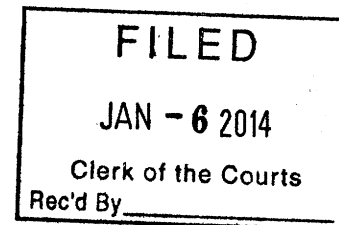


IN THE TENNESSEE BOARD OF JUDICIAL CONDUCT

**IN RE: THE HONORABLE JOHN A. DONALD
GENERAL SESSIONS JUDGE
SHELBY COUNTY, TENNESSEE**

Docket No. M2013-02204-BJC-DIS-FC

File No. 11-4762



**DISCIPLINARY COUNSEL'S RESPONSE TO
MOTION TO DISMISS
OF JOHN A. DONALD, GENERAL SESSIONS JUDGE**

Timothy R. Discenza, Disciplinary Counsel for the Tennessee Board of Judicial Conduct, for Response to the Motion to Dismiss heretofore filed by Judge John A. Donald, would state as follows:

Introduction

Following a full investigation authorized under the provisions of Tennessee Code Annotated § 17-5-304(b)(3), and at the direction of an investigative panel of three members of the Board of Judicial Conduct, in accordance with Tennessee Code Annotated § 17-5-301, *et. seq.*, Disciplinary Counsel has heretofore filed Formal Charges against the Honorable John A. Donald, General Sessions Judge of Shelby County, Tennessee. The Formal Charges were filed October 2, 2013. Judge Donald, by and through counsel, timely filed an Answer, styled "Response to Formal Charge and Motion to Dismiss." Both the Formal Charges and Response are incorporated herein by reference.

Summary of Argument

The Motion to Dismiss of Judge John A. Donald should be dismissed.

Argument

Rule 12, Tennessee Rules of Civil Procedure, provides, in pertinent part, as follows:

Rule 12.02. How Presented

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion in writing: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19, and (8) specific negative averments made pursuant to Rule 9.01. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to the claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

In his Motion, Judge Donald appears to have limited the scope to Rule 12.02 (6), “failure to state a claim upon which relief can be granted,” and has apparently not “presented” “matters outside the pleadings.”

Tennessee jurisprudence applying Rule 12.02 (6) has been consistent and potent in articulating the formidable standards against which such a Motion as that of Judge Donald must be measured and adjudicated. Those standards resonate in an unequivocal voice militating toward a denial of the effort.

Recently (2011) canvassing the Tennessee tradition in Rule 12.0 (6) Motions, the Tennessee Supreme court summarized the body of governing principles:

Tennessee Rule of Civil Procedure 8.01 requires that a pleading for relief "shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the pleader seeks." Rule 8.05(1) further provides:

Each averment of a pleading shall be simple, concise and direct. No technical forms of pleading or motions are required. Every pleading stating a claim or defense relying upon the violation of a statute shall, in a separate count or paragraph, either specifically refer to the statute or state all of the facts necessary to constitute such breach so that the other party can be duly apprised of the statutory violation charged. The substance of any ordinance or regulation relied upon for claim or defense shall be stated in a separate count or paragraph and the ordinance or regulation shall be clearly identified. The manner in which violation of any statute, ordinance or regulation is claimed shall be set forth.

When a complaint fails to comply with Rule 8, it is subject to dismissal by grant of a motion to dismiss for failure to state a claim upon which relief can be granted, as provided by Tennessee Rule of Civil Procedure 12.02(6). The standards by which our courts should assess and dispose of a Rule 12.02(6) motion to dismiss are well-established and have been clearly and consistently applied in Tennessee for nearly forty years, following the adoption of the Tennessee Rules of Civil Procedure in 1970. A Rule 12.02(6) motion challenges only the legal sufficiency of the complaint, not the strength of the plaintiff's proof or evidence. Highwoods Props., Inc. v. City of Memphis, 297 S.W.3d 695, 700 (Tenn.2009); Willis v. Tenn. Dep't of Corr., 113 S.W.3d 706, 710 (Tenn.2003); Bell ex rel. Snyder v. Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A., 986 S.W.2d 550, 554 (Tenn.1999); Sanders v. Vinson, 558 S.W.2d 838, 840 (Tenn.1977). The resolution of a 12.02(6) motion to dismiss is determined by an examination of the pleadings alone. Leggett v. Duke Energy Corp., 308 S.W.3d 843, 851 (Tenn. 2010); Trau-Med of Am., Inc. v. Allstate Ins. Co., 71 S.W.3d 691, 696 (Tenn.2002); Cook ex rel. Uithoven v. Spinnaker's of Rivergate, Inc., 878 S.W.2d 934, 938 (Tenn. 1994); Cornpropst v. Sloan, 528 S.W.2d 188, 190 (Tenn.1975) (overruled on other grounds by McClung v. Delta Square Ltd. P'ship, 937 S.W.2d 891, 899-900 (Tenn. 1996)). A defendant who files a motion to dismiss "admits the truth of all of the relevant and material allegations contained in the complaint, but ... asserts that the allegations fail to establish a cause of action." Brown v. Tenn. Title Loans, Inc., 328 S.W.3d 850, 854 (Tenn.2010) (quoting Freeman Indus., LLC v. Eastman Chem. Co., 172 S.W.3d 512, 516 (Tenn.2005)); see Edwards v. Allen, 216 S.W.3d 278,

284 (Tenn.2007); *White v. Revco Disc. Drug Ctrs., Inc.*, 33 S.W.3d 713, 718 (Tenn.2000); *Holloway v. Putnam Cnty.*, 534 S.W.2d 292, 296 (Tenn.1976).

In considering a motion to dismiss, courts "must construe the complaint liberally, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences." *Tigg v. Pirelli Tire Corp.*, 232 S.W.3d 28, 31-32 (Tenn.2007) (quoting *Trau-Med*, 71 S.W.3d at 696); see *Leach v. Taylor*, 124 S.W.3d 87, 92-93 (Tenn.2004); *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 716 (Tenn.1997); *Bellar v. Baptist Hosp., Inc.*, 559 S.W.2d 788, 790 (Tenn.1978); see also *City of Brentwood v. Metro. Bd. of Zoning Appeals*, 149 S.W.3d 49, 54 (Tenn.Ct.App. 2004) (holding that courts "must construe the complaint liberally in favor of the plaintiff by ... giving the plaintiff the benefit of all the inferences that can be reasonably drawn from the pleaded facts"). A trial court should grant a motion to dismiss "only when it appears that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief." *Crews v. Buckman Labs. Int'l, Inc.*, 78 S.W.3d 852, 857 (Tenn. 2002); see *Lanier v. Rains*, 229 S.W.3d 656, 660 (Tenn.2007); *Doe v. Sundquist*, 2 S.W.3d 919, 922 (Tenn.1999); *Pemberton v. Am. Distilled Spirits Co.*, 664 S.W.2d 690, 691 (Tenn.1984); *Fuerst v. Methodist Hosp. S.*, 566 S.W.2d 847, 848 (Tenn.1978); *Ladd v. Roane Hosiery, Inc.*, 556 S.W.2d 758, 759-60 (Tenn.1977). We review the trial court's legal conclusions regarding the adequacy of the complaint de novo. *Brown*, 328 S.W.3d at 855; *Stein*, 945 S.W.2d at 716.

Under Tennessee Rule of Civil Procedure 8, Tennessee follows a liberal notice pleading standard, see *Leach*, 124 S.W.3d at 92-93, which recognizes that the primary purpose of pleadings is to provide notice of the issues presented to the opposing party and court. *Abshure v. Methodist Healthcare-Memphis Hosps.*, 325 S.W.3d 98, 103 (Tenn.2010); see also Robert Banks, Jr. & June F. Entman, *Tennessee Civil Procedure* § 5-4(a) (3d ed. 2009) ("The essential function of the pleadings is simply to give notice of a claim or defense. History, as Professors Wright and Miller point out, has shown that the pleadings cannot successfully do more.") (footnotes omitted). Our state's notice pleading regime is firmly established and longstanding; this Court recognized well before the Tennessee Rules of Civil Procedure were adopted that "[t]he object and purpose of any pleading is to give notice of the nature of the wrongs and injuries complained of with reasonable certainty, and notice of the defenses that will be interposed, and to acquaint the court with the real issues to be tried." *Hammett v. Vogue, Inc.*, 179 Tenn. 284, 165 S.W.2d 577, 579 (1942).

To be sufficient and survive a motion to dismiss, a complaint must not be entirely devoid of factual allegations. Tennessee courts have long

interpreted Tennessee Rule of Civil Procedure 8.01 to require a plaintiff to state "the facts upon which a claim for relief is founded." Smith v. Lincoln Brass Works, Inc., 712 S.W.2d 470, 471 (Tenn.1986) (quoting W & O Constr. Co. v. City of Smithville, 557 S.W.2d 920, 922 (Tenn.1977)).

A complaint "need not contain detailed allegations of all the facts giving rise to the claim," but it "must contain sufficient factual allegations to articulate a claim for relief." Abshire, 325 S.W.3d at 103-04. "The facts pleaded, and the inferences reasonably drawn from these facts, must raise the pleader's right to relief beyond the speculative level." *Id.* at 104. Thus, as we observed in Leach, "While a complaint in a tort action need not contain in minute detail the facts that give rise to the claim, *it must contain direct allegations on every material point* necessary to sustain a recovery on any legal theory, even though it may not be the theory suggested ... by the pleader, *or contain allegations from which an inference may fairly be drawn that evidence on these material points will be introduced at trial.*" 124 S.W.3d at 92 (quoting Donaldson v. Donaldson, 557 S.W.2d 60, 61 (Tenn.1977)) (alteration in original); accord Givens v. Mullikin ex rel. Estate of McElwaney, 75 S.W.3d 383, 399 (Tenn.2002). Moreover, courts are not required to accept as true assertions that are merely legal arguments or "legal conclusions" couched as facts. Riggs v. Burson, 941 S.W.2d 44, 47-48 (Tenn.1997). Webb V. Nashville Area Habitat for Humanity, Inc., 346 S.W. 3d 422, 426 (Tenn. 2011)

Stated alternately, in considering a motion to dismiss for failure to state a claim upon which relief can be granted, courts should construe the complaint liberally in favor of the plaintiff, taking all allegations of fact as true, and deny the motion unless it appears that the plaintiff can prove no set of facts in support of her claim that would entitle her to relief. Rules Civ.Proc., Rule 12.02(6). Proctor v. Chattanooga Orthopaedic Group, P.C., 2008, 270 S.W.3d 56.

Courts reviewing a complaint tested by a motion to dismiss for failure to state a claim upon which relief can be granted must also give the plaintiff the benefit of all reasonable inferences that can be drawn. A motion to dismiss for failure to state a claim upon which relief can be granted admits the truth of the material factual allegations in the

complaint but asserts that no cause of action arises from these facts Rules Civ.Proc., Rule 12.02(6). *Conley v. Life Care Centers of America, Inc.*, 2007, 236 S.W.3d 713, *Crews v. Buckman Laboratories Intern., Inc.*, 2002, 78 S.W.3d 852,

In the venerable 1975 case of *Cornpropst v. Sloan*, 528 S.W. 2d 188 (Tenn. 1975), the Supreme Court observed that nothing said in argument on a motion to dismiss for failure to state a claim upon which relief can be granted can add to or take from the complaint; the complaint must stand or fall upon its allegations unaffected by the approbation of its author or the denunciations of the defense as expressed in oral argument.

Against then these graven-in-stone evaluative standards, the Motion must fail as the Complaint herein more than meets the requisites necessary to hurdle the challenge of the Motion.

By way of illustration, the Complaint, in “short and plain terms” systematically sets forth the facts upon which relief may be granted, to wit,

1. Judge Donald at the relevant times was (and is) a General Sessions Judge of Shelby County, Tennessee (Complaint Paragraph XXX), and subject therefore to judicial discipline by the Board of Judicial Conduct by statute;

2. A complaint against Judge Donald was filed according to the statute governing the Tennessee Court of the Judiciary, predecessor to the Board of Judicial Conduct (Complaint, Paragraph 2.) Judge Donald was asked to respond to the complaint and did so. In addition, Judge Donald, in retaliation for the filing of the complaint , initiated a Board of Professional Responsibility Complaint against the attorney who filed the judicial complaint against Judge Donald. The BPR complaint in due course was

dismissed by the Board of professional Responsibility (Complaint, Paragraphs XXX_XXX).

Hence, Rule 12.02 (6) directs a determination by this court in assessing the instant Motion to dismiss that the act of Judge Donald in lodging a spurious professional formal complaint against the attorney was done in a retaliatory manner and that Judge Donald's actions be taken as true for purposes of this Motion. The pleadings, taken "liberally" or for that matter on their plain terms, establish the conduct and the retaliation by Judge Donald. No inferences need be made. Alternatively, the facts as established by the complaint, admitted as true for purposes of the subject Motion, reasonably allow an inference of retaliation.

Specific theses offered by Judge Donald fail to circumvent the established construction of Rule 12.02 (6).

Judge Donald, it would seem by the subject Motion, appears to seek a factual determination as to whether or not there was a "retaliation." That determination is precisely the exercise precluded in the forum of a Rule 12.02 (6), as the fact of a retaliation is "taken as true." No inference is necessary. Or viewed conversely, for Judge Donald to extricate himself via the Rule 12.02 process, he would have to demonstrate as this juncture, "plaintiff can prove no set of facts in support of (the) claim that would entitle her to relief, *supra*." And also at this point, for purposes of this motion, Disciplinary Counsel is entitled to this court "construing the complaint liberally in favor of the plaintiff by ... giving the plaintiff the benefit of all the inferences that can be reasonably drawn from the pleaded facts"). Even if the allegation of "retaliation" is not

deemed a “fact” by this Court, the inference of retaliation can more than be “reasonably drawn from the pleaded facts, *supra*.”

No argumentative “denunciations” or “approbations” by Judge Donald alters the process at this stage.

Judge Donald laments that there is in fact no authority for the claim that there can be judicial conduct by a judge engaging in the retaliation actions taken as true here, a startling position. As an Indiana court has stated,

Specifically, Judge Danikolas's retaliatory discharge of Magistrate Sakelaris constitutes willful misconduct and an abuse of the power of his judicial office to advance a private vendetta, and is prejudicial to the administration of justice. As we noted in *In re Boles*, 555 N.E.2d 1284, 1288 (Ind.1990), “The use of judicial power as an instrument of **retaliation** is a serious violation of the **Code of Judicial Conduct**.” See also *In re Buchanan*, 100 Wash.2d 396, 669 P.2d 1248 (1983) (holding judge violated, *inter alia*, Judicial Canons 1 and 2(A) by discharging court employees in **retaliation** for their participation in the Washington Judicial Conduct Commission's case against the judge).” CITATION 838 N.E.2d 422 Supreme Court of Indiana. In the Matter of the Honorable James DANIKOLAS, Judge of the Lake Superior Court, Civil Division 3.No. 45S00-0403-JD-126.Dec. 6, 2005.

To suggest that there is no judicial conduct or ethics breach occasioned by a sitting judge filing a suspect attorney discipline complaint almost immediately on the heels of the same attorney exercising a legal right to file a complaint against a Judge pursuant to a statutory judicial conduct process would not simply undermine Rule 10, Rules of the Supreme Court, Code of Judicial Conduct, that suggestion would utterly eviscerate even the concept of cognizable judicial conduct standards. Nor does the advancement that Tennessee has no set jurisprudence as to judicial “retaliation” in any fashion doom the current action. As noted, in *Danikloas, et al. supra.*, and as plainly

reproduced in the Donald complaint, retaliation falls easily within the goals and umbrella of Canon 1 and Canon 2 (Complaint , Paragraph).

As retaliation takes shape in multiple factual and legal contexts, “a one-sized fits all” definition would seem impossible. Last year (2012) a Tennessee Court of Appeals utilized a basic dictionary definition in an employment context, stating, To “retaliate” is to “to return the like for: repay or requite in kind (as an injury) ... [or] to put or inflict in return.” WEBSTER'S THIRD NEW INT'L DICTIONARY 1938 (1993 Unabridged). **White v. Empire Exp., Inc.**, 395 S.W.3d 696, at 725, Tenn. App.2012).

Indeed, the individual who filed the judicial conduct complaint against Judge Donald in this matter not only possessed a statutory right to take such action, but likely had a duty under the Rules of Professional Responsibility:

RULE 8.3: REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the Disciplinary Counsel of the Board of Professional Responsibility.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the Disciplinary Counsel of the Board of Judicial Conduct.

Judge Donald would seek to impose a most definitive “chilling effect” on that right and duty by countering with patently retaliatory and baseless filing with the BPR assaulting the very professional status of the original complainant.

Further, Judge Donald advances the proposition that somehow the complaint must be dismissed due to the fact that Disciplinary Counsel affixed the signatures of the individual members of the Investigative Panel authorizing the Complaint, in contravention of the Rules of the Board of Judicial Conduct. Putting aside for the moment the reality that such an objection does not necessarily address the standard that “When considering a motion to dismiss for failure to state a claim, courts must give effect to the substance, rather than the form or terminology of a pleading. *Stewart v. Schofield*, 2012, 368 S.W.3d 457., that theorem disregards the apparent allowance of Rule 11.01 (a), Tennessee Rules of Civil Procedure for authorized signature by counsel, as done in this instance. Moreover, the interposition of such an objection in the environment of a Rule 12.02 (6) Motion hardly can be said to level the accurate requisite focus, i.e., “A motion to dismiss requires the courts to review the complaint alone and to look to the complaint's substance rather than its form, *Mitchell v. Campbell*, 2002, 88 S.W.3d 561, Similarly, the strained urging that somehow the process has not moved “promptly” is not directed at the pleadings themselves, and their substance. No statute of limitations defense (which could be a valid Rule 12.02 (6) item) is offered, merely a subjective belief that the matter has not moved “promptly” to the satisfaction of Judge Donald.

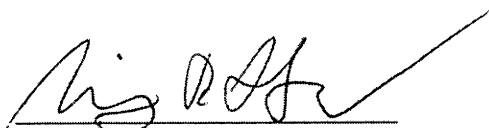
Having admitted the substance of the facts alleged in the Complaint, for purposes of this motion, Judge Donald is not entitled to a full evidentiary hearing in this moment to obtain a comprehensive ruling on his myriad defenses and theories. Only the pleadings

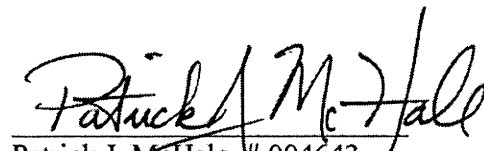
matter at this time, given the formidable weight and education offered by unbroken Tennessee Rule 12.02 (6) holdings.

Conclusion

The Motion to dismiss of Judge Donald should be denied. This the 4 day of ~~December~~, 2013.
January 4

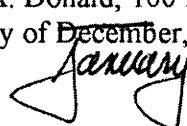
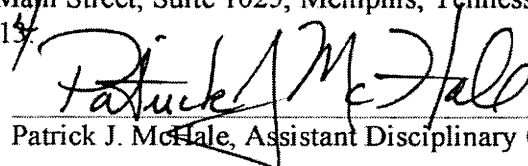
Respectfully submitted,


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Certificate of Service

I certify that a true and exact copy of the foregoing has been mailed, delivered, and/or sent via email to Ms, Theresa H. Patterson, Attorneys at Law, Attorney for The Honorable John A. Donald, 100 N. Main Street, Suite 1025, Memphis, Tennessee 38103, on this the 4 day of ~~December~~, 2013.



Patrick J. McHale, Assistant Disciplinary Counsel