FILED
02/14/2023
Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs December 2, 2022

LAWRENCE SIMONETTI ET AL. v. THOMAS F. MCCORMICK ET AL.

Appeal from the Circuit Court for Davidson County
No. 19C1362 Joseph P. Binkley, Jr., Judge

No. M2022-01669-COA-T10B-CV

Following a hearing on the issue of attorney's fees resulting from a discovery dispute, the trial judge or his office contacted an attorney for the defendants to obtain certain discovery responses that had not been filed with the court. The defendants' attorney responded by email with the requested documents, carbon-copying plaintiffs' counsel on the email. The trial court then entered an order awarding the plaintiffs attorney's fees in which the fees awarded were only a small portion of those requested. The plaintiffs filed a motion to recuse, citing the communication between the defendants' attorney and the trial judge. The trial court denied the motion for recusal. We agree with the trial court's ultimate conclusion that recusal was not required.

Tenn. Sup. Ct. R. 10B Accelerated Interlocutory Appeal; Judgment of the Circuit Court Affirmed and Remanded

J. STEVEN STAFFORD, P.J., W.S., delivered the opinion of the court, in which THOMAS R. FRIERSON, II and JEFFREY USMAN, JJ., joined.

Michael G. Hoskins, Nashville, Tennessee, for the appellants, Lawrence Simonetti, and Gloria Simonetti.

Christopher B. Fowler and Benjamin Ealey Goldammer, Nashville, Tennessee, for the appellees, Thomas Frank McCormick, Akbar K. Arab, Harry Bonnaire, M.D., Dwell Investment Group, LLC, Shaun Haggerty, John P. McCormick, and TNG Contractors, LLC.

OPINION

I. FACTUAL AND PROCEDURAL HISTORY

This is not the first interlocutory appeal in this case. *See generally* ***Simonetti v. McCormick***, No. M2021-00754-COA-R3-CV, 2022 WL 1633798 (Tenn. Ct. App. May 24, 2022). The underlying facts are generally not at issue in this appeal. Suffice it to say that in June 2017, Plaintiffs/Appellants Lawrence Simonetti and Gloria Simonetti (together, "Appellants") entered into a contract to purchase a planned unit development from a developer. After closing on the uncompleted home, Appellants discovered various defects. A dispute then occurred as to whether the home was covered by a warranty from a third-party.

In June 2019, Appellants filed a complaint against several defendants in the Circuit Court of Davidson County ("the trial court"). The complaint was later amended to include additional defendants, including Defendants/Appellees Thomas Frank McCormick, Akbar K. Arab, Shaun Haggerty, Harry Bonnaire, M.D., John P. McCormick, Dwell Investment Group, LLC, and TNG Contractors, LLC (collectively "Appellees"). Appellants alleged that the home was negligently constructed and that they were induced to buy the home by the fraudulent promise of a home warranty. Appellants further alleged that the developer's owners should be personally liable for the damages through corporate veil piercing.

In response to the complaint, Appellees sought to compel arbitration. The trial court denied the defendants' motions to compel. We affirmed the denial of the motions and granted Appellants damages for having to defend against a frivolous appeal. ***Id.*** at *5–6. The calculation of the fees to be awarded was remanded to the trial court. ***Id.*** at *6.

The frivolous appeal damages were not the only ramification for Appellees' litigation strategies. Indeed, while the first appeal was pending, in October 2021, the trial court granted Appellants' motion for sanctions against Appellees for failure to fully and candidly engage in discovery. The trial court therefore awarded Appellants "all reasonable attorney's fees and expenses incurred in securing [Appellees'] cooperation and compliance with discovery[.]" Appellants' counsel thereafter filed an application for fees seeking $56,490.00 in attorney's fees and $3,265.00 in expenses.

At this point, the Court of Appeals had entered its opinion in the arbitration appeal. So Appellants filed a motion in the trial court for attorney's fees incurred in defending against that appeal. This motion sought $40,680.00 in fees incurred on appeal.

The two pending fees applications were heard together on September 7, 2020. Three witnesses testified on behalf of Appellants. Appellees submitted no witnesses and no exhibits.[1] The trial court took the matter under advisement at the close of proof.

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[1] Although there was no court reporter present for this hearing, an affidavit was later filed by Appellants attesting to the witnesses and exhibits presented. Appellees do not appear to take issue with Appellants' allegation that they presented no affirmative proof.

What occurred next is the central focus of this appeal. According to Appellants, between September 7 and September 12, 2022, the trial judge, Joe P. Binkley, Jr., contacted counsel for Appellees, Christopher B. Fowler, concerning the pending matter. There is no dispute that Attorney Fowler is the trial judge's former law clerk. According to Appellants, the exact nature of the communication has never been disclosed.

What is known is that on September 12, 2022, Attorney Fowler sent an email to the trial judge's judicial assistant attaching certain discovery documents that had apparently been requested by the trial judge. Specifically, the email stated, in relevant part, as follows:

> Dear [Judicial Assistant],
>
> As requested, attached are defendants TNG Contractors, LLC and Dwell Investment Group, LLC's supplemental responses to the Plaintiffs' interrogatories and requests for production of documents served on June 29, 2020. Dwell's attached revised responses to requests for admission were served on July 27, 2021.
>
> Please let me know if you need anything further.

Appellants' counsel was carbon-copied on this email. Appellants' counsel then responded to Attorney Fowler via email, asking "what precipitated this correspondence?" Although the judge was carbon-copied on the response, neither the trial judge nor his judicial assistant responded. A different attorney representing Appellants did respond that Attorney Fowler "got a[n] unsolicited call from the court asking that we provide those documents. [Attorney Fowler] complied, and filed them—per the request; nothing more, nothing less[.]"[2]

On September 22, 2022, the trial court entered a lengthy order resolving the pending attorney's fees issues.[3] Therein, the trial court found that the fees incurred by Appellants resulted from their counsel's "zeal to be much more prepared than his adversaries" and was therefore excessive and unnecessary. As for the attorney's fees related to the discovery abuse, the trial court awarded Appellants $9,790.00 in fees and expenses, approximately 16% of the requested amount. For the frivolous appeal damages, the trial court awarded $11,580.00, or approximately 28% of the fees requested. In total, this amounted to a nearly 80% reduction in the fees and expenses requested.

On October 24, 2022, Appellants filed a motion to recuse Judge Binkley on the basis of the September 2022 ex parte communication with Attorney Fowler. Before the scheduled hearing, the trial court issued an order requesting the transcript from the

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[2] Although this correspondence characterizes the documents as having been "filed" with the court, Appellants assert in their petition that these documents were never "file-stamped by the Court Clerk[.]"

[3] The order spans twenty-six pages.

September 7, 2022 hearing and ruled that it would decide the motion to recuse without a hearing. The trial court further explained as follows:

> This Court has a vague recollection of [Appellees'] final arguments from the September 7, 2022 hearing, and the Court has reviewed its notes that were taken on the September 7, 2022 date of the evidentiary hearing. The Court's notes, however, do not contain the needed substance of [d]efense counsel's arguments, which prompted the Court to have its Judicial Assistant contact lead [d]efense counsel Attorney [] Fowler to obtain the above-stated supplemental responses submitted by [Appellees'] counsel to [Appellants'] counsel and the dates those supplemental responses were delivered to [Appellants'] counsel.

Appellees responded by informing the trial court that no court reporter was present at the September 7, 2022 hearing. Appellants' counsel confirmed that no court reporter was present.

On November 9, 2022, the trial court entered an order denying Appellants' motion to recuse. Therein, the trial court admitted that he asked his judicial assistant to request copies of the supplemental discovery responses, which have a certificate of service indicating that they were served on Appellants. The trial court further noted that after learning no transcript was available from the September 7, 2022 hearing, he made a thorough review of his notes from that hearing and found a notation that Appellants' counsel admitted during his testimony that all discovery was received by July 27, 2021.[4] Two pages of the judge's handwritten notes were appended to the judge's order.

The trial court further stated that

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[4] Despite previously confirming that no court reporter was present at the September 7, 2022 hearing, Appellants apparently located an audio recording of the hearing, which was transcribed on November 12, 2022, days after the trial court issued its ruling denying the motion to recuse. The transcript is among the exhibits attached to Appellant's petition for recusal appeal. It contains the following testimony from Appellants' counsel:

> Q. So, by July 27, 2021, you had received all documentation and answers to your requests for ·admission, the responses to your discovery requests to that point?
>
> A. Yes. But the answers to the requests for ·admission were demonstratively false. And the particularly the one that was demonstratively false, was the defendant's response to request for admission number 18, which asked whether or not the operating agreement that they produced in discovery and was Bates-stamped as set forth, whether or not that document was created before the lawsuit was filed. That document -- that answer was demonstratively false and was one of the reasons why we ended up filing the motion for sanctions that was ultimately adjudicated in October of 2021.
>
> Q. You've not filed a motion to compel other responses to your requests for admission?
>
> A. No. I took sworn depositions.

> When this Court requested copies of the [Appellees'] supplemental responses to the [Appellants'] discovery and the [Appellants'] requests to admit, all this Court was doing was going through the process of performing its due diligence to be assured that by the date July 27, 2021, [Appellants'] counsel had received all that was needed in order for the [Appellees] to be in compliance with this Court's previous Order for [Appellees] to properly supplement both their written discovery as well as their responses to requests to admit before beginning the lengthy process of preparing a Court Order on [Appellants'] counsel's request for attorney fees. This Court firmly believed then and firmly believes now that the Court's request for [Appellees'] counsel to provide the Court with the [Appellees'] supplemental responses to the written discovery as well as to the requests for admission was entirely proper. The Court's request was entirely proper not only due to the general impermissible filing of discovery materials as provided by 20th Judicial District Local Rule 22.01, but also this Court believes the request was entirely proper as per Tennessee Rule of Evidence 201 entitled: "Judicial Notice of Adjudicative Facts" as well as per Supreme Court Rule 10, Canon 2, Rule 2.9(C)[,] which allows the Court to inquire about and consider "**. . . any facts that may properly be judicially noticed**." (emphasis added).

The trial court further concluded that the dates upon which Appellees complied with discovery were adjudicative facts that were subject to judicial notice because these facts were "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." The trial court further concluded that it was entitled to ask that the discovery responses be filed with the trial court by virtue of a local rule. The trial court also concluded that the date upon which Appellees complied with discovery was tangential to the fees dispute, citing ***Runyon v. Runyon***, No. W2013-02651-COA-T10B, 2014 WL 1285729 (Tenn. Ct. App. Mar. 31, 2014).

The trial court also considered the timing of Appellants' motion. After noting that the motion was filed following the trial court's ruling on the outstanding fees issues, rather than promptly following counsel's knowledge of the communication, the trial court found that Appellants "deliberately delayed the filing of [the] motion for recusal" until they received an unfavorable judgment. As such, the trial court found that Appellants waived their right to seek recusal.

The trial court also rejected any notion that he was biased in favor of his former law clerk, citing the fact that he found Attorney Fowler to have committed discovery abuse. The trial court therefore concluded that based on the totality of the circumstances, he could remain impartial in the case such that "a reasonable and disinterested person knowing all of the above-stated relevant facts would think and believe that this Court has been and will continue to be impartial in this case."

On November 30, 2022, Appellants filed a petition for recusal appeal, which is the subject of the instant appeal. On December 6, 2022, this Court requested that Appellees file a response to Appellants' petition. Appellees filed their response on December 19, 2022. Following our review of these filings, we exercise our discretion to hear this appeal without oral argument. *See* Tenn. R. Sup. Ct. 10B § 2.06 ("An accelerated interlocutory appeal shall be decided by the appellate court on an expedited basis. The appellate court's decision, in the court's discretion, may be made without oral argument.").

II. Issue Presented & Standard of Review

The only issue before this Court is whether the trial court erred in denying Appellants' motion to recuse. *See* ***Duke v. Duke***, 398 S.W.3d 665, 668 (Tenn. Ct. App. 2012). Tennessee Supreme Court Rule 10B, section 2.07, provides that this Court shall decide an appeal of a recusal matter under this section "on an expedited basis upon a de novo standard of review."

III. Analysis

"Litigants in Tennessee have a fundamental right to a 'fair trial before an impartial tribunal.'" ***Holsclaw v. Ivy Hall Nursing Home, Inc.***, 530 S.W.3d 65, 69 (Tenn. 2017) (quoting ***State v. Austin***, 87 S.W.3d 447, 470 (Tenn. 2002)); *see* Tenn. Const. art. VI, § 11 ("No Judge of the Supreme or Inferior Courts shall preside on the trial of any cause in the event of which he may be interested. . . ."). The Tennessee Rules of Judicial Conduct require that judges "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary," Tenn. Sup. Ct. R. 10, RJC 1.2, and "uphold and apply the law, and . . . perform all duties of judicial office fairly and impartially." Tenn. Sup. Ct. R. 10, RJC 2.2. The rules define "impartiality" and "impartially" as the "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge." Tenn. Sup. Ct. R. 10, Terminology.

Under our rules governing judicial conduct, "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." Tenn. R. Sup. Ct. 10, RJC 2.11. "[T]he test for recusal is an objective one because the appearance of bias is just as injurious to the integrity of the courts as actual bias." ***State v. Cannon***, 254 S.W.3d 287, 307 (Tenn. 2008). Consequently, the test for recusal requires a judge to disqualify himself or herself in any proceeding in which "a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality." ***Id.*** (quoting ***Davis v. Liberty Mut. Ins. Co.***, 38 S.W.3d 560, 564 (Tenn. 2001)); *see also* ***Clinard v. Blackwood***, 46 S.W.3d 177, 187 (Tenn. 2001) ("[B]ecause judges have a privileged understanding of the legal system, they may fail to find an appearance of

impropriety where one would be found by a layperson.").

In this case, the trial court essentially denied Appellants' motion to recuse on two independent bases. First, the trial court ruled that Appellants' motion was delayed for strategic reasons and therefore waived. Second, the trial court found that the communication did not mandate recusal. Although we disagree with the trial court as to the former, we agree with the latter.

A.

First, we consider the timeliness of Appellants' recusal motion. Rule 10B, section 1.01 provides that a party seeking disqualification of a judge must do so by filing a written motion "promptly after the party learns or reasonably should have learned of the facts establishing the basis for recusal." As this Court has previously explained:

> A party may lose the right to challenge a judge's impartiality by engaging in strategic conduct. Courts frown upon the manipulation of the impartiality issue to gain procedural advantage and will not permit litigants to refrain from asserting known grounds for disqualification in order "to experiment with the court . . . and raise the objection later when the result of the trial is unfavorable." Thus, recusal motions must be filed promptly after the facts forming the basis for the motion become known, and the failure to assert them in a timely manner results in a waiver of a party's right to question a judge's impartiality.

Kinard v. Kinard, 986 S.W.2d 220, 228 (Tenn. Ct. App. 1998) (citations omitted).

The trial court ruled that Appellants engaged in prohibited strategic conduct by waiting until after the trial court entered its order on the outstanding fees applications before filing their motion to recuse. According to the trial court, this forty-three-day delay was not prompt. Respectfully, we disagree with the trial judge's conclusion on this issue.

From our review, it appears that only ten days elapsed between when Appellants learned about the communication at issue and when the trial court entered its order awarding Appellants only a portion of the fees they requested. Rule 10B has specific requirements that must be met in order for a proper recusal motion to be filed. ***See generally*** Tenn. R. Sup. Ct. 10B, § 1.01. The decision to file such a motion should not be made lightly. It is fairly untenable to expect an attorney to communicate with his or her client and then draft and file such a significant motion within ten days of learning of a purportedly inappropriate communication between the judge and the opposing party. Moreover, even considering the total forty-three-day delay, we conclude that this time period falls within the span of time that this Court has previously deemed acceptable. *See, e.g.*, ***Stark v. Stark***, No. W2019-00901-COA-T10B-CV, 2019 WL 2515925, at *6 (Tenn. Ct. App. June 18,

2019) ("[W]e are reluctant to conclude that a delay of six weeks between the entry of the written order at issue and the recusal motion results in a waiver of her arguments."). So we reverse the trial court's finding that Appellants waived their right to question the judge's impartiality due to their delay in filing the recusal motion.

B.

The next question is whether recusal is warranted in this case. Specifically, Appellants contend that the trial judge engaged in an ex parte communication with counsel for the opposing party and that recusal is thus mandated. In ***Holsclaw v. Ivy Hall Nursing Home, Inc.***, 530 S.W.3d 65 (Tenn. 2017), the Tennessee Supreme Court articulated a two-part test for determining whether an ex parte communication necessitates recusal. First, we must determine if "the trial judge engaged in action qualifying as an ex parte communication and an independent investigation[.]" ***Id.*** at 72. If so, then we must determine if this communication would cause "the trial judge's impartiality [to] reasonably be questioned by 'a person of ordinary prudence in the judge's position, knowing all of the facts known the judge.'" ***Id.*** (quoting ***State v. Cannon***, 254 S.W.3d 287, 307 (Tenn. 2008)). Applying this test, the ***Holsclaw*** Court concluded that even though the trial judge engaged in an improper ex parte investigation of a fact in dispute before it, this investigation would not cause an ordinary person to question the trial judge's impartiality. ***Id.*** at 72–73.

This Court came to the same conclusion in ***Patterson v. STHS Heart, LLC***, No. M2018-01419-COA-T10B-CV, 2018 WL 4091633 (Tenn. Ct. App. Aug. 28, 2018). First, the Court noted that the trial judge had admittedly engaged in an ex parte communication, but characterized the communication as administrative in nature. ***Id.*** at *1. Indeed, the communication at issue was remarkably analogous to the situation presented in the case-at-bar. Specifically, following an oral hearing in which the trial judge denied a motion for partial summary judgment, the trial judge's law clerk stopped counsel for the plaintiff in the hallway of the courthouse and asked counsel to submit an order denying the motion for partial summary judgment. Counsel for the plaintiff then sent the proposed order to the trial judge and defense counsel objected that it did not comply with ***Smith v. UHS of Lakeside, Inc.***, 439 S.W.3d 303 (Tenn. 2014). Counsel for plaintiff then sent an email to the trial court's staff referencing the earlier conversation and including a more detailed proposed order containing findings of fact and conclusions of law. Counsel for the defendant then asked for an explanation of the earlier conversation. The law clerk responded that "[a]fter the plaintiffs submitted their proposed order and the defense filed an objection to the proposed order, I called [plaintiff's counsel] and asked him to submit proposed findings of facts and conclusions of law, as the prevailing party." ***Patterson***, 2018 WL 4091633, at *1. This telephone call served as the basis of the defendant's efforts to recuse the trial judge.

The Court did not dwell on the question of whether the communication at issue was administrative in nature, as argued by the trial judge. Instead, our central focus was on whether this ex parte communication "create[d] an appearance of partiality or prejudice

against a party so as to call into question the integrity of the judicial process." ***Id.*** at *3 (quoting ***Runyon v. Runyon***, No. W2013-02651-COA-T10B-CV, 2014 WL 1285729, at *9 (Tenn. Ct. App. Mar. 31, 2014)). We concluded that it did not. ***Id.*** at *4. First, we noted that evidence that the trial court ruled against the defendant was not evidence of bias. We further rejected the defendant's claim that the trial judge's decision to ask the plaintiff alone for proposed findings of fact and conclusions of law was evidence of bias or prejudice. On the whole, we concluded that the defendant's argument was "based more on insinuation and speculation than on actual facts." ***Id.*** So we rejected the argument that "the trial court's ex parte communication with plaintiff's counsel regarding a proposed order created an appearance that the trial court was biased or prejudiced." ***Id.***

The case cited by the ***Patterson*** panel, ***Runyon v. Runyon***, is also analogous to this case. In ***Runyon***, the trial court entered an order naming the father as the primary residential parent. 2014 WL 1285729, at *1, *2. Months later, the mother discovered that in the course of drafting that order, the trial judge contacted the guardian ad litem to confirm "a minor factual matter" regarding whether the parties' home had a pool.[5] ***Id.*** at *1, *3. The mother filed a motion to recuse based on this ex parte communication, which the trial court denied, likewise characterizing the communication as administrative. ***Id.*** at *4–5, *8.

Once again, we affirmed the denial of the recusal motion on the basis that the party seeking recusal had presented "no *facts* in the record to support [the] argument that the ex parte communications mandate [the trial judge's] recusal." ***Id.*** at *9. Instead, we held that the facts showed nothing more than that the trial judge

> was unable to locate her notes on the parties' testimony on a minor fact, tangential to the primary issue before the trial court, so she or her office contacted the [guardian ad litem's] office to clarify [the trial judge's] recollection of the testimony. That is all. Mother has presented no facts indicating that the subject of the communications was anything other than what [the trial judge] said it was. A claim of bias or prejudice must be based on facts, not speculation or innuendo; Mother "must come forward with some evidence" to support her assertions of bias or partiality. ***Eldridge v. Eldridge***, 137 S.W.3d 1, 7 (Tenn. Ct. App. 2002) . . . . Mother has failed to do so.

Runyon, 2014 WL 1285729, at *10 (footnotes and some citations omitted). So we denied the mother's request to recuse the trial judge based on its "relatively minor transgression" of engaging in an ex parte communication with the guardian ad litem. ***Id.*** at *11.

A nearly identical "minor transgression" is at issue in this case. Here, the trial judge

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[5] The communication was only discovered when it was listed on an invoice from the guardian ad litem. ***Id.*** at *3.

reached out to counsel for one party to obtain some discovery documents that had not been previously filed with the trial court. To be sure, other than its reduction of Appellants' fees request, Appellants have not pointed to any evidence of an actual bias on behalf of the trial judge. And as we know, adverse rulings alone are not evidence of bias. ***Herrera v. Herrera***, 944 S.W.2d 379 (Tenn. Ct. App. 1996). Appellants also make much of the fact that the trial judge chose to reach out to Attorney Fowler, who was undisputedly the trial judge's former law clerk. Without more, however, evidence that a lawyer appearing before a judge worked as his law clerk years prior is not sufficient to warrant recusal. *See* ***In re Conservatorship of Patton***, No. M2012-01878-COA-10B-CV, 2012 WL 4086151 (Tenn. Ct. App. Sept. 17, 2012) (affirming the denial of a motion to recuse based on, inter alia, the fact that one party, who the trial court allegedly always sided with, was a former law clerk of the trial judge).

Moreover, like the mother in ***Runyon***, Appellants have presented no facts to suggest that the communication at issue was anything other than what the trial court claimed. Appellants assert, however, that the communication served to give Appellees an advantage in the fee dispute because without the discovery documents, there was no evidence of when Appellees finally complied with discovery requests. And Appellants argue that the trial judge cannot "sanitize" his actions by reliance on either the local rules or the ability to take judicial notice.[6]

The question in this case, however, is not whether the trial court committed a legal error when it relied on these discovery responses in its order awarding attorney's fees to

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[6] Specifically, the trial court relied on Davidson County Local Rule 22.01, which states that "[i]nterrogatories, requests for production and other materials will not be filed with the clerk unless and until such material is to be considered by the court for any purpose." Thus, the trial judge had authority under this rule to ask that the discovery responses be filed for consideration. The trial court also relied on Rule 201 of the Tennessee Rules of Evidence, allowing the trial court to take judicial notice of adjudicative facts "not subject to reasonable dispute" and "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Tenn. R. Evid. 201(b). In general, a court may take judicial notice of its own records, including discovery responses. 29 Am. Jur. 2d *Evidence* § 143. The disconnect here is that at the time the trial court communicated the need for the responses in the ex parte conversation with Attorney Fowler, the discovery responses at issue had not been filed as part of the formal record in this case.

It is important to note, however, that although Appellants dispute the trial court's decision to take judicial notice of the discovery responses, they do not appear to in any way dispute that Appellees provided the trial court with true and correct copies of their discovery responses reflecting accurate dates. Appellants' insinuation that the trial judge credited the authenticity of the responses due to Attorney Fowler's position as the judge's former law clerk is therefore specious. *See* ***State v. Nunley***, 22 S.W.3d 282, 288 (Tenn. Crim. App. 1999) (quoting Neil P. Cohen, Sarah Y. Sheppeard & Donald F. Paine, *Tennessee Law of Evidence* 44 (3d ed. 1995)) (noting that a pretextual argument opposing the taking of judicial notice is not sufficient to establish a reasonable dispute). Simply put, the documents speak for themselves. To the extent that Appellants assert that the trial court was wrong to conclude that discovery was in fact complete as of the date that the responses were received—because the responses given by Appellees were "demonstrably false"—that question is beyond the scope of this recusal appeal. *See* ***Duke***, 398 S.W.3d at 668.

Appellants. *See* ***Duke***, 398 S.W.3d at 668. Nor is the ultimate question whether the interaction between Appellees' counsel and the trial judge constitutes an ex parte communication prohibited by our rules of judicial conduct. *See generally* Tenn. Sup. Ct. R. 10, RJC 2.9; *see also* ***Patterson***, 2018 WL 4091633, at *1 (largely ignoring the trial court's claim that the communication was permissible as purely administrative); ***Runyon***, 2014 WL 1285729, at *8 (appearing to reject the trial judge's claim that the communication was administrative because it was not properly disclosed). Indeed, even if we were to agree that the communication at issue constituted an impermissible ex parte communication, this alone is not sufficient to mandate recusal. ***Holsclaw***, 530 S.W.3d at 72. Rather, the ultimate question is whether the trial court's action in engaging in this ex parte communication, i.e., reaching out to only one party to obtain this information, would cause "the trial judge's impartiality [to] reasonably be questioned by 'a person of ordinary prudence in the judge's position, knowing all of the facts known the judge.'" ***Id.***

Here, while the trial court's action may have been myopic, as it led to the present recusal effort, Appellants have not presented anything that would cause us to depart from the reasoning employed by the ***Patterson*** and ***Runyon*** panels when faced with very similar fact patterns. Indeed, like in those cases, Appellants have presented nothing but speculation and innuendo to suggest a lack of impartiality on the part of the trial judge. In this case, the trial court did nothing more than ask to be supplied with discovery responses that, although they had not yet been filed with the court, all parties had been privy to and no party now disputes. This request was directly in response to Appellants' efforts to obtain attorney's fees related to the parties' discovery dispute and was merely meant to confirm what was argued at the September 2022 hearing. Moreover, counsel for Appellees promptly and properly informed counsel for Appellants when it submitted the requested documents to the trial court. Under these circumstances, even if we assume that the trial court's communication constituted an impermissible ex parte communication, we cannot conclude that the trial court's action would cause a reasonable person to question its impartiality. We therefore affirm the trial court's decision to deny Appellants' recusal motion.

C.

Finally, Appellees seek an award of attorney's fees under Tennessee Code Annotated section 27-1-122, which provides as follows:

> When it appears to any reviewing court that the appeal from any court of record was frivolous or taken solely for delay, the court may, either upon motion of a party or of its own motion, award just damages against the appellant, which may include, but need not be limited to, costs, interest on the judgment, and expenses incurred by the appellee as a result of the appeal.

This Court has previously awarded attorney's fees under this statute in an accelerated appeal pursuant to Rule 10B when we have concluded that the appeal was frivolous and

taken only for delay. *See **Adkins v. Adkins***, No. M2021-00384-COA-T10B-CV, 2021 WL 2882491, at *22 (Tenn. Ct. App. July 9, 2021). Although Appellants have not been successful in this appeal, we do not find that this appeal was devoid of merit or taken only as a delay tactic. As such, we decline to award Appellees attorney's fees incurred in this appeal.

IV. CONCLUSION

The judgment of the Circuit Court of Davidson County denying Appellant's motion to recuse is affirmed, and this cause is remanded to the trial court for further proceedings. Costs of this appeal are taxed to Appellants Lawrence Simonetti and Gloria Simonetti, for which execution may issue if necessary.

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