THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

IN THE MATTER OF:
THE HONORABLE LOUISE E. GOLDSTON,
JUDGE OF THE 13TH FAMILY COURT CIRCUIT

SUPREME COURT NO. 20-0742
JIC COMPLAINT NOS. 30-2020
33-2020

JUDICIAL DISCIPLINARY COUNSEL'S REPLY BRIEF

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I.

INTRODUCTION

What started as a simple story of admission/contrition has morphed into a twisted tale of omnipotence, hubris, slander and revenge. It is clear from her June 24, 2021 brief that Respondent wants to have her cake and eat it too. Through the course of these proceedings, Respondent went from admitting her wrongdoing and accepting responsibility for her actions to denying any misconduct but accepting her punishment. Now, she is denying any transgressions, falsely claiming that the JDC forced and/or tricked her into an agreement; and advocating for no punishment or in the alternative mercy should the Court find that she violated the Code of Judicial Conduct.

In a nutshell, Respondent violated CJC Rules 1.1, 1.2, 1.3, 2.2, 2.4(B) and 2.5 for: (1) forcing her way into Mr. Gibson's house without permission, searching his residence and seizing particular items all in violation of the 4th Amendment to the United States Constitution and Article III, § 6 of the West Virginia Constitution; (2) violating Mr. Gibson's due process and equal protection rights set forth in the State and Federal Constitutions; (3) failing to follow the appropriate mechanism for contempt proceedings; and (4) engaging in an inappropriate judicial investigation of the facts which ultimately caused her to be disqualified from the underlying case.

Her conduct was done knowingly and intentionally, and it was egregious. She admitted to the facts and violations contained in the Formal Statement of Charges in writing and during the January 15, 2021 hearing, and the jointly submitted evidence supports the misconduct.

What is even more troubling is Respondent's flagrant disregard for the judicial disciplinary process and her attempts to undermine the integrity, independence and impartiality of the Court subsequent to the January 15, 2021 JHB Hearing. While it is up to the Court to determine what, if any, sanctions, should be imposed pursuant to RJDP 4.12, which includes but is not limited to suspension without pay for up to one year for each violation of the Code, JDC requests the Court to impose a censure and a $5,000.00 fine in keeping with the Agreement entered into by the parties.

II.

JDC's REPLY TO RESPONDENT'S STATEMENT OF THE CASE AND STATEMENT OF FACTS

A. JDC Withdraws Its Request For Costs.

JDC incorporates herein by reference and makes a part hereof her original Brief filed with the Court on or about May 6, 2021, with one exception. JDC hereby withdraws its request for costs. JDC argued that it was entitled to costs in Argument § D3 of its original brief. The argument was predicated on the facts that one of the provisions of the Agreement between JDC and Respondent called for her to be responsible for the payment thereof and her January 15, 2021 testimony at hearing in which she acknowledged responsibility for the same. However, Respondent is also correct in that there was a competing provision in the Agreement which stated that no costs had been incurred. The JDC incurred costs totaling $544.35 for two transcripts that were prepared – Respondent's sworn statement and the March 4, 2020 hearing.

JDC inadvertently did not consider the latter Agreement provision when it initially requested costs. Upon being reminded by Respondent, JDC acknowledges that it is in conflict

with the provision concerning responsibility for the payment thereof. Out of an abundance of caution since the agreement contained conflicting provisions and in fairness to Respondent, JDC hereby withdraws its request for costs should it prevail in this proceeding. *See generally Lee Enterprises v. Twentieth Century-Fox,* 172 W. Va. 63, 303 S.E.2d 63 (1983) (lower court erred in granting summary judgment in favor of licensee where contract was ambiguous in light of conflict between paragraph which permitted purchase of all episodes produced and paragraph which provided for limit of 168 episodes and because the language demonstrated that term of agreement was mutable).

B. Respondent's Brief States Multiple False Facts Not In Evidence Or Supported By The Record.

In her brief, Respondent makes multiple claims about the conduct of JDC in the investigation and joint resolution of the case.[1] There is no evidence in the record to support any of the claims. This Court has long held that it will not consider evidence which was not in the record before the lower court. *See Pearson v. Pearson*, 200 W. Va. 139, 488 S.E.2d 414 (1997). While this Court has *de novo* review of disciplinary matters, the record must still contain evidence to support the facts proffered by the parties. Like JDC, Respondent had the option to introduce evidence in the record below or to ask this Court for permission to supplement the record on appeal. Respondent didn't and she can't because the facts simply aren't true and the evidence simply does not exist. Therefore, those claims should not be considered by the Court in the record of this matter.

Assuming *arguendo* that the Court decides to consider the claims against JDC, they are false. By way of example, Respondent opines that JDC talked her out of obtaining a lawyer early

[1] The false statements are contained in Respondent's brief on page 1, paragraphs 1, 3 and 4; page 2, paragraphs 1, 2, and 3; page 3, paragraph 2 and paragraph 5, sentence 2 in part; and page 4, paragraph 3.

on. Her claim is spurious at best. *See* JDC 7/14/2021 Second Motion to Supplement the Record Exhibit No. 1. The only person who talked someone out of obtaining counsel was Respondent (3/4/2020 Tr. at 4-5 and 20-21). During the March 4, 2020 hearing, Mr. Gibson requested an attorney. Respondent informed him that he didn't need one since she doesn't put people in jail for contempt. She also told him that the hearing would have to be continued if he wanted to pursue obtaining a lawyer. After she talked Mr. Gibson out of obtaining a lawyer, she then turned around and threatened him with jail if he did not let her into his house. If the Court considers Respondent's inappropriate and reckless statements about JDC then it must also consider Exhibit No. 1 attached to the latest JDC Motion to Supplement the record. This exhibit will put to rest any of Respondent's fabricated and inflammatory allegations with respect to JDC during the investigation and prosecution of the case.

Respondent also goes into great detail about what her motives were for stopping the hearing and what she says transpired at the house on the day she illegally searched Mr. Gibson's home.[2] The best evidence of what happened is contained in the two videos. However, Respondent makes claims about what may have occurred outside of those videos and those claims are not evidence and are not supported anywhere in the record. Therefore, they should not be considered by this Court on Appeal. If Respondent wanted them addressed, she should have recorded the entire illegal search from the time she arrived at the home until she left or memorialized it in an Order since several days passed before the March 4, 2020 visit to the house and Mr. Gibson's filing of the Motion to Disqualify. She did neither. At various points in her brief and in the record, she stated that she viewed the illegal search as a continuation of the hearing. If it was, she could have very easily authorized her bailiff to record the matter or she could have done an order outlining

[2] Respondent's brief at page 8, paragraph 1; and page 9, paragraph 1 through page 10, paragraph 4, sentence 1.

the events. The record is lacking because of Respondents actions or inactions and as such, she should not be allowed to profit from the same per *Pearson.*

C. Respondent's Claims That JDC Relies On Facts Not In Evidence Concerning The JIC Vote To Issue Charges And That The JDC Had No Right To Submit Objections[3] To The JHB Decision Are Disingenuous.

There is an old adage that people who live in glass houses should not throw stones. Respondent wants the Court to discount the vote by the JIC to issue formal charges and the makeup of the august body but she wants you to consider her myriad of facts pertaining to JDC and the illegal search which are not in evidence. There is actually some support for the facts pertaining to the JIC vote contained in the record. There is no support for Respondent's bogus claims against the JDC or for what happened during the illegal search when the cameras weren't rolling.

The JIC cannot issue a Formal Statement of Charges unless a quorum is present and the majority vote to do so. Since there is a Formal Statement of Charges in this case, there must have been a quorum present on the day the matter was considered by the JIC and the majority of the members must have voted to issue the document. Otherwise, there would be no charges and we wouldn't now be in front of the Court. Moreover, the Court selects the members of the JIC and the JHB and their terms and memorializes them in an order. Therefore, the Court can take judicial notice of who was on the JIC/JHB and when. The Court can also take judicial notice of the judge's length of term as a judge given it keeps records regarding the same. *See Arnold Agency v. W. Va. Lottery Commission,* 206 W. Va. 583, 526 S.E. 2d 814 (1999) (A court is permitted to take judicial notice of adjudicative facts that cannot reasonably be questioned in light of information provided by a party litigant).

[3] Respondent's brief at page 17, paragraph 1; and page 4, paragraph 3.

The Honorable Alan D. Moats, Judge of the 19th Judicial Circuit, and The Honorable Patricia Keller, Judge of the 6th Family Court Circuit and the Family Court Judge representative, served on the JHB before this Court appointed them to the JIC. Judge Keller has decades of experience as a family court judge. Both members voted for the Statement of Charges in a unanimous 7-0 vote with two other judges who were present but recused themselves (See Exhibit No. 2 attached to JDC 7/14/2020 Second Motion to Supplement the Record). Therefore, at least two of the three family court judges involved in these proceedings, Judge Keller and Respondent, thought that Respondent violated the Code of Judicial Conduct for her conduct in the Gibson matter and should be sanctioned.

Respondent also claims that the JIC breached the Agreement by submitting objections to the JHB recommended decision. In actuality, it was Respondent who breached the agreement when she filed her post-hearing JHB briefs saying she did not violate the Code of Judicial Conduct. The agreement called for Respondent to admit to all of the facts contained in the Statement of Charges and all of the Code violations except for Rule 3.1. Her briefs contradicted her own admissions which violated the Agreement. *See generally State v. Myers,* 204 W. Va. 449, 518 S.E.2d 676 (1998); At that point, it was "Katy, bar the door" and JDC had the right to challenge the JHB recommended decision. Moreover, Respondent filed her own objection asking for no sanction to be imposed. Therefore, there is nothing improper with JDC raising objections to the JHB recommended decision.

III.

ARGUMENT

A. JUDGE STOTLER SHOULD HAVE RECUSED HIMSELF AT HEARING AND SHOULD BE DISQUALIFIED UPON ANY REMAND OF THE CASE.

In one breath, Respondent accuses JDC of being master manipulators and in the next, she calls us "pollyannish." The JDC is neither. Respondent wants this Court to believe that JDC thinks it's wrong for judicial officers to have preconceived opinions of the law and that is all that Judge Stotler was expressing during the January 15, 2021 hearing. JDC understands the concept but a judge, while having pre-conceived opinions must still look at each case with a fresh set of eyes to determine what should be done. He should not go into a case with blinders on. He should not reach a decision before seeing and hearing all of the evidence. It is clear that Judge Stotler had already made up his mind that the charges against Judge Goldston should be dismissed before he entered the courtroom and before all the evidence was in. Thus, he violated his duty to decide cases in a fair and impartial manner.

Respondent does not deny that the first thing emanating from Judge Stotler was the statement that the JIC should never have brought the charges in the first place. She simply ignores it. This is clear evidence of bias in favor of Judge Goldston. If this weren't enough, shortly after the JHB recommended decision was released, Judge Stotler sent a letter to the Supreme Court asking for the firing or severe reprimand of JDC in connection with the Goldston matter and in violation of CJC Rule 2.10(A) since her case is still pending before the Court. More importantly, his allegations, which were taken in part from Judge Goldston's post-hearing brief and not based on evidence, are false, *See* Exhibit No. 1 attached to JDC's July 14, 2021 Motion to Supplement the Record and made a part hereof. Based on his bias, Judge Stotler should have recused himself and this Court should disqualify him if the matter is remanded to the JHB.

B. THE FINDINGS OF FACT AND CONCLUSIONS OF LAW IN THE FORMAL STATEMENT OF CHARGES ARE BINDING; BUT WHETHER RESPONDENT WAS COOPERATIVE IS UP TO THE SUPREME COURT.

The findings of fact and conclusions of law contained in the formal statement of charges are binding for the reasons set forth in JDC's May 6, 2021 Brief. This Court upheld stipulations in a case similar to the instant case in *Lawyer Disciplinary Board v. Cavendish*, 226 W. Va.327, 700 S.E.2d 779 (2010). In *Cavendish,* a lawyer entered into stipulated findings of fact and conclusions of law with the Office of Lawyer Disciplinary Counsel. On appeal, the lawyer argued that the Hearing Panel's interpretation of the nature of stipulations did not comport with his own understanding. *Id.* The lawyer also argued that the Hearing Panel's use of the stipulations as a basis to support its legal conclusion that he violated the Rules of Professional Conduct contradicts his intention and memory in agreeing to the stipulations. *Id.*

In upholding the stipulations, this Court stated:

> "Stipulations or agreements made in open court by the parties in the trial of a case and acted upon are binding and a judgment founded thereon will not be reversed." . . . Further, we have explained that [w]here facts are stipulate they are deemed established as full as if determined by the [trier of facts] A stipulation is a judicial admission. As such, it is binding in every sense, preventing the party who makes it from introducing evidence to dispute it, and relieving the opponent from the necessity of producing evidence to establish the admitted fact. . . . Moreover, this Court previously has relied upon stipulations of fact in disciplining a lawyer for violations of the Rules of Professional Conduct. . . . Our review of the record below indicates that [the lawyer] stipulated to the facts as stated by the Hearing Panel Subcommittee in its September 29, 2009 report. As a result, [the lawyer] cannot now disavow these stipulations before this court. Therefore, we reject [the lawyer's] challenge to the Hearing Panel Subcommittee's reliance on the stipulations made by the parties.

Id. at 334-335, 700 S.E.2d at 786-787 (citations omitted).

JDC will concede that Respondent was cooperative up through and including the January 15, 2021 hearing. Beginning with the post-hearing briefs and moving forward, Respondent has been uncooperative. She flip-flopped on the issue of violating the Code of Judicial Conduct in her post-hearing briefs. Her level of remorse for her conduct is now non-existent. Any member of

the public who reads her testimony, the Agreement and her post-hearing briefs will wonder why she signed the document in the first place since she says she did not do anything wrong. She has also lacked candor in her statements about the JDC. These factors alone when coupled with her conduct in the Gibson matter warrant a censure and a $5,000.00 fine.

In two lawyer disciplinary cases, this Court stated:

> A person named in a disciplinary proceeding before this Court who, after the Hearing Panel Subcommittee has filed its Report with recommended sanctions, commits a violation of the Rules of Professional Conduct related to the facts in the underlying complaint may be subject to an increased degree of discipline. Such subsequent misconduct may be relied upon by this Court as an aggravating factor that justifies enhancement of the recommended sanctions of the Hearing Panel Subcommittee.

Syl. pt. 7, *Lawyer Disciplinary Board v. Grafton*, 227 W. Va. 279, 712 S.E.2d 488 (2011) (discipline imposed went from a one-year recommended suspension to a two-year suspension where lawyer failed to provide files to a trustee appointed to inventory his files after he abandoned his practice and admitted during oral argument that he did not contact the ODC about the matter but unilaterally decided not to comply); Syl. pt. 7, *Lawyer Disciplinary Board v. Hart*, 235 W. Va. 523, 775 S.E.2d 75 (2015) (discipline imposed went from one-year recommended suspension to a three-year suspension where, in part, the lawyer failed to file brief with the Supreme Court in connection with matter in direct contravention of this Court's briefing schedule). In reaching this conclusion, the Court stated:

> Whether an ethical violation relevant to a disciplinary case before this Court occurs before or after the HPS has acted does not change the multi-faceted responsibility this Court has to devise a proper sanction for the advancement of the legal system and protection of the public. To avoid allowing relevant misconduct to go unchecked in such situations, such behavior shall be considered an aggravating factor upon which this Court may rely to impose additional sanctions over those recommended.

Grafton at 589, 712 S.E.2d at 498.

JDC believes Respondent's conduct post-hearing is critical to her overall level of cooperation, and the fact that she flipped-flopped on her culpability is evidence of an aggravating factor. Accordingly, JDC respectfully requests the court to consider these facts in its determination of what, if any, sanction to impose.

C. AS A COURT OF LIMITED JURISDICTION, RESPONDENT HAD NO AUTHORITY TO CONDUCT AN ILLEGAL SEARCH AND IT WAS NOT THE "LEAST INTRUSIVE MEASURE" TO ENFORCE THE AMENDED FINAL ORDER.

The editor's notes contained in *Michie's W.Va. Code Annotated* to Article 8, § 16 of the West Virginia Constitution provides:

> This section was proposed by House Joint Resolution No. 30 1999 Regular Session, and ratified November 7, 2000, at the general election. The resolution also reads: "Resolved further, That in accordance with the provision of article eleven, chapter three of the code of West Virginia, one thousand nine hundred thirty-one, as amended such proposed amendment is hereby number 'Amendment No. 1' and designated as the 'Unified Family Court Amendment' and the purpose of the proposed amendment is summarized as follows: 'To amend the Constitution of West Virginia **to permit the Legislature to establish a unified system of family courts with jurisdiction over family law and child welfare matters.'"**

(emphasis added). Thus, the creation of the Family Court was initiated by the Legislature and established by the same.

Respondent incorrectly contends on page 21 of her brief that the concept of limited jurisdiction goes to substantive issues but not to its judicial authority. In Syl. pts. 3 and 4 of *W. Va. DHHR, Bureau for Child Support Enforcement v. Smith*, 218 W. Va. 480, 624 S.E.2d 917 (2005), this Court stated:

> 3. When a child is the subject of an abuse or neglect or other proceeding in a circuit court pursuant to Chapter 49 of the West Virginia Code, **the circuit court, and not the family court, has jurisdiction to establish a child support obligation for that child.**
>
> 4. When a circuit judge enters an order on an abuse or neglect petition filed pursuant to Chapter 49 of the West Virginia Code, and in so doing alters the

> custodial and decision making responsibility for the child and/or commits the child to the custody of the Department of Health and Human Resources, W. Va. Code § 49-7-5 [1936] requires the circuit judge to impose a support obligation upon one or both parents for the support, maintenance and education of the child. The entry of an order establishing a support obligation is mandatory; it is not optional.

(emphasis added). *See also In re: T.M. and S.M.*, 242 W. Va. 268, 835 S.E2d 132 (2019) (family court did not have jurisdiction to entertain allocation of custodial or decision-making responsibilities given pendency of abuse and neglect proceedings). These cases and the ones cited in JDC's original brief indicate that family court has limitations to both substantive issues and judicial authority. There is nothing in the statutes, rules or case law that gives Respondent or any other judge the authority to conduct an illegal search.

On page 23 of her brief, Respondent improperly argues that the least intrusive measure for enforcing the order was the illegal search. This argument is silly. The search itself was illegal and therefore intrusive by its very nature. The least intrusive means would have been for Respondent to hold Mr. Gibson in contempt in an order drafted upon the completion of the hearing and to require him to produce the items in question at the courthouse at a specified date and time or report to jail. Alternatively, she could have entered an order at the conclusion of the hearing requiring sheriff deputies to retrieve the items or accompany a responsible party to the house. Her claim in her sworn statement that the officers would not abide by a lawful order is ludicrous in light of the fact that the bailiff accompanied her to Mr. Gibson's home and helped search the place and that backup arrived upon the bailiff's request (7/22/2020 Tr. at 17, 29).

By going to the home and conducting an illegal search, Respondent not only violated the 4th Amendment, she improperly investigated the facts of the matter, caused her own disqualification, and placed herself, the ex-wife and others in unnecessary potential danger. Her claim that necessity and fear of the items being lost caused her to act swiftly is also nonsensical as

six months had already lapsed between the time the contempt petition was filed and the hearing actually took place. Interestingly, no one ever stated at the March 4, 2020 hearing that the items were still at the house. After six months, it would be prudent for a judge to determine the location of the items before he/she goes storming into someone's home in an effort to retrieve them. Moreover, Respondent did order Mr. Gibson to produce some items by a specified date falling after the hearing also negating any sense of urgency (3/4/2020 Tr. at 64).

D. RESPONDENT VIOLATED MR. GIBSON'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS AGAINST UNLAWFUL SEARCH AND SEIZURE.

After JDC submitted its original brief, the United States Supreme Court issued another 4th Amendment case which supports the contention that Respondent violated Mr. Gibson's state and federal constitutional rights against unlawful search and seizure. The case is *Caniglia, v. Strom*, 141 S. Ct. 1596 (2021). In this case, petitioner got into an argument with his wife, placed a gun on the dining room table and asked her to "shoot [him] and get it over with." The wife left the home. The next morning when she could not reach petitioner, she contacted the police and asked them to accompany her to the home on a welfare check. When they arrived at the home, they saw the petitioner on the porch and called an ambulance. The petitioner agreed to go to the hospital for a psychiatric evaluation on the condition that the officers not confiscate his firearms. After petitioner left, the officers found the guns and seized them. Petitioner sued claiming that the officers had entered his home and seized the guns without a warrant in violation of the Fourth Amendment. The federal district court granted summary judgement in favor of the officers who had argued that the removal of petitioner and his firearms was justified by a "community caretaking exception" to the warrant requirement. The First Circuit Court of Appeals affirmed the decision.

The U.S. Supreme Court vacated the decision and remanded the matter back to the lower court. The Court held:

> The First Circuit's "community caretaking" rule, however goes beyond anything this Court has recognized. The decision below assumed that respondents lacked a warrant or consent, and it expressly disclaimed the possibility that they were reacting to a crime. The court also declined to consider whether any recognized exigent circumstances were present because respondents had forfeited the point. Nor did it find that respondents' actions were akin to what a private citizen might have had authority to do if petitioner's wife had approached a neighbor for assistance instead of the police.
>
> Neither the holding nor logic of *Cady* [*v. Dombrowski*, 413 U.S. 433 (1973)] justified that approach. True, *Cady*, also involved a warrantless search for a firearm. But the location of that search was an impounded vehicle – not a home – "'a constitutional difference'" that the opinion repeatedly stressed. . . . In fact, Cady expressly contrasted its treatment of a vehicle already under police control with a search of a car "parked adjacent to the dwelling place of the owner."
>
> Cady's unmistakable distinction between vehicles and homes also places into proper context its reference to "community caretaking." This quote comes from a portion of the opinion explaining that the "frequency with which . . . vehicle[s] can become disabled or involved in . . . accident[s] on public highways" often requires police to perform noncriminal "community caretaking functions," such as providing aid to motorists. . . . But, this recognition that police officers perform many civic tasks in modern society was just that – a recognition that these tasks exist, and not an open-ended license to perform them anywhere. What is reasonable for vehicles is different from what is reasonable for homes. Cady acknowledged as much, and this Court has repeatedly "declined to expand the scope of exceptions to the warrant requirement to permit warrantless entry into the home.

Id. at 1599-1600.

Respondent wants this Court to believe that she engaged in a view. A view by its very name implies that one looks but doesn't take. Respondent admits going into the home, allowing a search to be conducted and seizing various items. She did not have a warrant. She did not have an order. She did not have consent. There were no exigent circumstances. Respondent had items taken from the home as a result of the search which is a seizure. Thus, Respondent violated the

4th Amendment and Article III, § of the W. Va. Constitution and therefore violated CJC Rules 1.1, 1.2, 1.3, 2.2(A), 2.4(B) and 2.5.

IV.

CONCLUSION

The facts of this case demonstrate that Respondent violated Rules 1.1, 1.2, 1.3, 2.2, 2.4(B) and 2.5 of the Code of Judicial Conduct. Respondent admitted it in her written agreement with JDC and in open court on January 15, 2021. The facts also bear out that the Respondent is not now remorseful for her conduct and does not believe she has done anything wrong. Because of the nature of her misconduct and her lack of remorse, JDC respectfully requests in keeping with the Agreement that the Court publicly censure Respondent and fine her $5,000.00.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Teresa A. Tarr, Judicial Disciplinary Counsel, hereby certify that I have served a true and accurate copy of the foregoing Reply Brief by placing the same in the United States Mail, first class postage pre-paid, on this 14th day of July 2021 to:

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