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IN THE TENNESSEE COURT OF THE JUDICIARY

IN RE: THE HONORABLE JOHN A. BELL
JUDGE, GENERAL SESSIONS COURT
COCKE COUNTY, TENNESSEE

APPELLATE COURT CLERK
NASHVILLE

Docket No. M2009-02115-CJ-CJ-CJ

COMPLAINT OF DAVID PLEAU
FILE NO. 08-3508

**DISCIPLINARY COUNSEL'S MEMORANDUM IN SUPPORT OF RESPONSE TO
JUDGE BELL'S MOTION FOR SUMMARY JUDGMENT**

Joseph S. Daniel, Disciplinary Counsel for the Tennessee Court of the Judiciary, pursuant to *Rule 56, Tennessee Rules of Civil Procedure*, would, by way of Memorandum in support of his Response to the Motion for Summary Judgment of The Honorable John A. Bell, state as follows:

1. The Motion is acutely premature and should be dismissed.

Judge Bell seeks summary judgment in the face of his own unwillingness to comply with the *Tennessee Rules of Civil Procedure* with respect to discovery, (see, Disciplinary Counsel's Motion to Compel) and as such, cannot seriously advance at this stage the proposition that there are "no genuine issues of material fact" as mandated by the clear Rule 56 language as a requisite for summary judgment. Consciously withholding facts by improper discovery tactics would not appear to be a recognized methodology for demonstrating a lack of material facts.

2. Tennessee jurisprudence concerning summary judgment is now guided by *Hannan v. Alltel Publishing Co., 270 S.W. 3d 1, (Tenn. 2008)*.

In 2008, the Tennessee Supreme Court undertook to address and clarify the standards for summary judgment existing since *Byrd v. Hall, 847 S.W.2d 208, 214 (Tenn.*

1993). After a historical perspective was visited, the Court stated “We now acknowledge that this Court in *Byrd* misused the term ‘affirmative defense’ in describing a different, yet valid, method of burden-shifting.” *Hannan, supra., at 270 SW. 2d 7*. Following additional perspective groundwork, the Court concluded :

“In summary, in Tennessee, a moving party who seeks to shift the burden of production to the nonmoving party who bears the burden of proof at trial must either: (1) affirmatively negate an essential element of the nonmoving party's claim; or (2) show that the nonmoving party cannot prove an essential element of the claim at trial.” *Hannan, at 8-9*.

The claimed undisputed facts, standing alone, would not in any manner meet the *Hannan* standards. Moreover, axiomatic Tennessee standards unaffected by *Hannan*, eradicate the claim of Judge Bell.

In reviewing a motion for summary judgment, a court must view the evidence and all reasonable inferences drawn from the evidence in a light most favorable to the nonmoving party. *Health Cost Controls, Inc. v. Gifford, 108 S.W.3d 227 (Tenn. 2003)*.

Whether or not genuine issue of material fact exists for purposes of summary judgment requires the trial court take the strongest legitimate view of evidence in favor of nonmoving party, allows all reasonable inferences in favor of that party, and discard all countervailing evidence; if there is dispute as to any material fact or doubt as to conclusions to be drawn from that fact, motion is denied. *Byrd v. Hall, 847 S.W.2d 208 (Tenn. 1993)*.

Upon the rigorous analysis thus mandated, then the court should grant a summary judgment when the undisputed facts, as well as the inferences reasonably drawn from the undisputed facts, support only one conclusion: that the party seeking the summary judgment is entitled to a judgment as a matter of law. *Eskin v. Bartee, 262 S.W.3d 727*

(Tenn. 2008).

A disputed fact presents a “genuine issue,” for purposes of precluding summary judgment, if a reasonable jury could legitimately resolve that fact in favor of one side or the other. *Martin v. Norfolk Southern Ry. Co.*, 271 S.W.3d 76 (Tenn. 2008).

All of the fundamental elements call for a denial of the motion.

3. The issue of excessive delay is subject to analysis as a matter of law but equally so, as a disputed fact matter uniquely suited to the trier of fact in a trial setting.

The applicable Canon under review is, by its terms, ideally suited to a developed factual finding.

C. CANON 3. A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently

B. Adjudicative Responsibilities...

(8) A judge shall dispose of all judicial matters promptly, efficiently, and fairly.

Decisional delays thus have been considered by the courts on a case-by-case basis. In deciding whether to and how to sanction decisional delay, the courts have considered several factors, including (1) the amount of delay from the date the case was ripe for decision; (2) the complexity of the case; (3) the administrative and judicial workload of the judge; (4) the number of special assignments given to the judge; (5) the amount of vacation time taken; and (6) other complaints involving delayed decisions made against the judge. *Matter of King*, 184 W.Va. 177, 399 S.E.2d 888, 892 (1990).

4. The *ex parte* issue raised by the pleadings is established to have occurred by the undisputed facts, even as they are claimed by Judge Bell.

The relevant Canon provides:

C. CANON 3. A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently

B. Adjudicative Responsibilities...

(7)...A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that...

There appears to be no doubt but that Judge Bell's intermediary Testerman approached Mr. Pleau who was both a complainant in a Court of the Judiciary matter and a litigant in a matter pending in Judge Bell's court. Either attempt likely violates the *ex parte* prohibition described by the applicable Canon. *See, e.g., Inquiry into the Conduct of the Honorable Thomas M. Murphy (retired), 737 N.W.2d 355 (Minnesota 2007).* (contact with witness in a disciplinary proceeding pending against the judge).

Nor is Judge Bell shielded by usage of an attorney as both the specific language of the Canon and the Commentary thereto make it abundantly clear that the judge bears responsibility for those under his control or direction.

While counsel for Judge Bell appears insistent that for a violation to occur due to the contact with complainant Pleau, there must be attached a *quid pro quo* inducement, such is simply not an element of an improper *ex parte* contact such as that engineered by Judge Bell.

5. The undisputed documentation easily demonstrated a material display of judicial bias.

The Canons further provide:

B. CANON 2. A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities

A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

E. Disqualification.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

Commentary. —Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless whether any of the specific rules in Section 3E(1) apply...

A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

By decisional law, the rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In the latter case, the judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as practicable.

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge* of disputed evidentiary facts concerning the proceeding;

(c) the judge knows* that he or she, individually or as a fiduciary, or the judge's spouse, parent, or child wherever residing, or any other member of the judge's family residing in the judge's household*, has an economic interest* in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis* interest that could be substantially affected by the proceeding;

In explicit fashion, Judge Bell made the identical finding of fault against Ms. Coleman in “Pleau II” that he made in the first Pleau action despite controverted evidence. At a minimum he was required to disclose to that party his background with the facts of the case. Moreover, by inference, it could be stated that Judge Bell’s interest in “Pleau II” was well in excess of *de minimis* given that he had engaged in an obvious attempt to discourage Pleau from pursuing the Court of the Judiciary matter, and it could be reasoned that finding for Pleau in the negligence case might favorably dispose Pleau toward Bell by an alteration of the initial outcome.

Thus, either by undisputed fact or permitted inference the Motion for Summary Judgment is doomed.

6. Judge Bell’s utilization of the Fifth Amendment some 86 times in many instances in and of itself creates facts sufficient to deny his Motion under the *Hannan* standards.

As has been noted in previous matters brought before this Court, employment of the constitutional protection may impact civil actions, as “[T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them....” *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976); *see also Rachels v. Steele*, 633 S.W.2d 473 (Tenn.Ct.App.1981).

By way of example only, and not in any sense limitation, two examples from Judge Bell’s deposition of the concept amply demonstrate how the inference itself would create adequate issue of material fact.

At page 175, line 23 of his deposition, Judge Bell was asked pointedly if he requested that Testerman act as his attorney for purposed of violating any rules if the


Court of the Judiciary. By responding (p. 176, l. 1) with his scripted privilege and Fifth Amendment incantation, the inference is thus drawn that in fact Judge Bell did in fact ask Testerman to facilitate a violation.

Similarly, at page 201, line 17 an identical response was made when faced with a specific question as to whether or not he violated the Canon prohibiting *ex parte* contact.

Conclusion

The Motion for Summary Judgment should be denied.

Respectfully submitted,



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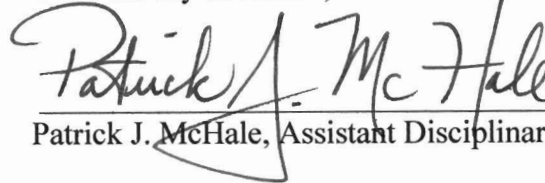
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Certificate of Service

I certify that a true and exact copy of the foregoing has been mailed, delivered, and/or transmitted by facsimile to Mr. Gordon Ball, BALL & SCOTT Law Offices, Attorneys at Law, Attorney for The Honorable John A. Bell, 550 W. Main Street, Suite 601, Knoxville, Tennessee 37902 on this the 1st day of March, 2010.



Patrick J. McHale, Assistant Disciplinary Counsel