipulations of the parties, and the court taking judicial notice of the the record in State Farm Fire and Casualty v. Baumruk.

Fred Nicolay testified that Baumruk shot him in the shoulder during an altercation during the shootings at the St. Louis County Courthouse on May 5, 1992. (Rel. Appendix A39, line 25 – A40, line 9). The parties stipulated that Baumruk shot Fred Nicolay on that day. (Rel. Appendix A38, lines 11-21). In addition to the stipulation, the plaintiff's attorney, Matt Padberg made reference to a discussion of facts that occurred off the record. (Rel. Appendix A37, lines 9-12). Mr. Padberg also asked the court to take, and Judge Seigel accepted, judicial notice of State Farm Fire and Casualty v. Baumruk, et al., St. Louis County cause number 674810, and the jury's verdict "that it was an intentional shooting." (Rel. Appendix A38, line 22 – A39, line7). A judgment in cause 674810 notes that the shooting of Mary Baumruk was "willful and malicious" and "in cold blood." (Resp. Supp. Ex. 15). The jury was instructed to find in favor of State Farm if they believed either:

> "That Kenneth Baumruk intentionally shot Fred Nicolay and expected or intended to cause some injury to Fred Nicolay; or

That the injury to Fred Nicolay resulted from the willful and malicious act of Kenneth Baumruk in shooting Fred Nicolay.

(Resp. Supp. Ex. 16). The jury returned a unanimous verdict in favor of State Farm. (Resp. Supp. Ex. 17).

The record refutes relator's claim that there was insufficient evidence for Judge Seigel to find that Baumruk's actions were outrageous, intentional and reckless. Relator has not identified a single extrajudicial source for any claim of bias on the part of Judge Seigel. Relator's claim that Judge Seigel based his findings on assumptions and external sources are speculative and unsupported by fact. It is not as if Judge Seigel made a ruling that was unsupported by any evidence. Judge Seigel had a record before him that demonstrated Baumruk committed an intentional shooting of multiple victims in a public place. Even this Court described Baumruk's actions as a "reign of terror" and the evidence of guilt as "overwhelming." Baumruk, 85 S.W.3d at 650-51.

Relator complains that Judge Seigel has already prejudged one of the aggravating circumstances in the penalty phase of the criminal case because Judge Seigel entered an order and made findings in Nicolay v. Baumruk that Relator's "conduct was so outrageous, extremely intentional..." and because one of the aggravators cited by the State in seeking the death penalty is that Relator's conduct was "outrageous." The adverse ruling in and prior contacts

with the Nicolay v. Baumruk case do not create a disqualifying bias for Judge Seigel. *See*, Johnson, 796 S.W.2d at 694. Judge Seigel's findings in the Nicolay case were necessary for the proper disposition of a civil damage case seeking punitive damages for an intentional harm.

Relator also claims that a "reasonable person" would question whether Judge Seigel could be fair and impartial based on the record of Nicolay v. Baumruk. As previously noted, the reasonable person in this standard is aware of all that has been said and done before the judge. Haynes, 937 S.W.2d at 203. Relator fails to note for this Court that Judge Seigel ruled in favor of Baumruk when Lisa Bakker and others tried to enforce a judgment against his retirement accounts at McDonnell Douglas.[1] Judge Seigel actually reversed the errors made by other judges and protected Kenneth Baumruk's retirement accounts.

Relator has not cited any statements by Judge Seigel in his handling of State v. Baumruk that shows an appearance of impropriety or a disqualifying bias. The jury found the existence of aggravating circumstances and Respondent was well within his duties as a trial court judge to impose the jury's recommended sentence of death and uphold the jury's findings.

Relator has not identified a single disqualifying bias in the seven times

1 Judge Seigel made the ruling on stipulated facts in Bakker v. McDonnell Douglas two years prior to hearing evidence in Nicolay v. Baumruk.

this issue has been litigated during the pendency of this case. There is not a disqualifying bias or an appearance of impropriety that would require Respondent to recuse himself or be recused. The application for a writ should be denied.

CONCLUSION

For the foregoing reasons, Relator is not entitled to a writ of prohibition.

Respectfully submitted,

_____

John R. Lasater MBE#38905
Office of the Prosecuting Attorney
100 S. Central
Clayton, MO 63105
314-615-2600 fax: 314-615-2611

CERTIFICATE OF COMPLIANCE AND SERVICE

I, the undersigned attorney, hereby certify as follows:

The attached brief complies with the limitations contained in the Court's Rule 84.06(b). The brief contains 6388 words according to Microsoft word count.

The floppy disk filed with this brief contains a copy of this brief. It has been scanned for viruses by McAfee Virus Scan and was found to be virus free by that program.

A true and correct copy of the attached brief and a floppy disk containing a copy of this brief were mailed this 20th day of October, 2004 to counsel for Relator, Ms. Deborah B. Wafer, Office of the Public Defender, 1000 St. Louis Union Station, Grand Central Buiding, Suite 300, St. Louis, MO 63103, and an e-mail containing the brief was sent to Ms. Wafer at Deborah.Wafer@mspd.mo.gov, and a true and correct copy was hand delivered to Respondent, Hon. Mark D. Seigel at Division 3 of the St. Louis County Courts Building.

_____

John R. Lasater
Attorney for Respondent

APPENDIX TO RESPONDENT'S BRIEF

Supreme Court Rule 32……..A1-A5

Supreme Court Rule 51……..A6-A9