

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 0922

TROY GERALD BROUSSARD

VERSUS

PAMELA SHIELDS BROUSSARD

Judgment Rendered: December 21, 2011

APPEALED FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF ST. TAMMANY PARISH
STATE OF LOUISIANA
DOCKET NUMBER 2001-13683

THE HONORABLE DAWN AMACKER, JUDGE

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BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

McDONALD, J.

This appeal arises from a judgment classifying a husband's use of the trade name "The DWI Dr." as his separate property. For the following reasons, we deny the husband's motions to strike portions of his former wife's appellate briefs, reverse the judgment, and remand to the trial court for further proceedings.

FACTUAL AND PROCEDURAL HISTORY

Troy and Pamela Broussard were married in 1982. In 1997, Mr. Broussard, an attorney, registered "The DWI Dr." with the Louisiana Secretary of State and stated on the registration application that the trade name was used in his business as a DWI criminal defense attorney. The parties were divorced in 2001, and Mr. Broussard filed a petition for judicial partition of the community property in 2007. On September 24, 2009, the trial court signed a stipulated judgment fixing the assets, liabilities, and reimbursements of the parties, but reserving judgment on the classification of "The DWI Dr." as separate or community property with the following language: "The DWI Dr." trade name/service mark classification is submitted on briefs to the Court for a ruling regarding its classification." However, by order dated October 29, 2009, the trial court rescinded the September 24, 2009 judgment as to the classification issue, noting she had insufficient evidence to decide the issue, because the parties' briefs referred to exhibits and testimony that were not attached to their briefs. The trial court ordered the parties to appear at a hearing on November 10, 2009, to present evidence on the issue.

On the day of the scheduled hearing, Ms. Broussard filed a motion to continue the hearing and an exception of lack of jurisdiction, claiming that only a federal court had authority to decide whether the Federal Trademark Act applied

to “The DWI Dr.,” thus preempting state community property law. The trial court granted the motion to continue and moved the hearing to a later date.

On November 12, 2009, Mr. Broussard filed a motion for sanctions against Ms. Broussard and her attorney, claiming her exception of lack of jurisdiction was “completely meritless,” intended for harassment, delay, and to increase Mr. Broussard’s litigation costs.¹ During the pendency of Ms. Broussard’s exception, and Mr. Broussard’s related motion for sanctions, Ms. Broussard filed two separate motions to recuse the trial judge, Judge Dawn Amacker. In due course, Judge William Crain held hearings and denied both recusal motions. Ms. Broussard eventually dismissed her exception of lack of jurisdiction, and after a hearing, Judge Amacker rendered a sanctions judgment against her and her attorney. In this appeal, Ms. Broussard challenges, *inter alia*, Judge Crain’s denial of her recusal motions; she has also appealed Judge Amacker’s sanctions judgment, which we address in a separate opinion, **Troy Broussard v. Pamela Broussard**, 2011 CA 0925 (La. App. 1 Cir. 12/21/11).

Regarding the classification of “The DWI Dr.,” the parties filed pleadings, submitted evidence, and the trial court scheduled a hearing on the issue for June 30, 2010. On the morning of the hearing, Ms. Broussard filed an emergency writ application with this court, challenging several of the trial court’s prior rulings and seeking a stay of the hearing. This court refused to consider the writ application based on untimeliness as to most of the issues presented and multiple other rule violations. **Troy Broussard v. Pamela Broussard**, 2010 CW 1173 (La. App. 1 Cir. 6/30/10). The trial court thereafter held the scheduled hearing. On October

¹ During this litigation, Ms. Broussard has been represented by her brother and her father. According to Mr. Broussard, Ms. Broussard does not pay for her family members’ legal services and is not financially affected by the legal fees associated with trial delays.

11, 2010, the trial court signed a judgment stating, *inter alia*, that “the trade name/service mark “[The] DWI D[r].” and any funds, directly or indirectly, derived therefrom” were Mr. Broussard’s separate property.

Herein, Ms. Broussard appeals the trial court’s judgment insofar as it classifies “The DWI Dr.” as Mr. Broussard’s separate property.² She also claims the trial court erred in refusing to allow her to file a motion for summary judgment in the context of this community partition proceeding. Lastly, as earlier stated, Ms. Broussard challenges the denial of her two motions to recuse Judge Amacker.

**MR. BROUSSARD’S MOTION TO STRIKE
PORTIONS OF MS. BROUSSARD’S BRIEF**

Before moving to the merits of the appeal, we address a motion to strike, filed by Mr. Broussard after this appeal was lodged, seeking to strike Ms. Broussard’s appellate brief in part. According to Mr. Broussard, several assignments of error raised by Ms. Broussard on appeal have already been addressed and decided by this court in its June 30, 2010 opinion under 2010 CW 1173 and are not now properly before this court. He also seeks damages, attorney fees, and court costs for the defense of this appeal.

When an unrestricted appeal is taken from a final judgment, the appellant is entitled to seek review of all adverse interlocutory judgments prejudicial to him, in addition to the review of the final judgment. **Judson v. Davis**, 04-1699 (La. App. 1 Cir. 6/29/05), 916 So.2d 1106, 1112, writ denied, 05-1998 (La. 2/10/06), 924 So.2d 167. This general principle is subject to exceptions where the adverse

² Ms. Broussard also contends the trial court erred by failing to base its decision on the parties’ briefs alone and upon the presumption of community property set forth in La. C.C. art. 2340. By rescinding the September 24, 2009 judgment, and allowing more evidence before ruling on the proper classification of the asset, Ms. Broussard contends the trial court gave Mr. Broussard “two bites at the apple” to prove “The DWI Dr.” was his separate property. We see no error in the trial court’s rescission of the September 24, 2009 judgment and receipt of further evidence before rendering judgment. The parties had not properly attached evidence to their briefs, and the court

interlocutory judgment has previously been appealed as an interlocutory judgment causing irreparable harm, or where the aggrieved party has sought supervisory writs and the appellate court makes a ruling which constitutes the “law of the case.” *Id.* at 1113. In the instant case, we refused to consider the merits of Ms. Broussard’s application due to untimeliness and rule violations. Because we did not reach the merits, the “law of the case” doctrine does not preclude our consideration of the issues raised by Ms. Broussard on appeal of the October 10, 2010 judgment. Accordingly, we deny Mr. Broussard’s motion to strike and award him no damages, attorney fees, or court costs.

**CLASSIFICATION OF “THE DWI DR.”
AS SEPARATE OR COMMUNITY PROPERTY**

Under Louisiana law, property of married persons is generally characterized as either community or separate. La. C.C. art. 2335. The classification of property as community or separate is fixed at the time of its acquisition. **Biondo v. Biondo**, 99-0890 (La. App. 1 Cir. 7/31/00), 769 So.2d 94, 99; **Noil v. Noil**, 96-2167 (La. App. 1 Cir. 9/19/97), 699 So.2d 1134, 1135; **Smith v. Smith**, 95-0913 (La. App. 1 Cir. 12/20/96), 685 So.2d 649, 651. See also **Succession of Wiener**, 203 La. 649, 14 So.2d 475, 477 (La. 1943) (The community is a “partnership in which the husband and wife own equal shares, their title thereto vesting at the very instance such property is acquired”) Things in the possession of a spouse during the existence of a regime of community of acquets and gains are presumed to be community, but either spouse may rebut the presumption of community by proving the separate nature of the property by a preponderance of the evidence. La. C.C. art. 2340; **Noil**, 699 So.2d at 1135. The trial court’s findings regarding the nature of property as community or separate are factual determinations and

was unable to perform its duties without proper evidence.

governed by the manifest error-clearly wrong standard of review. **Biondo**, 769 So.2d at 99.

In reaching the conclusion that “The DWI Dr.” was Mr. Broussard’s separate property, the trial court focused on statutory and jurisprudential principles applicable to trademarks and trade names.³ The court determined the phrase could be classified as either a trade name or a service mark under Louisiana law;⁴ that the trade name “The DWI Dr.” was an inseparable part of Mr. Broussard’s personal, professional law practice; that he alone had used the trademark to the exclusion of Ms. Broussard and all others; and it could not be assigned separately from his practice’s goodwill.⁵

³ The statutes applicable to “Trade Marks, Trade Names, and Domain Names” are found at La. R.S. 51:211, *et seq.*

⁴ We will refer to “The DWI Dr.” as a trade name for purposes of brevity.

⁵ In its September 21, 2010 reasons for judgment, the trial court stated, in pertinent part:

Substantive rights in a mark arise only from the use of the mark and not from registration. [Citation omitted.] ...

The rights of a party to use a trade name/service mark are determined by the priority of appropriation of use. [Citation omitted.] The party establishing the prior appropriation by use is entitled to the exclusive use thereof. [Citations omitted.]

...

The trade name/service mark “DWI DR.” is merely a symbol and part of Mr. Broussard’s law practice’s goodwill and has no independent significance apart from the goodwill it symbolizes. [Citation omitted.] Mr. Broussard’s “goodwill” as a professional is not a community asset, but only an element of his continuing business. [Citation omitted.] It is attributable only to his “personal qualities” as a DWI attorney of many years experience. See La. R.S. 9:2801.2

...

It was proven at trial that the trade name/service mark “DWI DR.” is personal to Troy Broussard after his years of exclusive use of the trade name/service mark, the vast majority of which occurred after the community ended. The trade name/service mark has and has had no separate value or identity other than its association with Mr. Broussard’s name, reputation and practice as a DWI attorney.

Therefore, the trade name/service mark “DWI DR.” is deemed to be an inseparable part of, or element of, the personal professional goodwill of Mr. Broussard and cannot be assigned separate from his practice’s goodwill.

Even if these findings are accepted as correct, they do not lead us to similarly conclude that the trade name is Mr. Broussard's separate property. Although "The DWI Dr." as a trade name may be inseparable from the goodwill of Mr. Broussard's law practice, the undisputed facts remain that, at the time he acquired it in 1997, he was married to Ms. Broussard, and the parties were living under a community property regime. This is not changed by the fact that Mr. Broussard has exclusively used the trade name since 1997, or by the trial court's conclusion that "The DWI Dr." is an "inseparable part" of, and could not be separately assigned from, Mr. Broussard's law practice's goodwill. Although these principles might be applicable, for example, in legal proceedings involving another person attempting to use "The DWI Dr." in his business, Ms. Broussard is not attempting to use the trade name, nor is she seeking an assignment of the name. She is merely asserting her partial ownership rights to the trade name as a community asset. This right accrued in April of 1997, when Mr. Broussard registered the trade name with the Secretary of State and began using it to market his law practice, and did not cease until the termination of the parties' community property regime several years later.

Based on the presumption that things possessed during a community regime are community property, and on the jurisprudential rule that the status of an asset as community or separate property is fixed at this time of its acquisition, we find Mr. Broussard did not overcome the presumption of community property, and the trial court manifestly erred in finding otherwise. We reverse the October 11, 2010 judgment insofar as it classifies "The DWI Dr." as Mr. Broussard's separate property. We hold that "The DWI Dr." was a community asset belonging to Mr. and Ms. Broussard, and we remand this case to the trial court to determine the

value of the asset during the existence of the community and the respective rights of the parties under applicable community property laws.⁶

**TRIAL COURT'S REFUSAL TO ALLOW
MOTION FOR SUMMARY JUDGMENT IN
COMMUNITY PROPERTY PARTITION PROCEEDINGS**

Ms. Broussard next contends the trial court erred in refusing to allow her to file a motion for summary judgment in the context of this community property partition proceeding. With the subject motion, Ms. Broussard was attempting to defeat Mr. Broussard's reimbursement claim for a legal fee debt owed to a law firm in a separate lawsuit.⁷ In its October 11, 2010 judgment, the trial court rendered judgment in favor of Mr. Broussard and against Ms. Broussard for this reimbursement claim in the amount of \$9,894.10. On appeal, Ms. Broussard has not assigned specific error to this award, and thus, we are precluded from reviewing it. See Uniform Rules – Courts of Appeal, Rule 1-3. Because that portion of the judgment is final, we conclude Ms. Broussard's challenge to the trial court's refusal to allow the motion for summary judgment is moot.

DENIAL OF MOTIONS TO RECUSE

We next address Ms. Broussard's challenge to two orders denying her motions to recuse Judge Dawn Amacker from these proceedings due to alleged bias against Ms. Broussard and her counsel.

On November 13, 2009, Ms. Broussard filed a motion to recuse Judge

⁶ In its September 21, 2010 reasons for judgment, the trial court found Ms. Broussard "failed to carry her burden of proof that there were any funds generated from the logo "DWI DR.," much less any that were separate and independent from the personal qualities and goodwill of Mr. Broussard and his law practice." Because we reverse on the issue of the proper classification of "The DWI Dr.," on remand, we respectfully direct the trial court to conduct a hearing allowing the parties an opportunity to present evidence on the value of the community asset during the existence of the community.

⁷ Without setting forth the full factual and procedural background leading to Ms. Broussard's motion for summary judgment, we note the motion addressed what the parties and trial court refer to as the "Dwyer Cambre debt." The resolution of this matter is set forth in the trial court's

Amacker. Judge William Crain held a hearing on the recusal motion and signed an order denying the motion on December 29, 2009. On April 13, 2010, Ms. Broussard filed a second motion to recuse Judge Amacker. The matter was again heard by Judge William Crain, and he denied the second motion by order dated June 28, 2010.

Louisiana Code of Civil Procedure article 151(A)(4) states, in pertinent part, that a judge of any court shall be recused when he “[i]s biased [or] prejudiced ... toward or against the parties or the parties’ attorneys or any witness to such an extent that he would be unable to conduct fair and impartial proceedings.” Article 151 requires a finding of actual bias or prejudice, as opposed to perceived, and the bias or prejudice must be of a substantial nature. **Southern Casing of Louisiana, Inc. v. Houma Avionics, Inc.**, 00-1931, 00-1930 (La. App. 1 Cir. 9/28/01), 809 So.2d 1040, 1050. Further, a judge is presumed to be impartial. **Whalen v. Murphy**, 05-2446 (La. App. 1 Cir. 9/15/06), 943 So.2d 504, 509, writ denied, 06-2915 (La. 3/16/07), 952 So.2d 696.

We have reviewed the transcripts from both recusal hearings, the evidence presented at these hearings, and Judge Crain’s findings on both motions. We find no abuse of discretion in his denials of both motions to recuse. After the first recusal hearing, Judge Crain determined that Judge Amacker had not displayed actual bias to either the parties or their attorneys that would reflect an inability on her part to conduct a fair and impartial proceeding. He noted that “what she has tried to do is to move this particular case along.” And, at the end of the second recusal hearing, Judge Crain again concluded that none of the evidence submitted was of the substantial nature required to warrant recusal, and particularly, that

recusal required more than a showing that Judge Amacker had ruled adversely to Ms. Broussard. The voluminous record herein establishes that, over the several years she has presided over this case, Judge Amacker has ruled in favor of and adversely to both parties. Further, she has occasionally expressed exasperation and impatience from the bench. In many instances, her rulings and emotions were understandable and justified; and, in some instances, she exercised remarkable restraint. Thus, considering the evidence presented, we find the evidence simply does not establish actual, substantial bias. Ms. Broussard's arguments to the contrary are meritless.

CONCLUSION

For the reasons set forth herein, the October 10, 2010 judgment, insofar as it classifies "The DWI Dr." as Mr. Broussard's separate property, is reversed. Judgment is rendered classifying "The DWI Dr." as the community property of Troy Broussard and Pamela Broussard. The matter is remanded to the trial court for a determination of the value of the community asset during the existence of the parties' community property regime and the respective rights of the parties under applicable community property law. Mr. Broussard's motion to strike Ms. Broussard's appellate brief, in part, is denied. Costs of the appeal are assessed equally to the parties.

MOTION TO STRIKE DENIED. JUDGMENT REVERSED, RENDERED, AND REMANDED.