

No. 21-1257

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IN THE  
**Supreme Court of the United States**

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BRIAN EVANS, AS THE ADMINISTRATOR  
OF THE ESTATE OF HELEN MARIE BOUSQUET,

*Petitioner,*

v.

RONALD A. MARVIN, M.D., ET AL.,

*Respondents.*

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ON PETITION FOR WRIT OF CERTIORARI TO THE  
COMMONWEALTH OF MASSACHUSETTS APPEALS COURT

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**RESPONDENTS' OPPOSITION BRIEF**

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Chad P. Brouillard

*Counsel of Record*

cbrouillard@fosteld.com

Siobhainin S. Funchion

sfunchion@fosteld.com

Foster & Eldridge, LLP

300 Trade Center, Suite 2610

Woburn, Massachusetts 01801

(617) 252-3366 – (617) 252-3377 (Fax)

*Attorneys for Respondents*

*Anne Marie Mede, R.N., Holy Family Hospital,*

*Steward Medical Group, Inc.*

*and Steward HealthCare System, LLC*

Dated: April 15, 2022

— *Additional Counsel listed on the inside cover* —

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Lydia C. Knight  
lknight@sloanewalsh.com  
Sloane and Walsh, LLP  
One Boston Place  
201 Washington Street, Suite 1600  
Boston, Massachusetts 02108  
(617) 523-6010

*Attorneys for Respondents*  
*Ronald A. Marvin, M.D. and Orthopaedics*  
*Northeast, P.C.*

**COUNTER STATEMENT OF  
QUESTION PRESENTED**

I. Does the Supreme Court of the United States have jurisdiction over this matter when it was not litigated in a Circuit Court of Appeals nor does it involve a federal question?

II. Did the Massachusetts Superior Court Judge abuse his discretion under Massachusetts State Law in failing to recuse himself from the case due to his wife's alleged connection with the defendant hospital?

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## INTRODUCTION

Petitioner's characterizations of the questions presented goes beyond the issues posed, argued, and decided below, and requests that this Court issue rulings beyond the scope of the litigated issues. The question before this court is whether the Massachusetts Superior Court Judge abused his discretion under Massachusetts State Law in failing to recuse himself from the case due to his wife's alleged connection with the defendant hospital. Plainly, the answer to this question does not involve a federal question nor is this question on appeal from a US Court of Appeals. As a result, the Supreme Court does not have jurisdiction over this case. In Massachusetts, the answer to this question is found in the two-part test of impartiality under *Lena v. Commonwealth*, 369 Mass. 571 (1976). The Massachusetts Superior Court Judge found, pursuant to *Lena v. Commonwealth*, 369 Mass. 571 (1976), that he was confident in his impartiality. Further, Petitioner, impermissibly proceeding pro se in this action, failed to file a timely Notice of Appeal under the Massachusetts Rules of Appellate Procedure, Rule 4(a)(1) of the denial of his motion regarding recusal. Consequently, the petition for certiorari, to order a new trial or remand the case for further inquiry into the Superior Court Judge's wife's relationship with the hospital defendant, should be denied.

## STATEMENT OF THE CASE

This is a medical malpractice wrongful death case brought on behalf of the Estate of Helen Bousquet by her son, Brian Evans. Plaintiff filed the Complaint in this action on April 13, 2015 in the Massachusetts Superior Court. A jury trial took place from August 27, 2018 through September 17, 2018 before the

Honorable Salim Tabit. Judgment in favor of the Defendants, Ronald Marvin, M.D., Orthopaedics Northeast, PC, Kristin DaSilva, R.N., Anne Marie Mede, R.N., and Holy Family Hospital entered on September 17, 2018. On October 4, 2018, the Plaintiff filed a Notice of Appeal in which he indicated that he planned to appeal the judgment entered in favor of the Defendants on September 17, 2018. Mr. Evans filed the Notice of Appeal pro se. In the lower court proceedings, the Court found that Evans, pro se, was not licensed to practice law, and may not represent the estate of Helen Bousquet in court proceedings.

The first mention of alleged judicial bias was not made until September 21, 2020, two years after the jury's verdict. The Appellant never requested leave from the trial court to file a Motion for New Trial but served a "Motion for Declaration of a Mistrial, Motion for Recusal and Motion to Set New Trial..." on October 1, 2020, 749 days after the judgment entered. The Superior Court Judge denied this Motion in an Order entered on October 6, 2020. The Appellant then filed a Motion for Reconsideration of this Recusal Order on October 6, 2020. The Motion for Reconsideration was denied on October 13, 2020. The Appellant failed to file a Notice of Appeal as to Judge's denial of his "Motion for Declaration of a Mistrial, Motion for Recusal and Motion to Set New Trial..." and the related Motion for Reconsideration, and Plaintiff's Writ should be denied on this basis alone.

Appellant's sole argument for judicial bias was based on information he found while conducting an internet investigation on Judge Tabit's wife for some undisclosed reason two years after judgment had entered.

Judge Tabit noted on the lower court docket that:

[t]he plaintiff's assertions that my wife is employed by Steward Holy Family Hospital are simply wrong. Dr. Tabit is currently employed by MGH, Brockton, formerly Partners Healthcare. Prior to that, Dr. Tabit was employed by Greater Lawrence Family Health Center. While Dr. Tabit may have had admitting privileges at Holy Family Hospital, she has never been employed there. Upon consideration pursuant to Supreme Judicial Court's two-part test of impartiality identified in Pena [sic] v. Commonwealth, 369 Mass. 571 (1976), the court is confident in its impartiality.

Judge Tabit's Order clarifies that Dr. Tabit never had an employment relationship with the Defendants. Judge Tabit indicated in his responsive order that Dr. Tabit's admitting privileges at the defendant Holy Family Hospital were held in the past.

The Massachusetts Appeals Court found that the Plaintiff failed to file a notice of appeal pursuant to the Massachusetts Rules of Appellate Procedure regarding the issue of recusal and that even if he had filed a timely notice of appeal, the claim would be untimely. Mass. R. App. P. 4(a)(1). Further, the Appeals Court found that if the claim was timely raised it would not have succeeded because the nature of the Judge's wife's privileges was not sufficiently substantial to require the judge's recusal. A Petition for Further Appellate Review was denied by the Massachusetts Supreme Judicial Court.

## **REASONS FOR DENYING CERTIORARI**

### **I. The Supreme Judicial Court of the United States Does Not Have Jurisdiction Over This Case**

#### **a. The Supreme Judicial Court Does Not Have Jurisdiction Because the Underlying Case Was Not Litigated in a Circuit Court of Appeals, Nor Does it Involve A Federal Question**

This Court does not have subject matter jurisdiction over the instant case. The Petitioner asserts that this Court has jurisdiction pursuant to 28 U.S.C. § 1254. However, 28 U.S.C. § 1254 does not grant this Court jurisdiction over Petitioner's case. 28 U.S.C. § 1254 grants jurisdiction for appeals of decisions from a US Court of Appeals. The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923). This case was litigated in Massachusetts state courts. At no point was the instant case filed in the Circuit Courts of Appeals. This action was first brought before the Massachusetts Superior Court on April 13, 2015. A Judgment on the jury verdict entered on behalf of the Defendants on September 17, 2018. The Plaintiff then filed this matter with the Massachusetts Appeals Court on February 22, 2019. The Appeals Court returned their decision on November 22, 2021, finding in favor of the Appellees on all claims. The Plaintiff then filed an Application for Further Appellate Review with the Supreme

Judicial Court of the Commonwealth of Massachusetts on December 10, 2021. The Application was denied on January 14, 2022. At that point, the Plaintiff had exhausted all remedies for appeal.

The federal or constitutional issue required for jurisdiction pursuant to 28 U.S.C. § 1257 is absent from this case. Pursuant to 28 U.S.C. § 1257 the Supreme Court of the United States may review of decisions by a state's highest court to address questions of federal law. *Hillman v. Maretta*, 569 U.S. 483, 489 (2013) (“We granted certiorari to resolve a conflict among the state and federal courts.”); *Kindred Nursing Ctrs. Ltd. P’ship v. Clark*, 137 S. Ct. 1421, 1427 (2017) (considering state supreme court’s ruling in light of Federal Arbitration Act). “But the language of the statute [governing review of State court cases,]in making the jurisdiction of this court dependent on the decision of certain questions by the State court against the right set up under Federal law or authority, conveys the strongest implication that these questions alone are to be considered when the case is brought here for revision.” *Murdock v. Memphis*, 87 U.S. 590 (1874).

In the instant case, there is no question of federal law. The substantive issues in the case related to a medical malpractice matter governed by Massachusetts case law. Further, the issues on appeal involve that of judicial recusal, an issue governed by Massachusetts case law. Massachusetts has a well settled standard governing Massachusetts judicial officers. *Lena v. Commonwealth*, 369 Mass. 571, 340 N.E.2d 884 (1976). Thus, this court does not have jurisdiction over this matter.

**b. Petitioner Failed to File a Timely Notice of Appeal Under Massachusetts Rules of Appellate Procedure, Rule 4(a)(1)**

Petitioner's Appeal was denied for failure to file a Notice of Appeal as required by the Massachusetts Rules of Appellate Procedure, Rule 4(a)(1). The Appellant failed to file a Notice of Appeal as to the Massachusetts Superior Court Judge's denial of his Motion for Declaration of a Mistrial, Motion for Recusal and Motion to Set New Trial and the related Motion for Reconsideration and so waived the issue. Pursuant to Massachusetts Rules of Appellate Procedure 3(a)(1) "[a]n appeal permitted by law from a lower court shall be taken by filing a notice of appeal with the clerk of the lower court within the time allowed by Rule 4 [being 30 days], with service upon all parties." Mass. R. App. P. 3(a)(1). Appellant effectively waived his appeal of the Order denying his recusal and request for new trial by failing to file a notice of appeal of the Order. The Massachusetts Appeals Court found that the Plaintiff failed to file a notice of appeal pursuant to the Massachusetts Rules of Appellate Procedure regarding the issue of recusal and that even if he had filed a timely notice of appeal, the claim would be untimely. Mass. R. App. P. 4(a)(1).

**c. Petitioner Has No Standing to Appear Pro Se Representing the Estate of the Decedent**

The Petitioner may not appear pro se, providing legal representation for the decedent's estate. Here, the Petitioner, filing this writ pro se, is attempting to represent another legal entity, the estate of Helen Bousquet. The right to proceed pro se in civil actions in federal courts is guaranteed by 28 U.S.C. § 1654, which provides: "In all courts of the United States the parties may plead and conduct their own cases

personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.” *Iannaccone v. Law*, 142 F.3d 553, 556 (2d Cir. 1998). The Petitioner in this case is impermissibly representing the interests of the estate as a pro se litigant.

Further, when the Plaintiff filed his Notice of Appeal with the Commonwealth of Massachusetts Appeals Court, he impermissibly did so pro se. In Massachusetts, pursuant to Mass. Gen. Laws ch. 221, § 46A, “No individual, other than a member, in good standing, of the bar of this commonwealth shall practice law...” However, “Parties may manage, prosecute or defend their own suits personally...” Mass. Gen. Laws ch. 221, § 48. “Plainly the commencement and prosecution for another of legal proceedings in court, and the advocacy for another of a cause before a court ... are reserved exclusively for members of the bar.” *Lowell Bar Ass’n v. Loeb*, 315 Mass. 176, 183 (1943). Massachusetts has never held that an agent may practice law on behalf of a principal.” *LAS Collection Mgmt. v. Pagan*, 447 Mass. 847, 850-851 (2006).

The Massachusetts Appellate Court ruled that “the Superior Court motion judges correctly applied the governing Massachusetts law prohibiting any non-attorney representative from pursuing litigation for any legal entity other than himself or herself as a natural person.” *Staten v. O’Neill*, 83 Mass. App. Ct. 1105 (2013). The Court went on to state that a non-attorney pro se litigant lacks the requisite capacity to represent an estate. *See Id.* Likewise, the lower court in the instant case ruled that the Plaintiff, pro se, is not licensed to practice law, and may not represent the estate of Helen Bousquet in court proceedings.

As a result, the pro se Petitioner does not have standing to represent the estate in this case.

**II. The Massachusetts Appellate Court Did Not Err In Determining The Trial Judge Was Not Required To Recuse Himself From the Trial or Disclose His Spouse's Hospital Privileges To the Parties Prior to Litigation**

The Massachusetts Appellate Court appropriately determined trial Judge Tabit was not required to recuse himself from trial or disclose his spouse's hospital privileges prior to litigation in accordance with Massachusetts' case law and the Commonwealth's Code of Judicial Conduct. Petitioner misrepresents Judge Tabit's spouse's purported 'relationship' to Respondents. Judge Tabit's spouse, Dr. Jean Tabit, is a physician board-certified in family medicine. According to Judge Tabit's Order denying Petitioner's untimely Motion for Declaration of Mistrial, Motion for Recusal and Motion to Set New Trial, Dr. Tabit was *not employed* by Holy Family Hospital and only had admitting privileges there (emphasis added). As the Appeals Court appreciated:

“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.” *June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103, 2112 (2020).

Admitting privileges do not create a financial or other interest between parties. Other than mere untimely conjecture, Petitioner has not brought forth any evidence to the contrary. The Massachusetts Appeals Court's Decision in this matter specifically noted that

while it may have been “better practice” for Judge Tabit to reveal his wife had admitting privileges, the “nature of such ‘privileges’ was not sufficiently substantial to require the judge’s recusal.” *Id.* Further, in his Order Judge Tabit notes that upon consideration pursuant to the two-part test of impartiality, he was confident in his impartiality. Wherefore, disclosure regarding prior admitting privileges is not required by Canon 2:2.11<sup>1</sup> or when applying the two-part test of judicial impartiality established in *Lena v. Commonwealth*, 369 Mass. 571 (1976).

The Petitioner fails to meet his burden under state law of demonstrating more than a *de minimus* financial or other interest between Dr. Tabit and Holy Family Hospital that would result in such information being required disclosure. Petitioner has further failed to demonstrate how Dr. Tabit’s potential *de minimus* interest did or would *substantially affect* the outcome of the proceeding. Petitioner fails to demonstrate Judge Tabit had an economic interest in the subject matter of the controversy. This matter simply did not rise to the level under state law to demonstrate recusal was required.

Petitioner erroneously cites to 28 U.S.C. § 455 which is applicable to Federal Court judges and inapplicable to the state courts. *See Shell Oil Co. v. U.S.*, 672 F.3d 1283, 1289 (Fed. Cir. 2012). Even assuming *arguendo* somehow Federal Judiciary and

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<sup>1</sup> Plaintiff references Section (C) implies that judge “ought to inform the parties of **any possible** conflict involving him or his family and place on the record. However, that is *not* what Canon 2:2.11 states or what was established in *Lena*, 369 Mass. 571 (1976).

Judicial Procedure applied to the Commonwealth's Superior Court judges, Petitioner still fails to make the requisite showing that any potential *de minimus* interest did or would substantially affect the outcome of the proceeding. *See Tumey v. Ohio*, 273 U.S. 510, 523, 47 S.Ct. 437, 71 L.Ed. 749. (Judge had a direct financial interest in the cases' outcome.) In *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986), the Court found recusal was required of Alabama Supreme Court Justice wherein he cast a vote upholding punitive damages awarded while he was the lead plaintiff in a nearly identical suit pending in Alabama's lower courts. In *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009) the Court found significant campaign contributions to a justice's election at a time when there was a vested stake in the outcome required recusal.

Further, case law Petitioner relies upon does not support his contentions for further review. In *Commonwealth v. Duarte*, 477 Mass. 630, 632-633 (2017), the trial judge recused himself only from the defendant's motion for a new trial concerning the judge's son's employment with the district attorney's office. The court therein specifically held that the son's employment without more did provide a basis for impartiality. Further, the court stated it did not require disclosure to the defendant in advance of jury waiver. In *Adoption of Tia*, 73 Mass. App. Ct. 115, 122 (2008) the court cautioned that a judge's impartiality can be questioned where the judge is the fact-finder at trial and premature assessments about settlement could cause a reasonable observer to conclude the judge made up their mind before the close of evidence. Notably, the Court therein found that the evidence substantially supported the judge's findings and

conclusions that the mistakes did not warrant reversal. In *Commonwealth v. Morgan RV Resorts, LLC*, 84 Mass. App. Ct. 1, 8-9 (2013), the judge in question was a former partner of one of the parties' law firms and had been engaged in a lawsuit against her former firm for a significant amount of money (six figures) and had inconsistent rulings on prior recusal motions involving the law firm. On the grounds of the significant amount of money at stake, the protracted nature of the litigation, the judge's personal involvement in the litigation, the judge's own admission about the appearance of impropriety and the inconsistent prior rulings, the Appeals Court of Massachusetts found that the trial judge was obligated to disqualify herself. *Id.* at 14. The other cases cited by Petitioner also speak to cases wherein the trial judges had prior relationships with attorneys of record or potential witnesses. None of these state cases support Petitioner's position that disclosure of Dr. Tabit's prior admitting privileges was required pursuant to the Commonwealth's Code of Judicial Conduct. The Massachusetts Appeals Court Decision is wholly consistent with the Commonwealth Code of Judicial Conduct, the two-part test in *Lena v. Commonwealth*, and all the case law cited by Petitioner.

### CONCLUSION

For all the aforementioned reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

Chad P. Brouillard

*Counsel of Record*

cbrouillard@fosteld.com

Siobhainin S. Funchion

sfunchion@fosteld.com

Foster & Eldridge, LLP

300 Trade Center, Suite 2610

Woburn, Massachusetts 01801

(617) 252-3366 – (617) 252-3377 (Fax)

*Attorneys for Respondents*

*Anne Marie Mede, R.N., Holy Family  
Hospital, Steward Medical Group, Inc.  
and Steward HealthCare System, LLC*

Lydia C. Knight

lknight@sloanewalsh.com

Sloane and Walsh, LLP

One Boston Place

201 Washington Street, Suite 1600

Boston, Massachusetts 02108

(617) 523-6010

*Attorneys for Respondents*

*Ronald A. Marvin, M.D. and Orthopaedics  
Northeast, P.C.*

Dated: April 15, 2022

# APPENDIX

## APPENDIX A

1577CV00569 Brian Evans Administrator of the  
Estate of Helen Marie Bousquet et al vs. Marvin,  
M.D., Ronald A et al

Case Type: Torts  
Case Status: Closed  
File Date: 04/13/2015  
DCM Track: A – Average  
Initiating Action: Malpractice – Medical  
Status Date: 04/13/2015  
Case Judge:

Next Event:

Evans, Brian  
- Plaintiff

Party Attorney  
Attorney  
Pro Se

Bousquet, Helen Marie  
- Plaintiff

Party Attorney

Marvin, M.D., Ronald A  
- Defendant

Orthopaedics Northeast PC  
- Defendant

Ganda, M.D., Sridar R  
- Defendant

Party Attorney  
Attorney  
Hinchey, Esq., Edward Thomas  
Bar Code  
235090  
Address  
Hinchey and Olenhoff, LLP  
22 Steeple St Suite 203 US Mail PO Box 2690  
Mashpee, MA 02649  
Phone Number  
(508)419-6714  
Attorney  
Knight, Esq., Lydia Carleton  
Bar Code  
684414  
Address  
Sloane and Walsh, LLP  
One Boston Place  
201 Washington Street Suite 1600  
Boston, MA 02108  
Phone Number  
(617)523-6010

Dasilva RN, Kristin A  
- Defendant

Mede RN, Anne Marie  
- Defendant

Holy Family Hospital  
- Defendant

Steward Medical Group Inc  
- Defendant

Steward Health Care System LLC  
- Defendant

Party Attorney  
Attorney  
Brouillard, Esq., Chad P  
Bar Code 657419  
Address  
Foster and Eldridge  
300 Trade Center  
Suite 2610  
Woburn, MA 01801  
Phone Number  
(617)252-3366  
Attorney  
Maloney, Esq., Shylah N  
Bar Code  
703663  
Address  
Foster and Eldridge  
300 Trade Center  
Suite 2610  
Woburn, MA 01801  
Phone Number  
(617)252-3366

01/09/2020 Endorsement on Motion for Clarification (#156.0); Other Action taken The Court assumes plaintiffs seeks clarification on this court's order denying P#154. In said order, the court denied plaintiff's request to treat that motion for reconsideration as a notice of appeal because it failed

to comply with the content requirements of MRAP 3(c).

02/18/2020 Plaintiff Brian Evans Administrator of the Estate of Helen Marie Bousquet's Notice to the court (157)

02/24/2020 Plaintiff Brian Evans Administrator of the Estate of Helen Marie Bousquet's Notice of Change of Address (158)

06/11/2020 Notice of docket entry received from Appeals Court (159)

08/12/2020 Notice of docket entry received from Appeals Court (160)

09/14/2020 CD of Transcript of 09/04/2018 09:00 AM Jury Trial, 09/05/2018 09:00 AM Jury Trial, 09/06/2018 09:00 AM Jury Trial; 09/07/2018 09:00 AM Jury Trial; 09/11/2018 09:00 AM Jury Trial; 09/12/2018 09/12/2018 09:00 AM Jury Trial, 09/13/2018 09:00 AM Jury Trial received from Trial (received from Allison Pollier, official stenographer for trial). (161)

09/21/2020 Notice of docket entry received from Appeals Court (162)

09/21/2020 Notice of docket entry received from Appeals Court (163)

09/21/2020 Notice of docket entry received from Appeals Court (164)

10/02/2020 Notice of docket entry received from Appeals Court (165)

10/05/2020 Plaintiff Brian Evans Administrator of the Estate of Helen Marie Bousquet's Motion for declaration of mistrial, recusal, and to set a new trial date for Judge Tabit failure to disclose his wife was employed by co-defendant (166)

10/06/2020 Endorsement on Motion for Declaration of Mistrial, Motion for Recusal and Motion to Set New Trial (#166.0); DENIED

After review, and for the reasons set forth, motion denied. 1) Evans has failed to comply with Rule 9A. 2) Even had Evans complied with Rule 9A, the motion would be denied on the merits. The Plaintiff's assertions that my wife is employed by Steward Holy Family Hospital are simply wrong. Dr. Tabit is currently employed by MGH, Brockton, formerly Partners Healthcare. Prior to that, Dr. Tabit was employed by Greater Lawrence Family Health Center. While Dr. Tabit may have had admitting privileges at Holy Family Hospital, she has never been employed there. Upon consideration pursuant to Supreme Judicial Court's two-part test of impartiality identified in *Pena v. Commonwealth*, 369 Mass. 571 (1976), the court is confident in its impartiality.

10/09/2020 Plaintiff Brian Evans Administrator of the Estate of Helen Marie Bousquet's Objection to Judge Tabits order on 10/6/2020 and Motion for reconsideration by unbiased judge (167)

10/13/2020 Endorsement on Motion for Reconsideration (#167.0): DENIED

10/19/2020 Opposition to Objection to Judge Tabits order on 10/6/2020 and Motion for reconsideration by unbiased judge filed by Ronald A Marvin, M.D., Orthopaedics Northeast PC, Kristin A Dasilva RN, Anne Marie Mede RN, Holy Family Hospital, Steward Medical Group Inc, Steward Health Care System LLC (168)

10/22/2020 Plaintiff Brian Evans Administrator of the Estate of Helen Marie Bousquet's Reply to Defendants Opposition of the Defendants to Plaintiff's Objection to Judge Tabit's Order of October 6, 2020 and Motion for Reconsideration by Unbiased Judge (169)

12/31/2020 Notice of docket entry received from Appeals Court (170)

01/05/2021 Notice of docket entry received from Appeals Court (171)

01/05/2021 Notice of docket entry received from Appeals Court (172)

01/19/2022 Rescript received from Appeals Court; judgment AFFIRMED November 22, 2021. (173)

01/20/22 JUDGMENT/ORDER after Rescript: The original judgment (#95.0) is Affirmed. (174)

Case Disposition

Disposition

Judgment after Jury Verdict

Date

09/17/2018

**APPENDIX B**

**CLERK'S NOTICE  
Docket Number 1577CV00569  
Trial Court of Massachusetts  
The Superior Court**

Case Name:

Brian Evans Administrator of the Estate of Helen  
Marie Bousquet et al vs. Marvin, M.D., Ronald A et  
al

Thomas H. Driscoll, Jr., Clerk of Courts

To:

Chad P Brouillard, Esq.  
Foster & Eldridge  
300 Trade Center  
Suite 2610  
Woburn, MA 01801

Court Name & Address

Essex County Superior Court – Lawrence  
43 Appleton Way  
Lawrence, MA 01841

You are hereby notified that on 10/06/2020 the  
following entry was made on the above referenced  
docket:

Endorsement on Motion for Declaration of Mistrial,  
Motion for Recusal and Motion to Set New Trial  
(#166.0):

**DENIED**

After review, and for the reasons set forth, motion  
denied. 1) Evans has failed to comply with Rule 9A.

2) Even had Evans complied with Rule 9A, the motion would be denied on the merits. The plaintiff's assertions that my wife is employed by Steward Holy Family Hospital are simply wrong. Dr. Tabit is currently employed by MGH, Brockton, formerly Partners Healthcare. Prior to that, Dr. Tabit was employed by Greater Lawrence Family Health Center. While Dr. Tabit may have had admitting privileges at Holy Family Hospital, she has never been employed there. Upon consideration pursuant to Supreme Judicial Court's two-part test of impartiality identified in *Pena v. Commonwealth*, 369 Mass. 571 (1976), the court is confident in its impartiality.

Date Issued  
10/06/2020

Associate Justice/ Assistant Clerk  
Hon. Salim Tabit

Session Phones  
(978)242-1900