

IN THE CIRCUIT COURT OF TENNESSEE  
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

FILED  
DEC 18 2015

HOMER L. CODY

Petitioner

vs

No. CT - 002259 - 15  
DIVISION IV

CIRCUIT COURT CLERK  
BY *Scott D.G.*

BOARD OF PROFESSIONAL  
RESPONSIBILITY OF THE  
SUPREME COURT OF TENNESSEE

Respondent

ORDER

This matter was heard on the 7<sup>th</sup> day of December, 2015, on the Petition for Writ of Certiorari filed by the Petitioner, Homer Cody, against the Respondent, Board of Professional Responsibility of the Supreme Court of Tennessee. The requested relief is judicial review of the judgment of the Hearing Panel filed on April 2, 2015. Specifically, Petitioner argues that the Board's judgment is (1) in violation of constitutional and statutory provisions, (2) in violation of Tenn. Sup. Ct. R. 9, Section 26.5(a), (3) exceeded the Board's jurisdiction, (4) in conflict with a prior final decision of the Shelby County Chancery Court, (5) arbitrary, capricious, characterized by abuse of discretion, and clearly an unwarranted exercise of discretion, (6) unsupported by evidence which is both substantial and material in the light of the entire record, (7) in violation of the Rooker-Feldman doctrine

## FINDINGS OF FACT

1. Petitioner represented Vivian Braxton, Otis Braxton and Pee Wee Wisdom Child Development, Inc., as plaintiffs, in the action styled Vivian Braxton, et. al v Apperson, Crump and Maxwell, PLLC, et. al., No. 2:12-cv-02761-JTF/tmp, in the United States District Court for the Western District of Tennessee.

2. On August 13, 2013, the District Court Judge, John T Fowlkes, Jr., entered an order finding, *inter alia*, “Mr. Cody must be disqualified from representing the Plaintiffs in the instant proceeding, which concerns the same matters heard and resolved by state court tribunals on more than one occasion” (A.R. p 623), and “Plaintiffs' counsel is again ORDERED to refrain from filing any additional pleadings, motions, responses or cases on behalf of these parties at any time, now and in the future.” (A.R. pp. 625-626).

3 In making this ruling the court also referenced a Tennessee Court of Appeals order dated August 27, 2010, wherein Mr. Cody was directed “to refrain from representing Mrs. Braxton and Pee Wee Wisdom, purporting to represent them, ghostwriting or submitting any pleadings on their behalf 'either now or in the future'”. (A.R. p. 623).

4. On March 25, 2014, the Braxtons filed a *Pro Se* Appellants' Brief in the United States Court of Appeals for the Sixth Circuit in Braxton, et.al. v. Apperson, Crump and Maxwell, PLLC, et.al , No 13-6218/13-6219. (A.R. pp. 627-647 and Tr Ex. 2)

5. On June 2, 2014, the Braxtons filed their *Pro Se* Appellants' Response to Appellees' Initial Brief (A R pp 649 – 660 and Tr. Ex. 3).

6. Petitioner provided material assistance to the Braxtons in the preparation of these briefs by typing them on his computer (Tr. p. 24, ln 16-18), assisting them in answering questions (Tr. p. 25, ln. 1-2), and determining the issues to raise on appeal and selecting the

wording for each of the issues. (Tr p. 26, ln. 14-22) In fact, Petitioner was the only lawyer that assisted in preparing and writing the briefs. (Tr. p. 44, ln. 1-8).

7. The Board of Professional Responsibility filed its initial petition for discipline on July 14, 2014, alleging a violation of the Rules of Professional Conduct, specifically 3.4(c) and 8.4 (a), (c) and (d). (A.R. pp. 1 – 7).

8 On September 11, 2014, the Board filed an amended petition for discipline. (A.R. pp. 123-129).

9. The Hearing Panel found that Petitioner failed to disclose his role in the preparation of the Braxtons' *pro se* briefs to circumvent the August 13, 2013, court order. (A.R. p. 592).

10. The Hearing Panel concluded that Petitioner's conduct violated Rules 3.4(c), 8 4(a), (c) and (d) of the Tennessee Rules of Professional Conduct. (A.R. pp. 593-594).

11. The Hearing Panel applied six (6) aggravating factors from the ABA Standard 9.22, to-wit Prior disciplinary offenses, a dishonest motive, a pattern of misconduct, multiple offenses, refusal to acknowledge wrongful nature of conduct, and substantial experience in the practice of law (A.R. pp. 594-595).

12 The Hearing Panel found no mitigating factors. (A.R. p 595).

13. The Hearing Panel suspended Petitioner from the practice of law for a period of one (1) year. (A.R p. 595).

14. Petitioner filed his petition for writ of certiorari in the Shelby County Circuit Court on May 28, 2015.

## STANDARD OF REVIEW

When reviewing a hearing panel's judgment, a trial court must consider the transcript of the evidence before the hearing panel, as well as the hearing panel's findings and judgment Tenn. Sup Ct R 9, § 1.3. With respect to questions of fact, the trial court should not substitute its own judgment for the conclusions of the hearing panel regarding the weight of the evidence. Skouteris v Board of Professional Responsibility, 430 S.W. 3d 359, 362 (Tenn. 2014). Further, any modification to a hearing panel's decision must be based upon one of the factors enumerated in Tennessee Supreme Court Rule 9, §1.3. Board of Professional Responsibility v Love, 256 S.W. 3d 644, 652 (Tenn. 2008). Specifically under § 1.3, a trial court may reverse or modify a hearing panel decision only if the petitioner's rights have been prejudiced because the hearing panel's findings, inferences, conclusions, or decisions are.

(1) in violation of constitutional or statutory provisions; (2) in excess of the panel's jurisdiction; (3) made upon unlawful procedure; (4) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or (5) unsupported by evidence which is both substantial and material in light of the entire record. Tenn. Sup. Ct. R. 9, § 1.3.

## CONCLUSIONS OF LAW

1. The Court will first address Petitioner's Motion to Dismiss for Lack of Jurisdiction filed on December 3, 2015. In his motion, Petitioner argued that the Chancery Court order of June 22, 2007, was a final, binding order resolving the issue of his conflict in the dual representation of the Braxtons and Pee Wee Wisdom Child Development Center in his favor. Since that order was never appealed, his argument goes, it can not be attacked in the District Court action because doing so violates the Rooker-Feldman doctrine, and since the District Court order was thus void, neither the Board of Professional Responsibility nor this Court has jurisdiction to act on it.

2. Petitioner's argument fails to consider the fact that the current action is based on his violation of the *District Court's* order for disqualification from further representation of the Braxtons, not the *Chancery Court's* order. His conflict of interest in the Chancery Court proceedings has previously been adjudicated by prior hearing panels and the Tennessee Supreme Court and is not before this Court. In fact, the Supreme Court has twice held that Petitioner did have a conflict in the Chancery proceedings and has upheld the Board's punishment for his misconduct. The issue of the *supremacy* of the Chancery order is therefore moot. Therefore, Petitioner's motion to dismiss for lack of jurisdiction based on the Chancery Court order is denied.

3. Petitioner cited seven (7) issues in his Appellate Brief before this Court:

Issue 1. Petitioner's first issue is the Board of Professional Responsibility's lack of subject matter jurisdiction. His argument appears to be that only the District Court has the authority to determine whether its order was violated.

It is well settled and indisputable that the Supreme Court has the "inherent supervisory power to regulate the practice of law . ." In re Burson, 909 S.W.2d 768, 773 (Tenn.1995). In exercise of that power, the Supreme Court has promulgated Rule 9, Rules of the Supreme Court, which addresses the discipline of lawyers and the enforcement thereof. Brown v Board of Professional Responsibility, 29 S.W. 3d 445, 449 (Tenn. 2000) Moreover, the Board, its authority, and all of its functions are derived from the Supreme Court Fletcher v. Board of Professional Responsibility, 915 S.W2d 448, 450 (Tenn Ct.App.1995).

The issue is not whether the District Court solely can determine violations of its orders, it is whether the Tennessee Supreme Court has the power to sanction an attorney for misconduct in

disregarding a court's order. Petitioner's argument has no merit. The Court finds that the Board of Professional Responsibility had jurisdiction to bring this matter.

Issue 2. Petitioner's second issue is whether the order of the District Court is a valid order. Petitioner cites no authority for his argument that the District Court's order is not valid. The Chancery action and the District action were two separate cases. It was not the Board's responsibility to determine whether the District Court's order to disqualify Petitioner from further representation was valid or appropriate. The Board's function was to determine whether the violation of the District Court's order was a violation of the rules of professional conduct. This argument has no merit.

Issue 3. Petitioner's third issue is whether his failure to disclose his assistance in writing briefs for the Braxtons created a false appearance of professional assistance. Petitioner also argues that Formal Ethics Opinion 2007-F-153 provided him with a "safe harbor" in assisting the Braxtons because it allows an attorney to prepare a "leading" pleading "to toll a statute of limitations, administrative deadline or other proscriptive rule, so long as the attorney does not continue undisclosed assistance of the pro se litigant "

Ample evidence exists in the record, including Petitioner's own admissions, that he provided material assistance to the Braxtons in the preparation of their *pro se* briefs. In fact, in paragraphs 7 and 8 of his statement of facts, Petitioner admits his assistance to the Braxtons without providing disclosure.

Further, Formal Ethics Opinion 2007-F-153 allows assistance in "leading" pleadings, but not "pleadings and other legal documents to assist a pro se litigant in the conduct of his or her litigation where doing so creates the false impression that the litigant is without substantial legal assistance."

With respect to questions of fact, the trial court should not substitute its own judgment for the conclusions of the hearing panel regarding the weight of the evidence. Skouteris v Board of Professional Responsibility, 430 S.W. 3d 359, 362 (Tenn. 2014) Certainly Petitioner's own admissions provided evidence that was both substantial and material in light of the entire record to support the Hearing Panel's decision. The Court finds that Formal Ethics Opinion 2007-F-153 does not provide Petitioner with a "safe harbor" for his conduct and the Hearing Panel's findings of fact and conclusions of law on this issue to be supported by the evidence.

Issue 4. Petitioner's fourth issue is the Board presented no evidence that the District Court order was violated. The District Court disqualified Petitioner from further representation of the Braxtons and from filing any other pleadings on their behalf. Petitioner admitted providing material assistance in the preparation of the *pro se* briefs. This Court finds his admissions to constitute substantial and material evidence. The Board of Professional Responsibility clearly has disciplinary jurisdiction over attorney misconduct and is not required to wait for a ruling from another tribunal to initiate disciplinary proceedings

Issue 5 Petitioner's fifth issue is that the Panel's decision violates his constitutional rights of association and free speech. It bears repeating that the District Court disqualified Petitioner from representing the Braxtons, not the Hearing Panel. The Court finds that nothing in the Hearing Panel's decision impacted Petitioner's constitutional rights.


Issue 6 Petitioner's sixth issue is whether he violated Rule 3.4(c) of the Rules of Professional Conduct. The Court finds the Hearing Panel properly complied with its statutory prerogative to review and adjudicate the evidence before it. Again, the Court finds that the Panel's decision was supported by evidence that was both material and substantial in light of the entire record.

Issue 7          Petitioner's seventh issue is that the Board failed to present sufficient proof that his actions were "unfair to any person or court" or "created an appearance of lack of professional assistance." The Court finds this issue to be without merit in light of the entire record.

4          This Court does not find the Hearing Panel's decision to be (1) in violation of constitutional or statutory provisions, (2) in excess of the Panel's jurisdiction; (3) made upon unlawful procedure; (4) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or (5) unsupported by evidence which is both substantial and material in light of the entire record

5.          This Court finds the Hearing Panel's decision to be supported by the evidence in the record and that reversal or modification is not warranted.

6.          The decision of the Hearing Panel is affirmed and costs are assessed against Petitioner, Homer L. Cody, for which let execution issue, if necessary.

  
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CHANCELLOR WILLIAM C. COLE  
Date: 2-16-15

CERTIFICATE OF SERVICE

I hereby certify that an exact copy of the foregoing Order was mailed, postage prepaid, to counsel of record on this the \_\_\_ day of December, 2015.

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CIRCUIT COURT CLERK