ORIGINAL

IN THE TENNESSEE COURT OF THE JUDICIARY

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

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

Complaint of David Pleau
File No. 08-3508

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

MAY IT PLEASE THE COURT:

NOW INTO COURT comes the Honorable John A. Bell, Judge, General Sessions Court, Cocke County, Tennessee ("Judge Bell"), pursuant to Rule 56 of the Tennessee Rules of Civil Procedure, and submits this Memorandum in Support of his Motion for Summary Judgment, which demonstrates the lack of genuine issues of material fact for trial on the three (3) counts listed in the Formal Charges and establishes that Disciplinary Counsel cannot establish misconduct under either of the 3 counts listed in the Formal Charges by clear and convincing evidence. As such, the Formal Charges are without merit, entitling Judge Bell to judgment as a matter of law.[1]

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[1]Notwithstanding the requirements of Tenn. Code Ann. § 17-5-304, which compels Disciplinary Counsel to recommend a full investigation to the investigative panel before formal charges are brought and to await authorization of such charges by the investigative panel following notice, Disciplinary Counsel has now sought leave to unilaterally "amend" the formal charges against Judge Bell without recommendation to or authorization from the investigative panel. In fact, Disciplinary Counsel has indicated that the investigation into alleged misconduct against Judge Bell is "continuing."

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I. PRELIMINARY STATEMENT

The summary judgment evidence demonstrates that Disciplinary Counsel filed Formal Charges against Judge Bell absent any colorable factual or legal basis. The record unmistakably fails to establish the merit of either Count by the requisite *clear and convincing* standard. Accordingly, summary judgment in Judge Bell's favor is appropriate.

Disciplinary Counsel has filed Formal Charges against Judge Bell alleging three counts of alleged judicial offenses. In deciding this motion, the Court should be mindful of two unerring rules: judges are not subject to discipline for the "appropriate exercise of judicial discretion" and the primary purpose of the Code of Judicial Conduct is to *protect the public* not to discipline judges. With that in mind, there is no allegation, much less clear and convincing evidence, that any party has been injured or prejudiced by any act or omission by Judge Bell.

COUNT I

First, there is no dispute that there was a 9½-month delay from hearing to judgment in *Pleau I*. Disciplinary Counsel has reiterated his view that no set of circumstances may justify such a delay, apparently making it a *per se* violation of Canon 3(B)(8). However, cases and commentators make clear that an *isolated* delay, like this one, does not equate to a *per se* violation of Canon 3(B)(8), nor demand disciplinary action. Moreover, before a court can conclude that a delay is misconduct, it must first examine the reason(s) behind the delay. Here, the Court is presented with an isolated instance of delay which was due to: (1) Judge Bell's heavy docket; (2) his dual roles as General Sessions and Juvenile Court Judge, (3) his hectic work schedule, (4) an intervening serious accidental injury that temporarily disabled him, and (4) the complexity of the issues. Accordingly, Judge Bell is entitled to summary judgment on the charge of decisional delay.

Second, Judge Bell also followed Tennessee law by dismissing Mr. Pleau's complaint against Merastar. Merastar has never complained – to this Court or to Judge Bell – of any prejudice from the delay. Likewise, there is no evidence that Mr. Pleau suffered palpable prejudice or injury from Judge Bell's non-merits dismissal of his action.

Third, the undisputed material facts and applicable Tennessee law unmistakably show that Judge Bell was neither responsible for transmitting copies of the judgment nor aware that copies were not timely mailed.

COUNT II

Next, the undisputed material facts show that Judge Bell exercised proper judicial discretion in continuing to preside over *Pleau II* after Mr. Pleau submitted his disciplinary complaint. The Court is guided by two fundamental rules. One, all public officials are afforded the presumption that they have properly discharged their public responsibilities. Thus, Disciplinary Counsel must initially – by clear and convincing evidence – rebut the presumption that Judge Bell's decision to hear the matter was the correct one. And two, Disciplinary Counsel faces a still heavier burden of proving – once again by clear and convincing evidence – that Judge Bell abused his discretion by not *sua sponte* disqualifying himself. Nothing offered by Disciplinary Counsel demonstrates – by clear and convincing evidence – that Judge Bell abused his judicial discretion by failing to disqualifying himself *sua sponte* in *Pleau II*.

COUNT III

As to the final count, after accumulating and analyzing the summary judgment record, not a scintilla of evidence exists to support Count III of the Formal Charges. The accuracy of the charges have been directly contradicted by Mr. Pleau's own statements which directly counter

Disciplinary Counsel's allegations of misconduct, and by Agent Lott's testimony that the TBI uncovered not a trace of evidence of criminal wrongdoing.

NOTICE

Finally, the record demonstrates that Disciplinary Counsel failed to provide Judge Bell with due notice pursuant to Tenn. Code Ann. §17-5-304(c) that he was being investigated for any alleged act or omission than those recounted in Count I with respect to decisional delay and service of a copy of the judgment on the parties. Consequently, Counts II and III should be summarily dismissed in their entirety.

II. SUMMARY OF UNDISPUTED MATERIAL FACTS

John A. Bell is a General Sessions Court Judge in Cocke County, having been duly elected in 1998 and reelected in 2006. [Statement of Undisputed Material Facts, ¶ 1 ("Statement")]. Along with being Cocke County's only general sessions court judge, he is also the juvenile judge for Cocke County. [Statement, ¶ 2].

In addition to the foregoing positions and responsibilities, Judge Bell is a decorated member of the armed services, having received three (3) Meritorious Service Medals,[2] and as many as six (6) Army Commendation Medals.[3] [Statement, ¶3]. Currently, Judge Bell holds the rank of Lieutenant Colonel in the United States Army Reserve. [Statement, ¶ 4].

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[2]The Meritorious Service Medal (MSM) is awarded to any member of the Armed Forces of the United States or to any member of the Armed Forces of a friendly foreign nation who, while serving in a non-combat area after January 16, 1969, has distinguished himself or herself by outstanding meritorious achievement or service. *See* http://www.armyawards.com/arcom.shtml.

[3]The Army Commendation Medal (ARCOM) is awarded to any member of the Armed Forces of the United States who, while serving in any capacity with the Army after December 6, 1941, distinguishes himself or herself by heroism, meritorious achievement or meritorious service. *See* http://www.armyawards.com/msm.shtml.

The Formal Charges brought against Judge Bell by Disciplinary Counsel, Joseph S. Daniel ("Disciplinary Counsel") stem from a car wreck case filed by a *pro se* plaintiff – Mr. David Pleau – against his uninsured motorist carrier – Meristar – in the General Sessions Court for Cocke County. The case, styled *David J. Pleau v. Merastar,* Case No. 2007-CV-869 ("Pleau I"), was tried before Judge Bell on September 18, 2007. [Statement, ¶ 5].

At the end of the September 18, 2007 hearing, Meristar moved to dismiss Mr. Pleau's complaint because he had failed to sue the uninsured motorist, Ms. Jo Ann Coleman, as required by Tenn. Code Ann. § 56-7-1206. [Statement, ¶ 7]. Judge Bell took the matter under advisement. [Statement, ¶ 8]. Judge Bell did not rule on Merastar's motion until nine and a half (9½) months later, when he granted Meristar's motion, dismissing the case without prejudice. [Statement, ¶ 13].

Judge Bell proffered the reasons which attended the delay, including the fact that between the interim period, according to records obtained from the Clerk's office in Cocke County, Judge Bell disposed of 12,123 cases. [Statement, ¶ 12]. Judge Bell often worked on the file, researching the applicable statutes and looking into whether any available statutory defenses had been waived, which might necessarily preclude dismissal. [Statement, ¶¶ 10-11].

Unfortunately, the clerk responsible for mailing copies of the judgment failed to actually mail the parties a copy of the entered judgment. [Statement, ¶¶14-15]. When Mr. Pleau ultimately received a copy of the judgment, his statutory appeal period. [Statement, ¶¶ 17-19].

Dissatisfied by this turn of events, Mr. Pleau filed a disciplinary complaint in this Court, charging Judge Bell with being dilatory in not entering the judgment. [Statement, ¶ 21]. Upon being advised by Disciplinary Counsel of Mr. Pleau's complaint and the Clerk's inadvertent failure to serve the judgment on him, at Disciplinary Counsel's suggestion [Statement, ¶ 23],

Judge Bell availed himself of the Rules of Procedure as made applicable to him by Tenn. Code Ann. § 16-15-727, and noticed Mr. Pleau and Meristar for a hearing on December 23, 2008. [Statement, ¶¶ 22-28].

By this time, however, Mr. Pleau, of his own volition, had already filed a new action against the uninsured driver, Ms. Coleman, on October 8, 2008 in Judge Bell's court. [Statement, ¶¶ 29-30]. This is wholly contrary to Disciplinary Counsel's allegation in the Formal Charges that on December 23, 2008, Judge Bell had "encouraged Mr. Pleau to file a new action against 'the other driver' . . . " [Formal Charges, ¶6], since Mr. Pleau had already filed the second action (*Pleau II*) against Ms. Coleman more than two months earlier. [Statement, ¶ 29].

The case was tried on April 24, 2009, absent any objection to Judge Bell's continued involvement. [Statement, ¶¶ 33-34]. Trial was held on Friday, April 24, 2009, and on Monday, April 27, 2009, Judge Bell found in Mr. Pleau's favor. [Statement, ¶ 36]. After Merastar appealed the decision to Circuit Court, the parties settled all of their claims. [Statement, ¶ 36].

The focus of events then shifts to the disciplinary complaint[4] filed by Mr. Pleau concerning the decisional delay and the Clerk's failure to mail him a copy of the judgment.[5] Disciplinary Counsel's initial letter of July 17, 2008 states:

> It is claimed that Mr. Pleau's case was tried September 18, 2007. He says you took the matter under advisement and did not render a decision until June 27, 2008. These facts if proven would constitute judicial delay, a violation of canon 3(B) (8) of the Code of Judicial Conduct.

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[4]The allegations of Mr. Pleau's complaint concerned only the delay by Judge Bell in not issuing his opinion until June 27, 2008 and the fact that Mr. Pleau did not receive a copy of the judgment until July 10, 2008. [Statement, ¶ 39].

[5]None of the parties in *Pleau II* have made any complaint to the Court of the Judiciary regarding Judge Bell's handling of any part of that case. [Statement, ¶ 37].

[Statement, ¶ 41].

Responding,, Judge Bell acknowledged the delay and made a good faith effort to explain the circumstances, including the research required, the fact that he had disposed of 1,926 civil cases, 2,576 juvenile cases, and 7,621 criminal cases (through May 13, 2008) for a total of 12,133 cases during that period, and finally, the fact that he had been seriously injured by a drunk driver in an automobile wreck which disabled him for several months. [Statement, ¶ 42].[6] Disciplinary Counsel replied by making it clear that he was not interested in an explanation, indicating that the delay, if it occurred, was a per se violation of Canon III(B)(2), III (B)(8) and II(A) of the Code of Judicial Conduct. [Statement, ¶¶ 43, 47].

In mid-late January 2009, Judge Bell received an anonymous telephone call indicating that Mr. Pleau would be "dropping" his disciplinary complaint, after which Judge Bell engaged Newport lawyer Tom Testerman, who contacted Mr. Pleau to inquire about his intentions regarding the disciplinary complaint. [Statement, ¶¶ 55-57]. Mr. Pleau advised Mr. Testerman that he was focusing on the civil trial and would not be dropping the complaint. [Statement, ¶ 60]. Mr. Pleau has stated that there "was no quid pro quo" and that Mr. Testerman did not offer him anything of any kind to drop the complaint. [Statement, ¶58]. Importantly, Mr. Pleau minced no words in stating that Mr. Testerman did not tell him that Judge Bell would find in his

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[6]Judge Bell later explained,

> I do not have any designated office time to do research. My regular work schedule has me holding court every day Monday through Friday. I have office time to do research only when the cases finish early. I did office work and research on this case when I was finished with court.

[Statement, ¶ 44].

favor if he dropped the charges. Mr. Pleau denied any implication that Mr. Testerman threatened him in any way if he did not drop the charges. [Statement, ¶ 59].

From that point Disciplinary Counsel's "investigation" resembled nothing short of a "witch hunt." First, he employed a private investigator to contact Mr. Pleau, who signed an affidavit for him, which but did not mention being offered anything to drop the charges or that he was in any way threatened if he did not. [Statement, ¶¶ 66-68]. The investigator, Mr. LaRue, met Mr. Pleau, who informed him about Mr. Testerman's call. According to Mr. Pleau, Mr. LaRue "jumped all over the issue." [Statement, ¶ 62]. Second, Disciplinary Counsel contacted the Tennessee Bureau of Investigation ("TBI"). [Statement, ¶ 69]. Disciplinary Counsel represented to the TBI Director that Mr. Pleau has made statements under oath to establish a conspiracy by Judge Bell acting through his lawyer, Mr. Testerman, to interfere with an official investigation and suppress the formal presentation of these charges. [Statement, ¶ 70].

The "investigation" – at this point purportedly limited to Mr. Pleau's charge of decisional delay and neglected service – involved subpoenaing telephone records from Judge Bell, his lawyer, and Mr. Pleau, "wiring" Mr. Pleau to help facilitate Mr. Testerman's further involvement, and secretly recording and videotaping a telephone call between Mr. Pleau and Mr. Testerman. [Statement, ¶¶ 71-81]. Mr. Pleau again confirmed that Mr. Testerman "did not promise him anything nor threaten him in any way." [Statement, ¶ 76].

The TBI outfitted Mr. Pleau with an audio/video recording device for a meeting with Mr. Testerman. [Statement, ¶ 81]. Twice more, Mr. Pleau asked Mr. Testerman if dropping the charges against Judge Bell would make a difference in how Judge Bell would rule in his lawsuit, and both times, Mr. Testerman confirmed that it would not make a difference. [Statement, ¶ 83].

The evidence is compelling that Disciplinary Counsel decided to pursue Formal Charges regardless of the findings made by the TBI or uncovered by the "investigation." To illustrate, Mr. LaRue, the investigator, did not listen to the meeting between Mr. Pleau and Mr. Testerman [Statement, ¶ 84], did not listen to the recording or watch the video [Statement, ¶ 85], and did not discuss any part of the conversation between Mr. Pleau and Mr. Testerman. [Statement, ¶ 85]. Despite seeking the assistance of the Attorney General's Office and TBI, neither Disciplinary Counsel nor Assistant Disciplinary Counsel ever spoke with the TBI agent. [Statement, ¶ 86]. Records provided to Judge Bell's counsel by Disciplinary Counsel suggest that no one involved in the investigation on behalf of the TBI, the Attorney General's office, or this Court has spoken with Mr. Pleau since March 20, 2009. [Statement, ¶ 87].

Still, the "investigation" of Judge Bell continued. On June 1, 2009, after approval from Disciplinary Counsel, TBI agent Lott subpoenaed phone records relating to Judge Bell and his lawyer, Mr. Testerman. [Statement, ¶ 88]. TBI Agent Lott ultimately indicated that he has no knowledge of how Judge Bell may have violated any of the criminal statutes. [Statement, ¶ 101].

On July 16, 2009, Disciplinary Counsel and his investigator went to Mr. Testerman's office and informed Mr. Testerman that he had violated the Code of Professional Conduct by communicating directly with Mr. Pleau. [Statement, ¶¶ 89-90]. Mr. Testerman stated that he was intimidated by Disciplinary Counsel, who pressed him for information regarding his conversations with Judge Bell. [Statement, ¶ 91]. Succumbing to threats and intimidation, Mr. Testerman revealed information which he believed was protected by the attorney-client privilege. [Statement, ¶¶ 92-93]. Disciplinary Counsel nevertheless informed Mr. Testerman that he would have to report him. [Statement, ¶ 84]. After threatening Mr. Testerman,

Disciplinary Counsel informed him "of the criminal implications of this case" after which Mr. Testerman "became wary of answering any more questions." [Statement, ¶¶ 96-97].

III. SUMMARY JUDGMENT STANDARDS

In *Stanfill v. Mountain*, 2009 Tenn. LEXIS 832 (Tenn. Dec. 3, 2009), the Supreme Court reiterated the standards applicable when courts are confronted with summary judgment:

> Summary judgment is appropriate only when the moving party can demonstrate that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04: *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1, 5 (Tenn. 2008); *Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn. 1993). In *Hannan*, this Court reaffirmed the basic principles guiding Tennessee courts in determining whether a motion for summary judgment should be granted, stating:
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> > The moving party has the ultimate burden of persuading the court that "there are no disputed, material facts creating a genuine issue for trial . . . and that he is entitled to judgment as a matter of law." *Byrd*, 847 S.W.2d at 215. If the moving party makes a properly supported motion, the burden of production then shifts to the nonmoving party to show that a genuine issue of material fact exists. *Id.*
> >
> > . . .
> >
> > [I]n 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.
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> *Hannan*, 270 S.W.3d at 5, 8-9. It is insufficient for the moving party to "merely point to omissions in the nonmoving party's proof and allege that the nonmoving party cannot prove the element at trial." *Id.* at 10. "Similarly, the presentation of evidence that raises doubts about the nonmoving party's ability to prove his or her claim is also insufficient." *Martin v. Norfolk S. Ry. Co.*, 271 S.W.3d 76, 84 (Tenn. 2008).

The standard by which our courts must assess the evidence presented in support of, and in opposition to, a motion for summary judgment is also well established:

> Courts must view the evidence and all reasonable inferences therefrom in the light most favorable to the non-moving party. *Robinson v. Omer*, 952 S.W.2d 423, 426 (Tenn. 1997). A grant of summary judgment is appropriate only when the facts and the reasonable inferences from those facts would permit a reasonable person to reach only one conclusion. *Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83, 89 (Tenn. 2000). In making that assessment, this Court must discard all countervailing evidence. *Byrd*, 847 S.W.2d at 210-11.

Giggers v. Memphis Housing Auth., 277 S.W.3d 359, 364 (Tenn. 2009).

IV. DISCIPLINARY COUNSEL MUST PROVE THE MISCONDUCT SET FORTH IN EACH COUNT OF THE FORMAL CHARGES *BY CLEAR AND CONVINCING* EVIDENCE.

Make no mistake, Disciplinary Counsel's burden is a heavy one. Misconduct must be established by *clear and convincing evidence*. *See* Tenn. Code Ann. § 17-5-308(c). Such a limitation serves to exclude doubtful or insignificant evidence of judicial misconduct. The Court of Appeals recently explained the standard as follows:

> Although it does not require as much certainty as the "beyond a reasonable doubt" standard, the "clear and convincing evidence" standard is more exacting than the "preponderance of the evidence" standard. In order to be clear and convincing, evidence must eliminate any serious or substantial doubt about the correctness of the conclusions to be drawn from the evidence. Such evidence should produce in the fact-finder's mind a firm belief or conviction as to the truth of the allegations sought to be established. In contrast to the preponderance of the evidence standard, clear and convincing evidence should demonstrate that the truth of the facts asserted is "highly probable" as opposed to merely "more probable" than not.

Newman v. Woodard, 288 S.W.3d 862, 868 (Tenn. Ct. App. 2008) (citations omitted).

In the context of judicial misconduct proceedings, clear and convincing evidence means evidence "'so clear as to leave no substantial doubt'; 'sufficiently strong to command the unhesitating assent of every reasonable mind.'" *Inquiry Concerning Judge Robert G. Spitzer,* 2007 Cal. Comm. Jud. Perform. LEXIS 1 (Cal. Comm. Jud. Perform. Oct. 2, 2007). And so, while the evidence must establish a "high probability" the charge is true, it need not prove the charge beyond a reasonable doubt.

Tenn. Code Ann. § 17-5-302[7] enumerates the type of conduct for which a judge may be disciplined.[8] Judges, however, are not subject to discipline for the "appropriate exercise of judicial discretion," and consequently, "necessary judicial independence requires that a judge not be subject to discipline for good faith comments directed primarily and principally at issues properly before the court." *In re Brown*, 879 S.W.2d 801, 806 (Tenn. 1994). For the sake of clarity, Judge Bell will discuss the charges individually.

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[7]Only three reported decisions address the statute: *In re Murphy*, 726 S.W.2d 509 (Tenn. 1987); *In re Williams*, 987 S.W.2d 837 (Tenn. 1998); *McLendon v. McLendon*, 2004 Tenn. App. LEXIS 663 (Tenn. Ct. App. Oct. 12, 2004).

[8] Offenses of which the court may take cognizance shall include the following:

> (1) Willful misconduct relating to the official duties of the office; (2) Willful or persistent failure to perform the duties of the office; (3) Violation of the Code of Judicial Conduct as set out in the rules of the supreme court of Tennessee; (4) The commission of any act constituting a violation of so much of the Tennessee Rules of Professional Conduct as set out in the rules of the supreme court of Tennessee as is applicable to judges; (5) A persistent pattern of intemperate, irresponsible or injudicious conduct; (6) A persistent pattern of discourtesy to litigants, witnesses, jurors, court personnel or lawyers; (7) A persistent pattern of delay in disposing of pending litigation; and (8) Any other conduct calculated to bring the judiciary into public disrepute or to adversely affect the administration of justice.

V. LEGAL ARGUMENT

A. Disciplinary Counsel Cannot Establish by Clear and Convincing That The 9½ Months-Long Delay in Judgment in *Pleau I* Violated Judicial Canons.

In Count I, Disciplinary Counsel makes three independent allegations. First, Disciplinary Counsel contends that Judge Bell is guilty of misconduct for not issuing a ruling in *Pleau I* for 9½ months. Second, he maintains that Judge Bell failed to "respect" and "comply" with the law and "promote public confidence in the integrity and impartiality of the judiciary." And third, he argues that Judge Bell is guilty of misconduct for apparently not making certain that the litigants in *Pleau I* received a copy of the judgment once it was entered.

1. Disciplinary Counsel Cannot Establish By Clear and Convincing Evidence That Judge Bell's Decisional Delay of 9½ Months Warrants a Finding of Misconduct.

First of all, the undisputed material facts demonstrate that Judge Bell did not violate Canon 3(B)(8), which requires a judge to "dispose of all judicial matters promptly, efficiently and fairly." While there is no dispute that there was a 9½-month delay following the hearing in *Pleau I*, the mere fact of a lone delay does not equal a *per se* violation of Canon 3(B)(8).

Of course, there is no question that lengthy, unjustified delays in the disposition of a court's docket compromise the interests of parties and diminish confidence in the judiciary and the legal system. Parties rightfully expect to receive prompt, efficient, and fair resolutions of their cases and judges must meet these expectations impartially and diligently. That said, cases and commentators construing Canon 3(B)(8) repeatedly observe that to constitute a violation, a judge must fail to render decisions *in multiple cases* for a *lengthy period of time*.

Here, however, not only does Disciplinary Counsel fail to allege multiple failures by Judge Bell, but his bald charge of decisional delay undisputedly relies upon a single, isolated

event of delay. *See* Formal Charges, ¶¶ 1-5. Disciplinary Counsel also forecloses the possibility of a reasonable basis or extenuating circumstances for the delay. [Statement, ¶ 41].

What's more, before a court can adjudicate a delay as misconduct, the court must first examine the basis or circumstances of delay. Here, Judge Bell candidly acknowledged the delay and made a good faith effort to explain the circumstances.[9] In Disciplinary Counsel's view, the delay was a *per se* violation of Canons III(B)(2), III (B)(8) and II(A). [Statement, ¶¶ 43, 47]. Fortunately for Tennessee's judges, the judge's prior conduct in promptness is rightly a consideration, as is the basis and circumstances which attenuated the delay.

Disciplinary Counsel's unbridled pursuit to find misconduct on Judge Bell's part aside, it is incumbent upon this Court to consider the aberration of and the basis and circumstances underlying the delay, and not to view an isolated delay as *per se* misconduct. Here, Judge Bell's explanation was three-fold: one, that as the only General Sessions Judge in Cocke County, along with being that county's lone Juvenile Court Judge, his docket is crowded and unwieldy[10]; two, Judge Bell explained that he had to do his own research on the case:

> I do not have any designated office time to do research. My regular work schedule has me holding court every day Monday through Friday. I have office time to do research only when the cases finish early. I did office work and research on this case when I was finished with court.[11]

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[9]Judge Bell never denied the delay. He merely attempted to explain the reasons for it. [Statement, ¶ 48].

[10]For instance, Judge Bell disposed of 1,926 civil cases, 2,576 juvenile cases, and 7,621 criminal cases through May 13, 2008, for a total of 12,133 case dispositions. [Statement, ¶ 12].

[11]For example, Judge Bell stated that while the case was under advisement, he researched the applicable statutes and whether any available statutory defenses available had been waived by Merastar. [Statement, ¶ 10].

[Statement, ¶ 44]; and three, Judge Bell recounted the fact that he had been seriously injured in an automobile accident by a drunk driver and that this injury left him disabled for several months during the delay. [Statement, ¶ 42]. Judge Bell also stated that he had worked on the file on about a weekly basis. [Statement, ¶ 11].

While courts inherently have the power to supervise and control their dockets (*see State ex rel. Buck v. McCabe*, 140 Ohio St. 535, 537, 45 N.E.2d 763 (Ohio 1942), this power is rightly tempered by a responsibility to efficiently administer justice. Canon 3 of the Code of Judicial Conduct requires judges to perform their duties with impartiality and diligence, to give their judicial duties precedence over all other activities, to dispose of cases and other judicial matters "promptly, efficiently, and fairly," and to hold their staff, court officials, and others to these high standards. Canon 3, 3(A), 3(B)(8), and 3(C)(2). The Court should, however, be mindful of the principle that the primary purpose of the Code of Judicial Conduct is to *protect the public* rather than simply to discipline judges. *See In re Judge Clark,* 866 So.2d 782, 792 (La. 2004).

Significantly, the court in *In re Tuck*, 683 So.2d 1214, 1218 (La. 1996)[12] expressed that some delays are defensible, *e.g.*, they result from causes beyond the judge's control, such as excessive caseload, insufficient numbers of sitting judges or staff, structural inefficiency inherent in the judicial system, and case complexity. *Id.* Some delays, on the other hand, are

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[12]In *In re Tuck*, the court held that a minimum sanction of censure was warranted by a *six-year* delay in deciding a case, in light of the judge's failure to report two cases to the judicial administrator as being held under advisement. The court noted that the delay in a case which the judge inadvertently neglected was not sanctionable misconduct. However, in the other case, the judge allowed lawyers to abuse the decision-making process by granting them numerous extensions in which to file briefs. *In re Tuck*, 683 So.2d at 1219.

indefensible, including delays due to the judge's own inefficiency, as well as belligerence or spite, disability or infirmity, and sloth or neglect. 683 So.2d at 1218.

The *In re Tuck* court noted several factors to consider in deciding decisional delay cases, 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 by the judge, and (6) other complaints involving delayed decisions made against the judge. 683 So.2d at 1214.

Finally, the court observed that only indefensible delay constitutes judicial misconduct, because excessive, unjustified delay is prejudicial to the expeditious administration of the court's business. *Id.* (quoting Charles Gardner Geyh, *Adverse Publicity as a Means of Reducing Judicial Decision-Making Delay; Periodic Disclosure of Pending Motions, Bench Trials and Cases Under the Civil Justice Reform Act*, 41 Clev. St. L. Rev. 511, 520 (1993)). Sanctions have been imposed, for example, in cases involving: (1) a substantial number of delayed decisions; (2) a small number of delayed decisions involving particularly long delays; and (3) proof of vindictive or other malicious motive behind an instance of delay. *See In re Tuck*, supra; *In re Sommerville*, 364 S.E.2d 20, 23 (W. Va. 1987). In contrast, when there are only one or two instances of delay, courts generally have declined to impose sanctions, absent some other type of misconduct or aggravating circumstances. Jeffrey M. Shaman et al., *Judicial Conduct and Ethics,* § 6.05 (2d ed.1995).

Not surprisingly, Disciplinary Counsel takes a rigid and inflexible approach to the delay issue. Less surprisingly, Tennessee courts are less rigid and more flexible. Indeed, as the Tennessee Court of Appeals has observed, our courts are afforded a presumption that they have

properly discharged their public responsibilities. Consequently, the Court is directed to consider the basis for the delay, especially where the delay results from extenuating circumstances:

> The issue of delay in entering final judgment in this case must be addressed, and is a recurring problem. A trial court has broad discretion in the conduct of trials and the management of its docket. *See Kelley v. Brading*, 337 S.W.2d 471, 47 Tenn. App. 223 (1960). However, the elapse of four years between the evidentiary hearing and resolution of the issues in a case would be an abuse of discretion, unless there are extenuating circumstances. An inordinate delay in resolving issues in dispute results in prejudice to the judicial process. *See* T.R.A.P. Rule 36(b). The record before us does not establish any basis for the long delay in the final resolution of the case, but all public officials are afforded the presumption that they have discharged their public responsibilities in a proper manner. Delays can be and are caused by misplaced court records, cases being inadvertently removed from the docket and other extenuating circumstances.

Justice v. Sovran Bank, 918 S.W.2d 428, 429-30 (Tenn. Ct. App. 1995) (footnote omitted).

Notably, the delay was due to Judge Bell's extraordinarily heavy docket and his dual roles as General Sessions and Juvenile Court Judge, his hectic work schedule, an intervening serious accidental injury that left him temporarily disabled, and the complexity of issues.

Significantly, a review of judicial ethics opinions from across the country demonstrates that a single violation of the rule is usually not enough to warrant discipline. Instead, the opinions strongly suggest that a pattern of such misconduct must be shown. *See Schultz, Misconduct or Judicial Discretion: A Question of Judicial Ethics in the Connecticut Supreme Court*, 40 Conn. L. Rev. 549, 580 (Dec. 2007).[13]

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[13]For instance, a Louisiana judge violated this Canon after failing to render timely judgments in eighteen cases for a period ranging from three to nine months and further failed to timely report (as required by court rules) to the judicial administrator that she had taken the cases under advisement. *In re Lee*, 933 So. 2d 736, 737-38 (La. 2006). A judge in Florida faced similar consequences when he failed to rule in a timely manner on a dozen cases for close to, or more than, a year. *In re Allawas*, 906 So. 2d 1052, 1053-55

Judge Joe G. Riley, formerly presiding judge of this Court, emphasized that there can be no "definitive deadline," observing that "[t]he complexities of each case and each judge's caseload are factors to be considered" in reviewing a delay in any given case. Judge Riley said:

> Some judges are busier than others, and some rule more promptly than others. Is the length of time it takes to decide a case completely within the judge's unbridled discretion? As Presiding Judge of the court of the Judiciary, I have received numerous complaints from litigants alleging unreasonable delay in the disposition of cases. A judge has an ethical duty to "dispose" promptly of the business of the court" and to be punctual in attending court. Furthermore, a little-known statutory provision requires trial judges to render decisions within sixty days from the completion of the trial. From an ethical perspective, however, there can be no definitive deadline. The complexities of each case and each judge's caseload are factors to be considered in determining how promptly a ruling should be made. Nevertheless, judges should be sensitive to the need to rule promptly.

Ethical Obligations of Judges, 23 Memph. State L. Rev., No. 3, p. 507, 512 (1993).

Finally, while Judge Bell bears primary responsibility for the delay, it is also true that attorneys for the parties are also required to take all reasonable steps to obtain a timely resolution of the issues in their cases. Tenn. R. App. P. 36(a) explicitly provides that "Nothing [in the Rules of Appellate Procedure] shall be construed as requiring relief be granted to a party . . . who

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(Fla. 2005). In contrast, a judge charged with delaying one decision for 3½ months was determined to not have violated the Canon. *In re King*, 399 S.E.2d 888, 893 (W. Va. 1990). The court explained: "[C]ourts dealing with judicial disciplinary proceedings arising from unreasonable delay in the disposition of cases *have seldom imposed judicial discipline for isolated incidents of delay*. Disciplinary sanctions are more frequently imposed upon offenders who exhibit an extensive pattern of delay." *Id.* (emphasis added). *See also In re Emanuel*, 755 So. 2d 862, 872 (La. 1999) (judge charged with failure to timely render and sign judgments in two cases and failure to report a case as under advisement for more than one year. Each case involved delays of approximately one year. The court concluded that public censure was warranted.); *In re Judge Wimbish*, 733 So. 2d 1183 (La. 1999) (minimum sanction of public censure warranted for failure to render timely decisions in 56 cases, failure to report 7 cases under advisement, and failure to timely report status of 34 cases under advisement).

failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error." And while attorneys are understandably reluctant to ask a busy judge to decide the issues in their case, after a reasonable elapse of time, attorneys should file a joint motion asking for a judicial determination. Indeed, zealous representation requires attorneys to take all reasonable steps to bring about a timely resolution of the clients' disputes. *See* Rule 8, Code of Professional Responsibility, Canon 7; *see also Justice*, 918 S.W.2d at 430.

And Mr. Pleau is not relieved of a similar obligation by his own *pro se* status. To be sure, when a party is proceeding *pro se*, he or she should be accorded the same treatment as that given to the represented party. *McLendon v. McLendon*, 2004 Tenn. App. LEXIS 663 (Tenn. App. Oct. 12, 2004); *Irvin v. City of Clarksville*, 767 S.W.2d 649, 652 (Tenn. App. 1988). However, the *pro se* litigant is not excused from complying with the same procedures and substantive law as those applicable to a represented party. *Id.* In *Pleau I*, neither counsel for Meristar nor Mr. Pleau sought relief, and so, they too bear some responsibility for the delay.

In the final analysis, to constitute a violation, it appears settled that a judge must delay decisions in multiple cases for a lengthy period of time. Here, Disciplinary Counsel has failed to show – by clear and convincing evidence – misconduct on the part of Judge Bell's for his isolated failure – much less any repeated failure – to dispose of judicial matters promptly, efficiently, and fairly.

2. Disciplinary Counsel Cannot Establish by Clear and Convincing Evidence That Judge Bell Failed to Respect and Comply with the Law and Promote Public Confidence in the Integrity and Impartiality of the Judiciary.

The undisputed material facts demonstrate that Judge Bell ultimately (and correctly) entered a judgment in favor of the defendant insurer in *Pleau v. Merastar,* 2007-CV-869 (Cocke

Gen. Sessions), which Disciplinary Counsel has admitted was required by Tennessee law. Thus, while his decision was delayed, for the reasons explained above, Judge Bell nonetheless ultimately followed Tennessee law by dismissing Mr. Pleau's complaint against Merastar. Merastar has never complained – to this Court or to Judge Bell – of any prejudice or other injury. Plainly, Mr. Pleau suffered no palpable prejudice or injury from Judge Bell's non-merits dismissal of his action, which he re-filed. [Statement, ¶¶ 5-17].

3. Disciplinary Counsel Cannot Establish by Clear and Convincing Evidence That the Clerk's Failure to Transmit Copies of the Judgment to the Parties in Pleau I Was Misconduct on the Part of Judge Bell.

Finally, Disciplinary Counsel appears to charge Judge Bell with misconduct due to the fact that a copy of the judgment was evidently not mailed to Mr. Pleau, or to Meristar's counsel within the 10-day appeal period. However, Judge Bell was neither responsible for such transmission of copies of the judgment nor was he aware that copies were not timely mailed to the parties. [Statement, ¶¶ 14-17].

In fact, the judgment was signed by Judge Bell, but it was Ms. Joyce Clark, a full-time employee for the Clerk's office, who actually signed the "certificate of service" to affirm that the June 27, 2008 judgment was mailed to the parties. [Statement, ¶¶ 13-15]. But Disciplinary Counsel's suggestion that Judge Bell is responsible for actually putting the judgment into an envelope, addressing it, sealing it, affixing postage to it and then placing it in the mailbox is absurd. In Cocke County, the court offices are not even permitted to have stamps, and "all outgoing mail from the clerk's office is taken the office of the County Mayor, where it is stamped and put in the mail." [Statement, ¶ 16].[14]

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[14]Evidence does not approach the clear and convincing level to establish that either Mr. Pleau or Meristar suffered any sort of harm as a result of Ms. Clark's failure to

In order to resolve the situation, Disciplinary Counsel informed Judge Bell that he should consider addressing the issue concerning the failure to mail Mr. Pleau a copy of the judgment under the Tennessee Rules of Civil Procedure, as applied by statute to general sessions courts. [Statement, ¶ 23]. This is precisely what Judge Bell decided to do. [Statement, ¶ 24].

Accordingly, summary judgment should be awarded to Judge Bell on Count I.

B. Disciplinary Counsel Cannot Establish By Clear and Convincing Evidence That Judge Bell Should Have Disqualified Himself in *Pleau II*.

In Count II, Disciplinary Counsel charges Judge Bell with violating Canon 3(B)(1) and Canon 3(E)(1)(a) by not disqualifying himself from hearing *Pleau II*.[15] The undisputed material facts show that Judge Bell exercised proper judicial discretion in not refusing to hear the case.

To be sure, all litigants are entitled to the "cold neutrality of an impartial court" and have a right to have their cases heard by fair and impartial judges. *Kinard v. Kinard*, 986 S.W.2d 220, 227 (Tenn. Ct. App. 1998) (quoting *Leighton v. Henderson*, 220 Tenn. 91, 414 S.W.2d 419, 421 (1967); *Chumbley v. People's Bank & Trust Co.*, 165 Tenn. 655, 57 S.W.2d 787, 788 (Tenn. 1933)). To that end, a judge should recuse himself or herself if there is any doubt regarding the judge's ability to preside impartially or if the judge's impartiality can reasonably be questioned. *See State v. Hines*, 919 S.W.2d 573, 578 (Tenn.1995).

Dual barriers prohibit a finding that Judge Bell had a duty to recuse himself. First, all public officials are afforded the presumption that they have discharged their public

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mail a service copy, since Mr. Pleau re-filed the action, this time against Ms. Coleman, without objection by Meristar or Ms. Coleman. [Statement, ¶¶ 29-37].

[15]Under Canon 3 of the Code of Judicial Conduct, a judge is required to recuse himself when "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." Tenn. R. Sup. Ct. 10, Canon 3(E)(1)(a).

responsibilities in a proper manner. *See Justice*, 918 S.W.2d at 429-30. So, Disciplinary Counsel must first – by clear and convincing evidence – rebut the presumption that Judge Bell's decision to hear the matter was correct. Second, even if he can clear this hurdle, Disciplinary Counsel face an even heavier burden of proving – again by clear and convincing evidence – that Judge Bell abused his discretion by not disqualifying himself.

Unquestionably, it cannot be disputed that a judge should take appropriate action to withdraw from a case where he or she deems himself or herself biased or prejudiced. Just as important, however, is the rule that a judge has an equally strong duty to sit where there is no valid reason for recusal. *See Laird v. Tatum*, 409 U.S. 824 (1972) (Memorandum of Rehnquist, J.); *Stern Bros., Inc. v. McClure*, 160 W. Va. 567, 236 S.E.2d 222 (1977). In other words, while due consideration should be given to the notion that the administration of justice should be beyond the appearance of unfairness, a trial judge in deciding whether to recuse himself should also consider whether cases may be unfairly prejudiced or unduly delayed, or discontent may be created through unfounded charges of prejudice or unfairness made against the judge in the trial of a cause. *See State v. Flint*, 171 W. Va. 676, 301 S.E.2d 765 (1983).

Here, Judge Bell determined that he could make a fair and impartial decision. Neither Mr. Pleau, Meristar, nor Ms. Coleman hinted toward disqualification. [Statement, ¶ 34]. Moreover, neither Mr. Pleau nor Ms. Coleman, nor Meristar for that matter, made any complaint regarding Judge Bell's handling of *Pleau II*. [Statement, ¶37].

Besides, disqualification would have been directly contrary to the expressed position of the Court. To illustrate, the following quote is taken from a pamphlet distributed by the Court of the Judiciary and information to the public on the Court of the Judiciary's official website:

> **Can I get a judge off my case if I make a complaint against the judge?**
>
> No. An allegation of judicial misconduct is *not* a substitute for recusal procedures. You should seek the advice of your attorney about the procedure for attempting to remove a judge from your case.

[Statement, ¶¶ 36-37]. Even the "Frequently Asked Questions" section on the Court of Judiciary's website states: "[a]n allegation of misconduct is not a substitute for recusal procedures." [Statement, ¶ 35].

And while the undisputed facts foreclose a finding of misconduct on Count II, such a determination fails as a matter of law as well. Recusal for bias or prejudice was discussed by the Court of Appeals in *Wright v. Pate*:

> Bias and prejudice are only improper when they are personal. A feeling of ill will or, conversely, favoritism toward one of the parties to a suit are what constitute disqualifying bias or prejudice. . . . However, neither bias nor prejudice refer to the attitude that a judge may hold about the subject matter of a lawsuit. That a judge has a general opinion about a legal or social matter that relates to the case before him or her does not disqualify the judge from presiding over the case. Despite earlier fictions to the contrary, it is now understood that judges are not without opinions when they hear and decide cases. Judges do have values, which cannot be magically shed when they take the bench. The fact that a judge may have publicly expressed views about a particular matter prior to its arising in court should not automatically amount to the sort of bias or prejudice that requires recusal.

Wright v. Pate, 117 S.W.3d 774, 778 (Tenn. Ct. App. 2002) (quoting *Caudill v. Foley*, 21 S.W.3d 203, 215 (Tenn. Ct. App. 1999) (citing *Shaman*, § 4.04, at 101-02 (footnotes omitted)).

Although in this case Judge Bell was never asked to recuse himself, the question of whether he should recuse himself is purely a matter within his judicial discretion. *Wright*, 117 S.W.3d at 779. The inquiry called for under Canon 3(E)(1) requires more than mere speculation

based upon suspicion. *Gillispie v. City of Knoxville,* 2006 Tenn. App. LEXIS 242, *23 (Tenn. App. April 18, 2006). While Mr. Pleau complained about the delay in *Pleau I*, by not raising disqualification, Mr. Pleau was satisfied with Judge Bell's handling of *Pleau II.*

Furthermore, the only person challenging Judge Bell's impartiality in *Pleau II* is Disciplinary Counsel. When a party challenges a judge's impartiality, he is required to present evidence that would cause a reasonable and disinterested person to conclude that the judge's impartiality might reasonably be questioned. *Davis v. Tennessee Department of Employment Security*, 23 S.W.3d 304, 313 (Tenn. Ct. App. 1999). Other than Mr. Pleau's disciplinary complaint, which, according to the Court's public instructions, cannot be made to obtain disqualification of the accused judge, no evidence has been presented to rebut the presumption that Judge Bell acted correctly and to support a determination that he abused his discretion.

C. Disciplinary Counsel Cannot Establish By Clear and Convincing Evidence That Judge Bell Is Guilty of Misconduct Merely By Having His Counsel Contact Mr. Pleau to Verify Facts Surrounding the Disposition of Mr. Pleau's Disciplinary Complaint.

In Count III of the Formal Charges, Disciplinary Counsel alleges that Judge Bell engaged in a plethora of violations amounting to misconduct by having his attorney, Mr. Tom Testerman, contact Mr. Pleau to inquire about a rumored disposition of Mr. Pleau's disciplinary complaint against Judge Bell. The burden on Disciplinary Counsel remains a heavy one: Disciplinary Counsel must come forward with clear and convincing evidence to support these serious charges. But Judge Bell's counsel have accumulated and analyzed all of the summary judgment record, and in the final analysis, there is not a scintilla of evidence – not testimony or affidavits from the complainant, Mr. Pleau; not testimony from Judge Bell's lawyer, Mr. Testerman; not testimony

from Judge Bell himself; not testimony from Disciplinary Counsel's private investigator, Mr. LaRue; and not evidenced produced by the TBI – to support Count II of the Formal Charges.

At the outset, it has been Disciplinary Counsel's position throughout these proceedings that Mr. Pleau was *his* client. For instance, Disciplinary Counsel instructed Mr. Testerman that he had violated the Rules of Professional Conduct by communicating directly with Mr. Pleau. [Statement, ¶ 80]. This position is untenable. The Court of Judiciary's own website instructs complainants that Disciplinary Counsel does not provide legal advice or represent clients.[16] Therefore, to the extent Disciplinary Counsel's charges are based upon Mr. Testerman's communications with Mr. Pleau, they are without merit, cannot be proven under any theory by clear and convincing evidence, and should be dismissed as a matter of law.[17]

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[16]**Does the Court of the Judiciary give legal advice?**

> No. The Court is not authorized to give legal advice to citizens or to represent clients.

See Court of Judiciary, at http://www.tsc.state.tn.us/geninfo/COJ/COJindex.htm.

[17]The following Rule of Professional Conduct applys to communications with an unrepresented person:

> **Rule 4.3**
>
> **DEALING WITH AN UNREPRESENTED PERSON**
>
> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are, or have a reasonable possibility of being, in

Confidential or not, many persons in Cocke County were aware that Judge Bell was being investigated. [Statement, ¶ 54]. In mid-late January 2009, Judge Bell received an anonymous phone call informing during which the caller stated that Mr. Pleau was going to drop his disciplinary complaint. [Statement, ¶ 55]. Judge Bell then engaged the services of Cocke County lawyer, Tom Testerman [Statement, ¶ 56], who contacted Mr. Pleau [Statement, ¶ 57] and identified himself as an attorney calling on behalf of Judge Bell. [Statement, ¶ 57]. Mr. Testerman merely asked Mr. Pleau if he was going to drop the charges against his client. [Statement, ¶ 57]. At no time did Mr. Testerman offer Mr. Pleau anything to drop the complaint against Judge Bell. [Statement, ¶ 57].

When it was time for the trial in *Pleau II*, Disciplinary Counsel dispatched an investigator to Newport to attend. The investigator asked Mr. Pleau to sign an affidavit about the call from Mr. Testerman, which he agreed to do. [Statement, ¶¶ 61-63]. Again, nowhere in Mr. Pleau's affidavit does he state that he was offered consideration to drop the charges against Judge Bell, or that he was in any way threatened if he did not. [Statement, ¶ 68].

Having failed to uncover any actual evidence of misconduct – a *quid pro quo* – in his own investigation of Judge Bell, Disciplinary Counsel referred the charges against Judge Bell to the Tennessee Bureau of Investigation ("TBI").[18] Despite the fact that Mr. Testerman did not offer Mr. Pleau any consideration to drop the charges, Disciplinary Counsel advised the TBI:

> The statements that Mr. Pleau has made under oath will constitute a conspiracy by Judge Bell acting through Testerman to interfere

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conflict with the interests of the client.

[18]In his letter to the TBI, Disciplinary Counsel not only referenced Mr. Pleau's complaint and the call from Mr. Testerman, but also a past complaint against Judge Bell which had been settled in September 2008. [Statement, ¶ 69].

> with an official investigation and suppress the formal presentation of these charges.

[Statement, ¶ 71].

On March 4, 2009, Agent Lott and others interviewed Mr. Pleau, who confirmed that Mr. Testerman "did not promise him anything nor threaten him in any way." [Statement, ¶¶ 101]. Mr. Pleau called Mr. Testerman to arrange for a meeting. [Statement, ¶ 77]. The TBI outfitted Mr. Pleau with an audio/video recording device. [Statement, ¶ 81]. Mr. Pleau understood that Mr. Testerman was acting as Judge Bell's attorney. [Statement, ¶ 82]. Twice during the meeting on March 20, 2009, Mr. Pleau asked Mr. Testerman if dropping the charges against Judge Bell would make a difference in how Judge Bell would rule in Mr. Pleau's lawsuit against his insurance company (*Pleau II* – which was set to be heard on April 24, 2009). Both times, Testerman confirmed that it would not make a difference. [Statement, ¶ 83].

Finally, after all of this, Agent Lott of the TBI, who presided over the TBI's investigation, stated unequivocally that he had "no knowledge of how Judge Bell may have violated any of the criminal statutes referenced in the Formal Charges." [Statement, ¶¶ 101]. Disciplinary Counsel lacks clear and convincing evidence to support Count III.

D. Disciplinary Counsel Cannot Establish By Clear and Convincing Evidence That Notice of the Facts Gathered After January 5, 2009 Has Been Properly Given to Judge Bell.

Despite Disciplinary Counsel's representation to Judge Bell that the decision on whether or not to proceed with Formal Charges was going to be decided by the Investigative Panel, based upon facts gathered *through January 5, 2009*, Disciplinary Counsel sent private investigator James LaRue to attend the trial set for February 20, 2009. [Statement, ¶ 61]. Disciplinary

Counsel has since indicated that the investigation is "continuing," a fact proven when Disciplinary moved to amend the Formal Charges.

The undisputed material facts demonstrate that Disciplinary Counsel failed to provide Judge Bell notice pursuant to Tennessee Code Annotated §17-5-304(c) that he was being investigated for any other alleged action or inaction than those recounted in Count I with respect to decisional delay and service of a copy of the judgment on the parties. [Statement, ¶ 53]. Consequently, Counts II and III should be summarily dismissed.

E. The Summary Judgment Evidence Demonstrates That Judge Bell is a Victim of Vindictive Prosecution.

Judge Bell argues that he is either the victim of vindictive prosecution (*United States v. King*, 126 F.3d 394, 397 (2d Cir. 1997)) or is being selectively prosecuted on account of malicious or bad faith intent to injure him (*Harlen Assocs. v. Inc. Vill. of Mineola*, 273 F.3d 494, 499 (2d Cir. 2001)). The evidence shows that Disciplinary Counsel unsuccessfully attempted to bring about Judge Bell's resignation in 2008. Now, although witness after witness has been interviewed, although witness after witness has testified, although the TBI has determined that no evidence exists of any criminal offense, and although Disciplinary Counsel's own investigator cannot identify any real evidence on which Disciplinary Counsel could rightly continue to prosecute the Formal Charges against Judge Bell, Disciplinary Counsel is undeterred to bring still additional charges. This time, however, it appears that the Amended Formal Charges were not even authorized by the Investigative Panel, as the statute requires.

VI. CONCLUSION

In view of the undisputed material facts and prevailing law, there is insufficient evidence to prove Judge Bell is guilty of misconduct of any nature by clear and convincing evidence.

Respectfully submitted, 1st day of March, 2010.

Gordon Ball
Wallace A. McDonald
Ball & Scott Law Offices
550 W. Main Street, Suite 601
Knoxville, TN 37902
Telephone: (865) 525-7028

CERTIFICATE OF SERVICE

A copy of the foregoing was served upon the following by US Mail, first class postage prepaid, and via electronic mail, upon:

Joseph S. Daniel
tlawdaniel@comcast.net
Disciplinary Counsel
Patrick J. McHale
patrickjmchale@gmail.com
Assistant Disciplinary Counsel
Court of the Judiciary
503 North Maple Street
Murfreesboro, Tennessee 37130

This 1st day of March, 2010.

Gordon Ball