IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 18, 2022 Session

JOHNNY NESMITH v. SAMUEL C. CLEMMONS ET AL.

Appeal from the Chancery Court for Williamson County
No. 14CV-43480 Russell Parkes, Judge

No. M2021-01030-COA-R3-CV

Defendants appeal from the denial of their effort to invalidate a 2017 judgment on the basis that the trial judge harbored animosity against them at the time the judgment was rendered. Because these allegations were adjudicated in an earlier Rule 60.02 action, we conclude that res judicata bars the instant effort for relief from the judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed and Remanded

J. STEVEN STAFFORD, P.J., W.S., delivered the opinion of the court, in which ARNOLD B. GOLDIN and KENNY ARMSTRONG, JJ., joined.

Mark Andrew Hammervold,[1] Elmhurst, Illinois, for the appellant, Shannon N. Clemmons, and Samuel C. Clemmons.

Virginia L. Story, Franklin, Tennessee and Kathryn L. Yarbrough, Spring Hill, Tennessee, for the appellee, Johnny Nesmith.

OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

The procedural history of this case is fairly torturous to recount because it involves proceedings in three separate actions that were occurring simultaneously. The saga of this particular case ("the instant case") began in 2014 when Plaintiff/Appellee Johnny Nesmith

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[1] Attorney Hammervold filed a notice of appearance in this case on September 1, 2022, following briefing. As noted *infra*, the attorney that originally represented the appellants was suspended during the pendency of this appeal.

filed a complaint for breach of contract against his daughter Defendant/Appellant Shannon Clemmons ("Mrs. Clemmons") and her husband Samuel C. Clemmons ("Mr. Clemmons," and together with Mrs. Clemmons, "Appellants"). The instant case was filed in Williamson County Chancery Court ("the trial court") and assigned to Judge Michael W. Binkley. Appellants, however, attempted unsuccessfully to remove Judge Binkley on a number of occasions.[2]

Eventually, the instant case was heard via bench trial in 2016 and 2017. The basis of Mr. Nesmith's claim was that Appellants breached a membership transfer agreement and promissory note. Judge Binkley issued an order in August 2017 awarding Mr. Nesmith substantial damages. On November 27, 2017, Judge Binkley also awarded Mr. Nesmith attorney's fees under the promissory note. Appellants appealed the judgment to this Court, raising issues related to denial of a continuance, discovery issues, the record on appeal, and the trial court's interpretation of the membership transfer agreement. ***Nesmith v. Clemmons***, No. M2017-02521-COA-R3-CV, 2019 WL 5847286, at *10 (Tenn. Ct. App. Nov. 7, 2019) ("***Clemmons I***"). Appellants did not however, "contend that the court's extensive factual findings of fact [were] unsupported by the evidence." ***Id.***

While ***Clemmons I*** was on appeal, proceedings were taking place in two other Williamson County Circuit Court cases presided over by Judge Binkley that would have ramifications on the instant case: (1) a case in which both Mr. Nesmith and Appellants were among the parties, ***Elite Emergency Services v. Nesmith***;[3] (2) and an unrelated case involving different parties and issues, ***Chase v. Stewart***.[4] First, in July 2018, as part of ***Chase v. Stewart***, Judge Binkley entered what Appellants describe as a "scathing" order awarding considerable sanctions against Attorney Brian Manookian, who was representing several of the defendants.[5] In this order, Judge Binkley purportedly "openly impugn[ed] [Attorney] Manookian for his conduct going back to September 2016." The sanctions awarded in in the July 2018 order amounted $622,496.12.

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[2] Appellants' initial efforts resulted in an accelerated interlocutory appeal. Ultimately, this Court affirmed Judge Binkley's decision to deny their recusal efforts based on the allegations at that time. *See generally* ***Clemmons v. Nesmith***, No. M2016-01971-COA-T10B-CV, 2017 WL 480705 (Tenn. Ct. App. Feb. 6, 2017). The facts that led to that effort to recuse Judge Binkley are different than the facts at issue in this appeal.

[3] The full style of this case is *Elite Emergency Services, LLC (EES), Samuel C. Clemmons and Shannon N. Clemmons v. Johnny Nesmith, Russell Morrow, Ben Dearman, Wanda Jones, Kelly Pendergrass, Tiffany Jones, and Cellco Partnership d/b/a Verizon Wireless*, and it was filed in 2014. Judge Binkley eventually recused from this matter in November 2018.

[4] The matter was styled *David Chase v. Chris Stewart, Emily Stewart, Lauren Bull, Jason Ritzen, Andy Cho, Lino Lovrenovic, Bryan Everett, Susan Martin, and Clayton McKenzie,* and it was initiated in 2015.

[5] Attorney Manookian was temporarily suspended by the Tennessee Supreme Court by order of September 21, 2018. He was allowed to continue representing current clients until October 21, 2018. Attorney Manookian was reinstated on May 17, 2019. On October 11, 2019, however, he was once again suspended. This suspension remains in effect pending further orders from the Tennessee Supreme Court.

In the meantime, at a hearing on August 30, 2018 in ***Elite Emergency Services v. Nesmith***, Judge Binkley openly discussed the ***Chase v. Stewart*** sanctions and Attorney Manookian. Specifically, Judge Binkley stated that he "did not like what Mr. Manookian did at all" in conspiring with "another person" to prepare what the judge described as a "fake and false" report of ethical violations against Judge Binkley. The judge also twice advised that "my day will come" and warned that "it's just about here." There is no dispute that the other person to whom Judge Binkley was referring to was Mr. Clemmons.[6]

At a hearing a month later in ***Elite Emergency Services v. Nesmith***, counsel of record for Appellants at that time, Connie Reguli,[7] informed Judge Binkley that Attorney Manookian had filed a civil lawsuit against the judge for his comments at the August 2018 hearing. Judge Binkley then denied Appellants' request for a stay of the proceedings in ***Elite Emergency Services v. Nesmith*** or for an interlocutory appeal.

The effects of Judge Binkley's ill-advised comments at the August 2018 ***Elite Emergency Services v. Nesmith*** hearing rippled across both the instant case and ***Chase v. Stewart***. First, on September 21, 2018, Attorney Manookian filed a motion to recuse Judge Binkley in ***Chase v. Stewart***.[8] Judge Binkley denied the motion, reasoning that his comments were "irrelevant to the issues in the present case." ***Chase v. Stewart***, No. M2018-01991-COA-R3-CV, 2021 WL 402565, at *3 (Tenn. Ct. App. Feb. 4, 2021), *reh'g denied* (Mar. 16, 2021), *perm. app. denied, not for citation* (Tenn. Aug. 6, 2021).[9] Judge Binkley then awarded over $100,000.00 in attorney's fees against Attorney Manookian related to the sanctions; the orders awarding sanctions and attorney's fees were designated

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[6] For example, in ***Elite Emergency Services v. Nesmith***, the following occurred during this timeframe: (1) in a September 2018 hearing, Judge Binkley stated that Mr. Clemmons and Attorney Manookian had communications about collateral matters; (2) in a September 2018 order Judge Binkley accused Mr. Clemmons and Attorney Manookian of working to game the system; (3) in a September 25, 2018 order, Judge Binkley accused Mr. Clemmons and Attorney Manookian of working together to "game the system to their own advantage, and at the same time, attempting to make a mockery of the judicial system"; and (4) an October 10, 2018 "Notice of Filing of Pleading and Exhibits" was filed sua sponte by Judge Binkley, in which Judge Binkley accused Mr. Clemmons and Attorney Manookian of "an ongoing connection . . . to disrupt the proceedings" and submitted several documents originally filed in both ***Chase v. Stewart*** and the instant case, for inclusion into the ***Elite Emergency Services v. Nesmith*** court file.

[7] Attorney Reguli was suspended from the practice of law by the Tennessee Supreme Court on April 22, 2022. As of the date of this Opinion, Attorney Reguli was still under suspension and was awaiting final discipline from the Board of Professional Conduct.

[8] This was the third motion to recuse that Attorney Manookian had filed in ***Chase v. Stewart***. The first motion was appealed, but the denial of the motion affirmed on procedural grounds. *See* ***Chase v. Stewart***, No. M2017-01192-COA-T10B-CV, 2017 WL 3738466, at *4 (Tenn. Ct. App. Aug. 29, 2017). A second recusal motion was also filed, but no appeal of that denial was sought.

[9] Pursuant to Rule 4(E)(2) of the Rules of the Tennessee Supreme Court, ***Chase v. Stewart*** cannot be cited unless a listed exception applies. Appellants argue in this case that the collateral estoppel exception is applicable. We discuss the facts, procedural history, and holding of ***Chase v. Stewart*** only as necessary to address this argument.

as final pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure. Attorney Manookian and his law firm separately appealed the recusal issue and the sanctions/attorney's fees issue. This Court consolidated the two separate appeals. ***Id.***

Meanwhile, ***Clemmons I*** was still pending before this Court on appeal. As such, rather than file a motion to recuse Judge Binkley related to the August 2018 comments and aftermath, Appellants filed a motion with this Court in April 2019 for consideration of post-judgment facts and "for sua sponte disqualification of Judge Binkley or in the alternative for remand for Rule 60 relief." Therein, Appellants asked that Judge Binkley be removed nunc pro tunc to February 2017 or in the alternative that the judgment he entered be set aside under Rule 60.02 of the Tennessee Rules of Civil Procedure. In support of this motion, Appellants cited to twenty-six exhibits,[10] including complaints and orders in the various cases, news articles, continuing education seminar transcripts, and various other documents spanning from 2014 to 2019.

The allegations contained in Appellants' Court of Appeals recusal motion were numerous. Essentially, Appellants asserted that Judge Binkley held a bias against Mr. Clemmons as early as February 2017, as evidenced by his comments at the August 2018 hearings, as well as later comments and orders that generally accused Mr. Clemmons and Attorney Manookian of working in concert to undermine Judge Binkley.[11] Appellants further alleged that Attorney Manookian had entered a notice of appearance in the instant case in July 2017 and "appeared on the Court docket as counsel for the Clemmons by September 2017."[12] Appellant also alleged that Judge Binkley's bias continued post-2018, as evidenced by a January 2019 letter Mr. Clemmons received in which an attorney threatened litigation against Mr. Clemmons over the social media page calling for an investigation of Judge Binkley.[13] According to this letter, Attorney Manookian attributed this page to Mr. Clemmons.

Based on these facts, Appellants argued in their Court of Appeals motion that Judge Binkley's history of personal animus against Appellants would cause a reasonable person to question Judge Binkley's impartiality. Moreover, Appellants alleged that they did not have the full story as to Judge Binkley's purported animus until the January 29, 2019 letter threating a defamation lawsuit against Mr. Clemmons. Appellants therefore asked that Judge Binkley be removed nunc pro tunc to February 2017.

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[10] The list spans twenty-seven exhibits, but states that exhibit ten was intentionally omitted.

[11] Some of these comments and orders are detailed in footnote five, *supra*.

[12] Appellants' motion cites Exhibit 11 for this statement, which it describes as a "[d]ocket." Exhibit 11 is a notice of appearance by Attorney Manookian on behalf of Appellants that bears no indication that it was ever filed. Instead, it appears to be a copy of a document that was faxed on July 17, 2017. Appellants did not point to any pleadings or other documents that had ever been filed by Attorney Manookian on behalf of Appellants in the instant action, nor did they point to any hearings in which he appeared as their counsel of record.

[13] The posts on this social media page dated back to February 2017.

The Court of Appeals, however, denied Appellants' motion by order of November 5, 2019.[14] Two days later, we affirmed the judgment rendered by the trial court in full. *See* ***Clemmons I***, 2019 WL 5847286, at *10–11 (also awarding Mr. Nesmith additional attorney's fees). Appellants filed an application for permission to appeal the affirmance to the Tennessee Supreme Court, which was denied by order of March 26, 2020.[15] ***Clemmons I*** was remanded back to the trial court, and Mr. Nesmith attempted to collect on his judgment, leading to additional trial court proceedings.

With additional proceedings came additional attempts to remove Judge Binkley. Before the Tennessee Supreme Court ruled on the pending application for permission to appeal, on January 2, 2020, Appellants filed a motion seeking to join the instant case with ***Elite Emergency Services v. Nesmith*** for purposes of consideration of a recusal motion against Judge Binkley filed on October 18, 2018. According to a separate motion to recuse filed in the instant case on the same day, however, Judge Binkley had already recused from ***Elite Emergency Services v. Nesmith*** years prior, by order of November 13, 2018.[16] The recusal motion also relied on the January 2019 letter threatening a lawsuit against Mr. Clemmons.

On February 10, 2020, Judge Binkley entered an order in the instant case adjudicating both pending motions related to recusal. First, Judge Binkley recounted some of the procedural history of the case, including his belief that Appellants worked in concert with Attorney Manookian to remove Judge Binkley from the instant case. Judge Binkley also noted that Attorney Manookian was currently suspended from the practice of law due to the risk of harm that he posed to the public. Judge Binkley also reiterated his comments that Appellants and Attorney Manookian attempted to "game" the judicial system. The Judge finally noted that despite all of that, the underlying judgment in Clemmons I was affirmed in all respects and was "for all practical purposes, final." Based on these facts, Judge Binkley reaffirmed that he did not agree with the recusal motion filed in ***Elite Emergency Services v. Nesmith***, "except for the potential of a lawsuit to be filed against [Appellants] as a result of their extra-judicial attempts to place this Court in a false light and the invasion of privacy of this Court and this Judge's personal life." As for the motion to recuse filed in the instant case, Judge Binkley explained:

After careful thought and consideration, this Court believes in order for the

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[14] The order did not provide an explanation for the denial.

[15] It does not appear that Appellants raised the denial of their disqualification motion as an issue in their application for permission to appeal.

[16] The copy of the November 13, 2018 order does not bear a stamp file, but it does not appear disputed that Judge Binkley recused from ***Elite Emergency Services v. Nesmith*** on or near this date. In the order, Judge Binkley states that he disagrees with the request for recusal, but has decided to grant the motion "in order for the administration of justice to prevail in this case without irrelevant outside activities and other interference which has been beyond the scope of the issues in this case."

> administration of justice to prevail in this case without constant, irrelevant outside attempts made to disqualify this Judge as well as other interference precipitated by [Appellants] in order to delay the outcome of this lawsuit, all of which have been totally beyond the scope of the issues in this simple contract case, this Court will step aside and recuse itself from further consideration of the issues of this case since the case is now in the appellate process with little, if any, further trial court activity to be ruled upon.

Judge J. Russell Parkes was ordered to preside over the case by interchange. Thus, as of February 2020, Judge Binkley no longer presided over the instant case in any respect.

Appellants, however, were not satisfied with the recusal of Judge Binkley for only the proceedings going forward. As such, they filed two motions attacking the 2017 judgment against them. First, on April 24, 2020, Appellants filed a motion for relief from the final judgment against them under Rule 60.02 of the Tennessee Rules of Civil Procedure. The motion itself did not contain a multitude of factual allegations. Instead, the Rule 60.02 relied largely on the 2019 recusal motion that had been filed in and rejected by the Court of Appeals, discussed in detail, *supra*. The Court of Appeals motion and its twenty-six exhibits were therefore reproduced in their entireties as exhibits to the Rule 60.02 motion. The Rule 60.02 motion did note that Judge Binkley had entered an order of recusal in 2020, but argued that the facts as alleged in the Court of Appeals motion and Judge Binkley's recusal order indicated that Judge Binkley's animus against Appellants began as early as February 2017. For example, the Rule 60.02 motion referenced the January 2019 letter in which an attorney threatened legal action against Mr. Clemmons for his role in the social media page targeting Judge Binkley. That social media page "existed as early as February 2017," months prior to the entry of the disputed August and November 2017 judgments in the instant case. As such, Appellants asked that the August and November 2017 judgments be set aside. Appellants later filed a supplement to their Rule 60.02 motion and a declaration from Mr. Clemmons in which they provided more detailed arguments as to why the judgment from 2017 should be set aside despite Judge Binkley's 2020 recusal. Appellants also asked that the judgment be stayed pending resolution of their Rule 60.02 motion.

On September 29, 2020,[17] the trial court, presided over by Judge Parkes, denied Appellants' Rule 60.02 motion on the basis that Appellants had not carried their burden by clear and convincing proof. Specifically, the trial court found that there was no evidence that Judge Binkley harbored a prejudice against Appellants as of the August 2017 order awarding Mr. Nesmith damages. Moreover, the trial court noted that Appellants had "four (4) bites at the apple, to address these issues" all without success, in every level of the Tennessee courts. As such, the trial court found that Appellants had not filed their motion

[17] The order was filed on this date but signed by the trial judge on September 24, 2020. Counsel's certificate of service on the order indicates it was sent to Appellants' counsel in early September.

within a reasonable period of time as required by Rule 60.02. On September 24, 2020, Appellants filed a notice of appeal of the "September 24, 2020 order,"[18] but later voluntarily dismissed this appeal.

The appeal in ***Chase v. Stewart*** was all the while proceeding in the background. Indeed, a few months following the denial of Appellants' Rule 60.02, this Court issued its Opinion in ***Chase v. Stewart***. 2021 WL 402565, at *1. According to the Court, the issues briefed by the parties in the consolidated appeal involved both the alleged bias of Judge Binkley and the merits of the sanctions and attorney's fees orders. ***Id.*** at *4. We concluded, however, that the recusal issue was dispositive of the appeal. ***Id.*** Specifically, we held that the comments made by Judge Binkley in ***Elite Emergency Services v. Nesmith*** would cause a reasonable person to question Judge Binkley's impartiality. ***Id.*** at *5. The Court did note that there was no evidence that Judge Binkley was "actually partial." Still, actual bias being unnecessary to require recusal, we held that Judge Binkley's comments were sufficient to warrant disqualification. ***Id.*** at *5–6.

Given that the recusal appeal had been consolidated with the sanctions and attorney's fees issue, the Court then turned to consider the impact of the disqualification on that issue. After noting that recusal typically only has prospective application, we nevertheless concluded that the disqualification should have retroactive effect because the basis for Judge Binkley's thoughts about Attorney Manookian "may have existed for nearly a year and a half before the July 2018 contempt order." ***Id.*** at *7. Indeed, we held that the thoughts "likely existed at least since May 23, 2017[.]" So the Court vacated the orders entered in July 2018 and September 2018 and remanded the case for reassignment and further proceedings. ***Id.*** Although the ***Chase v. Stewart*** decision was appealed to the Tennessee Supreme Court, our high court denied the application for permission to appeal and designated the Opinion "Not for Citation." *See* Tenn. Sup. Ct. R. 4(E) (discussed in detail, *infra*).

The February 2021 issuance of the ***Chase v. Stewart*** Opinion spurred a third effort by Appellants to be relieved from the judgment in the instant case. Specifically, on March 23, 2021, Appellants filed the motion that is the subject of the instant appeal: a motion for the retroactive recusal of Judge Binkley and the vacatur of the underlying August and November 2017 judgments and all subsequent orders. In their motion, Appellants detailed many of the same facts that had been alleged in the prior motion to set aside filed with the Court of Appeals and in Appellants' later Rule 60.02 motion. Indeed, it included the same list of twenty-six exhibits that had previously been cited in those filings. The motion did, however, include new allegations and two additional exhibits: (1) the ***Chase v. Stewart***

[18] On September 24, 2020, the trial court entered an order awarding attorney's fees to a non-party bank. This order was signed by the trial court judge on September 22, 2020. The parties do not appear to dispute the fact that the September 2020 notice of appeal concerned the denial of the Rule 60.02 motion. Regardless, as we explain *infra*, the finality of the Rule 60.02 action does not depend on whether an appeal was filed.

Opinion; and (2) a news article discussing the Opinion and other allegations against Judge Binkley unrelated to the instant case. In their motion, Appellants argued that Judge Binkley's animosity toward Attorney Manookian had been tied to Mr. Clemmons and that recusal was therefore warranted in the instant case.

Mr. Nesmith filed a response in opposition on April 14, 2021. Therein, Mr. Nesmith argued, inter alia, that the March 2021 retroactive recusal motion was based on the same allegations that had previously been decided when the trial court denied Appellants' Rule 60.02 motion. Mr. Nesmith therefore argued that Appellants could not relitigate this issue.

On April 28, 2021, the trial court denied Appellants' motion for retroactive recusal. In that order, the trial court noted that "[m]any of the exhibits are identical to the exhibits tendered to the Court and/or argued in support of [Appellants'] April 24, 2020, Motion for Rule 60 Relief" and that Appellants had cited no rule of procedure in support of their request for relief. Moreover, the trial court pointed out that it had previously questioned the timeliness of even Appellants' Rule 60.02 motion, much less an even later motion requesting essentially the same relief. As such, the trial court ruled that the request for relief was untimely. Finally, the trial court ruled that the motion for retroactive recusal should be denied on the additional ground that it involves the same facts as has been set forth in Appellants' previously denied Rule 60.02 motion.

Although Appellants sought to alter or amend the ruling, the trial court ultimately denied that motion. In its order, the trial court noted that the only substantive difference between the motion for retroactive recusal and the Rule 60.02 motion was the issuance of ***Chase v. Stewart***, but that case had no precedential value as it had been designated "Not for Citation" by the Tennessee Supreme Court. The trial court also ruled that the ***Chase v. Stewart*** Opinion did not collaterally estop Mr. Nesmith from defending against the recusal in this case because he was not a party to ***Chase v. Stewart***. Appellants thereafter appealed to this Court.

II. Issues Presented

Appellants raise three issues in this appeal,[19] which we consolidate into the following issue: whether the trial court erred in denying Appellants' motion for retroactive

[19] Specifically, Appellants raised the following issues:

> **ARGUMENT I** – Due to issues of collateral estoppel and privity of the parties, the application of [] ***Chase v. Stewart*** is proper and in accordance with Tenn. Sup. Ct. S.R. 4, Sec. (E)(2).
>
> **ARGUMENT II** – The trial court erred in denying the Rule 10B motion for retroactive recusal.
>
> **ARGUMENT III** – The trial court erred in not applying collateral estoppel where the Court (Judge Michael Binkley) inextricably tied the appellant to Attorney Manookian.

recusal. In the posture of appellee, Mr. Nesmith asks for an award of attorney's fees pursuant to the parties' promissory note. For the following reasons, we conclude that the trial court did not err in denying that motion, and we grant Mr. Nesmith's request for attorney's fees incurred in defending against this appeal.

IV. ANALYSIS

A.

The thrust of Appellants' arguments on appeal is that the ***Chase v. Stewart*** Opinion is indisputable proof that Judge Binkley harbored animosity against Mr. Clemmons as early as May 2017 and that the August and November 2017 judgments should be vacated and the proceedings reheard before a new judge. Mr. Nesmith argues, however, that (1) he is not bound by the ***Chase v. Stewart*** opinion, both because he was not involved in that case and because it has no precedential value; and (2) that these same allegations have been raised and rejected and therefore cannot be relitigated.

In order to resolve these issues, it is necessary to first consider the nature of the relief that Appellants are actually seeking in this appeal. Although Appellants characterize the relief they seek as simply involving recusal, we judge motions by their content, rather than their caption. ***Pickard v. Ferrell***, 45 Tenn. App. 460, 471, 325 S.W.2d 288, 292–93 (Tenn. 1959); *see also* ***Edwards Lifesciences, L.L.C. v. Covenant Health Sys.***, 205 S.W.3d 687, 690 (Tex. Ct. App. 2006) ("[W]e note the old adage: 'a rose is a rose by any other name.' That is, irrespective of the label appended to the motion, its substance is of import.") (citation omitted). Recusal generally applies prospectively—that is, it does not necessarily invalidate all the prior orders entered by the disqualified judge. ***Watson v. Cal-Three, LLC***, 254 P.3d 1189, 1193 (Colo. App. 2011); *see also* Tenn. R. Sup. Ct. 10B (including no indication that the rule provides for invalidation of past orders); *cf.* 46 Am. Jur. 2d Judges § 210 ("Judicial acts taken before recusal may not later be set aside unless the litigant shows actual impropriety or actual prejudice; an appearance of impropriety is not enough to poison the prior acts."). In this case, after five attempts to remove him, Judge Binkley is no longer presiding over this case and had not done so for more than a year prior to the filing of the retroactive recusal motion. As such, the central relief that Appellants seek is not removal of Judge Binkley, i.e., recusal, but invalidation of the August and November 2017 judgments on the basis of his exhibited animus toward Mr. Clemmons.

Unlike in ***Chase v. Stewart*** or the other cases cited by Appellant, [20] however, the judgment that Appellants seek to invalidate is long since final. Indeed, it has even been

[20] Although we invalidated an order entered prior to the filing of a recusal motion in ***Olerud v. Morgan***, No. M2010-01248-COA-R3-CV, 2011 WL 607113, at *1 (Tenn. Ct. App. Feb. 18, 2011), this case is not analogous due to its procedural posture. ***Olerud*** involved a direct appeal of both an underlying judgment and the denial of a recusal issue, as such, those issues were squarely before the court in that appeal.

affirmed by this Court and review refused by the Tennessee Supreme Court. *See generally* ***Clemmons I***, 2019 WL 5847286, at *2–11. Appellants have cited no law of any kind that suggests that a party may simply file a recusal motion years after the proceedings at issue in order to invalidate a final judgment. Instead, the proper vehicle for Appellants' effort to invalidate the August and November 2017 judgments is not a recusal motion, but a motion for relief from a final judgment pursuant to Rule 60.02 of the Tennessee Rules of Civil Procedure.[21] Indeed, the Tennessee Supreme Court has held that once a judgment becomes final, a litigant's "*sole* avenue for relief from the [judgment] [becomes] a motion in accordance with Rule 60.02." ***Henry v. Goins***, 104 S.W.3d 475, 479 (Tenn. 2003) (emphasis added) (citing Tenn. R. App. P. 60.02).[22]

Of course, Appellants have already attempted to obtain relief from the August and November 2017 judgments by way of a Rule 60.02 motion—to no avail. And inexplicably, Appellants abandoned any appeal as to the denial of their Rule 60.02 motion.[23] Thus, Appellants here chose to abandon the appeal of the one motion that was actually the proper vehicle for requesting the relief that they desired. When the ***Chase v. Stewart*** Opinion was released, Appellants glimpsed another opportunity to obtain relief of the judgment by way of a retroactive recusal motion. Yet, regardless of how Appellants have chosen to dress

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[21] Rule 60.02 provides as follows:

> On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (3) the judgment is void; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that a judgment should have prospective application; or (5) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1) and (2) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this Rule 60.02 does not affect the finality of a judgment or suspend its operation, but the court may enter an order suspending the operation of the judgment upon such terms as to bond and notice as to it shall seem proper pending the hearing of such motion. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to set aside a judgment for fraud upon the court. Writs of error coram nobis, bills of review and bills in the nature of a bill of review are abolished, and the procedure for obtaining relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

[22] We note that Rule 60.02 also speaks of an independent action that may be used in lieu of a Rule 60.02 motion; however, no such action is at issue in this case. Moreover, the circumstances in which an independent action under Rule 60.02 may be utilized are very limited. *See generally* ***Reliant Bank v. Bush***, 631 S.W.3d 1, 9 (Tenn. Ct. App. 2021), *perm. app. denied* (Tenn. June 11, 2021) (quoting ***Jerkins v. McKinney***, 533 S.W.2d 275 (Tenn. 1976) ("Resort to an independent action may be had only rarely, and then only under unusual and exceptional circumstances.")).

[23] Again, it was only after an appeal to this Court that Attorney Manookian was successful in removing Judge Binkley and vacating the orders entered by him in ***Chase v. Stewart***.

their effort, we must conclude that the crux of Appellants' motion for retroactive recusal is an effort to obtain relief from a final judgment.

Having determined the proper framework for considering the motion that is subject to this appeal, we turn to consider the arguments of the parties. Obviously, the ***Chase v. Stewart*** Opinion was the impetus for Appellants' retroactive recusal motion and the central authority cited in support of Appellants' arguments on appeal. We conclude, however, that Appellants' reliance on ***Chase v. Stewart*** suffers from a number of fatal infirmities, not the least of which is that the ***Chase v. Stewart*** Opinion was designated as "Not For Citation" by the Tennessee Supreme Court. That means that ***Chase v. Stewart*** is neither persuasive nor controlling in cases except for purposes of res judicata, collateral estoppel, law of the case, or to establish a split of authority. Tenn. Sup. Ct. R. 4(E)(2) (including one other exception applicable in criminal matters). Appellants indeed argue that collateral estoppel applies here. It does not.

In order to prevail on a claim of collateral estoppel, the party asserting the applicability of the doctrine must establish the following elements:

> (1) that the issue to be precluded is identical to an issue decided in an earlier proceeding, (2) that the issue to be precluded was actually raised, litigated, and decided on the merits in the earlier proceeding, (3) that the judgment in the earlier proceeding has become final, (4) that the party against whom collateral estoppel is asserted was a party or is in privity with a party to the earlier proceeding, and (5) that the party against whom collateral estoppel is asserted had a full and fair opportunity in the earlier proceeding to contest the issue now sought to be precluded.

Bowen ex rel. Doe v. Arnold, 502 S.W.3d 102, 107 (Tenn. 2016) (citing ***Mullins v. State***, 294 S.W.3d 529, 535 (Tenn. 2009). Mr. Nesmith argues that elements four and five are missing in this case.

Appellants do not appear to dispute that neither they nor Mr. Nesmith were parties in ***Chase v. Stewart***. Instead, Appellants argue that Attorney Manookian and Appellants should be considered in privity because Judge Binkley linked them in a nefarious scheme against him. Appellants, however, are not the party that is at issue. Regardless of whether offensive or defensive collateral estoppel is at issue, in order to determine the final two elements of collateral estoppel, we must answer whether "'the party against whom collateral estoppel is asserted has litigated and lost in an earlier action[.]'" ***Bowen***, 502 S.W.3d at 110 (quoting ***Parklane Hosiery Co. v. Shore***, 439 U.S. 322, 329, 99 S. Ct. 645, 650, 58 L. Ed. 2d 552 (1979)). Appellants are the parties asserting collateral estoppel, not the party against whom it is asserted. Importantly, there is no allegation that Mr. Nesmith was in privity with any party involved with, or the subject matter of, ***Chase v. Stewart***. *See* ***Phillips v. Gen. Motors Corp.***, 669 S.W.2d 665, 669 (Tenn. Ct. App. 1984) ("The

Tennessee rule holds that privity as used in the context of *res judicata* does not embrace relationships between persons or entities, but rather to the subject matter of the litigation."). Thus, there can be little disagreement that Mr. Nesmith in particular was not provided "a full and fair opportunity to litigate the issue in the first action[,]" as he was not involved in that action. ***Bowen***, 502 S.W.3d at 116. As such, Appellants' effort to collaterally estop Mr. Nesmith from defending against their recusal motion must fail.

Although it is somewhat difficult to understand, it appears that Appellants assert that the party against whom they are asserting collateral estoppel is not Mr. Nesmith, but Judge Binkley.[24] Respectfully, we disagree. First, we note that Appellants have cited no legal authority to suggest that the trial judge should be considered a party for purposes of collateral estoppel. Here, Appellants are seeking to set aside a judgment obtained by Mr. Nesmith, not by attacking Mr. Nesmith or the correctness of the judgment itself, but by attacking the trial judge. Regardless of how Appellants have brought this motion, it is Mr. Nesmith's judgment that is at risk. As such, he is the party against whom collateral estoppel is asserted. Because he was not a party to ***Chase v. Stewart*** and did not have an opportunity to litigate the recusal issue in that action, he is not collaterally estopped from defending the allegations made in this case. ***Bowen***, 502 S.W.3d at 107.

Moreover, even if ***Chase v. Stewart*** could be relied upon, the procedural posture of that case is so far departed from the instant case as to be inapposite. As a reminder, the recusal and vacatur of ***Chase v. Stewart*** came following direct appeals of the denied recusal motion and the award of sanctions and attorney's fees. At the time of the appeals, ***Chase v. Stewart*** was in no way final. In the instant case, however, Appellants are attempting to use C***hase v. Stewart*** as a means to set aside a judgment that is long since final by removing a judge that is no longer presiding over the case.

And again, the ultimate relief that Appellants seek in the instant case is invalidation of a final judgment—in other words, Rule 60.02 relief. It appears, however, that Appellants may want to avoid their request being framed in this way because they have already attempted unsuccessfully to obtain relief via Rule 60.02. Indeed, the trial court specifically found that Appellants' motion for retroactive recusal involved the same allegations that had previously been raised in Appellants' rejected Rule 60.02 motion. According to Mr. Nesmith, this finding implicates the doctrine of res judicata and is a sufficient basis to

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[24] Inexplicably, this argument is set forth most fully in Appellants' statement of the case, rather than the argument section of their initial brief. The statement of the case section of a brief should not be used to set forth legal arguments. ***Krulewicz v. Krulewicz***, No. M2021-00190-COA-R3-CV, 2022 WL 287811, at *14 (Tenn. Ct. App. Feb. 1, 2022) ("This court has generally held that arguments should be confined to the argument sections of appellate briefs.") (citing ***In re Est. of Storey***, No. W2017-00689-COA-R3-CV, 2018 WL 1151944, at *7 (Tenn. Ct. App. Mar. 5, 2018) (quoting ***Freiden v. Alabaster***, No. 86186–2, 1990 WL 14562 (Tenn. Ct. App. Feb. 21, 1990), *perm. app. denied* (Tenn. June 11, 1990) (citing Tenn. R. App. P. 27)) ("This Court has previously held that it was inappropriate for a litigant to submit a brief where the statement of facts was 'interlaced and intertwined' with arguments of counsel.")).

affirm the trial court's denial of Appellants' motion for retroactive recusal, however characterized.

Res judicata and collateral estoppel are "very similar." ***Richardson v. Tennessee Bd. of Dentistry***, 913 S.W.2d 446, 459 n.11 (Tenn. 1995). Res judicata "bars a second suit between the same parties or their privies on the same cause of action with respect to all issues which were or could have been litigated in the former suit." ***Creech v. Addington***, 281 S.W.3d 363, 376 (Tenn. 2009) (citing ***Massengill v. Scott***, 738 S.W.2d 629, 631 (Tenn. 1987)). "The primary purposes of the doctrine are to promote finality in litigation, prevent inconsistent or contradictory judgments, conserve legal resources, and protect litigants from the cost and vexation of multiple lawsuits." ***Id.*** (citing ***Sweatt v. Tennessee Dep't of Corr.***, 88 S.W.3d 567, 570 (Tenn. Ct. App. 2002)). This Court has applied the doctrine of res judicata in circumstances involving allegations of bias against a trial judge. *See, e.g,* ***Hill Boren Properties v. Boren***, No. W2019-02128-COA-T10B-CV, 2020 WL 119738, at *4 (Tenn. Ct. App. Jan. 10, 2020) (holding that allegations of the trial judge's bias and prejudice were res judicata); ***In re Adison P.***, No. W2015-00393-COA-T10B-CV, 2015 WL 1869456, at *4 (Tenn. Ct. App. Apr. 21, 2015) (declining to apply res judicata because the party's second motion raised facts that did not exist at the time the first motion was filed).

The party asserting the defense of res judicata must establish the following elements:

> (1) that the underlying judgment was rendered by a court of competent jurisdiction;
> (2) that the same parties or their privies were involved in both suits;
> (3) that the same claim or cause of action was asserted in both suits; and
> (4) that the underlying judgment was final and on the merits.

Regions Bank v. Prager, 625 S.W.3d 842, 848 (Tenn. 2021) (citing ***Elvis Presley Enters, Inc. v. City of Memphis***, 620 S.W.3d 318, 324 (Tenn. 2021)). "A trial court's decision that a claim is barred by the doctrine of res judicata or claim preclusion involves a question of law which will be reviewed de novo on appeal without a presumption of correctness." ***Jackson v. Smith***, 387 S.W.3d 486, 491 (Tenn. 2012). After considering each of the required elements, we conclude that the doctrine of res judicata indeed bars Appellants' motion for retroactive recusal.

First, there is no allegation that the denial of the Rule 60.02 motion was rendered by a court of incompetent jurisdiction. ***Id.*** The Rule 60.02 motion and the motion for retroactive recusal also clearly involved the same parties, as the two requests for relief were both filed in the instant case. ***Id.***

We further conclude that the order denying that motion is a final judgment for

purposes of res judicata. ***Prager***, 625 S.W.3d at 848. A final judgment adjudicates all "claims, rights, and liabilities of all the parties" and "resolves all the issues [leaving] 'nothing else for the trial court to do.'" ***E Sols. for Bldgs., LLC v. Knestrick Contractor, Inc.***, No. M2018-00732-COA-R3-CV, 2018 WL 1831116, at *3 (Tenn. Ct. App. Apr. 17, 2018) (citing ***Discover Bank v. Morgan***, 363 S.W.3d 479, 488 n.17 (Tenn. 2012); ***In re Estate of Henderson***, 121 S.W.3d 643, 645 (Tenn. 2003)). At oral argument, Appellants argued that res judicata could not apply here because the motion for retroactive recusal and the Rule 60.02 motion were filed in the same case.[25] According to Appellants, res judicata can only preclude a judgment obtained in a collateral action. Rather, Appellants argue that the proper framework for deciding this issue is the law of the case doctrine. As we perceive it, this argument concerns whether the denial of the Rule 60.02 motion was a final judgment for purposes of res judicata.

Respectfully, we disagree with Appellants' contention. By its very terms, a motion under Rule 60.02 "does not affect the finality of a judgment or suspend its operation[.]" Tenn. R. Civ. P. 60.02. As a result, this Court has repeatedly characterized Rule 60.02 motions as collateral to the underlying action. *See, e.g.*, ***Nelson v. Justice***, No. E2020-00287-COA-R3-CV, 2021 WL 870736, at *5 (Tenn. Ct. App. Mar. 9, 2021), *perm. app. denied* (Tenn. July 13, 2021) (quoting Tenn. R. Civ. P. 60.02) (describing a motion under Rule 60.02 as a "collateral attack" on the basis that a Rule 60.02 motion does not affect the finality of the judgment or suspend its operation); ***Frazier v. Frazier***, 72 S.W.3d 333, 335 (Tenn. Ct. App. 2001) ("The domesticated judgment has the same legal effect as one originating in Tennessee, and is governed by the same law regarding finality of judgments, subject to collateral attack for grounds set forth in Tenn. R. Civ. P. Rule 60.02, assuming the original judgment is valid."); ***Jones v. McMurray***, No. M2000-01959-COA-R3-CV, 2001 WL 1097052, at *4 (Tenn. Ct. App. Sept. 20, 2001) ("We discuss Rule 60.02 because

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[25] Oral argument was the first time that Appellants made a real effort to address Mr. Nesmith's res judicata argument, as little to no argument about this doctrine was included in either Appellants' initial or reply briefs. Indeed, while Appellants statement of the facts and statement of the case combine to total fifty-eight pages of their initial brief, Appellants' argument section spans only eight pages. Perhaps in an effort to remedy that issue after Attorney Hammervold was retained, Appellants filed two lengthy citations to supplemental authorities pursuant to Rule 27(d) of the Tennessee Rules of Appellate Procedure citing law directed toward the res judicata issue. Rule 27(d), however, states that supplemental authorities should be provided to the Court "without argument." As is characteristic of Appellants, they did not heed this mandate, but used their supplemental authorities to raise new arguments for which the time had passed for doing so.

We note that, typically, a failure to raise an argument in more than a skeletal fashion constitutes a waiver. ***Sneed v. Bd. of Pro. Resp. of Supreme Ct.***, 301 S.W.3d 603, 615 (Tenn. 2010). Although the trial court did note that Appellants were attempting to relitigate issues, it did not expressly apply the doctrine of res judicata. Thus, while we are permitted to affirm the trial court on different grounds, we decline to hold that Appellants' waived consideration of res judicata on the basis of their failure to properly brief it. *See* ***Barner v. Boggiano***, 222 S.W.2d 672, 677 (Tenn. Ct. App. 1949) ("It is well settled that if there is any ground upon which a decree before the appellate court on a broad appeal can be affirmed, it will be done, even though it be a different ground from that upon which the chancellor bases his decree.").

that Rule addresses collateral attacks on judgments[.]"). Thus, Appellants' Rule 60.02 motion is properly characterized as a collateral attack on the underlying judgment for purposes of res judicata.

Because a Rule 60.02 motion is collateral to the underlying judgment, the denial of such a motion is appealable as a final judgment so long as it adjudicates all of the claims raised therein. *See* Tenn. R. App. P. 3 (allowing an appeal as of right of all judgments that adjudicate all the issues of all the parties); *see also, e.g.*, ***Biggers v. Houchin***, No. M2008-01356-COA-R3-CV, 2009 WL 2176567, at *6 (Tenn. Ct. App. July 21, 2009) (noting that the appellee "does not dispute the fact that the order denying the Tenn. R. Civ. P. 60.02 motion to set aside constituted a final judgment from which Plaintiff was entitled to pursue a Tenn. R. App. P. 3(a) appeal as of right"); ***Lee v. Lee***, No. 29, 1990 WL 90942, at *1 (Tenn. Ct. App. July 3, 1990) (involving an appeal of the denial of a Rule 60.02 motion). Here, the trial court dismissed Appellants' Rule 60.02 motion in its entirety. Thus, the denial of the Rule 60.02 motion was a final judgment that Appellants were entitled to appeal notwithstanding the fact that other proceedings relating to collection on the August and November 2017 judgments were ongoing in the trial court. *Cf.* ***Ammons v. Longworth***, No. E2018-01004-COA-R3-CV, 2019 WL 6034939, at *6 (Tenn. Ct. App. Nov. 14, 2019) (holding that "ancillary matters relating to the enforcement or collection of the judgment do not impact finality").

Appellants also apparently viewed the Rule 60.02 denial as a final, appealable judgment because they filed a notice of appeal within thirty days following the denial of their recusal motion. Although it is somewhat unclear from the record, Appellants do not appear to dispute that the subject of this appeal was the order denying their Rule 60.02 motion.[26] In any event, regardless of whether Appellants appealed the denial of the Rule 60.02 motion and dismissed the appeal or chose not to appeal that order at all, the result is that the denial of the Rule 60.02 motion on the merits was rendered final for purposes of res judicata. *See* ***Creech***, 281 S.W.3d at 377 ("As a general rule, a trial court's judgment becomes final thirty days after its entry unless a party files a timely notice of appeal or specified post-trial motion."). Thus, the fourth element of res judicata is also met in this case. *See* ***Prager***, 625 S.W.3d at 848.

The final question then is whether "the same claim or cause of action was asserted in both suits[.]" ***Id.*** We conclude that this element is also met. Comparing the 2021 motion for retroactive recusal and the 2020 Rule 60.02 motion, it is clear that they involve the same allegations. Both allege that Judge Binkley held an animus against Mr. Clemmons that pre-dated the underlying judgment such that the judgment should be wholly set aside. Both motions point to the August 2018 hearing in ***Elite Emergency Services v. Nesmith*** as when this alleged animus was fully brought to light. In support of this argument, the Rule 60.02 motion and the motion for retroactive recusal cited the exact same list of twenty-six

[26] As a reminder, the notice of appeal cited a date which could refer to two different orders.

exhibits. Indeed, these are the same twenty-six exhibits that Appellants cited in their April 2019 Court of Appeals motion. So Appellants have raised these same factual allegations in the Spring of 2019, the Spring of 2020, and the Spring of 2021. And both the 2021 motion and the 2020 Rule 60.02 motion also noted the January 2019 letter as evidence that the animus continued.

The only difference between the 2020 Rule 60.02 motion and the 2021 motion for retroactive recusal was the issuance of the ***Chase v. Stewart*** Opinion. But as previously discussed, this Opinion cannot be cited a legal precedent. *See* Tenn. R. Sup. Ct. 4(E)(2). The ***Chase v. Stewart*** panel's conclusion that the facts alleged in Attorney Manookian's recusal motion were sufficient to warrant disqualification of Judge Binkley is a legal conclusion. *See* ***Cook v. State***, 606 S.W.3d 247, 253 (Tenn. 2020) (holding that "whether [a] judge's comments [] establish that the judge should have recused himself because his impartiality might reasonably be questioned—is a question of law to which de novo review applies"). As such, we simply cannot rely on that conclusion in this unrelated case.

Appellant appears to argue, however, that the ***Chase v. Stewart*** Opinion constitutes newly discovered facts which provide an exception to the res judicata doctrine. It is true that Tennessee courts have recognized that newly discovered facts may operate as an exception to the res judicata doctrine. *See* ***Creech***, 281 S.W.3d at 381 (holding that "[t]he doctrine of res judicata 'extends only to the facts in issue as they existed at the time the judgment was rendered, and does not prevent a re-examination of the same question between the same parties where in the interval the facts have changed or new facts have occurred which may alter the legal rights or relations of the litigants.'") (quoting ***Banks v. Banks***, 18 Tenn. App. 347, 77 S.W.2d 74, 76 (1934)); *see also* ***In re Adison P.***, 2015 WL 1869456, at *4 (holding that res judicata did not apply because the second recusal motion alleged new facts that did not exist at the time of the first recusal motion). Still, Appellants' argument that ***Chase v. Stewart*** establishes new facts is unavailing.

A review of the ***Chase v. Stewart*** Opinion reveals that it relied on facts that were established in 2018 to order recusal of Judge Binkley in that case. These are the same facts that had been cited in Appellants' 2019 Court of Appeals motion and 2020 Rule 60.02 motion. While the legal consequences of Judge Binkley's statements to the ***Chase v. Stewart*** litigation were not known until recently,[27] the facts that led to those legal consequences had been established and known by the time that Appellants filed both their 2019 Court of Appeals motion and their 2020 Rule 60.02 motion. And despite the fact that the ***Chase v. Stewart*** Opinion may have relied most heavily on different statements by

[27] And again, the legal conclusions reached by the panel in ***Chase v. Stewart*** have no precedential value in this case. *See* ***Cook v. State***, 606 S.W.3d 247, 253 (Tenn. 2020) (holding that "whether [a] judge's comments [] establish that the judge should have recused himself because his impartiality might reasonably be questioned—is a question of law to which de novo review applies").

Judge Binkley from the August 2018 hearing than were relied upon in those earlier motions, it cannot be disputed that all of Judge Binkley's statements were known or should have been known at that time. Again, res judicata bars a second suit "with respect to all issues which were or could have been litigated in the former suit." ***Creech***, 281 S.W.3d at 376 (citing ***Massengill***, 738 S.W.2d at 631). So it appears that the third element of res judicata has also been met in the instant case.

The purpose of res judicata is to prevent a litigant from vexing an opposing party by taking multiple bites at the same apple. *See* ***Edwards v. City of Memphis***, No. W2007-02449-COA-R3-CV, 2009 WL 2226222, at *3 (Tenn. Ct. App. July 27, 2009) (describing res judicata as entitling a litigant to "only to one bite at the apple"). Prior to filing the instant motion for retroactive recusal, Appellants had previously taken at least two bites of the apple seeking the same relief based on the same facts—the 2019 Court of Appeals motion and the 2020 Rule 60.02 motion. Unlike the appellant in ***Chase v. Stewart***, who only obtained relief following a successful direct appeal, Appellants chose to abandon their appeal of the denial of their Rule 60.02 motion.[28] As a result, the denial of that motion, for better or worse, became a final judgment entitled to preclusive effect. *Cf.* ***Creech***, 281 S.W.3d at 376 (quoting ***Warwick v. Underwood***, 40 Tenn. (3 Head) 238, 241 (Tenn. 1859) (stating that a final judgment cannot be relitigated "[r]ight or wrong")); ***Jackson v. Smith***, No. W2011-00194-COA-R3-CV, 2011 WL 3963589, at *6 (Tenn. Ct. App. Sept. 9, 2011), *aff'd,* 387 S.W.3d 486 (Tenn. 2012) (quoting ***Federated Dep't Stores, Inc. v. Moitie***, 452 U.S. 394, 398, 101 S. Ct. 2424, 2428, 69 L. Ed. 2d 103 (1981) ("[N]or are the *res judicata* consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong . . . .")). So while we can certainly understand Appellants' frustration that Attorney Manookian was able to obtain the relief in ***Chase v. Stewart*** that they have desperately sought in this case, their decision to abandon the appeal of the proper vehicle for requesting that relief precludes their efforts now. Because the allegations at issue in this case were or should have been litigated in the previous Rule 60.02 motion and are now final, Appellants are simply not entitled to a third bite at the apple to relitigate this issue.[29] Indeed, at this point nothing is left of the apple but its core. The trial court therefore did not err in denying Appellants' third attempt to utilize these allegations to invalidate the August and November 2017 judgments.

B.

As a final matter, Mr. Nesmith seeks an award of attorney's fees incurred in this appeal under the parties' promissory note. Paragraph 4 of the promissory note provides as follows:

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[28] Again, we note that Appellants also did not raise the recusal issue in their application for permission to appeal to the Tennessee Supreme Court in ***Clemmons I***.

[29] Indeed, Judge Parkes characterized this as Appellants' fourth attempt at this relief, presumably counting Appellants' application for permission to the Supreme Court in ***Clemmons I***.

> It is expressly understood and agreed by Makers that if it is necessary to enforce payment of this note through an attorney or by suit, the Makers shall pay reasonable attorney's fees and all costs of collection.

Absent fraud, mistake, or some other defect, courts are required to enforce contractual attorney's fee provisions as written. ***Eberbach v. Eberbach***, 535 S.W.3d 467, 478 (Tenn. 2017). Thus, when a contract entitles a party to attorney's fees under certain circumstances, Tennessee courts do "not have the discretion to set aside the parties' agreement and supplant it with [their] own judgment." ***Id.*** (citing ***Christenberry v. Tipton***, 160 S.W.3d 487, 494 (Tenn. 2005).

The parties' promissory note entitles Mr. Nesmith to reasonable attorney's fees when he employs an attorney or lawsuit to enforce payment thereunder. As previously discussed, the crux of this appeal is Appellants' inexhaustible effort to avoid the August and November 2017 judgment against them. As such, we must conclude that Mr. Nesmith was required to utilize the services of an attorney to defend against Appellants' efforts to avoid payment under the promissory note. As such, Mr. Nesmith is entitled to the award of reasonable attorney's fees.

V. CONCLUSION

The judgment of the Williamson County Chancery Court is affirmed. This matter is remanded to the trial court for all further proceedings as are necessary and consistent with this Opinion, including the determination of Appellee Johnny Nesmith's reasonable attorney's fees incurred in defending against this appeal. Costs of this appeal are taxed to Appellants Shannon Clemmons and Samuel C. Clemmons, for which execution may issue if necessary.

S/ J. Steven Stafford
J. STEVEN STAFFORD, JUDGE