

No. 21-1257

ORIGINAL

In The
Supreme Court of the United States



BRIAN EVANS, as the Administrator
of the Estate of Helen Marie Bousquet,

Petitioner,

v.

RONALD MARVIN, M.D., et al.,

Respondents.

**On Petition For Writ Of Certiorari To The
Commonwealth Of Massachusetts Appeals Court**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was it appropriate for a judge to conceal that he was married to a doctor admitted to practice in the very hospital Plaintiff was suing in a medical malpractice case?
2. Was it appropriate for the Appeals Court to not Order to remand back to the Superior Court further proceedings to question what other connections to the Defendants the judge's wife had to the hospital, which was within their authority to do?
3. In the Interests of Justice and public interests, was it appropriate for the Appellate Court or The Massachusetts Supreme Court, (who declined to review a Further Appellate Review application) to not reach the issue of whether the trial judge in this case should have either recused himself because his spouse, a doctor, had some sort of undisclosed financial relationship with at least one of the defendants in the medical malpractice case the judge was presiding over, or that he failed to disclose the relationship to the parties prior to litigation, all of which gives an appearance of impropriety to the common person aware of all these facts?
4. Would the Appearance of a doctor's wife being, at the least, admitted to practice in a hospital the Plaintiff was suing give the appearance to the common man reason to doubt the judge's impartiality if this information was concealed by the judge?

QUESTIONS PRESENTED – Continued

5. Shall a judge be allowed to rule on a Motion that seeks to set aside a trial based on his own wife's admitted connection to the defendants?
6. Shall we send the message to the public that judges cover up for other judges by using technicalities over the interests of justice?

PARTIES TO THE PROCEEDING

Petitioner BRIAN EVANS, Administrator of The Estate of Helen Marie Bousquet, was the plaintiff in the district court proceedings and appellant in the court of appeals proceedings. Respondents Dr. Ronald Marvin M.D., et al., were the appellees in the court of appeals proceedings.

STATEMENT OF RELATED CASES

Evans v. Marvin, et al., No. 1577CV00569, Essex County Superior Court, Lawrence, Massachusetts—Judgment Entered October 6, 2021.

Evans v. Marvin, et al., No. 2019-P-0288, Massachusetts Court of Appeals—Judgment Entered November 22, 2021.

Evans v. Marvin, et al., Docket No. FAR-28606, Massachusetts Supreme Court—Judgment Entered Docket January 14, 2022.

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Brian Evans petitions for a writ of certiorari to review the judgment of the Massachusetts Supreme Court (or Massachusetts Appeals Court, I'm not sure which given no opinion was given by the Massachusetts Supreme Court given they just declined to accept the case, whereas an Opinion was actually issued by the Massachusetts Appeals Court) in this case.



OPINIONS BELOW

The Opinion (Denial for Further Appellate Review) of The Massachusetts Supreme Court filed on January 14, 2022 is unpublished and is reproduced in the Appendix at App. 1.

The Opinion of The Massachusetts Appeals Court filed on November 22, 2021 is unpublished and is reproduced in the Appendix at App. 2.

The Order of the Essex County Superior Court filed on October 5th, 2020 is unpublished and is reproduced in the Appendix at App. 24.



JURISDICTION

The denial of the Appeal from the Massachusetts Court of Appeals was on November 22, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.



STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case does not involve interpretation of statutory or constitutional provisions.



INTRODUCTION AND STATEMENT OF THE CASE

The Complaint alleging medical malpractice upon Helen Marie Bousquet, Plaintiff's mother, who went to the hospital to receive elective knee surgery and who died while being left in an unmonitored recovery room despite the hospital knowing she had a condition known as Sleep Apnea, which the very hospital diagnosed her with months prior to her surgery (and provided no CPAP or any monitoring) was filed in the Essex Superior Court on April 13, 2015. It should be noted that a Defendant nurse was found to be negligent in the case, but the hospital was not held responsible, a hospital the judge's wife, a doctor (which in itself should have been revealed) was admitted to practice in, as was admitted by the Superior Court judge in his Order denying Plaintiff's motion, only in the midst of Evans' Appeal when he discovered this on his own two years later, and again, in the midst of his Appeal. There was no opportunity to raise the issue at trial as the trial judge concealed his wife's connection to the hospital from the Plaintiff until Evans discovered it two years later during his Appeal.

Appellant was represented by counsel, and jury trial of the Complaint commenced on August 27, 2018, the Hon. Salim Tabit presiding. The jury returned a

verdict in favor of all the Defendants and judgment entered on September 17, 2018.

Notice of appeal by Evans was timely filed on October 4, 2018, and then pro se Evans, representing himself during the COVID-19 pandemic, was not able to hire an attorney to perfect the instant appeal until November 12, 2020.

The Court of Appeals denied all requested relief on November 22, 2021. The rescript of the Court of Appeals is appended to the instant Request.

Appellant submits that the question this Court ought to consider is whether the known facts of this case—i.e., the trial judge’s wife having an undisclosed relationship with the defendants in this matter and the failure to disclose the relationship to the Appellant gives the appearance of impropriety and unfairness to the common person thus violating the Judicial Conduct rules.

In the Appellees argument, Plaintiff Evans failed to raise the issue of the judge’s wife’s connection to the hospital until two years after the trial had ended, however the Plaintiff did not discover this information until two years later and into the appeal when a website article was posted online. Evans immediately filed a Motion to a Mistrial to that same judge, and Appellees argued that Evans was not an attorney and should not be able to “practice law,” despite the Defendants responding to all other motions Plaintiff had filed without objection in the lower court in Lawrence, Massachusetts. In the Interests of Justice and Public

Interests, the Appeals Court should have erred on the side of caution and granted Evans' Appeal, or in the least, the Appeals Court had the power to remand the case back to the lower superior court to further question the judge as to why he did not reveal his wife's connection with the hospital. The judge then denied Evans' Motion for a Mistrial/Retrial based on this information, the judge himself denying said Motion for a Mistrial/Retrial. On Appeal, The Massachusetts Appeals Court stated that the judge's wife merely being "admitted to practice" was not sufficient in a footnote, to order a new trial. However, the Appeals Court had within its discretion the ability to further question just how deep the rabbit hole went. The Appeals Court requested no information about how long she was admitted to practice in the very hospital Evans sued, if she was making any income that was earned within the judge's household, if the judge's wife had any other dealings or business with the numerous other doctors who worked for the very same hospital and whether or not some of the Defendants had paid her, or if any of the corporate Defendants had paid her. None of these questions were asked of the judge by the Appeals Court, who simply stated that Evans hadn't Appealed the Order fast enough. It should be noted that contrary to the Rules in Massachusetts, it took the lower court Court Reporter 17 months to even provide Evans with the transcripts for his Appeal, far beyond the 120 days that Massachusetts law required (and this was long before COVID became an issue).

The questions here are the Appearance. The judge in the lower court had a duty to recuse himself, or to

alert the parties that his wife was a doctor. As Evans was suing doctors, doctors the judge's wife knew, that alone should have been revealed. However not only was that not revealed, it was also not revealed that the judge's wife was actually, in the least and admitted by the lower state Court's judge, that his wife was admitted to practice in the hospital the Plaintiff was suing, and her husband, the judge, then ruled on that Motion for a Mistrial/Retrial based on his concealment of her relationship to the Defendants. The Appeals Court had a duty to put the interests of justice and Appearances over a colleague judge's interests.

Canon 2A states: An appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired.

Plaintiff, who was pro se at the time, did not Appeal the Order by the lower court judge who ruled on a motion filed by him because as a non-lawyer, he simply did not know he had to and various motions in the Appeals Court clearly displayed Evans, by his various motions to the Appeals Court, that the judge's wife and her connection to the hospital was at issue, and nowhere did the Defendants through counsel raise that issue until filing their Reply Briefs and at Oral Argument. However, the bigger picture is the integrity of the judicial system, the interests of justice, and the public's perception of fairness within the Courts, and

all of the courts had within their discretion to put justice over a pro se defendant's technicality.



REASONS FOR GRANTING THE PETITION

The Judge in this case concealed that his wife was a doctor admitted to practice in the very hospital that the Plaintiff was suing. Plaintiff was suing other doctors in that hospital, doctors the judge's wife may have worked with given they worked at the same hospital, a hospital the judge's wife was admitted to practice in, which the Plaintiff did not gain knowledge of until in the midst of his Appeal. The interests of justice and public interest must prevail over any minor technicality.

To state the point succinctly, the very integrity of the Judicial Branch of the Commonwealth of Massachusetts, and indeed courts across the United States is at stake in this matter and this is the reason why the Court ought to this Writ and set the correct precedent for analogous situations that may arise, namely that the trial judge in this case knew, or should have known, that his wife, a doctor, had some type of working relationship with one of the defendants in the medical malpractice case then before him, but failed to disclose such relationship, which would have given the parties an opportunity to delve into the relationship and make appropriate objections if necessary. Appellant contends this lack of disclosure alone creates an appearance of impropriety, which in turn jeopardizes the appearance

of judicial impartiality throughout the Commonwealth's courts.

United States Supreme Court Justice John Roberts recently, publicly, made the issue of appearance being a big problem within the judicial system. Rule 2.11 of the Commonwealth's code of judicial conduct states in pertinent part that a judge shall "disqualify himself or herself in any proceeding in which . . . the judge's impartiality might reasonably be questioned." 2.11 (A). This includes circumstances where "[t]he judge knows that . . . the judge's spouse . . . is" id. (2) "a person who has more than a de minimis financial or other interest that could be substantially affected by the proceeding", id. (2)(c), or "The judge knows . . . or the judge's spouse . . . [that the judge or spouse] has an economic interest in the subject matter of the controversy", id. (3). The rule further requires that a judge "keep informed" about his spouse's "personal economic interests" id. (B).

Section (C) of the Rule implies that a judge ought to inform the parties of any possible conflicts involving him or his family and place on the record any disqualifying issues.

The Editors' Notes and Comments to the Rule states that "The objective standard requires disqualification whenever the judge's impartiality might reasonably be questioned by a fully-informed disinterested observer, regardless of whether any of the specific provisions of Paragraphs (A)(1) through (5) apply. Comments at ¶ 1. The Comments at ¶ 2 states that judges

are obligated to consider disqualification sua sponte without motion. Finally, the Comments at ¶7 make it clear that a judge “should disclose on the record information that the judge believes the parties, or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.”

Appellant submits that the trial judge, in this case, failed to follow this rule. Moreover, the Appellate Court failed to reach this issue in their denial, simply ruling that Appellant should have discovered the relationship earlier and that the issue was not properly preserved for appeal because the pro se Appellant, who contends that he was abandoned after the adverse verdict by his trial counsel, did not follow proper procedure in filing a notice of appeal relative to the issue. However Evans did not discover the judge's wife's relationship to the Defendants until the midst of his appeal.

In 28 U.S.C. §455. Disqualification of justice, judge, or magistrate judge (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Pursuant to the appearance of impropriety rule, Appellant submits that litigants have absolutely no obligation to investigate the background of any judge that they appear before.

The questions here are the Appearances and Public perception and interests, over protecting a fellow

judge. That is exactly what the common man would believe, and has certainly been the opinion of the common man after this entire case, a case that was over the moment this judge was assigned to this case and concealed his wife's involvement with the Defendants. He had a duty to disclose it. Plaintiff is not arguing bias, but the Appearance of impartiality and this judge far surpassed that.

The Appeals Court did nothing to make certain that the interests of justice prevailed over making sure a judge, who was on the cover of The Massachusetts Lawyers Weekly over this issue when this issue was revealed by Plaintiff prior to the Appeals Court Order, was impartial given his wife's connection to the hospital.

It is a judge's duty, who have statutory obligations, to be aware of their and their families' relationships and to disclose sua sponte any possible potential conflicts to the parties in each particular case. This was not done here, and the relationship was never disclosed, leaving the taint of impropriety and unfairness.

While the Appellate Court, delegating their statement to footnote 12, concluded that the judge's wife only had "admitting privileges" to the defendant hospital, such a statement is not based on any tested fact nor is there any evidence in this case what admitting privileges encompass at the defendant hospital or what financial benefits the judge's spouse reaped from her relationship with the hospital. None of these facts are in the record because the judge failed to disclose to

any of the parties his wife's relationship with the hospital when the case was before him.

It is ironic that the Appellate Court below once noted, "Our decisions and those of the Supreme Judicial Court have commented often and in a variety of contexts on the importance of maintaining not only fairness but also the appearance of fairness in every judicial proceeding" *Adoption of Tia*, 73 Mass. App. Ct. 115, 122 (2008) (listing cases), and yet completely ignored in the instant decision the impact of the failure to disclose the relationship by the trial judge and that known facts give an appearance of impropriety in this case. Also see, *Commonwealth v. Morgan RV Resorts, LLC*, 84 Mass. App. Ct. 1, 8-9 (2013) (listing cases); In *Morgan*, the judge herself had been once involved in acrimonious litigation with a party's law firm, and while the Court determined the judge's decision not to recuse herself was made in the good-faith belief that she could decide the case impartially, the Court held that a reasonable person would question her impartiality and she should have recused herself.

It is virtually unheard of in the Commonwealth's courts that a judge does not disclose information required by the Judicial Conduct rules. See, e.g., *Commonwealth v. Duarte*, 477 Mass. 630, 632-633 (2017) (trial judge recuses himself because his son was an assistance district attorney); *United States v. Cargill, Inc.*, 66 F.3d 1256, 1258 (1st Cir. 1995) (judge discloses his prior relationship with attorney); *Meyer v. Daniels*, No. 90 Mass. App. Ct. 1106 (unpublished) (trial judge realizes possible connection with potential witness and

informs parties sua sponte); *Commonwealth v. Norris*, 483 Mass. 681, 695 (2019) (judge informed parties at sidebar as soon as she realized that as a lawyer she had represented someone in party's family)

Therefore, based on the foregoing, Appellant submits that the question this Court ought to consider is whether the known facts of this case—i.e., the trial judge's wife having an undisclosed relationship with the defendants in this matter and the failure to disclose the relationship to the Appellant gives the appearance of impropriety and unfairness to the common person thus violating the Judicial Conduct rules.

◆

CONCLUSION

The case should be Ordered for a new trial, or at a minimum, remanded to the lower court so that the judge in this case is made to answer as to what other connections, aside from his own admission that his wife was admitted to practice in the hospital the Plaintiff was suing, there was or is.

The Appearance of Impartiality is at issue in this case, and the common man's assessment, which is all that is required under the law, would surely raise a question as to this judge's impartiality. This case has already become a public interest matter, as 39 United States Governors issued Sleep Apnea Proclamations as direct result as to what happened here to Mrs. Bousquet, and like the 39 Governors, most of whom

mention the decedent by name, we must not allow technicalities to prevail over the interests of justice.

The Court ought to grant this Writ in the interests of justice to clearly set the standards for judicial conduct within the Commonwealth, and indeed the United States as a whole for future matters where a judge's family member has a relationship with a party in a case to be heard before that judge. The Courts are here to protect the interests of justice, and not to sweep under the rug serious questions that must be answered. None of the lower courts prior to this Writ to the United States Supreme Court have put the interests of justice of public interests over protecting the judge who presided over this case, then ruled on motions about his own wife.

Respectfully submitted,

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App. 1

8:06

6 Messages

< All Inboxes **FAR-28606 – Notice: . . . ^ v**

-----Original Message-----

From: SJC Full Court Clerk

<SJCCommClerk@sjc.state.ma.us>

Sent: Friday, January 14, 2022 4:00 PM

To: richard@chamberslawoffice.com

Subject: FAR-28606 – Notice: FAR denied

Supreme Judicial Court for the Commonwealth of
Massachusetts

RE: Docket No. FAR-28606

BRIAN K. EVANS, administrator

vs.

RONALD A. MARVIN & others

Essex Superior Court No. 1577CV00569

A.C. No. 2019-P-0288

**NOTICE OF DENIAL OF APPLICATION FOR
FURTHER APPELLATE REVIEW**

Please take note that on January 14, 2022, the appli-
cation for further appellate review was denied.

Francis V. Kenneally Clerk

Dated: January 14, 2022

To: Richard C. Chambers, Jr., Esquire

Chad R Brouillard, Esquire

Shylah Maloney, Esquire

Lydia Carleton Knight, Esquire

Timothy B. Sweetland, Esquire

App. 2

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-288

BRIAN K. EVANS, administrator,¹

vs.

RONALD A. MARVIN & others.²

MEMORANDUM AND ORDER
PURSUANT TO RULE 23.0

(Filed Nov. 22, 2021)

A jury in the Superior Court returned a verdict in favor of the defendants in this medical malpractice

¹ Of the estate of Helen Marie Bousquet.

² Krisin A. Dasilva, Orthopaedics Northeast, P.C., Anne Maria Mede, Holy Family Hospital, Steward Medical Group Inc., and Steward Health Care System, L.L.C.

App. 3

wrongful death action. The plaintiff appeals arguing that the judge erred in failing to dismiss a juror and in failing to instruct the juror that he could not consider or share his personal experiences in deliberations. The plaintiff separately contends that the judge abused his discretion in failing to recuse himself from the case due to his wife's alleged connection to one of the defendant parties. For the reasons that follow, we affirm.

Background. The plaintiff is the son of decedent Helen Bousquet, who passed away in 2012 at Holy Family Hospital in Methuen several days after a knee replacement surgery. The plaintiff filed a wrongful death suit, alleging that his mother died as a result of negligent pre and post-operative care.³

At the jury trial, Bousquet's cause of death was disputed. The plaintiff contended that she died from respiratory failure caused by the coalescence of her sleep apnea and the negligent administration of post-operative narcotics. Defendants argued that her cause of death was a primary cardiac event that led to a fatal arrhythmia.

Several days into trial, juror number 27 informed the judge that he had suffered a heart attack and understood that heart attacks could arise without warning and could afflict unexpected victims. The judge conducted a sidebar conference and questioned juror

³ One of the named defendants, Sridhar R. Ganda, D.O., settled with the plaintiff and was dismissed from the case prior to trial.

App. 4

27 to assess his impartiality.⁴ During sidebar, the plaintiff's counsel expressed concern that juror 27 would share his perspective with the other members of the jury. Counsel expressed her opinion that the juror should be dismissed, or in the alternative, that he should be instructed not to speak to the other jurors about his experience.⁵ Following these conversations and a brief recess to research the law, the judge retained juror 27, noting there was nothing to suggest he could not be impartial, and that a thorough instruction was the "less intrusive alternative."⁶ The judge instructed juror 27 to put his personal views aside until the close of evidence and to avoid discussing his cardiac history with the other jurors. The juror agreed that he would do so. At the end of the sidebar and the judge's instruction to the juror, the juror returned to his seat on the jury and neither party objected. Prior to deliberations, the judge also instructed the jury as a whole that they could rely on their common sense and

⁴ The judge had already found each individual juror to be indifferent and impartial prior to their seating. And at the beginning of trial, he stated further that the jury as a group stood indifferent. Neither party objected and the jury were sworn.

⁵ The plaintiff's counsel stated: "I'm also now concerned that he's going to go in and talk to the rest of the jurors about his condition. You know, if you're inclined to keeping him, I would want an instruction that he can't go talk about that. I think he should be let go."

⁶ The judge also stated his belief that the question of whether cardiac events could occur suddenly was "not [at] issue here."

App. 5

life experiences in considering the evidence.⁷ Again, neither party objected.

The jury found in favor of the defendants.⁸ The plaintiff timely appealed to this court.

Two years passed. Then, the plaintiff discovered that the trial judge's wife may have had admitting privileges at defendant Holy Family Hospital at the time of the trial. The plaintiff promptly filed a motion for a mistrial, a motion for recusal, and a motion for a new trial arguing that the trial judge was obligated to disclose his wife's alleged relationship with defendant Holy Family and recuse himself from the case.⁹ The judge denied these motions due to the plaintiff's failure to comply with Rule 9A of the Rules of the Superior

⁷ The judge instructed: "Now, the final thing is that, you know, when you go in to deliberate – and I'm going to instruct you a little bit on this – it is appropriate for you to use your own common sense, your own life experiences. I mean, how else do you put into context the evidence that's been presented in this case? And that is perfectly appropriate. And to the extent that any party asks you to use your common sense, to use your life experiences and what you know of those experiences in relating to the evidence, that is appropriate." "Again, you should use your life experiences to evaluate the evidence, but it is not proper, nor should you try to put yourselves in the shoes of any of the parties in this case."

⁸ The jury did find that one of the defendants, a nurse, was negligent in her care and treatment of the decedent. But it went on to find that this negligence was not a substantial contributing factor in causing the decedent's death.

⁹ In these initial motions, the plaintiff described the relationship between the judge's wife and Holy Family as an employment relationship. However, the judge clarified the nature of the relationship in his order on the motions.

App. 6

Court (2020), but also noted that even had the plaintiff complied with the rule, he would have denied the motion on the merits.¹⁰ The plaintiff filed a motion for reconsideration, which was denied. The plaintiff did not file a notice of appeal from either of the denials relating to recusal.

Discussion. 1. Juror 27. The plaintiff argues that the judge erred in failing to dismiss juror 27 and in instructing the jury that they could rely on their life experiences, along with other relevant factors, in deciding the case. Specifically, he contends that Juror 27's personal experience of having suffered a heart attack led him to "make up his mind" about the decedent's cause of death¹¹ and to "inject" impermissible and "extrinsic" personal opinions into deliberations.

This claim is waived because the plaintiff's trial counsel failed to object when the judge announced his decision to keep juror 27. To preserve an error for appellate review, a party must "make a specific objection on point before the trial judge" (quotation and citation

¹⁰ The judge stated: "The plaintiff's assertions that my wife is employed by Steward Holy family Hospital are simply wrong. [My wife] is currently employed by MGH, Brockton, formerly Partners Healthcare. Prior to that, [she] was employed by Greater Lawrence Family Health Center. While [she] may have had admitting privileges at Holy Family Hospital, she has never been employed there. Upon consideration pursuant to [the] Supreme Judicial Court's two-part test of impartiality identified in Lena v. Commonwealth, 369 Mass. 571 (1976), the court is confident in its impartiality."

¹¹ The plaintiff further argues that "[t]he issue of a cardiac event and what caused it was at the gravamen of the trial."

App. 7

omitted). Wildlands Trust of Southeastern Massachusetts, Inc. v. Cedar Hill Retreat Center, Inc., 98 Mass. App. Ct. 775, 787 (2020). The requirement of an objection is a “fundamental principle of appellate review.” Commonwealth v. Gallison, 383 Mass. 659, 669 (1981). Counsel merely expressed her concern over the situation but did not directly object. She stated: “[y]ou know, if you’re inclined to keeping him, I would want an instruction that he can’t go talk about that. I think he should be let go.” Counsel’s ambivalent statement that she thought juror 27 should be dismissed was thus insufficient to satisfy our basic requirement of appellate review.

Even assuming counsel made a proper objection, the judge did not abuse his discretion by retaining juror 27. In evaluating a juror’s impartiality “it is sufficient for the judge to inquire whether potential jurors can set aside their own opinions, properly weigh the evidence, and follow the judge’s instructions.” Commonwealth v. Chambers, 93 Mass. App. Ct. 806, 809 (2018). “A trial judge is vested with the discretion to discharge a juror prior to deliberations ‘in the best interests of justice.’” Commonwealth v. Howard, 479 Mass. 52, 66 (2018), quoting G. L. c. 234A, § 39. “[A] determination by the judge that a jury are impartial will not be overturned on appeal in the absence of a clear showing of abuse of discretion or that the finding was clearly erroneous” (citation omitted). Chambers, 93 Mass. App. at 809.

Before deciding to keep juror 27, the judge spoke to him at length and in front of counsel to evaluate his

ability to set aside his experience and remain neutral. After determining that juror 27 was capable of doing so, the judge instructed him accordingly. Juror 27 agreed to follow these instructions. Given the judge's thorough investigation and instructions, we see no error or abuse of discretion.

Nor did the judge err in instructing juror 27 and the jury as a whole, that they could bring their life experiences into the deliberation room. Our courts have recognized that it would be "unrealistic and undesirable" to "expect jurors to perform their duties without the benefit of their life experiences." Commonwealth v. Watt, 484 Mass. 742, 759 (2020). Contrary to the plaintiff's assertion, these experiences do not constitute extraneous evidence. Indeed, our courts have explicitly distinguished the two sources of information. See *id.* at 758759.

2. Disclosure and recusal. The plaintiff also argues that the trial judge abused his discretion in failing to disclose his wife's affiliation with defendant Holy Family Hospital and in failing to recuse himself from the case. However, the plaintiff failed to file a notice of appeal from either of the denials of his motions regarding the issue of recusal. Accordingly, this claim is waived as the plaintiff failed to comply with Mass. R. A. P. 4 (a) (1), as appearing in 481 Mass. 1606 (2019). See New Bedford Hous. Auth. v. Olan, 435 Mass. 364, 372 (2001). Under Rule 4 (a) (1), a notice of appeal must "be filed with the clerk of the lower court within 30 days of the date of the entry of the judgment, decree, appealable order, or adjudication." See DeLucia v.

App. 9

Kfoury, 93 Mass. App. Ct. 166, 170 (“A timely notice of appeal is a jurisdictional prerequisite to our authority to consider any matter on appeal”).

Even if the plaintiff had filed a notice of appeal, his claim would still be untimely. “Recusal motions filed after trial are presumptively untimely at least absent a showing of good cause for tardiness” (citation omitted). Demoulas v. Demoulas, 432 Mass. 43, 50 (2000). When filing an untimely motion, the moving party must “make a strong showing that nothing could have been done at an earlier time” (citation omitted). Id. Not only is plaintiff’s claim presumptively untimely, but he has also failed to make a showing of good cause for why he could not have discovered the information at issue prior to trial.¹²

¹² Plaintiff’s claim would not have succeeded even if it had been timely raised. While it may have been better practice for the judge prior to trial to reveal that his wife had admitting privileges at Holy Family Hospital, the nature of such ‘privileges’ was not sufficiently substantial to require the judge’s recusal. See June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2112 (2020), quoting La. Rev. Stat. Ann. § 40:1061(A)(2)(a) (“‘active admitting privileges’ [] mean[s] that the doctor must be a member in good standing of the hospital’s medical staff . . . with the ability to admit a patient and to provide diagnostic and surgical services to such patient”). See also Whole Woman’s Health v. Hellerstedt, 136 S. Ct. 2292, 2310-2313 (2016) (discussing admitting privileges).

App. 10

Judgment affirmed.

By the Court (Milkey, Henry
& Walsh, JJ.¹³),

/s/ Joseph F. Stanton
Clerk

Entered: November 22, 2021.

¹³ The panelists are listed in order of seniority.

App. 11

Commonwealth of Massachusetts
Appeals Court for the Commonwealth
At Boston

In the case no. 19-P-288

BRIAN K. EVANS, administrator,

vs.

RONALD A. MARVIN & others.

(Filed Nov. 22, 2021)

Pending in the Superior

Court for the County of Essex

Ordered, that the following entry be made on the
docket:

Judgment affirmed.

By the Court,

/s/ Joseph F. Stanton, Clerk

Date November 22, 2021.

<p align="center">JUDGMENT ON JURY VERDICT</p>	<p>Trial Court of Massachusetts The Superior Court</p>
<p>DOCKET NUMBER 1577CV00569</p>	<p>Thomas H. Driscoll, Jr., Clerk of Courts</p>
<p>CASE NAME Brian Evans Administrator of the Estate of Helen Marie Bousquet et al vs. Ronald A Marvin, M.D. et al</p>	<p>COURT NAME & ADDRESS Essex County Superior Court – Lawrence 43 Appleton Way Lawrence, MA 01841</p>
<p>JUDGMENT FOR THE FOLLOWING DEFENDANT(S) Marvin, M.D., Ronald A Orthopaedics Northeast PC Dasilva RN, Kristin A Mede RN, Anne Marie Holy Family Hospital</p>	
<p>JUDGMENT AGAINST THE FOLLOWING PLAIN- TIFFS) Brian Evans Administrator of the Estate of Helen Marie Bousquet</p>	
<p>This action came on for a jury trial before the Court, Hon. Salim Tabit, presiding, the issues having been duly tried and the jury having rendered its verdict, It is ORDERED AND ADJUDGED: That the above named plaintiff(s) take nothing, that the action be dismissed on the merits, and that the defendant(s) named above will recover statutory costs.</p>	

App. 13

DATE JUDGMENT ENTERED 09/17/2018	CLERK OF COURTS/ASST. CLERK X [Illegible]
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App. 14

Commonwealth of Massachusetts
Supreme Judicial Court

—◆—

No. 2019-P-0288

BRIAN K. EVANS, *et al.*,

Appellants,

— against —

KRISTIN A. DASILVA, R.N. & others,

Appellees.

ON APPEAL FROM THE ORDER OF
THE APPEALS COURT FOR THE
COMMONWEALTH OF MASSACHUSETTS

**APPLICATION FOR FURTHER
APPELLATE REVIEW**

(Filed Dec. 10, 2021)

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**[4] REQUEST FOR FURTHER
APPELLATE REVIEW**

The Appellant, Brian Evans *et al.*, (hereinafter, “Appellant” and/or “Evans”) respectfully requests further appellate review of his Appeal, which was decided by a panel of the Appeals Court on November 22, 2021. A copy of the memorandum and order of the Appellate Court appears in the addendum to this application. The Appellant submits that this application is founded upon substantial reasons affecting the public interest and the interests of justice.

STATEMENT OF PRIOR PROCEEDINGS

The Complaint alleging medical malpractice was filed in the Essex Superior Court on April 13, 2015.

Appellant was represented by counsel, and jury trial of the Complaint commenced on August 27, 2018,

the Hon. Salim Tabit presiding. The jury returned a verdict in favor of all the Defendants and judgment entered on September 17, 2018.

Notice of appeal by Evans was timely filed on October 4, 2018, and then *pro se* Evans, representing himself during the COVID-19 pandemic, was not able to hire an attorney to perfect the instant appeal until November 12, 2020.

[5] The Court of Appeals denied all requested relief on November 22, 2021. The rescript of the Court of Appeals is appended to the instant Request.

STATEMENT OF FACTS

Pursuant to Rule 27.1(b)(3), Mass. R.A.P., Appellant generally agrees with the factual background given by the Appellate Court in their decision appended hereto and thus does not repeat it here. *However*, Appellant disagrees with the Appellate Court's view at page 4 and notes 9 and 10 that in any manner suggests that the trial judge's wife only had admitting privileges at the defendant hospital and that the judge's wife did not have some sort of financial relationship with the defendant hospital.

STATEMENT OF POINT REQUIRING FURTHER APPELLATE REVIEW

Did the Appellate Court err in not reaching the issue of whether the trial judge in this case should have either recused himself because his spouse, a

doctor, had some sort of undisclosed financial relationship with at least one of the defendants in the medical malpractice case the judge was presiding over, or that he failed to disclose the relationship to the parties prior to litigation, all of which gives [6] an appearance of impropriety to the common person aware of all these facts?

**REASON WHY FURTHER APPELLATE
REVIEW IS APPROPRIATE**

To state the point succinctly, the very integrity of the Judicial Branch of the Commonwealth of Massachusetts is at stake in this matter and this is the reason why the Court ought to grant further review and set the correct precedent for analogous situations that may arise, namely that the trial judge in this case knew, or should have known, that his wife, a doctor, had some type of working relationship with one of the defendants in the medical malpractice case then before him, but failed to disclose such relationship, which would have given the parties an opportunity to delve into the relationship and make appropriate objections if necessary. Appellant contends this lack of disclosure alone creates an appearance of impropriety, which in turn jeopardizes the appearance of judicial impartiality throughout the Commonwealth's courts.

Rule 2.11 of the Commonwealth's code of judicial conduct states in pertinent part that a judge shall "disqualify himself or herself in any proceeding in [7] which . . . the judge's impartiality might reasonably be

questioned.” 2.11 (A). This includes circumstances where “[t]he judge knows that . . . the judge’s spouse . . . is” *id.* (2) “a person who has more than a de minimis financial or other interest that could be substantially affected by the proceeding”, *id.* (2)(c), or “The judge knows . . . or the judge’s spouse . . . [that the judge or spouse] has an economic interest in the subject matter of the controversy”, *id.* (3). The rule further requires that a judge “keep informed” about his spouse’s “personal economic interests” *id.* (B). Section (C) of the Rule implies that a judge ought to inform the parties of any possible conflicts involving him or his family and place on the record any disqualifying issues.

The Editors’ Notes and Comments to the Rule states that “The objective standard requires disqualification whenever the judge’s impartiality might reasonably be questioned by a fully-informed disinterested observer, regardless of whether any of the specific provisions of Paragraph (A)(1) through (5) apply. *Comments* at ¶ 1. The Comments at ¶ 2 states that judges are obligated to consider disqualification *sua sponte* without motion. Finally, the Comments at ¶ [8] 5 make it clear that a judge “should disclose on the record information that the judge believes the parties, or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.”

Appellant submits that the trial judge, in this case, failed to follow this rule. Moreover, the Appellate Court failed to reach this issue in their denial, simply ruling that Appellant should have discovered the

relationship earlier and that the issue was not properly preserved for appeal because the *pro se* Appellant, who contends that he was abandoned after the adverse verdict by his trial counsel, did not follow proper procedure in filing a notice of appeal relative to the issue.

Pursuant to the appearance of impropriety rule, Appellant submits that litigants have absolutely no obligation to investigate the background of any judge that they appear before. It is a *judge's* duty, who have statutory obligations, to be aware of their and their families' relationships and to disclose *sua sponte* any possible potential conflicts to the parties in each particular case. This was not done here, and [9] the relationship was never disclosed, leaving the taint of impropriety and unfairness.

While the Appellate Court, delegating their statement to footnote 12, concluded that the judge's wife only had "admitting privileges" to the defendant hospital, such a statement is not based on any *tested* fact nor is there any evidence in this case what admitting privileges encompass at the defendant hospital or what financial benefits the judge's spouse reaped from her relationship with the hospital. None of these *facts* are in the record because the judge failed to disclose to any of the parties his wife's relationship with the hospital when the case was before him.

It is ironic that the Appellate Court below once noted, "Our decisions and those of the Supreme Judicial Court have commented often and in a variety of

contexts on the importance of maintaining not only fairness but also the appearance of fairness in every judicial proceeding” *Adoption of Tia*, 73 Mass.App.Ct. 115, 122 (2008) (listing cases), and yet completely ignored in the instant decision the impact of the failure to disclose the relationship by the trial [10] judge and that known facts give an appearance of impropriety in this case. *Also see, Commonwealth v. Morgan RV Resorts, LLC*, 84 Mass.App.Ct. 1, 8-9 (2013) (listing cases); In *Morgan*, the judge herself had been once involved in acrimonious litigation with a party’s law firm, and while the Court determined the judge’s decision not to recuse herself was made in the good-faith belief that she could decide the case impartially, the Court held that a reasonable person would question her impartiality and she should have recused herself.

It is virtually unheard of in the Commonwealth’s courts that a judge does not disclose information required by the Judicial Conduct rules. *See, e.g., Commonwealth v. Duarte*, 477 Mass. 630, 632-633 (2017) (trial judge recuses himself because his son was an assistance district attorney); *United States v. Cargill, Inc.*, 66 F.3d 1256, 1258 (1st Cir. 1995) (judge discloses his prior relationship with attorney); *Meyer v. Daniels*, No. 90 Mass.App.Ct. 1106 (unpublished) (trial judge realizes possible connection with potential witness and informs parties *sua sponte*); *Commonwealth v. Norris*, 483 Mass. 681, 695 (2019) (judge informed parties at sidebar as soon [11] as she realized that as a lawyer she had represented someone in party’s family)

Therefore, based on the foregoing, Appellant submits that the question this Court ought to consider is whether the *known* facts of this case – i.e., the trial judge’s wife having an undisclosed relationship with the defendants in this matter and the failure to disclose the relationship to the Appellant gives the appearance of impropriety and unfairness to the common person thus violating the Judicial Conduct rules.

CONCLUSION

The Court ought to grant further appellate review in the interests of justice to clearly set the standards for judicial conduct within the Commonwealth for future matters where a judge’s family member has a relationship with a party in a case to be heard before that judge.

Respectfully submitted,
The Appellant,
Brian Evans,
By his attorney,

DATED: December 10, 2021

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[13] **CERTIFICATON UNDER RULE 16
OF MASS.R.A.P.**

Now comes, Richard C. Chambers, Jr., Esq., counsel for the Application for Further Appellate Review, and hereby certifies that the Brief submitted herewith complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass.R.A.P. 16(a)(6) (pertinent findings or memoranda of decision); Mass.R.A.P. 16(e) (references to the record); Mass.R.A.P. 16(f) (reproduction of statutes, rules, regulations); Mass.R.A.P. 16(h) (length of brief); Mass.R.A.P. 18 (appendix to the briefs); and Mass.R.A.P. 20 (form of briefs, appendices and other papers). The font used in this Brief is Courier New, 12 point. Not including the non-exclusionary pages, the Brief contains 12 pages.

I further attest that this brief is being filed and service via electronic filing.

/s/Richard C. Chambers, Jr.
Richard C. Chambers, Jr.

App. 24

**ESSEX COUNTY SUPERIOR COURT
LAWRENCE, MASSACHUSETTS**

BRIAN EVANS, Administrator
of The Estate of Helen Marie
Bousquet

(Filed Oct. 5, 2020)

v.

DR. RONALD MARVIN, et al

CASE NUMBER
1577CV00569

MOTION FOR DECLARATION OF MISTRIAL,
MOTION FOR RECUSAL, AND MOTION TO
SET NEW TRIAL FOR JUDGE TABITS
FAILURE TO DISCLOSE HIS WIFE WAS
EMPLOYED BY CO-DEFENDANTS

Plaintiff, Brian Evans, Administrator of the Estate of Helen Marie Bousquet herein files this Motion for Immediate Remand for Retrial in the Case of Evans v. Dr. Ronald Marvin. The presiding Judge in the Lower Court Salim Tabit, is the husband of Jean Tabit, DO, who had been employed by Co-Defendant Steward Holy Family Hospital and had an obligation to disclose and then recuse himself from this trial as a result. This was just discovered in the last two weeks.

The Plaintiff just learned that the Judge in this case is married to a woman who was employed by Co-Defendants in this case and never disclosed it to anyone. So, while this Judge was questioning whether or not the jury members were in any way connected to the Defendants as we attempted to seat a jury, The Judge in this case knew that his own wife was.

App. 25

The recent application of the “appearance of impartiality” standard by the First Circuit in *In re Bulger*, 710 F.3d 42 (1stCir. 2013), which demonstrates that this standard may—and in that case

* * *
