IN THE MISSOURI SUPREME COURT

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In Re: **NO. SC86122**

ELBERT A. WALTON, JR.

Respondent

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

Respondent agrees with the Informant's statement of jurisdiction.

STATEMENT OF FACTS

Respondent finds that the Informant's statements of facts in general is fairly well stated and therefore simply adds additional facts that Respondent wants to bring to the attention of the Court.

Disciplinary Case

When the panel issued its decision on April 14, 2004, it made recommendations for discipline. First it stated: "This panel concludes that the above aggravating factors above supports the decision to recommend public admonition." (App. 124-125) Then it said: "The Disciplinary Hearing Panel recommends that Respondent be subject to a public admonition and that costs be taxed to Respondent on Count I." (App. 125) On May 11, 2004, the panel issued what it called a "Judgment Nunc Pro Tunc" changing the recommendation from a public admonition to a public reprimand. (App. 127)

Count I

The two cassette tapes bearing a recording of the February 5, 2001, hearing, show that in the exchange between Respondent and the Judge that upon the judge accusing Respondent of pointing his finger at him, that Respondent immediately apologized. Furthermore, the tape abruptly comes to an end and the remainder of the exchange is not contained on the tape. Respondent testified that he made exculpatory statements, during the exchange with the judge, that he had not pointed

his finger at the Judge; however, that due to the fact that the tape was turned off, those statements do not appear on the record. (Tr. Pp. 310-311) Two of the witnesses called by the Respondent, Angela Fox (Tr. P. 119, l. 6-10) and Kimberly Bush (Tr. P. 127, l. 17-25), testified that the Judge ordered the clerk to turn off the tape during the exchange. Thereafter, the Judge ordered respondent removed from the courtroom by the bailiff. (Tr. P. 121, L. 4-10)

The respondent was returned to the courtroom by the bailiff and the tape was turned back on. The tape reveals that Respondent apologized for "pointing his finger" at the judge. At no time does the Judge state to Respondent, at the time of this apology, on the tape, that Respondent leaned over the bench and placed his finger within inches of the judge's face. (See tape recording)

The incident occurred on February 5, 2001. (Tr. p 11) The Respondent and his client had hearings in the judge's court both on February 28, 2001 and March 12, 2001. (Tr. P. 37 & p. 40) At the March 12, 2001 appearance, the Respondent's client, Ernestine Washington, became disturbed when the judge advised her ex-husband to dismiss his case without prejudice and prepared the memo for him, and thus she filed a complaint with the Commission on Discipline, Retirement and Removal of Judges against the Judge alleging that such assistance on the part of the judge was improper. The Respondent received a request from the Commission that he relate what he observed about the incident of March 12,

2001. The Respondent sent in a written statement to the Commission. On April 16, 2001, the judge received a letter from the Commission with a request that he respond to Ms. Washington's complaint. (Tr. P. 46) On May 3, 2001, some three months after the February 5, 2001 incident, the judge sent in a reply to the Commission as to the complaint filed against him, and contemporaneously, on the same date, also sent in a complaint to the Office of the Chief Disciplinary Counsel against Respondent about the February 5, 2001 incident. (Tr. P. 51)

RESPONDENT'S POINTS RELIED ON

POINT I

THE SUPREME COURT SHOULD NOT PUBLICLY REPRIMAND RESPONDENT BECAUSE HIS COURTROOM CONDUCT ON FEBRUARY 5, 2001, DID NOT VIOLATE RULES 4-3.5(C) AND 4-8.4(D) IN THAT BY THE PREPONDERANCE, GREATER AND CLEAR WEIGHT OF THE CREDIBLE EVIDENCE RESPONDENT DID NOT LEAN OVER THE JUDGE'S BENCH NOR WAVE HIS HAND IN ANY THREATENING MANNER CLOSE TO THE JUDGE'S FACE, THE JUDGES COMPLAINT WAS MADE IN ORDER TO RETALIATE AGAINST RESPONDENT FOR GIVING A STATEMENT TO THE COMMISSION ON DISCIPLINE, RETIREMENT AND REMOVAL OF JUDGES DUE TO A COMPLAINT BEING FILED BY RESPONDENT'S CLIENT AGAINST THE JUDGE, THE APOLOGY MADE BY RESPONDENT BEFORE THE TRIAL JUDGE AT THE TIME OF THE ALLEGED INCIDENT SHOULD HAVE ENDED THE MATER, AND THE NUNC PRO TUNC JUDGMENT OF THE

PANEL WAS ISSUED WITHOUT JURISDICTION OF THE PANEL AS NO CLERICAL ERROR APPEARS IN THE RECORD IN SUPPORT OF SAID NUNC PRO TUNC JUDGMENT.

In re Speiser, 294 S. W. 2d 656 (Mo.App. 1956)

In re Snyder, 355 S.W. 3d 38 (Mo 2000)

In re Mason, 203 S.W. 2d 750 (Mo App. 1947)

In re Warden, 146 S.W. 2d 874 (Mo 1940)

In re Brown, 12 S.W. 3d 398

In re Westfall, 808 S.W. 2d 829 (Mo. 1991)

In re Conrad, 105 S.W. 2d 1 (Mo 1937)

In re Williams, 113 S.W. 2d 353

State ex rel Clark v. Swain, 122 S.W. 2d 882 (Mo App. 1938)

In re Mills, 462 S.W. 2d 700 (Mo 1971).

Pirtle v. Cook, 956 S.W.2d 235 (Mo. banc 1997)

City of Ferguson v. Nelson, 438 S.W.2d 249, 253 (Mo. 1969)

In re Marriage of Royall , 569 S.W.2d 369, 371

Javier v. Javier, 955 S.W.2d 224, 226 (Mo.App. E.D. 1997)

Unterreiner v. Estate of Unterreiner , 899 S.W.2d 596, 598 (Mo.App. E.D. 1995

Rule 74.06(a)

ARGUMENT

POINT I

THE SUPREME COURT SHOULD NOT PUBLICLY REPRIMAND RESPONDENT BECAUSE HIS COURTROOM CONDUCT ON FEBRUARY 5, 2001, DID NOT VIOLATE RULES 4-3.5(C) AND 4-8.4(D) IN THAT BY THE PREPONDERANCE, GREATER AND CLEAR WEIGHT OF THE CREDIBLE EVIDENCE RESPONDENT DID NOT LEAN OVER THE JUDGE'S BENCH NOR WAVE HIS HAND IN ANY THREATENING MANNER CLOSE TO THE JUDGE'S FACE, THE JUDGES COMPLAINT WAS MADE IN ORDER TO RETALIATE AGAINST RESPONDENT FOR GIVING A STATEMENT TO THE COMMISSION ON DISCIPLINE, RETIREMENT AND REMOVAL OF JUDGES DUE TO A COMPLAINT BEING FILED BY RESPONDENT'S CLIENT AGAINST THE JUDGE, THE APOLOGY MADE BY RESPONDENT BEFORE THE TRIAL JUDGE AT THE TIME OF THE ALLEGED INCIDENT SHOULD HAVE ENDED THE MATER, AND THE NUNC PRO TUNC JUDGMENT OF THE

PANEL WAS ISSUED WITHOUT JURISDICTION OF THE PANEL AS NO CLERICAL ERROR APPEARS IN THE RECORD IN SUPPORT OF SAID NUNC PRO TUNC JUDGMENT.

A. Nunc Pro Tunc Judgment

Respondent shall first address the "Nunc Pro Tunc Judgment" entered by the panel. When the panel issued its decision on April 14, 2004, it made recommendations for discipline. First it stated: "This panel concludes that the above aggravating factors above supports the decision to recommend public admonition." (App. 124-125) Then it said: "The Disciplinary Hearing Panel recommends that Respondent be subject to a public admonition and that costs be taxed to Respondent on Count I." (App. 125) On May 11, 2004, the panel issued what it called a "Judgment Nunc Pro Tunc" changing the recommendation from a public admonition to a public reprimand, but did not change its conclusion that a public admonition was supported. (App. 127) A judgment "nunc pro tunc" is supposed to correct a clerical error that appears of record. Had the panel in its original judgment concluded that a public reprimand was in order and then recommended a public admonition, the conflict could be explained as a clerical error; and thus the panel's entering a later judgment "nunc pro tunc" to correct the

recommendation to a public reprimand would be supported by the record. However, as the court should note from the record, the "nunc pro tunc" judgment retained the conclusion that a public admonition was supported, but changed the recommendation from a public admonition to a public reprimand. The panel was without jurisdiction to enter a judgment "nunc pro tunc" without support on the record that it was merely correcting a clerical mistake.

The common law concept of *nunc pro tunc* judgments is codified in Missouri by way of Rule 74.06(a), which states that "[c]lerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders." There is a long line of cases establishing a well-defined and limited scope to such orders. In ***Pirtle v. Cook***, 956 S.W.2d 235 (Mo. banc 1997), our supreme court stated: "It is universally held that the only true function of a *nunc pro tunc* order is to correct some error or inadvertence in the recording of that which was *actually done* , but which, because of that error or omission was not properly recorded; and, that it may not be used to order that which was *not* actually done, or to change or modify the action which was taken." ***Id***. at 240 (quoting ***City of Ferguson v. Nelson***, 438 S.W.2d 249, 253 (Mo. 1969)); *see also* ***In re Marriage of Royall*** , 569 S.W.2d 369, 371 ("The purpose of the *nunc pro tunc* amendment is to make

the record conform to what was actually done where there is a basis in the record for the amendment."). The record must indicate that the intended judgment is different from the one actually entered. ***Javier v. Javier***, 955 S.W.2d 224, 226 (Mo.App. E.D. 1997). Thus, the power to issue an order or judgment *nunc pro tunc* constitutes no more than the power to make the record conform to the judgment already rendered; it cannot change the judgment itself. ***Pirtle*** at 240. "'The purpose of the *nunc pro tunc* amendment is to make the record conform to what was actually done.'. . . [A]n order *nunc pro tunc* may be used only to correct a clerical error in entering a rendered judgment, it may not be used to alter or amend the rendered judgment." ***Id.*** at 241 (quoting ***Unterreiner v. Estate of Unterreiner*** , 899 S.W.2d 596, 598 (Mo.App. E.D. 1995. The panel attempted to alter or amend a final judgment, not to correct a clerical error that appeared of record. Therefore, the panel's "Judgment Nunc Pro Tunc" should be stricken from the record on the grounds that it was entered in excess of the jurisdiction of the panel.

B. Preponderance of the greater, clear and credible evidence favors verdict for respondent.

Discipline of an attorney should not be meted out arbitrarily, lightly, at the pleasure of a judge, in hostility, passion or based upon prejudice, but must be in moderation, with sound discretion and only in a clear case for weighty reasons. **In**

Re Speiser, 294 S. W. 2d 656 (Mo.App. 1956). In the case at bar, the Informant called two witnesses, the Judge and his bailiff. The respondent on the other hand called five witnesses, himself, his client and two of her witnesses who were present in the courtroom at the time of the exchange, as well as the attorney for the adversarial party who was of course in the courtroom at the time of the incident. Not a single one of Respondent's five witnesses observed the Respondent to lean over the bench and point his finger within inches of the trial court's face. The only witness to make such an observation was the judge himself. The judge's bailiff stated that Respondent was approximately 12 inches or a foot away from the judge. (Tr. P. 152) Furthermore, all of the testimony showed that the judge was upon a raised bench well away from the reach of persons in the courtroom. (Tr. P. 70)

Proof of misconduct should be by a preponderance of the evidence. ***In re Snyder***, 355 S.W. 3d 38 (Mo 2000), ***In re Mason***, 203 S.W. 2d 750 (Mo App. 1947) When this Honorable Supreme Court reviews the record under the standard of a preponderance of the greater weight of the clear and credible evidence, ***In Re Warden***, 146 S.W. 2d 874 (Mo 1940), particular weight should be given to the testimony of the adversarial party's counsel, Atty. Barry Gubin, the only witness who had no ties to either the Judge nor the Respondent.

The Respondent argues that the allegation of the trial judge is untrue and that it was spurred by his desire to retaliate against the Respondent for Respondent's written statement given in response to a complaint made by Respondent's client to the Commission on Discipline, Retirement and Removal of Judges. The Informant argues that the allegation is true solely on the basis of the testimony on the trial judge.

In cases of civil contempt, the contemnor is afforded the opportunity to purge himself of contempt. ***In Re Brown***, 12 S.W. 3d 398. And upon doing so, is no longer in contempt. The Judge determined at the time of the exchange to afford the Respondent the opportunity to purge himself of any possible contempt by making an apology. The Respondent so apologized and the issue appeared to be resolved. Yet some three months later, the judge files a complaint with the Bar about the incident. Why would the judge wait three months to file a complaint; and then only contemporaneously with his response to a complaint against him before the Commission on Discipline, Retirement and Removal of Judges? Clearly the complaint was made to chill and silence the Respondent.

The Informant would have the Supreme Court ignore the fact that the trial court had the power to issue contempt proceedings against the Respondent; but instead accepted an apology at the time of the alleged finger pointing incident; and at no time during the apology, did the trial judge allege that Respondent had leaned

over the bench and pointed his finger within inches of the judges' face. Moreover, the trial judge's response to the complaint before the Commission on Discipline, Retirement and Removal of Judges by contemporaneously sending a letter of denial to the Commission at the same time that he sent in a letter of complaint to the Bar against Respondent is clear evidence of an attempt at retaliation against the Respondent. Clearly it was and is the intention of the trial judge to chill and silence Respondent or any other attorney's from making statements about the judge's conduct before the Commission on Discipline, Retirement and Removal of Judges. Such an effort to chill and silence a lawyer on the part of the trial court is not favored by the Supreme Court. ***In Re Westfall***, 808 S.W. 2d 829 (Mo. 1991) Discipline of lawyers is to be exercised with great care and should not be arbitrary or despotic. ***In re Conrad***, 105 S.W. 2d 1 (Mo 1937) What the trial court proposes is to despotically punish Respondent for meeting his ethical duty to respond to the Commission on Retirement, Discipline and Removal of Judge's investigatory request.

The Informant has failed to show any willful and intentional commission of any action that would warrant discipline. ***In Re Williams,*** 113 S.W. 2d 353, ***State ex rel Clark v. Swain***, 122 S.W. 2d 882 (Mo App. 1938). The only thing that the Informant showed was that Respondent raised his voice while arguing with the

court and used the word "tricked" in characterizing the court's view of Respondent's entry of appearance in the case below. The raised voice and the use of the word "tricked" may have been in bad taste or bad manners; however, such actions do not warrant discipline. ***In re Mills***, 462 S.W. 2d 700 (Mo 1971).

On the other hand, Respondent has shown the court through the testimony of the most credible of the witnesses, Attorney Barry Gubin, the adversarial party's counsel that nothing occurred that warranted the actions of neither the trial court nor the complaint to the Chief Disciplinary Counsel. (Tr. Pp. 159, 160, 165.)

Atty. Gubin pointed out that he had never been in a courtroom where a lawyer had been removed from the courtroom by the judge. He thus would have recalled any actions on the part of Respondent that should have given rise to discipline of the Respondent. Gubin testified that Respondent was two or three steps away from the ledge to the bench at the time of the incident in question, which certainly is not within inches of the judge's face. He testified that he did not observe Respondent to do anything in his opinion that warranted the judge's order removing Respondent from the courtroom. He testified that the only thing that may have occurred was a raised voice, on the part of Respondent, which is corroborated by the tape recording of the proceedings. He further testified that during the verbal exchange between Respondent and the Judge that Respondent

offered to apologize, but that the court ordered the bailiff to remove Respondent from the courtroom. (Tr. Pp. 158-161)

CONCLUSION

The case at bar would amount to the judge's word against the appellant's were it not for the independent witnesses in the courtroom. These witnesses corroborate Respondent's testimony that he did not lean over the bench and waive his finger within inches of the judge's face. Most noteworthy is the testimony of Attorney Barry Gubin who stated that the only thing that Respondent did was raise his voice. Furthermore, it is clear that the judge's motivation for filing the complaint and falsely alleging that the Respondent waived his finger within inches of the judge's face was to retaliate against Respondent for corroborating Respondent's client's allegations of judicial misconduct before the Commission on Discipline, Retirement and Removal of Judges. There is no clear proof and thus this is not a clear case with weighty reasons showing that the allegations made against respondent are true. Thus, the preponderance of the evidence, or the greater weight of the clear and credible evidence is that Respondent did not lean over the judge's bench nor did he waive his hand in a threatening manner close to the judge's face. Therefore, this Honorable Supreme Court should dismiss the Informant's complaint as unsupported by the greater weight of the clear and credible evidence.

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