

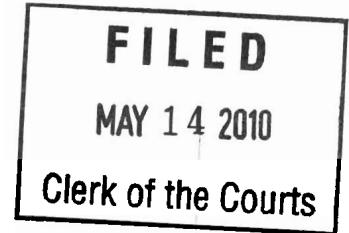
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**IN THE TENNESSEE COURT OF THE JUDICIARY**

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

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

**COMPLAINT OF DAVID PLEAU  
FILE NO. 08-3508**



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**ORDER**

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This matter was heard by the entire hearing panel on May 11, 2010 upon several motions filed by both parties in this matter. After reviewing the motions, along with the arguments presented by counsel, this Court, in concurrence with the other members of the panel, finds as follows:

**MOTION TO DISQUALIFY TEMPORARY PANEL MEMBERS**

This motion requests the Court to issue an order disqualifying Judge David Loughry and attorney John Rodgers from acting as temporary panel members for this matter. As grounds for the motion, Respondent avers he was notified Disciplinary Counsel Joseph S. Daniel and Patrick McHale had prior business dealings with Judge Loughry and Mr. Rodgers. Specifically, Mr. McHale previously shared a law office and expenses with Judge Loughry approximately twenty-five years ago, and Mr. Rodgers is a co-owner of the building where Disciplinary Counsel Daniel maintains an office.

Canon 3(E) states a "judge should disqualify himself or herself in a proceeding in which the judge's impartiality may be questioned," including instances where the judge has a prejudice

or bias concerning a party or party's attorney or knowledge of evidentiary facts, the judge served as a lawyer in the matter in controversy or practiced with a lawyer while they served on the case, or the judge has been a material witness in the case, the judge has a financial interest in the outcome of the case, the judge or the judge's spouse or a person with the third degree of relationship to either of them is a party in the case, a lawyer in the case, has more than a de minimis interest affected by the outcome of the case, or is likely to be a material witness in the case.

After reviewing the rule regarding disqualification and disclosing any potential conflicts, Mr. Rodgers felt it was necessary to disqualify himself from hearing this matter. Therefore, insofar as the motion applies to Mr. Rodgers, the motion is GRANTED. Mr. Paul DeHoff has been appointed as Mr. Rodgers' substitute. However, Judge Loughry feels no need to recuse himself, and this Court finds his past contact with Mr. McHale twenty-five years ago so distant in time, his impartiality cannot reasonably be questioned. Therefore the motion as it applies to Judge Loughry is DENIED.

#### MOTION FOR PROTECTIVE ORDER AND MOTION TO QUASH DEPOSITION

Under this motion, Disciplinary Counsel Joseph S. Daniel requests the Court to quash a notice of deposition of Disciplinary Counsel Daniel, claiming attorney-client privilege as Disciplinary Counsel for the Court of the Judiciary and "work product" protection.

In order to assert the attorney-client privilege, T.C.A. § 23-2-103 requires the person asserting the attorney-client privilege to show:

(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

TENN. CODE ANN. § 23-3-103; *Royal Surplus Lines Ins. V. Sofamor Danek Group*, 190 F.R.D. 463 (W.D. Tenn. 1999).

In order for the privilege to exist under this statute, the communication must also meet two requirements: (a) it must involve the subject matter of the representation or pursuant to the attorney-client relationship and (b) it must be made with the intent the communication will be kept confidential. *State ex. rel. Flowers v. Tenn. Trucking Ass'n Self Ins. Group Trust*, 209 S.W.3d 602 (Tenn. Ct. App. 2006). Further, the Court of Appeals has found the key issue regarding the applicability of the privilege is the purpose of the investigation. If the purpose is to provide legal advice or to prepare for litigation, then the privilege applies. *The Tennessean v. Tenn. Dept. of Personnel*, 2007 WL 1241337 \*12 (Tenn. Ct. App. 2007) citing *Payton v. N.J. Turnpike Authority*, 148 N.J. 524, 551 (N.J. 1997).

Judge Bell asserts in his responses to the motion Mr. Daniel became a witness by his affirmative conduct in the investigation, which he alleges was merely a part of his statutory duties rather than work in anticipation of litigation. Judge Bell also submitted an affidavit by Lucian T. Pera, asserting him as an expert witness, who says he does not believe Disciplinary Counsel to the Tennessee Court of the Judiciary ordinarily establishes an attorney-client relationship with a complainant in an investigation or proceeding before the Court of the Judiciary. Mr. Pera also asserts Disciplinary Counsel's role is very similar to Disciplinary Counsel to the Board of Professional Responsibility of the Supreme Court of Tennessee. Under this analysis, Mr. Pera believes serving as Disciplinary Counsel for the Court of the Judiciary while also serving as counsel for the complainant would create a conflict of interest. This Court respectfully disagrees with the analysis by Mr. Pera.

Tennessee Rule of Civil Procedure 26.02 allows a party to obtain discovery regarding any matter, not privileged, which is relevant to the subject matter in the pending action. First, after reviewing the items in the deposition subpoena requested, the Respondent failed to articulate the relevance of the information requested of Mr. Daniel to this case, rendering it not discoverable. Specifically, the deposition subpoena requested in addition to all investigative files relating to the investigation of Judge Bell, as well as Tom Testerman, both directly and indirectly, a list of all complaints filed with the Court of the Judiciary filed between January 1, 2003 and the present alleging a violation of Canon 3(B)(8) or under and/or excessive delay in rendering a decisions, a written statement setting forth the facts of each case listed, and a written disposition of each case.

Even if this information were to be found relevant, this Court finds there are other witnesses who can testify to evidence the Respondent wants to introduce through Mr. Daniel's testimony. Further, Mr. Daniel's work in the investigation of this matter was done in preparation for litigation and is therefore covered by the attorney-client privilege. *See The Tennessean*, 2007 WL at \*12. As a result, this motion is GRANTED.

#### MOTION TO AMEND FORMAL COMPLAINT/MOTION TO STRIKE PLEADINGS

Disciplinary Counsel Daniel requests, pursuant to Tennessee Rule of Civil Procedure 15, to amend his original complaint, or the Formal Charges, to delete language from Paragraph 6 and substitute the language with the following proposed language:

On December 23, 2008 Judge Bell thereupon held a hearing under the auspices of Rule 60, Tennessee Rules of Civil Procedure and presented to the original parties or their counsel the order of June 27, 2008. He did not enter any new or additional order relative to the June 27, 2008 determination and order, which rendered the hearing of December 23, 2008 a nullity. Prior to December 23, 2008, David J. Pleau filed a second complaint concerning this automobile accident which was styled David Joseph Pleau v. Jo Ann Coleman, Docket No. 2008-CV-1186. This complaint was filed October 8, 2008 and states in the civil summons portion of the complaint that it is for "damages done to my vehicle in a judgment rendered in Cocke County Sessions Court on September 18, 2007, Court Number 2007-CV-869.

During the hearing, both Disciplinary Counsel and counsel for Judge Bell acknowledged the original language of paragraph 6 mistakenly asserted Mr. Pleau's second lawsuit was filed at the encouragement and instruction of Judge Bell. Given this information, the motion as it applies to the substitution of the above language to paragraph 6 is GRANTED.

The remainder of the motion requests to amend by adding charges to the original complaint due to information Disciplinary Counsel alleges they have uncovered during the investigation of this matter. However, Rule 6, Sec. 3(b) of the Rules for the Court of the Judiciary states there will be a review of an initial complaint by the investigative panel, and then the panel will make a decision to authorize a full investigation or dismiss the complaint. According to Rule 6, Sec. 3(c), following a full investigation, the panel will review the recommendations of Disciplinary Counsel and either approve, disapprove, or modify the recommendations. In this case, the proposed amendments to the complaint were not presented to the panel, and were thus not approved by the panel. Therefore, this Court finds the proposed amendments should have gone through the investigative panel pursuant to statute, and the motion to amend, notwithstanding changing the language to paragraph 6, is DENIED.

Further regarding the language of the Formal Charges, Tennessee Rule of Civil Procedure 12.06 provides a court may, upon its own initiative at any time, strike from any pleading any redundant, immaterial, or impertinent matter. Pursuant to this rule, this Court finds it necessary to strike from Paragraph 12 of the Formal Charges the phrase "constitute multiple violations of law, Tennessee statutes." This Court also strikes Paragraph 13, 14, 15, 16, 17, 18, and from Paragraph 19 the phrase "statutory law."

MOTION TO COMPEL AND MOTION IN LIMINE  
(Judge Bell and Mr. Tom Testerman)

A Motion to Compel and Motion in Limine was filed by Disciplinary Counsel Daniel for both Judge Bell and Mr. Thomas Testerman. The motions requested an Order by this Court compelling Judge Bell to answer discovery propounded to him, as he asserted the attorney-client privilege and 5<sup>th</sup> Amendment right against self-incrimination during depositions on January 12 and January 19, 2010, and compelling Mr. Testerman to answer discovery propounded to him, as he claimed the attorney-client privilege during his deposition on January 12, 2010. In addition, the motions claim the privilege assertion was unfounded and improper, and without intervention of the Court would likely obstruct legitimate discovery efforts necessary to the prosecution of this matter.

The standard for asserting the attorney-client privilege has previously been discussed under the Motion for Protective Order and Motion to Quash Notice of Deposition. Further, there must be evidence the communication was made for the purpose of rendering legal advice, the legal advice was the dominant purpose of the communications, the lawyer was not primarily serving in a non-legal role, and there was an intent to keep the communication confidential, as explicitly stated by the client, as well as evidenced by external factors. 32 AM. JUR. PROOF OF FACTS 3d 189 § 13. External factors tending to prove the communication was confidential include an absence of persons, other than the client and attorney, from oral communications, limited distribution of documents, and confidential communications not discussed with persons beyond the scope of the privilege's protection. *Id.*

Neither Judge Bell nor Mr. Testerman provided facts during their depositions to establish an attorney-client privilege existed between them. Bell Depo. p. 150 *et seq.*; Testerman Depo. p. 19, 10-15; p. 25 *et seq.* In Judge Bell's Consolidated Reply to Motions to Compel and Motions in

Limine, Judge Bell asserts he cannot even give precise dates he was represented by Mr. Testerman because the dates themselves could be incriminating. In failing to disclose the dates of when Judge Bell retained Mr. Testerman and whether the information passed was in confidence while an attorney-client relationship was in existence, both parties fail to meet the burden on the party asserting the privilege. *See Flowers*, 209 S.W.3d at 602.

However, during the hearing, counsel for Judge Bell stipulated Mr. Testerman was Judge Bell's attorney in relation to the Pleau matter, and he was retained during a conversation in the hallway in the courtroom. As such, the Motion to Compel and Motion in Limine are GRANTED, in part, but questions to Judge Bell and Mr. Testerman regarding their relationship are limited to questions establishing the time, place, and circumstances of the engagement of the attorney-client relationship in relation to the Pleau case and Court of the Judiciary complaint will be permitted. Specifically, this Court orders Mr. Testerman to answer the following questions from his deposition: page 14, lines 19-20; page 25, lines 17-18; page 28, lines 14-15; page 31, lines 4-7; page 31, lines 19-25; page 32, lines 15-19; page 33, lines 11-14; page 33, lines 21-22; page 37, lines 6-10; page 37, lines 22-25; page 38, lines 23-25; page 39, lines 11-13; page 39, lines 19-23; page 40, lines 3-4; and page 40, lines 22-24. Judge Bell is ordered to answer the following questions from his deposition: page 150, lines 24-28; page 151, lines 14-16; page 151, line 21; page 152, lines 5-6; page 152, lines 10-11; page 152, lines 19-21; page 153, lines 5-7; page 153, lines 11-13; page 153, lines 17-19; page 153, lines 23-24; page 154, lines 8-9; page 154, lines 23-25; page 155, lines 4-6; page 158, lines 4-9; page 159, lines 21-23; page 160, lines 18-20; page 160, lines 24-25; page 161, lines 4-6; page 161, lines 10-12; page 161, lines 16-19; page 163, lines 5-7; page 163, lines 14-16; page 166, lines 1-2; page 166, lines 9-10; page 166, lines 17-21; page 169, lines 16-19; page 178, lines 8-11; and page 178, lines 18-20.

MOTION TO COMPEL PRODUCTION OF DOCUMENTS

(Mr. James LaRue)

Respondent Judge John A. Bell moves the Court for an Order compelling Disciplinary Counsel to produce documents and records created by James LaRue regarding his investigation into Judge Bell. During the hearing, counsel for Judge Bell stated the only document he wanted was the handwritten notes of Mr. LaRue.

Tennessee Rule of Civil Procedure 26.02(3) provides materials prepared “in anticipation of litigation” are discoverable “only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” TENN. R. CIV. P. 26.02(3). The proponent of the work product doctrine has the burden of demonstrating: “(1) that the material sought is tangible, (2) that the documents were prepared in anticipation of litigation or trial, and (3) that the documents were prepared by or for legal counsel.” *The Tennessean v. Tenn. Dept. of Personnel*, 2007 WL 1241337 \*12 (Tenn. Ct. App. 2007).

This Court finds the documents prepared by the investigator, Mr. LaRue, for Disciplinary Counsel were prepared in anticipation of litigation and were prepared for legal counsel. As such, the documents are protected by the work product doctrine, and the motion to compel is DENIED.

MOTION TO DISMISS OR  
IN THE ALTERNATIVE FOR A MORE DEFINITE STATEMENT

This motion, filed by Respondent Judge Bell requests an Order from this Court dismissing the Formal Charges or requesting for Disciplinary Counsel to provide a more definite statements of the factual allegations supporting the Formal Charges pursuant to Tennessee Rules of Civil Procedure 12.02 and 12.05. In support of the motion, Judge Bell argues T.C.A. § 17-5-



301 provides the statutory framework for bringing Formal Charges against an active judge, and T.C.A. § 17-5-304(b) says Disciplinary Counsel can only recommend the filing of formal charges “[u]pon the conclusion of the full investigation.” Judge Bell alleges Mr. McHale previously stated in email communications the investigation is still ongoing, which he says is contrary to law and affects his ability to create a defense. In the alternative, Judge Bell requests an Order requiring Disciplinary Counsel to provide a more definite statement.

After reviewing this motion along with the arguments presented during the hearing, and after already agreeing to strike any further amendments to this complaint as not having gone through the statutory process of being presented to the statutory investigative panel, the motion is DENIED.

#### MOTION FOR SUMMARY JUDGMENT

Respondent Judge Bell filed a Motion for Summary Judgment pursuant to Tennessee Rule of Civil Procedure 56.02. As grounds for the motion Judge Bell argues he is entitled to summary judgment as a matter of law because the undisputed material facts affirmatively negate essential elements of each of the three (3) counts contained in the Formal charges and show Disciplinary Counsel cannot prove essential elements of each of those counts at trial by clear and convincing evidence as required. For Count I, Judge Bell argues he could not have violated Canon 3(B)(8) requiring a judge to “dispose of all judicial matters promptly, efficiently, and fairly” because cases and commentators construing Canon 3(B)(8) have found a judge must fail to render decisions in multiple cases for a lengthy period of time, which was not alleged by Disciplinary Counsel. Next he argues he could not have violated Canon 2(A) by not respecting and complying with the law and by acting in a manner “promoting public confidence in the integrity and impartiality of the judiciary” because the undisputed material facts show he

ultimately and correctly entered a judgment for the Respondent insurer in *Pleau v. Merastar*. Further, Judge Bell argues the undisputed material facts show Judge Bell was not responsible for the transmission of the order, so the failure for it to be transmitted to the parties is not a basis for the charges in Count I.

For Count II, Disciplinary Counsel alleges Judge Bell violated Canon 3(B)(1) and 3(E)(1)(a) which state when a judge must disqualify himself or herself from a case because he was prejudiced against Jo Ann Coleman in the hearing of her matter, as he had previously expressed an opinion on the responsibility and damages in the controversy. Judge Bell alleges nothing in the Formal Charges could conceivably demonstrate Judge Bell was biased or prejudiced or otherwise required him to enter an order of disqualification or recusal in Mr. Pleau's second lawsuit.

Count III of the Formal Charges argues Judge Bell is guilty of "multiple violations of law, Tennessee statutes and the Code of Judicial Conduct," alleging a broad array of misconduct allegedly stemming from making contact with Mr. Pleau, through counsel, regarding resolution of Mr. Pleau's disciplinary complaint. Disciplinary Counsel alleges these actions violated Canon I(A), Canon II(A), and Canon III(B) because the alleged conduct was "calculated to bring the judiciary into public disrepute and adversely affects the administration of justice." Judge Bell alleges the undisputed material facts show even though he hired Mr. Testerman as his attorney and had him contact Mr. Pleau, Mr. Testerman's contact with Mr. Pleau included no offer or *quid pro quo*. As such, Judge Bell alleges he could not have been in violation of any of the laws as suggested in Count III.

In 2008, the Tennessee Supreme Court issued an opinion clarifying its position on the standard for granting summary judgment, specifically dealing with the burden shifting. *Hannan*


*v. Alltel Publishing Co.*, 270 S.W.3d 1, 9 (Tenn. 2008). 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 non-moving party's claim or (2) show that the nonmoving party cannot prove an essential element of the claim at trial. *Hannan*, 270 S.W.3d at 9.

According to *Hannan*, if the party seeking summary judgment makes a properly supported motion, the burden shifts to the nonmoving party to set forth specific facts establishing the existence of a genuine issue of material fact. *Hannan*, 270 S.W.3d at 5; *Staples v. CBL & Associates*, 15 S.W.3d 83, 86 (Tenn. 2000) (citing *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn. 1993)). If, however, the moving party fails to negate an essential element of the plaintiff's claim or show that plaintiff cannot prove an essential element at trial, the burden never shifts to the plaintiff nonmoving party to come forward with evidence to create an issue of disputed fact. *Hannan*, 270 S.W.3d at 11. *Hannan* also reiterates Tennessee does not follow the "put up or shut up" approach. "These cases [prior Tenn. opinions discussed] clearly show that a moving party's burden of production in Tennessee differs from the federal burden. It is not enough for the moving party to challenge the nonmoving party to 'put up or shut up' or even to cast doubt on a party's ability to prove an essential element at trial." *Hannan*, 270 S.W.3d at 8.

Although Judge Bell alleges in his motion the undisputed material facts affirmatively negate an essential element of each of the charges against him, the grounds he offers as proof for his motion do not meet the burden set forth in *Hannan*. Judge Bell asserts in order to violate Canon 3(B)(8), there must be allegations of multiple lengthy delays in rendering decisions. However, Judge Bell offers no proof this is the law, and this Court is unaware of any case supporting this allegation. Further on each of the following charges, Judge Bell asserts proof he

will present he is not guilty of the charges, but he neither affirmatively negates an essential element, nor proves Disciplinary Counsel will not be able to offer proof to the contrary during a trial. Therefore, while he states an essential element of each charge is affirmatively negated, he essentially follows the "put up or shut up" approach in his motion. Therefore, Judge Bell has not met the current burden of proof for a motion for summary judgment under current Tennessee law and the motion for summary judgment is DENIED.

IT IS SO ORDERED this 14 day of May, 2010.

  
Don R. Ash  
Presiding Judge, Court of the Judiciary

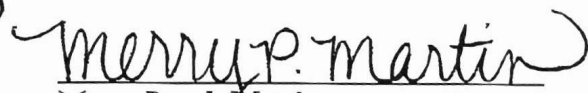
CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been delivered by U.S. mail to the following:

Joseph S. Daniel  
Disciplinary Counsel  
Patrick McHale  
Assistant Disciplinary Counsel  
503 North Maple Street  
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Gordon Ball  
Ball & Scott Law Offices  
Attorney for the Honorable John A. Bell  
550 W. Main Street, Suite 601  
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On this the 14<sup>th</sup> day of May, 2010.

  
Merry Peach Martin  
Judicial Assistant to Judge Don R. Ash