ORIGINAL

2010 AUG 23 AM 11: 26

APPELLATE COURT CLERK
NASHVILLE

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

CONSOLIDATED MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO ALTER OR AMEND A JUDGMENT and MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR DISCRETIONARY COSTS

NOW INTO COURT comes Respondent, Judge John A. Bell ("Judge Bell"), by and through undersigned counsel, pursuant to the Court's Order of July 7, 2010, and hereby responds to Disciplinary Counsel's Motion to Alter or Amend a Judgment and Motion to Assess Discretionary Costs, and the brief filed supporting those motions[1], as follows:

I. INTRODUCTION

The pending motions have been brought by Disciplinary Counsel following a two day trial on June 2-3, 2010 at which this Court found that Disciplinary Counsel had proven ethical violations by clear and convincing evidence on 4 of the 9 Canons under which Judge Bell was charged.

The first motion concerns the costs associated with the sanctions. The Court's sanctions against Judge Bell included (1) a 90 day suspension ***"without impairment of compensation,***

[1] Disciplinary Counsel's brief purports to quote language from the Motion to Alter or Amend a Judgment. While the language in the brief resembles that found in the Motion, the brief includes language not found in the Motion.

pursuant to state law" and (2) mandatory judicial ethics training in 2010-2012 ***at his own expense.***[2] (emphasis added). Ignoring this clear language of the Court's Order, Disciplinary Counsel insists that the Order did not "deal with the cost of implementing these sanctions" and requests that this Court alter or amend the judgment under Rule 59.04 to address that issue. Because the Court's Order clearly addresses the issue of costs related to the sanctions, Disciplinary Counsel' motion to alter or amend is improper and the Court is compelled to deny it. See, *Bradley v. McLeod,* 984 S.W. 2d 929, 933 (Tenn. Ct. App. 1998) (Koch, J.) (Motions under rule Tenn. R. Civ. P. 59 "should not, however, be granted if they are simply seeking to relitigate matters that have already been adjudicated.")

The prohibitions in the Tennessee Constitution and the statutes governing the Court of the Judiciary against diminishing a judge's compensation present even more fundamental problems for Disciplinary Counsel's motion. Disciplinary Counsel's motion is a blatant attempt to do an end-run around these laws, and is not supported by any authority. Thus, the motion should be denied.

Turning to the motion to assess discretionary costs, the costs sought by Disciplinary Counsel are for court reporter fees for depositions and pretrial hearings[3] which are paid through the Administrative Office of the Courts, <u>not by Disciplinary Counsel</u>. Thus, there is no authority under the statutes for assessing these costs to Judge Bell as part of the sanctions imposed against him. Moreover, Judge Bell was found not guilty under 5 of 9 Canons. Finally, these charges were incurred in large part due to the unnecessary action by Disciplinary Counsel in prosecuting this case – specifically referencing criminal statutes in the Formal Charges.

Accordingly, Judge Bell respectfully asks that this Court deny these motions.

---

[2] Judge Bell was ordered to render decisions within 30 days of hearing and court costs were assessed against Judge Bell.

[3] Fees for court reporting services at pretrial hearings are NOT recoverable under Rule 54.

II. ARGUMENT

A. THE MOTION TO ALTER OR AMEND SHOULD BE DENIED.

1. TENNESSEE LAW PROHIBITS DIMINSIHING JUDGE BELL'S COMPENSATION.

Tennessee law clearly provides that Judge Bell's compensation can not be "diminished" or "impaired" during his term of office.

Article 6, §7 of the Tennessee Constitution provides

> The Judges of the Supreme or Inferior Courts, shall, at stated times, receive a compensation for their services, to be ascertained by law, which shall not be increased or diminished during the time for which they are elected. They shall not be allowed any fees or perquisites of office nor hold any other office of trust or profit under this State or the United States. (emphasis added)

Further, under Tenn. Code Ann. § 17-5-301(f)(1), this Court has the power only to impose a suspension "without impairment of compensation."[4]

The Tennessee's Constitution's use of the term "diminished" and the Code's use of the phrase "impairment of compensation" are noteworthy. These words convey the intent that actions which lessen a judge's compensation to any extent are forbidden. These laws do not require the reduction in compensation to be "material", nor must the impairment be "substantial".[5] The prohibition is instead absolute.

Focusing on the word "impair", this term is also found in Article I, §10 (the "contracts clause") of the U.S. Constitution - "No State shall....pass any...Law ***impairing*** the Obligation of Contract". The right of a judge in Tennessee to his or her salary during the term of office is certainly akin to a contractual right, with elements of reliance and consideration. To be sure, most

---

[4] In fact, the statute provides no authority for monetary sanctions at all. See Section B1 below.

[5] In other contexts, in order for an impairment to be unlawful the legislature of this state requires it to be "substantial." Tennessee's Lemon Law's, for example, requires that a manufacturer repurchase an automobile applies only if a defect "***substantially*** impairs" its value. *Tenn. Code Ann. §55-24-103(a)(1).*

judges (Judge Bell included) have a successful law practice prior to taking the bench.[6] As part of their responsibilities, judges forego the ability to decide what cases to accept, set their own hours, and earn unlimited amounts of money – as opposed to a set salary paid to judges. Beyond the honor that comes with the position, a judge is given a salary and other benefits of government employment – including the important constitutional and statutory right not have his/her compensation diminished. Thus, to the extent there is any doubt as to the expansive meaning of the term "impairment" in Tenn. Code Ann. §17-5-301, cases under the contracts clause may be instructive.

Under the contracts clause, "impairing" is indeed a low threshold. States may not pass any law effecting a "change of the expressed stipulations of a contract, or a relief of a debtor from strict and literal compliance with its requirements". *Murray v. City of Charleston, S.C.*, 96. U.S. 432, 444 (1877). As one early court noted,

> The word, 'impair,' is familiar to every one, and means ... simply 'to diminish, to injure, to make worse'. It is remarkable that the [Constitutional] convention did not use the term, 'lessen, or increase, or destroy' but one more comprehensive, which prohibited the states, even without altering, lessening or increasing, from making *worse*, in any respect, a contract legitimate in its creation. The object, then, of this provision must have been to establish an important principle, and that was the entire inviolability of contracts. The inquiry, then, must be, with regard to every law affecting contracts, or operating upon either right or remedy, does it lessen the value of the contract, or in any measure render it worse? If it does, that law is repugnant to that clause of the constitution in question.

Blair v. Williams, and *Lapsley v. Brashears*, 14 Ky. 47, 69 (Ky. Ct. of App.); 1823 Ky. LEXIS 133 ** 10, 11 (October 11, 1823).

---

[6] Running for judicial office is also not without financial risk. Many judges (again including Judge Bell) seek election to the bench when their careers are peaking. Further, the judgeship may be short-lived since state and county court judges must seek re-election, and are thus susceptible to the political process.

2. THE PROHIBITION AGAINST IMPAIRING JUDGE BELL'S COMPENSATION INCLUDES INDIRECT IMPAIRMENT.

There is, of course, no substantive difference between reducing or eliminating Judge Bell's compensation during the term of the suspension and ordering him to pay for replacement judges. Whether Cocke County withholds his pay and uses the money to pay for a replacement or whether this Court orders Judge Bell to pay for a replacement judge from his own pocket, the result to him is the same.[7]

By asking this Court to consider requiring Judge Bell to pay for any replacement judges during the time of his suspension, Disciplinary Counsel is seeking to do indirectly that which it knows it cannot do directly. However, the constitutional and statutory protections afforded citizens and elected officials alike can not be so easily bypassed. Rather, in the eyes of the law, there is no difference between a direct and indirect impairment. *Ruano v. Spellman*, 505 P. 2d 447, 452 (Wash. 1973) (under contracts clauses of constitutions of both the United States and the State of Washington) ("That action, **though indirect**, which diminishes the value of the contract constitutes a prohibited impairment is an established rule.") (emphasis added), citing *State Tax Comm'n v. Baltimore & O.R.R.,* 17 A.2d 101 (Md. 1941).

Returning to the analogy to the federal contracts clause, the U.S. Supreme Court has confirmed that indirect impairment of contracts (often through taxation) is as prohibited as direct impairment. "Indeed, attempted State taxation is the mode most frequently adopted to affect contracts contrary to the constitutional inhibition." *Murray v. City of Charleston, supra at* 444 ("The constitutional provision against impairing contract obligations is a limitation upon the taxing power, as well as upon all legislation, whatever form it may assume.")

---

[7] In fact, if the cost of the replacement judge exceeds Judge Bell's take-home pay, he may be placed in an even worse position financially.

3. THE PROHIBITION AGAINST IMPAIRING JUDGE BELL'S COMPENSATION CANNOT BE IGNORED BASED UPON ALLEGATIONS OF UNFAIRNESS.

In its effort to do an end-run around the law, Disciplinary Counsel focuses on the supposed unfairness to the State of Tennessee and Cocke County that may result from Judge Bell's suspension. Just as magicians use distractions and trick-plays begin with a decoy, Disciplinary Counsel's motion requires a diversion. In the case of Disciplinary Counsel's motion, that is diverting the Court's attention to so-called injustice in hopes that the Court will ignore the law.[8]

Of course, Disciplinary Counsel's pleas of injustice are no reason to side-step the Tennessee Constitution or ignore a controlling statute. Moreover, when one considers the situation as a whole, the laws of this state against lessening the compensation of a judge during his or her term (even while serving a suspension) are not unreasonable or unjust; rather, these laws are reasonable and appropriate. The truth is that while on suspension a judge remains subject to the obligations of holding such office, and is thus unable to use his professional skills and training for extra income. The judge can not hold any other office in this state or the United States. *Tenn. Const., Art. VI, §7.* Nor, can the judge practice law. *Tenn. Sup. Ct., R. 10 (Code of Judicial Ethics), Canon 4G.* Nor, can the judge act as a private mediator or arbitrator. *Canon 4F.* The judge can not engage in business with lawyers or anyone else likely to come before his or her court. *Canon 4D.* It is certainly reasonable and fair that if Judge Bell remains subject to the requirements of office that he continue to receive the benefits –i.e. his salary.

---

[8] It should also be noted that the illusion of unfairness created by Disciplinary Counsel's motion is predicated upon Disciplinary Counsel "anticipat[ing] that Judge Bell will seek to either have the Administrative Office of the Courts to obtain and fund a substitute judge or to require the citizens of Cocke County to fund a substitute judge." Disciplinary Counsel's Motion to Alter or Amend a Judgment, page 1 (emphasis added).

Judge Bell did not seek a replacement judge. Also, Judge Bell has no input into the decisions of whether to appoint a replacement judge(s) and how many days the replacement judge(s) may work.

As set forth above, the law clearly provides that Judge Bell may not be compelled to pay for any part of the cost associated with replacement judges which may be appointed during his suspension. Any such action by this Court would diminish Judge Bell's compensation in violation of Article VI, §7 of the Tennessee Constitution and/or impair his compensation during the suspension as prohibited by Tenn. Code Ann. §17-5-301(f)(1).

4. DISCIPLINARY COUNSEL'S MOTION IS IMPROPER BECAUSE THE ISSUE OF COSTS ASSOCIATED WITH THE SUSPENSION HAS ALREADY BEEN ADDRESSED BY THIS COURT.

Not only does Disciplinary Counsel's motion to alter or amend fail as a matter of substantive law, it is also procedurally flawed. A motion under Rule 59.04 to alter or amend a judgment should not be granted if the moving party is seeking to relitigate an issue that has already been adjudicated. *Bradley v. McLeod,* 984 S.W. 2d 929, 933 (Tenn. Ct. App. 1998) (Koch, J.), citing *Windsor v. A. Fed. Executive Agency,* 614 F. Supp. 1255 (M.D. Tenn. 1983).

Notwithstanding Disciplinary Counsel's assertion to the contrary, the Court's Order of June 14, 2010 clearly addresses the issue of costs associated with the imposed sanctions. The Court's Order expressly states that Judge Bell's suspension shall be "without impairment of compensation."[9] Further, the Court specifically required Judge Bell, at his own expense, to complete 42 hours of judicial ethics training between 2010 and 2012. (emphasis added.)

The issue of sanctions, including the costs associated with those sanctions, has been fully adjudicated. Disciplinary Counsel put on its proof, and made its arguments to the Court. Judge Bell did the same. The evidence and arguments were considered by the Court – and, in imposing a

[9] In announcing the Court's verdict immediately after deliberations ended, Presiding Judge Ash specifically referred to the Tennessee Constitution in explaining why Judge Bell's compensation would not be impaired.

90 day suspension, the Court was certainly aware and undoubtedly considered the possibility that a replacement judge might be required.[10]

Simply stated, the Court has made its decision. Disciplinary Counsel obviously disagrees with the sanction imposed and desires a chance to re-argue its position, or perhaps make an argument that it did not make at trial. But, Rule 59 does not give Disciplinary Counsel a second chance to make its closing argument on sanctions.

B. DISCRETIONARY COSTS SHOULD NOT BE ASSESSED AGAINST JUDGE BELL

1. SANCTIONS AGAINST JUDGE BELL CAN NOT INCLUDE AWARDING DISCIPLINARY COUNSEL DISCRETIONARY COSTS. SUCH COSTS ARE NOT INCLUDED IN THE STATUTE SETTING FORTH PERMITTED SANCTIONS AND FURTHER, DISCIPLINARY COUNSEL DID NOT INCUR ANY ALLOWABLE COSTS

Disciplinary Counsel has also moved this Court for an order assessing discretionary costs to Judge Bell. As part of its motion Disciplinary Counsel seeks to recover court reporter costs for depositions and pre-trial hearings – the latter are not recoverable under Rule 54, *Duran v. Hyundai Motor Am., Inc.,* 271 S.W. 2d 178 (Tenn. Ct. App. 2008). Regarding the deposition costs, these were not paid by Disciplinary Counsel but rather are paid through the Administrative Office of Court. *Tenn. Code Ann. §17-5-314(f).* Clearly, Disciplinary Counsel should not be allowed to recover costs which it never paid in the first place. See, *Massachusetts Mutual Life Ins. Co. v. Jefferson,* 104 S.W.3d 13, 36 (Tenn. Ct. App. 1994) ("As a general matter, a party seeking these costs must file a timely motion and must support this motion with an affidavit detailing these costs, verifying that they are accurate and ***that they have actually been charged***, and that they are necessary and reasonable.") (emphasis added)

---

[10] Judge Bell testified that his docket (comprising civil, criminal and juvenile) was one of the largest in the state.

Given that Disciplinary Counsel does not pay for deposition costs, it is understandable that the statutory framework of the Court of the Judiciary does not provide for payment of discretionary costs as one of the sanctions. Under Tenn. Code Ann. §17-5-301, this Court may impose any of the following sanctions (including any combination thereof):

1. Suspension without impairment of compensation for such period as the court determines;
2. Imposition of limitations and conditions on the performance of judicial duties, including the issuance of a cease and desist order;
3. Private reprimand or private censure by the investigative panel; provided, that a private reprimand or private censure, whether imposed by the court or by an investigative panel, may be used in subsequent proceedings as evidence of prior misconduct solely upon the issue of the sanction to be imposed;
4. Entry into a deferred discipline agreement;
5. Public reprimand or public censure; and
6. Entry of judgment recommending removal of the judge from office.

Noticeable absent from the list of permissible sanctions is any monetary penalty, including assessment of "discretionary" costs. In the absence of statutory authority, this Court should not assess such costs against Judge Bell.

2. JUDGE BELL DEFENDED THIS MATTER IN GOOD FAITH, AND DISCRETIONARY COSTS SHOULD NOT BE ASSESSED AGAINST HIM.

Even if this Court believes it has the requisite authority to assess costs against Judge Bell, it should decline to do so. Discretionary costs under *Rule 54.04(2)* are "allowable only in the court's discretion." Here, the Court should exercise its discretion and deny Disciplinary Counsel request. Judge Bell's was successful on 5 of 9 Canons he was charged with violating. And, on the Canons he was found to have violated (one of which was by a vote of 5 to 3), he defended himself in good faith. Because this matter was defended by Judge Bell in good faith, this Court should deny the motion for cost. See, *Mix v. Miller,* 27 S.W.3d 508, 516 (Term. Ct. App. 1999) (upholding denial of costs to prevailing party where claims of losing party were not "frivolous" but rather were the

product of a "good faith disagreement" between the parties); *Merritt v. Yates*, 2000 Tenn. App. LEXIS 666 **14 (Term. Ct. App. Oct. 10, 2000).

In addition, this Court must "determine whether the prevailing party has engaged in conduct during the litigation that warrants depriving it of the discretionary costs to which it might otherwise be entitled". *Massachusetts Mutual Life Ins. Co. v. Jefferson,* 104 S.W.3d 13, 36 (Tenn. Ct. App. 1994). The Formal Charges brought against Judge Bell included allegations of criminal conduct which the Court ordered stricken under Rule 12.06. Disciplinary Counsel's improper assertion of criminal allegations led to Judge Bell asserting his Fifth Amendment privilege and invoking the attorney-client privilege, which increased costs to both parties. In addition, the Court will recall that Disciplinary Counsel refused to discuss any resolution of the charges short of Judge Bell's removal from the bench.

III. CONCLUSION

Disciplinary Counsel's Motion to Alter or Amend a Judgment regarding the costs associated with the sanctions imposed by this Court should be denied. The motion seeks to diminish and impair Judge Bell's compensation in violation of Tennessee law. In addition, a motion to alter or amend under Rule 59 should not be granted if the issue raised has been fully adjudicated, and without question the issue of such costs was addressed and fully adjudicated in the Court's June 14, 2010 Order.

Disciplinary Counsel's Motion to Assess Discretionary Costs should be denied as well. Disciplinary Counsel's office did not pay for the court reporter fees at issue, and assessment of discretionary costs is not one of the enumerated sanctions under the statutes governing the Court of the Judiciary. Further, Judge Bell was successful on more than half of the Canons which Disciplinary Counsel alleged he violated, and defended the others in good faith. Finally, the

tactics employed by Disciplinary Counsel increased costs for both sides, and warrants denying the motion.

Respectfully submitted this 20 August 2010.

Gordon Ball, BPR # 001135
W. Allen McDonald BPR# 016210
BALL & SCOTT
550 West Main Street, Suite 601
Knoxville, Tennessee 37902
Telephone: (865) 525-7028
Facsimile: (865) 525-4679
Attorneys for the Plaintiff

CERTIFICATE OF SERVICE

A copy of the foregoing was served upon the following via U.S. Mail, first class postage prepaid:

Timothy R. Discenza
Disciplinary Counsel
P.O. Box 3088
Memphis, TN 38173
trdiscenza@att.net

Patrick J. McHale
Assistant Disciplinary Counsel
5543 Edmondson Pike #5A
Nashville, TN 37211
patrickjmchale@gmail.com

This 20 August 2010.

W. Allen McDonald