No. 208PA15 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

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THE NORTH CAROLINA STATE BAR,	)	
Plaintiff,	)	BEFORE THE DISCIPLINARY HEARING COMMISSION OF THE NORTH CAROLINA STATE BAR
v.	)	
JERRY R. TILLETT,	)	15 DHC 7
Defendant.	)	

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RULE 11(c) SUPPLEMENT TO THE PRINTED RECORD ON APPEAL

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INDEX

STATE OF NORTH CAROLINA

WAKE COUNTY

BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
15 DHC 7

THE NORTH CAROLINA STATE BAR,

Plaintiff,

v.

JERRY R. TILLETT,

Defendant.

MOTION FOR JUDGMENT ON THE PLEADINGS

NOW COMES, Defendant, Jerry R. Tillett ("Judge Tillett"), by and through counsel, and moves the Court pursuant to Rule 12(c) of the Rules of Civil Procedure for judgment on the pleadings. Judge Tillett shows as follows unto the hearing panel of the DHC in support thereof:

The function of a Rule 12(c) motion for judgment on the pleadings is to dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit. See High v. Parks, 42 N.C. App. 707, 257 S.E.2d 661, *cert. denied*, 298 N.C. 806, 262 S.E.2d 1 (1979). Judgment on the pleadings is proper when the pleadings fail to present any issue of fact. See Gammon v. Clark, 25 N.C. App. 670, 214 S.E.2d 250 (1975).

On 8 March 2013, the Judicial Standards Commission ("JSC") issued a Public Reprimand to Judge Tillett regarding his interaction with the District Attorney's office and certain officials of the Town of Kill Devil Hills.

The JSC, a state agency, is comprised of, *inter alia*, four (4) members of the State Bar. N.C. Gen. Stat. § 7A-375. The State Bar members are elected by the State Bar Council, a state agency. N.C. Gen. Stat. § 7A-375; N.C. Gen. Stat. §§ 84-15 and 84-17. Nine (9) of the thirteen (13) members of the JSC are members of the State Bar.

The companion doctrines of *res judicata* and collateral estoppel bar the State Bar's prosecution of Judge Tillett.

Res judicata and collateral estoppel are closely related doctrines. Whitacre P'ship v. Biosignia, Inc., 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004). The doctrines apply to administrative decisions. See, e.g., Maines v. City of Greensboro, 300 N.C. 126, 133, 265 S.E.2d 155, 160 (1980).

Under *res judicata*, "a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies." Whitacre, 358 N.C. at 15, 591 S.E.2d at 880. Collateral estoppel differs slightly, in that "the determination of an issue in a prior judicial or administrative proceeding precludes relitigation of that issue in a later action[.]" Id. For collateral estoppel to apply, the "party against whom the estoppel is sought [must have] enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding." Id. The doctrine likewise applies to quasi-judicial decisions like those of the JSC. See Hillsboro Partners, LLC v. City of Fayetteville, ___ N.C. App. ___, ___, 738 S.E.2d 819, 824, review denied, 367 N.C. 236, 748 S.E.2d 544 (2013).

The State Bar's complaint against Judge Tillett raises the same issues and facts that were fully and conclusively litigated before the JSC.

The allegations in the State Bar's complaint are substantially similar to those charges of misconduct made in the JSC disciplinary proceeding against Judge Tillett. The State Bar's pleadings show that the alleged improper behavior occurred while Judge Tillett was acting in his judicial capacity. The JSC's Order of Public Reprimand fully resolved the JSC disciplinary proceeding. As a result, there has been a final judgment on the merits and resolution of the issue before the DHC (i.e., whether Judge Tillett acted inappropriately in his judicial capacity so as to prejudice the administration of justice). Moreover, any prejudice to the administration of justice has been resolved by the JSC's Public Reprimand of Judge Tillett.

The JSC and State Bar are in privity for purposes of the application of *res judicata* and/or collateral estoppel.

The State Bar Council, which elects members to serve on the JSC, makes up the "government" of the State Bar. N.C. Gen. Stat. § 84-17. The State Bar's elected members participate in the JSC deliberations. Its elected members and five (5) others members of the State Bar actually sat in judgment of Judge Tillett. Such participation, standing alone, is sufficient to establish privity. Masters v. Dunstan, 256 N.C. 520, 124 S.E. 2d 574 (1962); Workman v. Rutherford EMC, 613 S.E.2d 243 (NC 2005).

Our Supreme Court has held that the State and one of its agencies are in privity for purposes of collateral estoppel. State By & Through New Bern Child Support Agency ex rel. Lewis v. Lewis, 311 N.C. 727, 733, 319 S.E.2d 145, 149-50 (1984). The State had criminally prosecuted a parent for non-support. Id. Five (5) years later, the New Bern Child Support Agency brought a civil action for support against the same parent. Id. The defendant attempted to dispute paternity. The Court held that the parent was estopped, as that issue was determined in the prior criminal prosecution. Id.

Res judicata effect has also been given to a decision by a city's police department to discipline one of its police officers. Matter of Mitchell, 88 N.C. App. 602, 604, 364 S.E.2d 177, 179 (1988) (City's civil service board punished a police officer for the same conduct for which he had already been punished by the City's police department.) The Court of Appeals held that the punishment by the civil service board "is invalid on the grounds of *res judicata*[.]" Id. Significantly, the Court reasoned that, "[i]n our jurisprudence it is axiomatic that no one ought to be twice vexed for the same cause." Id. (emphasis supplied).

The JSC is an agency of the State. In re Nowell, 293 N.C. 235, 244, 237 S.E.2d 246, 252 (1977) (holding that the JSC "is an administrative agency created as an arm of the court"). The

State Bar is likewise an agency of the State. N.C. Gen. Stat. § 84-15. As State agencies, the JSC and the State Bar are in privity. Tillett has already been disciplined by the State's JSC for the same conduct that the State's DHC seeks to punish him. *Res judiciata* and collateral estoppel therefore apply, and Judge Tillett "ought [not] be twice vexed for the same cause."

The State Bar's own disciplinary rulings also have an estoppel effect on subsequent litigation involving the same issues. Vann v. N. Carolina State Bar, 79 N.C. App. 166, 169, 339 S.E.2d 95, 97 (1986). In Vann, the Court of Appeals rejected a plaintiff's efforts to "relitigate the identical issue considered and finally determined in the proceedings before the State Bar." Id. The JSC's public reprimand of Judge Tillett should be given the same preclusive effect.

The Public Reprimand issued by the JSC also has preclusive effect as to any discipline which the DHC may order. Matter of Mitchell, *supra.* The JSC is only authorized by statute to impose a Public Reprimand for **minor** violations of the applicable rules. The DHC is only allowed by statute to issue an "admonition" for a minor violation of the applicable rules. The imposition of more severe discipline by the DHC requires clear, cogent and convincing evidence of significant harm to the **public** as a result of Judge Tillett's conduct alleged in the Complaint. State Bar v Talford, 356 N.C. 626, 576 S.E.2d 305 (2003). Such a finding is precluded in that the DHC is bound by the JSC's determination that the Judge Tillett's misconduct was minor. Vann v State Bar, *supra.* Any potential harm to the public has already been addressed in the JSC's Public Reprimand.

Imposition of punishment by the State Bar is precluded by the doctrine of election of remedies.

The doctrine of election of remedies is used to prevent double redress for a single wrong. Whitacre P'ship v. Biosignia, Inc., 358 N.C. 1, 20, 591 S.E.2d 870, 883 (2004). Consequently,

election bars the discipline of Tillett by the State Bar for the same conduct for which he has already been punished by the JSC.

The State Bar's action against Judge Tillett should be dismissed based upon application of the overlapping doctrines of equitable estoppel, quasi-estoppel and judicial estoppel.

Judge Tillett relied upon the State Bar's stated position that judges are subject to discipline by the JSC in accepting the Public Reprimand. Tillett and the JSC are bound by the Order of Public Reprimand. The JSC and the State Bar are in privity. Those circumstances give rise to the application of the doctrine of equitable estoppel. Whitacre P'ship v. Biosignia, Inc., 358 N.C. 1, 23, 591 S.E.2d 870, 885 (2004). Therefore the doctrine of equitable estoppel requires the dismissal of the Complaint.

The doctrine of quasi-estoppel also applies in that the State Bar is not now permitted to ignore the Order of Public Reprimand issued by the JSC and the benefit derived by the public from the Public Reprimand. Id. at 18. So does the doctrine of judicial estoppel to protect the integrity of the proceedings before the DHC. Id. at 17. These doctrines bar the prosecution of the charges alleged against Tillett.

The State Bar's Ethics Opinions as to the scope of its own authority over the judiciary are clearly inconsistent with the position it has taken herein. As recently as 2013, the State Bar opined that: "Opinion on the professional conduct of judicial officers is outside the purview of the Ethics Committee." 2013 Formal Ethics Opinion 6 (emphasis supplied). The State Bar stated that "no opinion will be offered in response" to whether a judge "violate[d] the Rules of Professional Conduct or the Code of Judicial Conduct[.]" 2013 Formal Ethics Opinion 6.

Further, in RPC 208 (filed July 21, 1995), the State Bar opined that: "Judges are subject to the Code of Judicial Conduct and the regulation of the Judicial Standards Commission. Therefore, no opinion is expressed as to the ethical duty of a judge in this situation." RPC 208 (emphasis

supplied). The State Bar's own website states that "Complaints about North Carolina judges go to the NC Judicial Standards Commission[.]" See http://www.ncbar.gov/public/intro.asp (last visited, June 29, 2015).

The Rules of Professional Conduct likewise direct lawyers with an ethical concern about a judge to the JSC. Rule 8.3 of the Rules of Professional Conduct states that when a judge violates "applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office [an attorney] shall inform the North Carolina Judicial Standards Commission[.]" R. P. Con. 8.3(b) (emphasis supplied).

The State Bar is therefore estopped to prosecute Judge Tillett.

CONCLUSION

Nearly two (2) years after the JSC issued its Public Reprimand, the State Bar filed a complaint against Judge Tillett based on the same conduct which resulted in the JSC's Public Reprimand. The JSC is comprised, *inter alia,* of four (4) members of the State Bar elected by the State Bar Council. Both the JSC and the State Bar are agents of the State. The same facts and legal issues alleged in the State Bar's complaint have already been fully resolved by the JSC's issuance of a Public Reprimand, and its conclusion that Judge Tillett's conduct was minor. So has the discipline of Judge Tillett. Accordingly, the disciplinary action by the State Bar is barred by the doctrines of *res judicata* and/or estoppel.

Respectfully submitted, this the 6th day of July, 2015.

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CERTIFICATE OF SERVICE

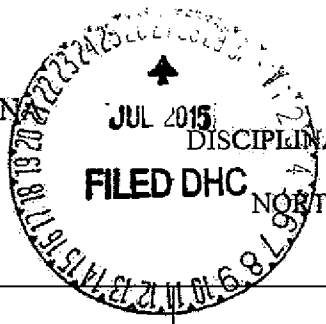
This is to certify that the undersigned has this date served a copy of the foregoing **MOTION FOR JUDGMENT ON THE PLEADINGS** upon the parties by depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service, addressed as follows:

G. Patrick Murphy
Jennifer A. Porter
The North Carolina State Bar
217 East Edenton Street
Raleigh, NC 27611
Attorney for Plaintiff

This the 6th day of July, 2015.

Norman W. Shearin

4843-1808-2085, v. 3



STATE OF NORTH CAROLINA WAKE COUNTY	BEFORE THE DISCIPLINARY HEARING COMMISSION OF THE NORTH CAROLINA STATE BAR 15 DHC 7
THE NORTH CAROLINA STATE BAR, Plaintiff v. JERRY R. TILLETT, Attorney, Defendant	RESPONSE TO MOTION FOR JUDGMENT ON THE PLEADINGS

NOW COMES, the North Carolina State Bar ("State Bar"), by and through Deputy Counsel G. Patrick Murphy and Jennifer A. Porter, responding to Defendant's Motion for Judgment on The Pleadings ("MJOP") filed on July 9, 2015. In support of its request that Defendant's motion be denied, Plaintiff states as follows:

STATEMENT OF THE CASE

On March 6, 2015, Plaintiff filed a Complaint alleging Defendant violated the North Carolina State Bar Rules of Professional Conduct ("the Rules"). On March 19, 2015, Defendant filed a Motion to Dismiss in Lieu of Answer ("Motion to Dismiss"). In his Motion to Dismiss, Defendant argued, in part, that Plaintiff was barred from prosecuting its claim based on collateral estoppel. On March 30, 2015, Defendant filed his Answer to the Complaint. On April 6, 2015, Plaintiff filed its Response to Defendant's Motion to Dismiss. On May 4, 2015, this Hearing Panel denied Defendant's Motion to Dismiss and Defendant has filed an interlocutory appeal of the denial of his Motion to Dismiss. Defendant's MJOP was filed July 9, 2015.

ARGUMENT

Defendant's MJOP asserts he is entitled to judgment on the pleadings because: 1) the doctrines of *res judicata* and collateral estoppel bar the State Bar's prosecution; 2) imposition of discipline by the State Bar is precluded by the doctrine of election of remedies; and 3) the application of the overlapping doctrines of equitable estoppel, quasi-estoppel and judicial estoppel require dismissal. As discussed below, Defendant's arguments are without merit.

A motion for judgment on the pleadings should not be granted unless the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law. *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974). The function of a motion for judgment on the pleadings is to dispose of baseless claims or defenses when formal pleadings reveal their lack of merit. *Hedrick v. Rains*, 121 N.C. App. 466, 466 S.E.2d 281 (1996). The party moving for judgment on pleadings admits the truth of all well-pleaded factual allegations in the opposing party's pleading and untruth of its own allegations insofar as they controvert or conflict with opposing party's pleading. *Peace River Elec. Co-op., Inc. v. Ward Transformer Co., Inc.,* 116 N.C. App. 493, 510, 449 S.E.2d 202, 214 (1994). As shown below, Defendant's MJOP is meritless. Accordingly, Plaintiff asks this Hearing Panel to deny Defendant's MJOP.

I. THE DOCTRINES OF *RES JUDICATA* AND COLLATERAL ESTOPEL DO NOT BAR PLAINTIFF'S PROSECUTION.

Defendant does not argue that the factual allegations in the Complaint do not constitute conduct prejudicial to the administration of justice, as alleged in the Complaint. Rather, he argues that the doctrines of *res judicata* and/or collateral estoppel bar

Plaintiff's case because the same conduct was the basis for the JSC imposing a reprimand upon Defendant for his violation of the Code of Judicial Conduct ("the Code").

"Broadly speaking, 'estoppel is a bar which precludes a person from denying or asserting anything to the contrary of that which has, in contemplation of law, been established as the truth.'" *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 13 (2004) (quoting 28 Am. Jur. 2d Estoppel and Waiver § 1 (2000)). Estoppel doctrines "reflect a shared and longstanding judicial reluctance to permit the assertion of inconsistent positions before a judicial or administrative tribunal." *Id.* at 14. They "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Allen v. McCurry*, 449 U.S. 90, 94 (1980).

In his MJOP, Defendant argues both collateral estoppel and *res judicata* as grounds to bar the State Bar's prosecution. Defendant cannot meet the necessary elements, however, to invoke defensive use of these doctrines in this case. As the Court of Appeals noted in *Williams v. City of Jacksonville Police Dept.*, 165 N.C.App. 587, 591, 599 S.E.2d 422, 427 (2004):

> Our Supreme Court has distinguished between these two doctrines:
>
> Under the doctrine of res judicata or "claim preclusion," a final judgment on the merits in one action precludes a second suit based on the same cause of action *between the same parties or their privies*. The doctrine prevents the relitigation of all matters ... that were or should have been adjudicated in the prior action. Under the companion doctrine of collateral estoppel, also known as "estoppel by judgment" or "issue preclusion," *the determination of an issue in a prior judicial or administrative proceeding precludes the relitigation of that issue in a later action, provided the party against whom the estoppel is asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding.*

Whitacre P'ship v. Biosignia, Inc., 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004) (internal

citations and quotations omitted). (emphasis added)

"Whereas res judicata estops a party or its privy from bringing a subsequent action based on the "same claim" as that litigated in an earlier action, collateral estoppel precludes the subsequent adjudication of a previously determined issue, even if the subsequent action is based on an entirely different claim." *Whitacre,* 358 N.C. at 15 (citing *Hales v. North Carolina Ins. Guar. Ass'n,* 337 N.C. 329, 333 (1994)). "The two doctrines are complementary in that each may apply in situations where the other would not and both advance the twin policy goals of 'protecting litigants from the burden of relitigating previously decided matters and promoting judicial economy by preventing needless litigation.'" *Whitacre,* 358 N.C. at 15 (citing *Bockweg v. Anderson,* 333 N.C. at 491, 428 S.E.2d at 161 (1993)).

The doctrine of *res judicata* does not bar Plaintiff's prosecution. For Defendant to establish that Plaintiff's claim is barred by *res judicata*, Defendant "must show (1) a final judgment on the merits in an earlier suit, (2) an identity of the cause of action in both the earlier and the later suit, and (3) identity of parties or their privities in the two suits." *Gregory v. Penland,* 179 N.C. App. 505, 510, 634 S.E.2d 625, 629 (2006) (internal quotation and citation omitted). Defendant has failed to meet the second and third requirements for *res judicata.* The cause of action in the JSC action was the alleged violations of the Code. The cause of action in the DHC case is the alleged violations of the Rules. These claims are distinct, involving the application of two different sets of standards, and therefore there is no identity of cause of action.

Furthermore, the JSC proceeding and the DHC case do not involve the same parties or their privities. Defendant does not allege that the two actions involve the same

parties, but rather that the State Bar is in privity with the JSC. "The prevailing definition that has emerged from our cases is that 'privity' for purposes of *res judicata* and collateral estoppel 'denotes a mutual or successive relationship to the same rights of property.'" *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 416-17, 474 S.E.2d 127, 130 (1996) (quoting *Settle v. Beasley*, 309 N.C. 616, 620, 308 S.E.2d 288, 290 (1983)). "In general, privity involves a person so identified in interest with another that he represents the same legal right." *Id.* The Court further noted:

> Privity is not established, however, from the mere fact that persons may happen to be interested in the same question or in proving or disproving the same state of facts, or because the question litigated was one which might affect such other person's liability as a judicial precedent in a subsequent action.

Id. (emphasis added)

Mere status as a state agency does not place all state agencies in privity with each other. There must be an identity of rights and interests. *Id.* For example, in *State By and Through New Bern Child Support Agency, ex rel. Lewis v. Lewis*, 311 N.C. 727, 319 S.E.2d 145 (1984), privity was found where the state instituted a criminal action for nonsupport and later a civil action through the New Bern Child Support Agency, because in both the state was pursuing its same financial interest in securing support payments by a parent in both actions. However, in *Settle v. Beasley*, 309 N.C. 616, 619, 308 S.E.2d 288, 290 (1983), no privity was found between mother-plaintiff in an action brought by a state agency seeking to recoup child support payments and a child-plaintiff in a subsequent action seeking support in his own right, because the interests of the two plaintiffs were separate and distinct. Privity is not established between different parties in different actions simply because both parties may be interested in the same question or

set of facts; the parties must share a legal interest. *Id.*, quoting *Masters v. Dunstan*, 256 N.C. 520, 524-26, 124 S.E.2d 574, 577-78 (1962). As stated in *Masters*, "[o]ne is 'privy,' when the term is applied to a judgment or decree, whose interest has been *legally* represented at the trial." *Id.* (emphasis in original)

The JSC and the State Bar are distinct entities. They are created under different statutes, with legal rights and authority coming from different statutes and regulations. They were created for distinct purposes, and apply different standards to address different harms. Although in certain circumstances, such as this case, the two entities may be interested in the same facts, as noted above this does not constitute privity.

Defendant further argues privity is established because nine (9) members of the JSC are members of the State Bar. See N.C. Gen. Stat. §7A-375 (the JSC is comprised of one court of appeals judge, two superior court judges, two district court judges and four members of the State Bar who have actively practiced in the courts of the State for at least 10 years. The four (4) State Bar members who are not members of the judiciary are elected to the JSC by the State Bar Council). The State Bar Council is the governing body of the State Bar. N.C. Gen. Stat. §84-17. However, as noted above, the State Bar and JSC were created under different statutes, with legal rights and authority coming from different statutes and regulations. Chapter 84 of the General Statutes grants the State Bar "the authority to regulate the professional conduct of licensed lawyers," and states that "any attorney admitted to practice law in this State is subject to the disciplinary jurisdiction of the [State Bar] Council." N.C. Gen. Stat. §§ 84-23(a) and 84-28(a). Pursuant to Article 30 of Chapter 7A of the N.C. General Statutes, the JSC was established for the investigation and resolution of inquiries concerning the qualification

or conduct of any judge or justice of the General Court of Justice. N.C. Gen. Stat. §7A-374.1. Pursuant to N.C. Gen. Stat. §7A-376, the JSC determines whether the conduct of a judge or justice violates the Code. As the statutory responsibilities of the State Bar and JSC demonstrate, the responsibility and authority of each agency is different. State Bar members on the JSC operate as members of the JSC, applying the Code of Judicial Conduct to the matters before them. They do not appear as a party before the JSC advocating any position on behalf of the State Bar in JSC proceedings, nor do they have the authority to discipline a member of the judiciary for a violation of the Rules in a JSC proceeding. Accordingly, the fact that members of the State Bar serve on the JSC does not establish privity for purposes of application of *res judicata*.

Defendant cites *Masters v. Dunstan*, 256 N.C. 520, 124 S.E.2d 574 (1962) and *Workman v. Rutherford EMC*, 613 S.E.2d 243 (2005) to support his argument that participation in Defendant's JSC proceedings by nine (9) members of the State Bar, standing alone, is sufficient to establish privity. In both *Masters* and *Workman*, however, the appellate court found that the party asserting estoppel was not in privity for estoppel purposes. As noted in *Masters*, "[o]ne is 'privy,' when the term is applied to a judgment or decree, whose interest has been legally represented at the trial." *Id.* at 526. Though members of the State Bar were part of the JSC that reprimanded Defendant for a violation of the Code, the State Bar's interest in disciplining violations of the Rules was not legally represented in the JSC proceeding. Defendant reliance on *Workman* is also misplaced. Defendant appears to cite *Workman* for the court's discussion of privity which references the ability of one not actually a party to the previous action to control the prior litigation, but that scenario is not present in the case before this Hearing Panel. Though members of

the State Bar were on the JSC, they were serving in their capacity as members of the JSC; the State Bar as an agency was not in control of the JSC proceeding. Thus, *Masters* and *Workman* do not support Defendant's privity argument.

Defendant next cites *Matter of Mitchell,* 88 N.C. App. 302, 364 S.E.2d 177 (1988) to support his *res judicata* claim noting the Court's reasoning that, "[i]n our jurisprudence it is axiomatic that no one ought to be twice vexed for the same cause." *Matter of Mitchell* is distinguishable because in that case a police officer was made to face two separate disciplinary proceedings and was twice suspended for violating the same departmental residency requirement based on the same facts. The difference in the two proceedings was that, in between the two, the police department changed the applicable police department Rules of Conduct to increase the length of time that an employee could be suspended for the residency violation. In contrast, the State Bar's case against Defendant alleges a violation of the Rules while the JSC discipline was for a violation of the Code. Accordingly, Defendant is not being twice vexed for the same cause of action, and the doctrine of *res judicata* does not apply.

The doctrine of collateral estoppel likewise does not bar the State Bar's prosecution of this disciplinary case. As noted earlier,

> Under the companion doctrine of collateral estoppel, also known as "estoppel by judgment" or "issue preclusion," *the determination of an issue in a prior judicial or administrative proceeding precludes the relitigation of that issue in a later action, provided the party against whom the estoppel is asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding.*

Whitacre P'ship v. Biosignia, Inc., 358 N.C. at 15, 591 S.E.2d at 880 (internal citations and quotations omitted). (emphasis added)

Under the analysis of *Whitacre*, the State Bar, the party against whom collateral estoppel is asserted, did not have an opportunity in the JSC proceeding to litigate the issue of Defendant having engaged in conduct prejudicial to the administration of justice in violation of the Rules. This is not a situation like *Williams v. City of Jacksonville Police Dept.* where the same parties in a State court civil action were previously parties in a federal court civil action based on the same factual issues. Since the State Bar did not have a full and fair opportunity to participate in the JSC proceedings and litigate the issue of Defendant engaging in conduct prejudicial to the administration of justice in violation of the Rules, Defendant cannot assert collateral estoppel defensively to bar the State Bar from pursuing this disciplinary action.

The case cited by Defendant to support application of collateral estoppel in this case is distinguishable. In *Vann v. North Carolina State Bar*, 79 N.C. App. 166, 339 S.E.2d 95 (1986), the first proceeding was before the State Bar Council and Vann participated as a party. The second proceeding was before the superior court, and again Vann was a party. The Court in *Vann* held that Vann, the common party to both proceedings, could not relitigate in the second what had already been considered and finally determined in the first. *Id.*, 79 N.C. App. at 169, 339 S.E.2d at 97. Such is not the case here, where the State Bar was not a party to the JSC proceeding and had no opportunity to litigate whether Defendant's conduct violated the Rules in the JSC's proceeding.

Based on the facts, circumstances and parties of this DHC proceeding, Defendant's defensive estoppel arguments fail. The question of whether Defendant's conduct violates the Rules was not determined by the JSC, and the State Bar was not a

party or privy to the JSC proceeding. The cases Defendant relies upon do not support his contentions and he is not entitled to judgment on the pleadings based on *res judicata* or collateral estoppel.

II. THE DOCTRINE OF ELECTION OF REMEDIES DOES NOT BAR THE STATE BAR'S CASE.

Defendant next argues that the doctrine of election of remedies bars this proceeding. He cites *Whitacre* to support his argument.

As noted in *Whitacre*, the doctrine of election of remedies

> "is founded on the principle that where by law or by contract there is a choice of two remedies which proceed upon opposite and irreconcilable claims of right, the one taken must exclude and bar the prosecution of the other." *Irvin v. Harris,* 182 N.C. 647, 653, 109 S.E. 867, 870 (1921). The doctrine precludes the assertion of inconsistent positions by confining a party to the position "which he first adopts." (citations omitted)

Whitacre P'ship v. Biosignia, Inc., 358 N.C. at 19, 591 S.E.2d at 882.

The State Bar has not previously pursued a remedy against Defendant much less one that is inconsistent with the present action. Thus, Defendant's claim that election of remedies should be invoked to prevent double redress for a single wrong is without merit. Election of remedies does not bar the State Bar's proceeding.

III. THE DOCTRINES OF EQUITABLE ESTOPPEL, QUASI-ESTOPPEL AND JUDICIAL ESTOPPEL DO NOT BAR THE STATE BAR'S CASE.

Defendant next argues that the doctrines of equitable estoppel, quasi-estoppel and judicial estoppel bar the State Bar's case. Again, *Whitacre* is the principle case he cites to support his claims, and his arguments focus on his alleged reliance on what he contends is the State Bar's stated position that judges are subject to discipline by the JSC. Defendant argues that State Bar Ethics Opinions regarding the scope of the Ethics Committee's authority over the judiciary are inconsistent with the position of the State

Bar in this DHC proceeding. Defendant's reliance on actions of the Ethics Committee of the State Bar to support these estoppel arguments is misplaced.

Judicial estoppel is generally limited to the context of inconsistent factual assertions made in judicial proceedings. *Whitacre*, 358 N.C. at 32. Judicial estoppel seeks to protect courts, not litigants, from individuals who would play fast and loose with the judicial system. *Id.* at 26 (citation and quotation marks omitted). The Court's extensive review of judicial estoppel case law in *Whitacre* makes clear that the positions of a party which may form the basis for application of judicial estoppel are those made in judicial proceedings. *Id.*, 358 N.C. at 22-30, 591 S.E.2d at 884-89.

Defendant identifies no earlier position taken by the State Bar in litigation or otherwise before a tribunal that would operate to judicially estop the position taken by the State Bar in this litigation. Instead, Defendant discusses ethics opinions issued by the Ethics Committee of the State Bar. The State Bar issues ethics opinions as a service, to assist and provide guidance to attorneys on ethical obligations and on the application of and compliance with the Rules of Professional Conduct. 27 N. C. Admin. Code, Chapter 1, Subchapter D, Section .0100, *Procedures for Ruling on Questions of Legal Ethics*. The rules applicable to the Ethics Committee and the actions taken by the Ethics Committee are unrelated to, and do not affect, the statutory disciplinary authority of the State Bar. Moreover, any statement of the Ethics Committee in an Ethics Opinion is not a statement made in a judicial proceeding. The State Bar has not asserted inconsistent facts in this or any prior judicial proceeding relative to discipline of Defendant. Accordingly, Defendant's argument based on judicial estoppel is meritless.

"Equitable estoppel arises when a party has been induced by another's acts to believe that certain facts exist, and that party rightfully relies and acts upon that belief to his [or her] detriment." *Jordan v. Crew,* 125 N.C. App. 712, 720, 482 S.E.2d 735, 739 (1997) (citation and quotation marks omitted). As noted above, the Ethics Opinions Defendant cites do not address the State Bar's authority to discipline attorneys serving as judges for violations of the Rules, nor is it the purpose of the Ethics Opinion to define the State Bar's statutory disciplinary authority. Accordingly, any purported reliance by Defendant on the cited Ethics Opinions was not rightful or reasonable.

Quasi-estoppel "is directly grounded ... upon a party's acquiescence or acceptance of payment or benefits, by virtue of which that party is thereafter prevented from maintaining a position inconsistent with those acts." *Godley v. Cty. of Pitt,* 306 N.C. 357, 361, 293 S.E.2d 167, 170 (1982) (quoting 31 C.J.S. Estoppel § 107 (1964)). The State Bar has not accepted any benefit from or taken any inconsistent position with respect to discipline of Defendant. Quasi-estoppel is not applicable to Defendant's case.

For the reasons noted above, none of the equitable doctrines Defendant advances to support his MJOP has any application or merit and his MJOP should be denied.

CONCLUSION

Based on the above, the State Bar is not barred from pursuing discipline against the Defendant by *res judicata*, estoppel or any of the other doctrines argued in his motion. Defendant's MJOP should be denied.

Respectfully submitted, this the 27th day of July 2015.

G. Patrick Murphy

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CERTIFICATE OF SERVICE

This is to certify that the foregoing Response to Defendant's Motion For Judgment on the Pleadings was served on counsel for Defendant by depositing it in the United States Mail, postage prepaid to the following address:

Mr. Norman W. Shearin
Mr. David P. Ferrell
Mr. Kevin A. Rust
VANDEVENTER BLACK LLP
Post Office Box 2599
Raleigh, NC 27602-2599

This the 27th day of July 2015.

G. Patrick Murphy
Deputy Counsel
The North Carolina State Bar
P.O. Box 25908
Raleigh, NC 27611

STATE OF NORTH CAROLINA

WAKE COUNTY

BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
15 DHC 7

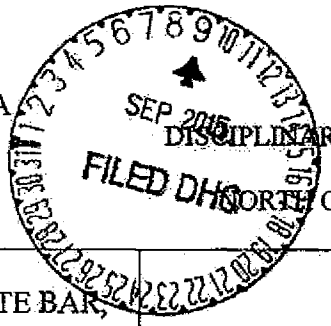
THE NORTH CAROLINA STATE BAR, Plaintiff v. JERRY R. TILLETT, Attorney, Defendant	ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

This matter is before the Hearing Panel of the Disciplinary Hearing Commission composed of Joshua W. Willey, Jr., Chair, Barbara B. Weyher, and Michael S. Edwards on Defendant's Motion for Judgment on the Pleadings pursuant to Rule 12(c) of the N.C. Rules of Civil Procedure. Having fully considered the motion, the response of the State Bar and the pleadings of record, the Hearing Panel is of the opinion that the motion should be denied.

Therefore, it is ORDERED that Defendant's motion is DENIED.

Signed by the Chair with the consent of the other Hearing Panel members, this 18 day of August, 2015.

Joshua W. Willey, Jr., Chair
Disciplinary Hearing Panel



STATE OF NORTH CAROLINA WAKE COUNTY	BEFORE THE DISCIPLINARY HEARING COMMISSION OF THE NORTH CAROLINA STATE BAR 15 DHC 7
THE NORTH CAROLINA STATE BAR, Plaintiff v. JERRY R. TILLETT, Attorney, Defendant	PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, the North Carolina State Bar, pursuant to N.C. Gen. Stat. § 1A-1, Rule 56 of the North Carolina Rules of Civil Procedure, moves for an order of summary judgment giving preclusive effect to the prior Public Reprimand and Order of the North Carolina Judicial Standards Commission in *In re Inquiry Concerning a Judge*, No. 12-013A, Jerry R. Tillett, which, with Defendant's admissions, establish there are no genuine issues of material fact in this case and that Plaintiff is entitled to judgment as a matter of law. A certified copy of the filed Judicial Standards Commission Public Reprimand and Order is attached as Exhibit A.

In support of its motion, Plaintiff respectfully shows as follows:

1. During the period of time relevant to the allegations of the State Bar's complaint, Defendant was a judge of the General Court of Justice, Superior Court Division in Judicial District 1.

2. On March 8, 2013 a Public Reprimand was filed against Defendant at the North Carolina Judicial Standards Commission ("JSC").

3. Defendant signed an acceptance of the JSC Public Reprimand.

4. On March 11, 2013, the JSC filed an order closing its matter against Defendant based upon Defendant's signed acceptance of the JSC Public Reprimand. The order recites that Defendant:

> 1. "Publically accepts and acknowledges specific findings of fact constituting improper judicial conduct that was in violation of Canons 1, 2A, and 3A(3) of the North Carolina Code of Judicial Conduct and acknowledges further that his actions constituted a significant violation of the principles of personal conduct embodied in the North Carolina Code of Judicial Conduct and created a public perception of a conflict of interest that was[sic] the

judiciary into disrepute and threatened public faith and confidence in the integrity and impartiality of the judiciary; and,

2. Publically accepts and pledges to abide by the terms of the corrective actions contained in the public reprimand...."

5. The material factual allegations of the State Bar's Complaint are contained in the allegation of the violation of Rule 8.4(d) of the Rules of Professional Conduct and are established by the findings and conclusions of the JSC set out in the JSC Public Reprimand as well as judicial admissions by Defendant in this case.

6. There are no genuine issues of material fact in this case because the material factual allegations in the State Bar's Complaint are established by the JSC Reprimand and Defendant's admissions.

7. The State Bar's Complaint alleges Defendant violated Rule 8.4(d) of the Rules of Professional Conduct as follows:

> THEREFORE, Plaintiff alleges that Defendant's foregoing actions constitute grounds for discipline pursuant to N.C. Gen. Stat. § 84-28(b)(2) in that Defendant violated the Rules of Professional Conduct in effect at the time of the conduct as follows:
>
> a. Defendant engaged in conduct that was prejudicial to the administration of justice in violation of Rule 8.4(d) as follows:
>
> i. Summoning government officials to an April 15, 2010 meeting in his chambers shortly after Defendant's son was detained by KDH police officers;
>
> ii. During the April 15, 2010 meeting, expressing his anger over the detention of his son by KDH police officers;
>
> iii. During the April 15, 2010 meeting, advising KDH officials at the meeting that he had the power to remove officials from office;
>
> iv. During the April 15, 2010 meeting, telling KDH officials that they needed to address the matters he discussed or he would take care of it for them;
>
> v. Becoming embroiled in the affairs of the KDH police department;

vi. Accepting *ex parte* complaints about KDH police and town officials;

vii. Sending notice to Chief Britt *sua sponte* that Defendant "will act appropriately in accord with statutory and/or inherent authority" regarding complaints he received about Chief Britt when no action was pending before Defendant related to Chief Britt;

viii. Issuing the September 19, 2011 order *sua sponte* without a hearing and without notice to Chief Britt, Murphy or any of the other affected individuals;

ix. Issuing the September 19, 2011 order without any action or petition pending before Defendant;

x. Pressuring Parrish and his assistant to file a petition to remove Chief Britt from office;

xi. Expressing his opinion about the administrative review that was being conducted in association with the League of Municipalities;

xii. Remaining actively and aggressively engaged in the affairs of the KDH police department after purporting to recuse himself;

xiii. Sending notice to Murphy *sua sponte* that Defendant "will act appropriately in accord with statutory and/or inherent authority" regarding complaints he received about Murphy when no action was pending before Defendant related to Murphy;

xiv. Drafting and sending to Judge Fitch a proposed order, and consulting with Judge Fitch about the January 19, 2012 order after purporting to recuse himself from complaints filed against Chief Britt;

xv. During the January 5, 2012 meeting, telling Parrish that there would be repercussions if the removal petition against Chief Britt was not filed;

xvi. During the January 5, 2012 meeting, having a deputy stationed outside Defendant's office door during the meeting to have Parrish arrested; and/or

xvii. During the January 5, 2012 meeting, telling Parrish not to consult with Lamb, and telling Lamb she had a duty to file the removal petition after purporting to recuse himself from complaints filed against Chief Britt.

8. The JSC Reprimand establishes the following facts, listed under the corresponding material fact from the Complaint listed above:

a) Summoning government officials to an April 15, 2010 meeting in his chambers shortly after Defendant's son was detained by KDH police officers;

i. "On April 15, 2010, eleven days after Judge Tillett's adult son was detained by Kill Devil Hills Police, a meeting was arranged between Judge Tillett and officials from the Town of Kill Devil Hills and its police department using Judge Tillett's judicial chambers." Para 2

ii. "Judge Tillett recognizes and admits that his frustration in his dealings with the District Attorney's Office and his embroilment in the affairs of the police department of the Town of Kill Devil Hills is reasonably perceived as coercive and retaliatory, and is conduct prejudicial to the administration of justice." Para 10

b) During the April 15, 2010 meeting, expressing his anger over the detention of his son by KDH police officers;

i. "During this meeting Judge Tillett expressed complaints about his son's detention by the police..." Para 2

ii. "Judge Tillett exhibited a demeanor that was described by the other participants at the meeting as stern, aggressive, agitated, and angry..." Para 2

iii. "Judge Tillett recognizes and admits that his frustration in his dealings with the District Attorney's Office and his embroilment in the affairs of the police department of the Town of Kill Devil Hills is reasonably perceived as coercive and retaliatory, and is conduct prejudicial to the administration of justice." Para 10

c) During the April 15, 2010 meeting, advising KDH officials at the meeting that he had the power to remove officials from office;

i. "The meeting became confrontational and Judge Tillett warned the Town that they needed to take care of these complaints." Para 2

ii. "...several participants felt threatened by Judge Tillett's conduct and by discussion of a superior court judge's ability to remove officials from office." Para 2

iii. "Judge Tillett's overly aggressive conduct displayed toward the District Attorney's office and certain employees of the Town of Kill Devil Hills..." Conclusions, p. 4

d) During the April 15, 2010 meeting, telling KDH officials that they needed to address the matters he discussed or he would take care of it for them;

i. "The meeting became confrontational and Judge Tillett warned the Town that they needed to take care of these complaints." Para 2

ii. "...several participants felt threatened by Judge Tillett's conduct and by discussion of a superior court judge's ability to remove officials from office." Para 2

iii. "Judge Tillett's overly aggressive conduct displayed toward the District Attorney's office and certain employees of the Town of Kill Devil Hills..." Conclusions, p. 4

e) Becoming embroiled in the affairs of the KDH police department;

i. "Throughout the year 2011, Judge Tillett began to receive communications from Kill Devil Hills police officers with grievances against Chief of Police Gary Britt and Assistant Town Manager Shawn Murphy related to personnel issues...Judge Tillett engaged in overly aggressive behavior in addressing these complaints, becoming embroiled in a public feud with these individuals..." Para 3

ii. "Judge Tillett recognizes and admits that his frustration in his dealings with the District Attorney's Office and his embroilment in the affairs of the police department of the Town of Kill Devil Hills is reasonably perceived as coercive and retaliatory, and is conduct prejudicial to the administration of justice." Para 10

f) Accepting *ex parte* complaints about KDH police and town officials;

i. "Throughout the year 2011, Judge Tillett began to receive communications from Kill Devil Hills police officers with grievances against Chief of Police Gary Britt and Assistant Town Manager Shawn Murphy related to personnel issues...Judge Tillett engaged in overly aggressive behavior in addressing these

complaints, becoming embroiled in a public feud with these individuals, and engaged in actions that fell outside of the legitimate exercise of the powers of his office." Para 3

ii. "Based upon the complaints he had received regarding Chief Britt over the course of 2011, but outside of any formal hearing or any court proceeding, Judge Tillett concluded that Chief Britt was guilty of professional malfeasance and argued the Chief's guilt to the District Attorney and members of the District Attorney's staff." Para 4

g) Sending notice to Chief Britt *sua sponte* that Defendant "will act appropriately in accord with statutory and/or inherent authority" regarding complaints he received about Chief Britt when no action was pending before Defendant related to Chief Britt;

i. "Based upon the complaints he had received regarding Chief Britt over the course of 2011, but outside of any formal hearing or any court proceeding, Judge Tillett concluded that Chief Britt was guilty of professional malfeasance and argued the Chief's guilt to the District Attorney and members of the District Attorney's staff." Para 4

ii. "After complaints were received beginning in February, 2011, Judge Tillett, on June 24, 2011, sent a letter to Chief Britt printed on his judicial stationary and signed in his capacity as Senior Resident Superior Court Judge, which stated that he had received 'complaints of professional misconduct' against the Chief of Police, and warned Chief Britt that 'to the extent that allegations involve conduct prejudicial to the administration of justice, conduct violative of public policy, and/or violations of criminal law including obstruction of justice, oppression by official, misconduct in public office and/or substantial offense, this office will act appropriately in accord with statutory and/or inherent authority.'" Para 5

h) Issuing the September 19, 2011 order *sua sponte* without a hearing and without notice to Chief Britt, Murphy or any of the other affected individuals;

i. "On or around September 19, 2011, Judge Tillett, upon his own initiative...drafted and executed an order requiring that copies of the private personnel records of certain employees of the town of Kill Devil Hills, including the Chief of Police and Assistant Town Manager, be copied and brought to him..." Para 6

ii. "Neither the District Attorney's office, nor the town, nor any of the complaining police officers had requested the order." Para 6

iii. "On October 16, 2012, the North Carolina Court of Appeals found that Judge Tillett acted beyond his jurisdiction in issuing this order against the town." Para 6

i) Issuing the September 19, 2011 order without any action or petition pending before Defendant;

i. "On or around September 19, 2011, Judge Tillett, upon his own initiative...drafted and executed an order requiring that copies of the private personnel records of certain employees of the town of Kill Devil Hills, including the Chief of Police and Assistant Town Manager, be copied and brought to him...." Para 6

ii. "Neither the District Attorney's office, nor the town, nor any of the complaining police officers had requested the order." Para 6

iii. "On October 16, 2012, the North Carolina Court of Appeals found that Judge Tillett acted beyond his jurisdiction in issuing this order against the town." Para 6

j) Pressuring Parrish and his assistant to file a petition to remove Chief Britt from office;

i. "Based upon the complaints he had received regarding Chief Britt over the course of 2011, but outside of any formal hearing or any court proceeding, Judge Tillett concluded that Chief Britt was guilty of professional malfeasance and argued the Chief's guilt to the District Attorney and members of the District Attorney's staff." Para 4

ii. "Judge Tillett frequently argued to the District Attorney and members of his staff that it was their duty to file a petition for the removal of Chief Britt..." Para 4

iii. "On January 5, 2012, Judge Tillett met with the District Attorney and a member of the District Attorney's staff in reference to complaints lodged against the District Attorney's office and the office's failure to file a petition against Chief Britt. Judge Tillett requested that a sheriff's deputy be present at the private meeting, which, along with Judge Tillett's critical and aggressive comments, had the effect of intimidating the officials from the District Attorney's office." Para 7

iv. "Judge Tillett recognizes and admits that his frustration in his dealings with the District Attorney's Office and his embroilment in

the affairs of the police department of the Town of Kill Devil Hills is reasonably perceived as coercive and retaliatory, and is conduct prejudicial to the administration of justice." Para 10

v. "Judge Tillett's overly aggressive conduct displayed toward the District Attorney's office and certain employees of the Town of Kill Devil Hills..." Conclusions, p. 4

k) Remaining actively and aggressively engaged in the affairs of the KDH police department after purporting to recuse himself;

i. "Judge Tillett's continued conduct in actions related to complaints about the District Attorney's Office and the Police Department of Kill Devil Hills...following his stated recusal from such matters..." Para 9

ii. "Judge Tillett recognizes and admits that his frustration in his dealings with the District Attorney's Office and his embroilment in the affairs of the police department of the Town of Kill Devil Hills is reasonably perceived as coercive and retaliatory, and is conduct prejudicial to the administration of justice." Para 10

iii. "Judge Tillett's overly aggressive conduct displayed toward the District Attorney's office and certain employees of the Town of Kill Devil Hills..." Conclusions, p. 4

l) Sending notice to Murphy *sua sponte* that Defendant "will act appropriately in accord with statutory and/or inherent authority" regarding complaints he received about Murphy when no action was pending before Defendant related to Murphy;

i. "On January 5, 2012, Judge Tillett sent a letter on his judicial stationary and signed in his capacity as Senior Resident Superior Court Judge, which stated that he had received 'complaints of professional misconduct' against the Assistant Town Manager, and warned Assistant Town Manager Murphy that 'to the extent that allegations involve conduct prejudicial to the administration of justice, conduct violative of public policy, and/or violations of criminal law including obstruction of justice, oppression by official, misconduct in public office and/or substantial offense, this office will act appropriately in accord with statutory and/or inherent authority.'" Para 8

m) Drafting and sending to Judge Fitch a proposed order, and consulting with Judge Fitch about the January 19, 2012 order after purporting to recuse himself from complaints filed against Chief Britt;

i. "Judge Tillett's continued conduct in actions related to complaints about the District Attorney's Office and the Police Department of Kill Devil Hills, including but not limited to his communication with other judges through suggested orders...following his stated recusal from such matters..." Para 9

ii. "Judge Tillett recognizes and admits that his frustration in his dealings with the District Attorney's Office and his embroilment in the affairs of the police department of the Town of Kill Devil Hills is reasonably perceived as coercive and retaliatory, and is conduct prejudicial to the administration of justice." Para 10

n) During the January 5, 2012 meeting, telling Parrish that there would be repercussions if the removal petition against Chief Britt was not filed;

i. "On January 5, 2012, Judge Tillett met with the District Attorney and a member of the District Attorney's staff in reference to complaints lodged against the District Attorney's office and the office's failure to file a petition against Chief Britt. Judge Tillett requested that a sheriff's deputy be present at the private meeting, which, along with Judge Tillett's critical and aggressive comments, had the effect of intimidating the officials from the District Attorney's office." Para 7

ii. "Judge Tillett recognizes and admits that his frustration in his dealings with the District Attorney's Office and his embroilment in the affairs of the police department of the Town of Kill Devil Hills is reasonably perceived as coercive and retaliatory, and is conduct prejudicial to the administration of justice." Para 10

iii. "Judge Tillett's overly aggressive conduct displayed toward the District Attorney's office and certain employees of the Town of Kill Devil Hills..." Conclusions, p. 4

o) During the January 5, 2012 meeting, having a deputy stationed outside Defendant's office door during the meeting to have Parrish arrested;

i. "On January 5, 2012, Judge Tillett met with the District Attorney and a member of the District Attorney's staff in reference to complaints lodged against the District Attorney's office and the office's failure to file a petition against Chief Britt. Judge Tillett requested that a sheriff's deputy be present at the private meeting, which, along with Judge Tillett's critical and aggressive comments, had the effect of intimidating the officials from the District Attorney's office." Para 7

ii. "Judge Tillett recognizes and admits that his frustration in his dealings with the District Attorney's Office and his embroilment in

the affairs of the police department of the Town of Kill Devil Hills is reasonably perceived as coercive and retaliatory, and is conduct prejudicial to the administration of justice." Para 10

iii. "Judge Tillett's overly aggressive conduct displayed toward the District Attorney's office and certain employees of the Town of Kill Devil Hills..." Conclusions, p. 4

p) During the January 5, 2012 meeting, telling Parrish not to consult with Lamb, and telling Lamb she had a duty to file the removal petition after purporting to recuse himself from complaints filed against Chief Britt.

i. "On January 5, 2012, Judge Tillett met with the District Attorney and a member of the District Attorney's staff in reference to complaints lodged against the District Attorney's office and the office's failure to file a petition against Chief Britt. Judge Tillett requested that a sheriff's deputy be present at the private meeting, which, along with Judge Tillett's critical and aggressive comments, had the effect of intimidating the officials from the District Attorney's office." Para 7

ii. "Judge Tillett's continued conduct in actions related to complaints about the District Attorney's Office and the Police Department of Kill Devil Hills...following his stated recusal from such matters..." Para 9

iii. "Judge Tillett recognizes and admits that his frustration in his dealings with the District Attorney's Office and his embroilment in the affairs of the police department of the Town of Kill Devil Hills is reasonably perceived as coercive and retaliatory, and is conduct prejudicial to the administration of justice." Para 10

iv. "Judge Tillett's overly aggressive conduct displayed toward the District Attorney's office and certain employees of the Town of Kill Devil Hills..." Conclusions, p. 4

9. Additionally, Defendant has made the following admissions in this case:

a) Applicable to the allegation in the Complaint that Defendant violated Rule 8.4(d) by "Expressing his opinion about the administrative review that was being conducted in association with the League of Municipalities," Defendant stated the following in his Answer on this topic: "Judge Tillett did repeat [to the District Attorney] a statement made to him by the KDH Town Attorney that this might be like 'the fox guarding the hen house.'" Answer, p. 24.

b) Regarding the allegations generally, Defendant has admitted the identical nature of the conduct at issue in the Complaint in this case with the

conduct at issue before the Judicial Standards Commission when it issued the JSC Reprimand:

i. In his Motion to Dismiss in Lieu of Answer, Defendant stated in paragraph 25: "The State Bar has been informed by Tillett that the conduct alleged in the Complaint has already been the subject of a Judicial Standards Commission inquiry which has been fully and completely resolved." p. 5

ii. In his Motion to Dismiss in Lieu of Answer, Defendant stated in paragraph 29: "The facts alleged in the Complaint, as well as those in the Judicial Standards Commission's Order and complaint, are virtually identical, yet the State Bar is seeking to relitigate these previously decided facts, and impose discipline for the same conduct for which Tillett has already been disciplined." p. 5

iii. In his Motion to Dismiss in Lieu of Answer, Defendant stated in paragraph 46: "The exact same factual allegations of judicial misconduct by Tillett have been finally resolved by the Judicial Standards Commission." p. 8

iv. In his Motion for Judgment on the Pleadings, Defendant stated: "The State Bar's complaint against Judge Tillett raises the same issues and facts that were fully and conclusively litigated before the JSC." p. 2

v. In his Motion for Judgment on the Pleadings, Defendant stated: "The allegations in the State Bar's complaint are substantially similar to those charges of misconduct made in the JSC disciplinary proceeding against Judge Tillett." p. 2

vi. In his Motion for Judgment on the Pleadings, Defendant stated: "there has been a final judgment on the merits and resolution of the issue before the DHC (i.e. whether Judge Tillett acted inappropriately in his judicial capacity so as to prejudice the administration of justice)." p. 2[1]

10. Rule 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law."

[1] In its opposition to Defendant's Motion to Dismiss in Lieu of Answer and the Motion for Judgment on the Pleadings, the State Bar did not disagree with Defendant's position that the first element of the doctrine of *res judicata* and for defensive use of collateral estoppel – to wit: final judgment on the merits in the earlier suit – had been met. Defendant could not establish the remaining elements for either, however, whereas Plaintiff can establish that the elements for offensive use of collateral estoppel are present.

11. An issue is material if it would constitute or would irrevocably establish any material element of a claim or defense. Bone Intern, Inc. v. Brooks, 304 N.C. 371, 375 (1981).

12. The facts established by the JSC Reprimand and Defendant's admissions irrevocably establish the bases set out in the Complaint for finding that Defendant violated Rule 8.4(d) of the Rules of Professional Conduct.

13. The prior findings in the JSC Reprimand and Defendant's admissions should be given preclusive effect in this proceeding, and Defendant estopped from denying or asserting anything to the contrary in this proceeding from what was established in the JSC Reprimand and his prior admissions.

Facts Established by Collateral Estoppel

14. "Broadly speaking, 'estoppel is a bar which precludes a person from denying or asserting anything to the contrary of that which has, in contemplation of law, been established as the truth.'" *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 13 (2004) (quoting 28 Am. Jur. 2d Estoppel and Waiver § 1 (2000)). Estoppel doctrines "reflect a shared and longstanding judicial reluctance to permit the assertion of inconsistent positions before a judicial or administrative tribunal." *Id.* at 14.

15. Collateral estoppel, also known as "estoppel by judgment" or "issue preclusion," "precludes the subsequent adjudication of a previously determined issue, even if the subsequent action is based on an entirely different claim." *Whitacre,* 358 N.C. at 15 (citing *Hales v. North Carolina Ins. Guar. Ass'n,* 337 N.C. 329, 333 (1994)).

16. A defendant's invocation of collateral estoppel to avoid repetitive claims related to an issue previously decided in the defendant's favor is called "defensive" collateral estoppel. Conversely, when a plaintiff attempts to prevent a defendant from relitigating issues it previously litigated, this is referred to as "offensive" use of collateral estoppel. *Tar Landing Villas Owners' Ass'n v. Atlantic Beach,* 64 N.C. App. 239, 244 (1983).

17. The United States Supreme Court held that collateral estoppel can be applied offensively. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 331 (1979).

18. A plaintiff asserting collateral estoppel need not be the same party as, or in privity with, the plaintiff in the prior action. *Id.* This holding as been adopted and applied in North Carolina. *Rymer v. Estate of Sorrells*, 127 N.C. App. 266, 269 (1997) (North Carolina "law allows a non-mutual party to assert offensive collateral estoppel.")

19. Under the doctrine of collateral estoppel, "the determination of an issue in a prior judicial or administrative proceeding precludes the relitigation of that issue in a later action, provided the party against whom the estoppel is asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding." *Whitacre,* 358 N.C. at 15 (citations omitted).

20. The Supreme Court "noted that offensive use of collateral estoppel might be unfair to a defendant if, among other things: (1) the defendant had little incentive to defend vigorously in the first action; (2) the judgment relied upon as the basis for collateral estoppel is inconsistent with previous judgments; and (3) the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result." *Rymer*, 127 N.C. App. at 270 (citing *Parklane Hosiery*, 439 U.S. at 330-31). Accordingly, "the Supreme Court cautioned that non-mutual, offensive collateral estoppel should not be applied where: (1) plaintiff in the second action could have easily joined in the earlier suit; or (2) where the application of offensive estoppel would be unfair to a defendant." *Id.*

21. A number of states have applied non-mutual collateral estoppel in disciplinary proceedings. In analyzing the *Parklane Hosiery* "fairness factors" in the context of attorney disciplinary proceedings, courts have cited the following circumstances in support of the conclusion that applying the doctrine was not unfair to the respondent lawyer:

a) the lawyer had "fair notice that his . . . conduct was prohibited by the Rules of Professional Conduct and therefore the subsequent disciplinary action was foreseeable"[2] (*Office of Disciplinary Counsel v. Kiesewetter*, 889 A.2d 47, 52 (Pa. 2005). *See also Matter of Capoccia*, 272 A.D.2d 838, 846 (N.Y. App. Div. 2000));

b) the disciplinary agency could not have joined in the prior case (*e.g. In re Brauer*, 890 N.E.2d 847, 859 (Mass. 2008)(bar counsel had no standing to join prior civil proceedings); *Goldstone*, 839 N.E.2d 825, 832 (Mass. 2005); *Kiesewetter*, 889 A.2d at 52);

c) the lawyer had incentive and opportunity to defend against the allegations in the prior proceeding (*e.g. Iowa Supreme Court Bd. of Professional Ethics and Conduct v. D.J.I.*, 545 N.W.2d 866, 873 (Iowa 1996); *Capoccia*, 272 A.D.2d at 846; *Brauer*, 890 N.E.2d at 859; *Goldstone*, 839 N.E.2d at 832; *Kiesewetter*, 889 A.2d at 52; *In re Caranchini*, 956 S.W.2d 910, 913 (Mo. 1997));

d) there were no procedural opportunities which were unavailable in the prior action but available in the disciplinary case and were likely to cause a different result (*e.g. D.J.I.*, 545 N.W.2d at 873; *Brauer*, 890 N.E.2d at 859; *Goldstone*, 839 N.E.2d at 833; *Kiesewetter*, 889 A.2d at 52); and

e) the burden of proof in the prior proceeding was the same as, or greater than, the burden in the disciplinary proceeding (*e.g. Bruzga's Case*, 712 A.2d 1078, 1079 (N.H. 1998); *Kiesewetter*, 889 A.2d at 53).

[2] In addition to discussing the foreseeability of disciplinary action, at least one court has also rejected a respondent-lawyer's argument that constitutional protections against double jeopardy prohibit further disciplinary consequences for conduct which already resulted in other sanctions. *Caranchini*, 956 S.W.2d at 914.

When these circumstances exist in a disciplinary case, "even with *cautious* application of the doctrine," courts have concluded that the "use of issue preclusion against the respondent [is] not...unfair." *D.J.I.*, 545 N.W.2d at 873 (emphasis in original).

22. In a case directly analogous to the instant case, the Supreme Court of New York disciplined a lawyer for conduct for which he had already been disciplined by the State Commission on Judicial Conduct. The findings of fact of the State Commission on Judicial Conduct were given preclusive effect in the disciplinary proceeding. *Matter of Intemann*, 165 A.D.2d 974 (N.Y. App. Div. 1990). The court noted "that an attorney may be charged with professional misconduct for the same act or acts for which he has been disciplined as a judge." *Id.* at 975. The factual allegations in the disciplinary complaint "mirror[ed] the findings of fact upon which the Commission on Judicial Conduct's determination of removal was partially based." *Id.* at 974. Because it was "established that the respondent had a full and fair opportunity to contest the Commission's decision," the court granted the plaintiff's motion for an order declaring that no factual issues were raised by the pleadings. *Id.*

23. Likewise, preclusive effect should be given in this case to the facts established in the JSC Reprimand. There is a final judgment on the merits in the JSC matter which contains findings of fact concerning Defendant's conduct and that the conduct was prejudicial to the administration of justice. Both the JSC proceeding and this disciplinary proceeding concern the same conduct of Defendant's and the nature of that conduct as prejudicial to the administration of justice. The findings regarding the conduct of Defendant's set forth in the JSC Reprimand and that it constituted conduct prejudicial to the administration of justice is the matter for which preclusion is sought and was essential to the JSC Reprimand. Defendant had a full and fair opportunity to litigate whether the conduct at issue occurred and whether it constituted conduct prejudicial to the administration of justice in his case before the JSC, although he chose instead to accept a Reprimand.[3] The elements of offensive collateral estoppel are met.

24. Moreover, application of non-mutual offensive collateral estoppel is fair in this case.

a) Defendant was represented by counsel in the proceedings before the JSC. Had he opted to litigate the matter rather than accept the Reprimand, he would have been entitled to subpoena witnesses and documents, to "defend against the charges by the introduction of evidence, examination and cross-examination of witnesses and to address the hearing panel in argument at the conclusion of the disciplinary hearing." Judicial Standards Commission Rule 18. The North Carolina Rules of Evidence applied, and "Commission Counsel [had] the burden of proving the existence of grounds for a recommendation of discipline by clear, cogent and convincing evidence." Judicial Standards Commission Rules 18 and

[3] Resolutions of prior proceedings short of full litigation through trial are entitled to preclusive effect as well. *See e.g. Williams v. City of Jacksonville Police Dep't*, 165 N.C. App. 587, 594 (2004) (preclusive effect given to issues resolved by summary judgment decision). *Accord In re Goldstone*, 839 N.E.2d at 832 (same).

20. The standard of proof in the instant case is the same as the burden in JSC proceedings, and this DHC proceeding does not afford Defendant procedural opportunities unavailable in the prior action that could readily cause a different result.

b) With his status and employment as a judge at stake, Defendant had adequate incentive to defend vigorously against the allegations before the JSC.

c) The State Bar could not have joined in the JSC proceedings against Defendant. Proceedings before the JSC transpire pursuant to N.C. Gen. Stat. § 7A-374.1, § 7A-376, and § 7A-377 solely for the determination of whether a judge has violated the Code of Judicial Conduct and of appropriate action by the JSC and/or Supreme Court pursuant to N.C. Const. Art. IV, Sec. 17(2) and Article 30 of Chapter 7A. The JSC is not a general court of justice holding proceedings in which other plaintiffs can join.

d) The JSC Reprimand is not "inconsistent with any previous judgments in favor of Defendant."

25. Defendant may argue that it is unfair to estop him from contesting the facts found by the JSC in this case because this disciplinary proceeding was not foreseeable, based on his understanding that there has been no other disciplinary proceeding brought by the State Bar against a sitting judge for actions taken as a judge for which the judge has been disciplined by Judicial Standards. However, the case of The North Carolina State Bar v. Badgett took place in 2010, and was the subject of an opinion by the Court of Appeals of North Carolina in 2011 which, although unpublished, is readily available in electronic form on the Court's website. Included in the matters at issue in the Badgett case was conduct undertaken by Mr. Badgett while a judge and in his role as judge for which he had previously been disciplined by the Supreme Court after proceedings before the Judicial Standards Commission. *North Carolina State Bar v. Badgett*, 212 N.C. App. 420 (2011); State Bar v. Badgett, 09 DHC 6 (2010).

26. Moreover, the conduct for which Defendant was disciplined by the JSC was conduct prejudicial to the administration of justice, and it is a violation of Rule 8.4(d) of the Rules of Professional Conduct to engage in conduct prejudicial to the administration of justice. *See Kiesewetter,* 889 A.2d at 52. *See also Capoccia*, 272 A.D.2d at 846.

27. Accordingly, a disciplinary proceeding by the State Bar for the conduct at issue before the JSC was certainly foreseeable. *Accord In re Caranchini*, 956 S.W.2d at 913 (Court rejected the appellant's argument based on lack of notice that the federal court sanctions would result in imposition of state discipline, finding that notice that the federal courts were making factual findings regarding her misconduct was sufficient.)

28. None of the *Parklane Hosiery* "fairness factors" are implicated in this case, and the application of collateral estoppel would not be unfair to Defendant.

29. Permitting Defendant to relitigate facts previously found by clear, cogent, and convincing evidence "would not comport with the judicial goals of finality, efficiency, consistency, and fairness." *Bar Counsel v. Bd. of Overseers*, 647 N.E.2d 1182, 1185 (Mass. 1995) (attorney precluded from relitigating in disciplinary proceeding issues determined against him in federal court). Preclusive effect should be given to the findings in the JSC Reprimand and the factual instances of conduct prejudicial to the administration of justice contained in the rule violation allegation of the State Bar's Complaint as set out above should be deemed established by collateral estoppel.

Facts Established by Admissions

30. Similarly, Defendant is estopped from taking a position inconsistent with prior positions taken in this case. The doctrine of judicial estoppel prevents a party from taking inconsistent positions in the same or related litigation. *Price v. Price*, 169 N.C. App. 187, 191, 609 S.E.2d 450, 452 (2005) (internal quotation and citation omitted).

31. There are three factors typically evaluated in determining whether to apply judicial estoppel in a particular case to prevent a party from taking a position inconsistent with a prior position, although both our Supreme Court and the United States Supreme Court have emphasized that "these three factors 'do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel' and '[a]dditional considerations may inform the doctrine's application in specific factual contexts." *Whitacre*, 358 N.C. at 29 (quoting *New Hampshire v. Maine*, 532 U.S. 742, 751 (2001)).

32. "The first factor, and the only factor that is an essential element which must be present for judicial estoppel to apply, *id.* at 28 n.7, is that a party's subsequent position must be clearly inconsistent with its earlier position. Second, the court should inquire whether the party has succeeded in persuading a court to accept that party's earlier position. Third, the court should inquire whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Wiley v. United Parcel Serv., Inc.*, 164 N.C. App. 183, 188 (2004) (quoting *Whitacre*) (internal quotations omitted).

33. In this case, Defendant has made statements in his Answer and in motions to this tribunal, as recited in paragraph 9 above. Having asserted the statements in his defense and in seeking to benefit by those statements before this tribunal, Defendant should not subsequently be allowed to take a contrary position in this case.

34. Furthermore, pursuant to Rule 56, all admissions on file are pertinent in evaluating whether there is any genuine issue of material fact. Accordingly, the admissions Defendant made in his prior filings in this case are properly considered. His admissions along with the findings in the JSC Reprimand establish there are no genuine issues of material fact in this case.

Summary Judgment

35. The facts of this case are established by the JSC Reprimand and Defendant's judicial admissions. Whether those facts constitute a violation of the Rules of Professional Conduct, however, is a question of law for this Committee. *See, e.g., Capoccia,* 272 A.D.2d at 844 (noting that even where respondent is precluded from litigating whether certain conduct occurred, "[t]he different question of whether such conduct constitutes a violation of the disciplinary rules is an issue of law for this Court"); *Kiesewetter,* 889 A.2d at 53 ("[W]hen the elements of collateral estoppel are satisfied, our Court makes an independent determination as to whether the findings in the previous action constitute professional misconduct and an independent determination as to what sanction is appropriate for such misconduct").

36. The conduct of Defendant's established by the JSC Reprimand was found by the JSC to be conduct prejudicial to the administration of justice in violation of the rules applicable in that forum (the Code of Judicial Conduct). Likewise, the conduct established by the JSC Reprimand along with the additional conduct established by Defendant's admissions should be found by this Hearing Panel to be conduct prejudicial to the administration of justice in violation of the rules applicable in this forum, Rule 8.4(d) of the Rules of Professional Conduct.

37. There is no genuine issue as to any material fact and the State Bar is entitled to judgment as a matter of law in this case. The State Bar asks that summary judgment be granted in its favor pursuant to Rule 56 of the Rules of Civil Procedure.

WHEREFORE, Plaintiff respectfully requests that:

(1) The Hearing Panel enter an order finding that the material facts alleged in the complaint are established by the JSC Reprimand and Defendant's admissions which are given preclusive effect, concluding as a matter of law that Defendant violated Rule 8.4(d) of the Rules of Professional Conduct by engaging in the conduct set out herein, and ordering that the only remaining issue in this case is what discipline, if any, is appropriate;

(2) If a hearing on this motion is necessary, that said hearing be conducted in advance of the currently-scheduled hearing date of 26 October 2015.

This the 9th day of September, 2015.

G. Patrick Murphy

G. Patrick Murphy, Deputy Counsel
State Bar #10443

Jennifer Porter, Deputy Counsel
State Bar #30016

The North Carolina State Bar
P. O. Box 25908
Raleigh, NC 27611
(919) 828-4620
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Plaintiff's Motion for Summary Judgment was served upon Defendant through counsel by depositing a copy thereof into the U.S. Mail in a postage prepaid envelope addressed as follows:

Norman W. Shearin
Vandeventer Black, LLP
PO Box 2599
Raleigh, NC 27602-2599

This the 9th day of September, 2015.

Jennifer A. Porter
Deputy Counsel
North Carolina State Bar
P.O. Box 25908
Raleigh, NC 27611

BEFORE THE

JUDICIAL STANDARDS COMMISSION

INQUIRY NO. 12-013A

PUBLIC REPRIMAND

JERRY R. TILLETT

SUPERIOR COURT JUDGE

Upon its own motion, the Judicial Standards Commission ordered a formal investigation into the conduct of Judge Jerry R. Tillett regarding his interactions with employees and officials of the Town of Kill Devil Hills, including his involvement in orders entered against the town, and regarding his interactions with the District Attorney's office of the 1st Prosecutorial District including pressuring that office to pursue certain legal actions.

The investigation was commenced by the Commission's Investigator on February 16, 2012 and was assisted by the State Bureau of Investigation. Over the next 12 months, the investigators conducted interviews with fifty individuals and collected documentary evidence related to the alleged incidents of judicial misconduct described above. The Commission has completed its review of the investigative report, including information provided by Judge Tillett, and after due deliberation has caused this Public Reprimand to be personally served upon Judge Tillett pursuant to Rule 11(b). In accordance with such Rule, the judge must, within 20 days of the date of service, either accept the Public Reprimand or reject it and demand, in writing, that disciplinary proceedings be instituted in accordance with Rule 12 of the Rules of the Judicial Standards Commission.

Findings of Fact

1. Jerry R. Tillett was at all times referred to herein and is now a judge of the General Court of Justice, Superior Court Division, Judicial District 1, and as such is subject to the Canons of the North Carolina Code of Judicial Conduct, the laws of the State of North Carolina, and the provisions of the oath of office for a superior court judge set forth in the North Carolina General Statutes, Chapter 11.

2. On April 15, 2010, eleven days after Judge Tillett's adult son was detained by Kill Devil Hills Police, a meeting was arranged between Judge Tillett and officials from the Town of Kill Devil Hills and its police department using Judge Tillett's judicial chambers. During this meeting Judge Tillett expressed complaints about his son's detention by the police as part of a series of other complaints about incidents of misconduct involving the Kill Devil Hills Police Department that did not involve his son. The meeting became confrontational and Judge Tillett warned the Town that they needed to take care of these complaints. Judge Tillett exhibited a demeanor that was described by the other participants in the meeting, as stern, aggressive, agitated, and angry, and several participants felt threatened by Judge Tillett's conduct and by discussion of a superior court judge's ability to remove officials from office. Judge Tillett's confrontation with Town officials outside of any legal proceeding, but in his chambers in his capacity as Chief Resident Superior Court Judge, created a reasonable and objective perception of conflict that tainted his subsequent use of the powers of his judicial office in matters adversarial to these officials.

3. Throughout the year 2011, Judge Tillett began to receive communications from Kill Devil Hills police officers with grievances against Chief of Police Gary Britt and Assistant Town Manager Shawn Murphy related to personnel issues. Judge Tillett, during this same period, began to receive complaints about the performance of the District Attorney of the 1st Prosecutorial District. Judge Tillett engaged in overly aggressive behavior in addressing these complaints, becoming embroiled in a public feud with these individuals, and engaged in actions that fell outside of the legitimate exercise of the powers of his office.

4. Based upon the complaints he had received regarding Chief Britt over the course of 2011, but outside of any formal hearing or any court proceeding, Judge Tillett concluded that Chief Britt was guilty of professional malfeasance and argued the Chief's guilt to the District Attorney and members of the District Attorney's staff. Judge Tillett frequently argued to the District Attorney and members of his staff that it was their duty to file a

petition for the removal of Chief Britt, and he was at times assured by the District Attorney and members of his staff that a petition would be filed, before the District Attorney and his staff ultimately concluded that there was insufficient evidence to support such a petition.

5. After complaints were received beginning in February, 2011, Judge Tillett, on June 24, 2011, sent a letter to Chief Britt printed on his judicial stationary and signed in his capacity as Senior Resident Superior Court Judge, which stated that he had received "complaints of professional misconduct" against the Chief of Police, and warned Chief Britt that "to the extent that allegations involve conduct prejudicial to the administration of justice, conduct violative of public policy, and/or violations of criminal law including obstruction of justice, oppression by official, misconduct in public office and/or substantial offense, this office will act appropriately in accord with statutory and/or inherent authority."

6. On or around September 19, 2011, Judge Tillett, upon his own initiative and under the belief that legal action was pending related to complaints of recording tampering in personnel matters by the Kill Devil Hills Police Department, drafted and executed an order requiring that copies of the private personnel records of certain employees of the town of Kill Devil Hills, including the Chief of Police and Assistant Town Manager, be copied and brought to him "for an in camera review, for the protection of integrity of information, to prevent alteration, spoliation, for evidentiary purposes and or for disclosure to other appropriate persons as directed by the Court." Neither the District Attorney's office, nor the town, nor any of the complaining police officers had requested the order, nor did any of the allegations of file tampering concern the Chief of Police's personal personnel file or the Assistant Town Manager's personal personnel file. On October 16, 2012, the North Carolina Court of Appeals found that Judge Tillett acted beyond his jurisdiction in issuing this order against the town.

7. On January 5, 2012, Judge Tillett met with the District Attorney and a member of the District Attorney's staff in reference to complaints lodged against the District Attorney's office and the office's failure to file a petition against Chief Britt. Judge Tillett requested that a sheriff's deputy be present at the private meeting, which, along with Judge Tillett's critical and aggressive comments, had the effect of intimidating the officials from the District Attorney's office.

8. On January 5, 2012, Judge Tillett sent a letter on his judicial stationary and signed in his capacity as Senior Resident Superior Court Judge, which stated that he had received "complaints of professional misconduct" against the Assistant Town Manager, and warned

Assistant Town Manager Murphy that "to the extent that allegations involve conduct prejudicial to the administration of justice, conduct violative of public policy, and/or violations of criminal law including obstruction of justice, oppression by official, misconduct in public office and/or substantial offense, this office will act appropriately in accord with statutory and/or inherent authority."

9. Judge Tillett's continued conduct in actions related to complaints about the District Attorney's Office and the Police Department of Kill Devil Hills, including but not limited to his communication with other judges through suggested orders, and his appellate filings in defense of such suggested orders, following his stated recusal from such matters, has created a public perception of a conflict of interest which threatens the public's faith and confidence in the integrity and impartiality of Judge Tillett's actions in these matters.

10. Judge Tillett recognizes and admits that his frustration in his dealings with the District Attorney's Office and his embroilment in the affairs of the police department of the Town of Kill Devil Hills is reasonably perceived as coercive and retaliatory, and is conduct prejudicial to the administration of justice. Judge Tillett has expressed his regret for his conduct and assured the Commission that he will exercise caution and restraint in the future.

Conclusions

The above-referenced actions by Judge Tillett constitute a significant violation of the principles of personal conduct embodied in the North Carolina Code of Judicial Conduct actions in violation of Canon 1, Canon 2A, and Canon 3A(3). Judge Tillett's overly aggressive conduct displayed toward the District Attorney's office and certain employees of the Town of Kill Devil Hills, and his misuse of the powers of his judicial office in connection thereto, resulted in the public perception of a conflict of interest between Judge Tillett and the District Attorney's office and the town of Kill Devil Hills, which brought the judiciary into disrepute and threatened public faith and confidence in the integrity and impartiality of the judiciary.

Corrective Action and Acceptance of Terms

1. Judge Tillett will not participate in any hearing or legal proceeding, nor communicate his opinion or any pertinent facts to any judicial official unless compelled to by subpoena, concerning any petition to remove the District Attorney of the First Judicial District and will recuse himself from all proceedings thereon;

2. Judge Tillett will not participate in any hearing or legal proceeding, nor communicate his opinion or any pertinent facts to any judicial official unless compelled to by subpoena, concerning any petition to remove the Chief of Police of Kill Devil Hills, any officer of the Kill Devil Hills Police Department or town official of the Town of Kill Devil Hills and will recuse himself from all proceedings thereon;

3. Judge Tillett will not participate in any hearing or legal proceeding, nor communicate his opinion or any pertinent facts to any judicial official unless compelled to by subpoena, specifically concerning personnel matters or professional grievances related to the Police Department of the Town of Kill Devil Hills and will recuse himself from all proceedings thereon;

4. Judge Tillett agrees that he will not repeat such conduct in the future, mindful of the potential threat any repetition of his conduct poses to public confidence in the integrity and impartiality of the judiciary and to the administration of justice;

5. Judge Tillett further agrees that he will not retaliate against any person known or suspected to have cooperated with the Commission, or otherwise associated with this matter;

6. Judge Tillett acknowledges that the Commission has caused a copy of this Public Reprimand to be served upon him, and that he had 20 days within which to accept the Public Reprimand or to reject it and demand, in writing, that disciplinary proceedings be instituted in accordance with Rule 12 of the Rules of the Judicial Standards Commission; and

7. Judge Tillett affirms he has consulted with, or had the opportunity to consult with, counsel prior to acceptance of this Public Reprimand.

I, Jerry R. Tillett, hereby accept the terms contained in this Public Reprimand this the 6th day of March, 2013.

Jerry R. Tillett

ORDER OF PUBLIC REPRIMAND

Now therefore, pursuant to the Constitution of North Carolina, Article IV, Section 17, the procedures prescribed by the North Carolina General Assembly in the North Carolina General Statutes, Chapter 7A, Article 30, and Rule 11(b) of the Rules of the Judicial Standards Commission, the North Carolina Judicial Standards Commission hereby orders that Jerry R. Tillett, be and is hereby PUBLICLY REPRIMANDED for the above set forth violations of the Code of Judicial Conduct. Judge Tillett shall not engage in such conduct in the future and shall fulfill all of the terms of this Public Reprimand, including those of the Corrective Action plan, as set forth herein.

Dated this the 6th day of March, 2013.

John C. Martin, Chairman
Judicial Standards Commission

CERTIFICATE OF TRUE COPY

The undersigned hereby certifies that the attached six (6) sheets are a true copy of the Judicial Standards Commissions Public Reprimand filed on March 8, 2013, in the matter of: Inquiry No. 12-013A, Jerry R. Tillett, Superior Court Judge.

This the 28th day of July, 2015.

J. Christopher Heagarty
Executive Director
Judicial Standards Commission

BEFORE THE JUDICIAL STANDARDS COMMISSION
STATE OF NORTH CAROLINA

IN RE: INQUIRY CONCERNING A JUDGE NO. 12-013A Jerry R. Tillett - Respondent	)	ORDER

Now therefore, pursuant to the Constitution of North Carolina, Article IV, Section 17, the procedures prescribed by the North Carolina General Assembly in the North Carolina General Statutes, Chapter 7A, Article 30, and Rule 11(b) of the Judicial Standards Commission, the North Carolina Judicial Standards Commission hereby ORDERS that:

Based upon the signed acceptance by Respondent Jerry R. Tillett, of a PUBLIC REPRIMAND, signed upon March 6, 2013 and received by the Commission on March 8, 2013, in which Respondent:

1. Publically accepts and acknowledges specific findings of fact constituting improper judicial conduct that was in violation of Canons 1, 2A, and 3A(3) of the North Carolina Code of Judicial Conduct, and acknowledges further that his actions constituted a significant violation of the principles of personal conduct embodied in the North Carolina Code of Judicial Conduct and created a public perception of a conflict of interest that was brought the judiciary into disrepute and threatened public faith and confidence in the integrity and impartiality of the judiciary; and,

2. Publically accepts and pledges to abide by the terms of the corrective actions contained within the public reprimand, which include, but are not limited to, prohibitions against participation in any hearing or legal proceeding, or communication of his opinion or any pertinent facts to any judicial official unless compelled to by subpoena, concerning any petition to remove the District Attorney of the 1st Judicial District, concerning any petition to remove the Chief of Police of the Kill Devil Hills, any officer of the Kill Devil Hills Police Department, or any town official of Kill Devil Hills, or concerning any matter specific to personnel matters or professional grievances related to the Town of Kill Devil Hills;

the Commission shall close the matter addressed in the Statement of Charges in INQUIRY CONCERNING A JUDGE NO. 12-013A and WITHDRAW the statement of charges. Any failure on behalf of the Respondent to comply with the terms and conditions of the Public Reprimand Order accepted by the Respondent on March 6, 2013 shall result in further disciplinary action by the Commission.

Approved and ordered to be filed.

This the 11th day of March, 2013.

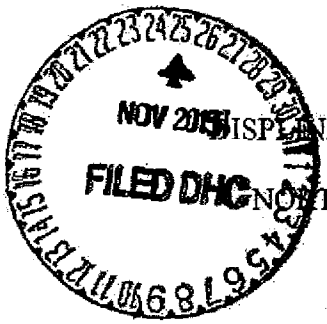
John C. Martin
Chief Judge, N.C. Court of Appeals
Chairman, N.C. Judicial Standards Commission

CERTIFICATE OF TRUE COPY

The undersigned hereby certifies that the attached two (2) sheets are a true copy of the Judicial Standards Commissions Order filed on March 11, 2013, in the matter of: Inquiry No. 12-013A, Jerry R. Tillett, Superior Court Judge.

This the 8th day of September, 2015.

J. Christopher Heagarty
Executive Director
Judicial Standards Commission



STATE OF NORTH CAROLINA

WAKE COUNTY

BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
15 DHC 7

THE NORTH CAROLINA STATE BAR,

Plaintiff,

v.

JERRY R. TILLETT,

Defendant.

MOTION AND MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT

NOW COMES, Defendant, Jerry R. Tillett ("Judge Tillett"), by and through counsel, and moves the Disciplinary Hearing Commission ("DHC") pursuant to Rule 56 of the Rules of Civil Procedure for an order granting Summary Judgment in his favor against the Plaintiff, The North Carolina State Bar, on the grounds that there is no genuine issue as to any material fact as shown by the pleadings, discovery responses, and movant is entitled to judgment as a matter of law. All materials previously filed herein are incorporated by reference. Judge Tillett shows as follows unto the Hearing Panel of the DHC in support thereof:

I. THE COMPANION DOCTRINES OF *RES JUDICATA* AND COLLATERAL ESTOPPEL BAR THE STATE BAR'S PROSECUTION OF JUDGE TILLETT.

Res judicata and collateral estoppel are closely related doctrines. Whitacre P'ship v. Biosignia, Inc., 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004). The doctrines apply to administrative decisions like those of the Judicial Standards Commission ("JSC") and DHC. See, e.g., Maines v. City of Greensboro, 300 N.C. 126, 133, 265 S.E.2d 155, 160 (1980).

Under *res judicata*, "a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies." Whitacre, 358 N.C. at 15, 591 S.E.2d at 880. Collateral estoppel differs slightly, in that "the determination of an issue in a prior judicial or administrative proceeding precludes relitigation of that issue in a later action[.]" Id. The defensive use of *res judicata* and/or collateral estoppel bar the State Bar's action. Both parties agree that collateral estoppel applies to this case. The parties disagree, however, as to the necessary elements of collateral estoppel for the offensive and defensive use of the doctrine. This memorandum will address the privity issue in some detail, but regardless as to whether privity is required for the defensive use of collateral estoppel, the JSC and State Bar are in privity.

Before turning to the issue of privity, there should be no dispute that there is a final judgment and/or final determination of an issue in a prior administrative proceeding. As such, the first element of *res judicata* and collateral estoppel have been established.

A. The same or substantially same issues are raised in the State Bar's complaint that have already been conclusively addressed by the JSC.

Because the same or substantially same issues that are raised in the State Bar's complaint have already been conclusively adjudicated by the JSC, the first element of collateral estoppel and/or *res judicata* has been established by Judge Tillett.

As noted above, under *res judicata*, a final judgment on the merits precludes a second action based upon same cause of action[.] Whitacre, 358 N.C. at 15, 591 S.E.2d at 880. Collateral estoppel holds that "the determination of an issue in a prior judicial or administrative proceeding precludes the relitigation of that issue in a later action[.]" Id.

Importantly for this case, "[w]hereas res judicata estops a party or its privy from bringing a subsequent action based on the 'same claim' as that litigated in an earlier action, collateral

estoppel precludes the subsequent adjudication of a previously determined issue, even if the subsequent action is based on an entirely different claim. Id. (emphasis supplied). As such, relitigation of "even . . . unrelated causes of action" are prohibited by the doctrine of collateral estoppel. King v. Grindstaff, 284 N.C. 348, 356, 200 S.E.2d 799, 805 (1973).

Thus, the State Bar's argument that it is pursuing a different claim under Chapter 84 than what was addressed under Chapter 7A by the JSC misses the mark, as both the JSC and State Bar matter are seeking to address the same issue – whether Judge Tillett's conduct was prejudicial to the administration of justice.

As to the primary issue on this element under both doctrines, whether the same or substantially same issues have been raised, there is no dispute. The allegations in the State Bar's complaint are substantially similar to those charges of misconduct made in the JSC disciplinary proceeding against Judge Tillett. The State Bar's pleadings show that the alleged improper behavior was conduct of a judge. No new or continuing conduct is alleged by the State Bar. The JSC's Order of Public Reprimand fully resolved the JSC disciplinary proceeding. As a result, there has been a final judgment on the merits and resolution of the issue before the DHC (i.e., whether the conduct prejudiced the administration of justice). The State Bar so concedes in its motion for summary judgment. As such, the harm sought to be redressed by the State Bar, conduct prejudicial to the administration of justice, has already been conclusively adjudicated by the JSC. The State Bar cites no authority that the meaning of "conduct prejudicial to the administration of justice" is different under Chapter 84 than Chapter 7A.

Accordingly, because the final judgment of the JSC has already conclusively adjudicated the same issues raised by the State Bar in this proceeding, the elements of the doctrines of collateral estoppel and/or *res judicata* are satisfied.

B. The JSC and State Bar are in privity for purposes of the application of *res judicata* and/or collateral estoppel.

Although neither the State Bar nor Judge Tillett contend that privity is required to apply the doctrine of collateral estoppel to this case, the issue is not settled.[1]

Case law as to whether "mutuality of parties" or "privity" is required to apply the doctrine of collateral estoppel is scattered. The State Bar contends that privity is not required for the offensive use of collateral estoppel. (Pl Mot. Sj., pg. 12, ¶ 18). The State Bar cites Rymer v. Estate of Sorrells By & Through Sorrells, 127 N.C. App. 266, 488 S.E.2d 838 (1997) for this proposition. The Rymer Court, however, actually "recogni[zed] the modern trend and conclude[s] that mutuality of parties is no longer required when invoking either offensive or defensive collateral estoppel." Id. (emphasis supplied). The State Bar itself has recently and successfully argued to the Court of Appeals that privity is not required for either the offensive or defensive use of collateral estoppel. See N. Carolina State Bar v. Gilbert, ___ N.C. App. ___, 772 S.E.2d 875 (unpublished, filed 5 May 2015) (available at 2015 WL 2061988).

In Gilbert, the State Bar argued the following in its brief to the Court of Appeals:

> **307 S.E.2d 181 (1983). A plaintiff asserting collateral estoppel need not be in privity with the plaintiff in the prior action, as North Carolina law no longer requires mutuality of parties for invocation of collateral estoppel, whether offensive or defensive. *Rymer v. Estate of Sorrells*, 127 N.C. App. 266, 269, 488 S.E.2d 838, 840 (1997).**

Br. of State Bar. Pg. 17.

[1] Privity appears to still be required for *res judicata*.

The Court of Appeals adopted the State Bar's argument nearly verbatim, and held that: "North Carolina law does not require mutuality of parties for invocation of collateral estoppel, whether offensive or defensive[.]" Id. at *5 (emphasis supplied). Despite this clear statement of law, the State Bar has continually argued in this case that Judge Tillett must establish privity between the State Bar and JSC for the doctrine of collateral estoppel to apply.[2]

Importantly, the Supreme Court has explicitly held that mutuality of parties is required for offensive use of collateral estoppel, while it is not required for the defensive use of the doctrine. Sawyers v. Farm Bureau Ins. of N.C., Inc., 170 N.C. App. 17, 30-31, 612 S.E.2d 184, 193-94 (Steelman, J. dissenting) ("However, the mutuality requirement still applies when collateral estoppel is used offensively and for all applications of *res judicata*."), rev'd per curiam for reasons stated in dissent, 360 N.C. 158, 622 S.E.2d 490 (2005). Due to the lack of privity in Sawyers, the Supreme Court rejected the use of offensive collateral estoppel. As such, it is the State Bar's motion for summary judgment that must be denied under the Supreme Court's mandate in Sawyers.

Regardless as to how the DHC resolves the issue of privity, the State Bar and JSC are in privity such that the doctrine of *res judicata* and/or collateral estoppel apply to bar the State Bar's action against Judge Tillett.

The State Bar Council, which elects four (4) members to serve on the JSC, makes up the "government" of the State Bar. N.C. Gen. Stat. § 84-17. The State Bar's elected representatives participate in the JSC deliberations. The State Bar's four (4) elected members actually sat in

[2] The Court of Appeals has recently acknowledged that after the Rymer decision "our Supreme Court has since defined the doctrine of collateral estoppel using the traditional definition, providing a lengthy analysis of the mutuality element." In re K.A., ___ N.C. App. ___, ___, 756 S.E.2d 837, 842 (2014). Later in 2014, the Court of Appeals again recognized that there has "been some confusion in recent years over whether the 'mutuality of parties' and privity is still required or not." Propst v. N. Carolina Dep't of Health & Human Servs., ___ N.C. App. ___, ___, 758 S.E.2d 892, 895, n.1 (2014).

judgment of Judge Tillett in the JSC proceeding. Such participation, standing alone, is sufficient to establish privity. Further, our Supreme Court has held that the State and one of its agencies are in privity for purposes of collateral estoppel. State By & Through New Bern Child Support Agency ex rel. Lewis v. Lewis, 311 N.C. 727, 733, 319 S.E.2d 145, 149-50 (1984). In that case, the State had criminally prosecuted a parent for non-support. Id. Five (5) years later, the New Bern Child Support Agency brought a civil action for support against the same parent. Id. The defendant attempted to dispute paternity. The Court held that the parent was estopped, as that issue was determined in the prior criminal prosecution. Id.

Res judicata effect has also been given to a decision by a city's police department to discipline one of its police officers. Matter of Mitchell, 88 N.C. App. 602, 604, 364 S.E.2d 177, 179 (1988) (City's civil service board punished a police officer for the same conduct for which he had already been punished by the City's police department.) The Court of Appeals held that the punishment by the civil service board "is invalid on the grounds of *res judicata*[.]" Id. Significantly, the Court reasoned that, "[i]n our jurisprudence it is axiomatic that no one ought to be twice vexed for the same cause." Id. (emphasis supplied). In that case, the city's civil service board purported to apply a different set of standards to the police officer, much like the State Bar is contending now, yet the Court still held that the second attempt at discipline was barred by *res judicata*.

The JSC is an agency of the State. In re Nowell, 293 N.C. 235, 244, 237 S.E.2d 246, 252 (1977) (holding that the JSC "is an administrative agency created as an arm of the court"). The State Bar is likewise an agency of the State. N.C. Gen. Stat. § 84-15. As State agencies, the JSC and the State Bar are in privity. Tillett has already been disciplined by the State's JSC for the same conduct that the State's DHC seeks to punish him. *Res judiciata* and collateral estoppel therefore

apply, and Judge Tillett "ought [not] be twice vexed for the same cause." Accordingly, assuming that privity is a necessary element of *res judicata* and/or collateral estppel, Judge Tillett has sufficiently established that privity exits between the JSC and the State Bar.

In the alternative, the Public Reprimand issued by the JSC also has preclusive effect as to any discipline which the DHC may order, as the doctrine of collateral estoppel applies not just to factual issues, but legal issues as well. It is well-settled that "[w]here the doctrine is applicable, a court will be precluded from issuing findings of fact and conclusions of law contrary to the previous disposition." Simms v. Simms, 195 N.C. App. 780, 782, 673 S.E.2d 753, 755 (2009) (emphasis supplied). Our Supreme Court, for example, has affirmed "the Court of Appeals' holding that the State was collaterally estopped from relitigating the issue of willful refusal when the prior court had determined as a matter of law that a refusal, in fact, did not exist." State v. Summers, 351 N.C. 620, 626, 528 S.E.2d 17, 22 (2000) (emphasis supplied). Thus, the State Bar is bound not just by the JSC's factual findings, but by the legal conclusions and punishment imposed by the JSC. The JSC imposed a Public Reprimand against Judge Tillett for the conduct subject to this action. A public reprimand applies only to **minor** violations of the applicable rules. N.C. Gen. Stat. § 7A-374.2. The DHC is only allowed by statute to issue an "admonition" for a minor violation of the applicable rules. N.C. Gen. Stat. § 84-28(c)(5). Thus, in the alternative, if the DHC is to grant summary judgment in favor of the State Bar on collateral estoppel, the State Bar must also be bound by the JSC's disposition – a finding of minor conduct – and only an admonition may be imposed upon Judge Tillett.

As discussed above, however, because the State Bar and JSC are in privity, the doctrines of collateral estoppel and/or *res judicata* bar the entirety of the State Bar's action against Judge Tillett. The DHC should therefore grant Judge Tillett's motion for summary judgment.

II. THE STATE BAR'S ACTION AGAINST JUDGE TILLETT SHOULD BE DISMISSED BASED UPON APPLICATION OF THE OVERLAPPING DOCTRINES OF EQUITABLE ESTOPPEL, QUASI-ESTOPPEL AND JUDICIAL ESTOPPEL.

The State Bar has clearly articulated its position on two (2) separate occasions that it does not have jurisdiction over conduct of a judge. As such, the State Bar's present action is barred by the doctrine of equitable estoppel.

Equitable estoppel applies "when any one, by his acts, representations, or admissions . . . intentionally or through culpable negligence induces another to believe a certain fact exists, and such other rightfully relies and acts on such believe, so that he will be prejudiced" as a result of the reliance. Whitacre, 358 N.C. at 17, 591 S.E.2d at 881. Mutuality of parties is required for the application of equitable estoppel. Id. As set forth above, the State Bar and JSC are in privity with one another, satisfying this element.

The State Bar's Ethics Opinions as to the scope of its own authority over the judiciary are clearly inconsistent with the position it has taken herein. As recently as 2013, the State Bar opined that: "Opinion on the professional conduct of judicial officers is outside the purview of the Ethics Committee." 2013 Formal Ethics Opinion 6 (emphasis supplied). The State Bar stated that "no opinion will be offered in response" to whether a judge "violate[d] the [State Bar's] Rules of Professional Conduct or the Code of Judicial Conduct[.]" 2013 Formal Ethics Opinion 6. Further, in RPC 208 (filed July 21, 1995), the State Bar opined that: "Judges are subject to the Code of Judicial Conduct and the regulation of the Judicial Standards Commission. Therefore, no opinion is expressed as to the ethical duty of a judge in this situation." RPC 208 (emphasis supplied). The State Bar's own website states that "Complaints about North Carolina judges go to the NC Judicial Standards Commission[.]" See http://www.ncbar.gov/public/intro.asp (last visited, November 29, 2015). Judge Tillett relied upon the State Bar's stated position that judges are subject to discipline

by the JSC in accepting the Public Reprimand. Those circumstances give rise to the application of the doctrine of equitable estoppel. Therefore the doctrine of equitable estoppel requires the dismissal of the Complaint.

The doctrine of quasi-estoppel applies in that the State Bar is not now permitted to ignore the Order of Public Reprimand issued by the JSC and the benefit derived by the public from the Public Reprimand. Whitacre, 358 N.C. at 18, 591 S.E.2d at 881-82.

So does the doctrine of judicial estoppel to protect the integrity of the proceedings before the DHC. Id. at 17, 291 S.E2d at 881. This is especially true here, where the State Bar has recently taken inconsistent positions before the Court of Appeals from what it is now arguing to this tribunal (and to the Court of Appeals). The State Bar offers no explanation for these inconsistencies, and has failed to disclose the same to the DHC. Although the Court in Whitacre stated that judicial estoppel, which does not require mutuality of parties, does not apply to inconsistent legal positions, a subsequent holding by the Court of Appeals actually applying the doctrine is to the opposite. The Court of Appeals specifically held that "[j]udicial estoppel forbids a party from asserting a legal position inconsistent with one taken earlier in the same or related litigation. The doctrine prevents the use of 'intentional self-contradiction . . . as a means of obtaining unfair advantage in a forum provided for suitors seeking justice.'" Price v. Price, 169 N.C. App. 187, 191, 609 S.E.2d 450, 452 (2005). The State Bar's position on the privity requirement for collateral estoppel in January of 2015, as articulated in its brief in Gilbert, is the same as Judge Tillett's today. The State Bar, however, has now taken the exact opposite position in this litigation. (Pl Mot. Sj., pg. 12, ¶ 18). This is the type of conduct that the doctrine of judicial estoppel should prevent.

These doctrines bar the prosecution of the charges alleged against Tillett. The State Bar is therefore estopped to prosecute Judge Tillett.

III. THE STATE BAR DOES NOT HAVE JURISDICTION TO DISCIPLINE JUDGE TILLETT

The State Bar "derive[s] its jurisdiction by legislative act[.]" 27 NCAC 01B .0102(3). The statutory authority for the State Bar to discipline attorneys is set forth in N.C. Gen. Stat. § 84-23. See 27 NCAC 01b .0104 (setting forth the powers and duties of the State Bar). The statutory scheme provides no express authority to discipline conduct of a judge. There is no appellate case law that holds that the State Bar has jurisdiction to discipline a sitting judge.

Instead, the relevant statutory language grants the sole and exclusive jurisdiction to the JSC and the Supreme Court. Specially, Chapter 7A provides that "[t]he procedure for discipline of any judge or justice of the General Court of Justice shall be in accordance with this Article." N.C. Gen. Stat § 7A-375.1 (emphasis supplied).

The State Bar's complaint concedes that Judge Tillett's conduct was that "of [a] judge[.]" As such, the procedure for his discipline "shall" be in accordance with Article 30 of Chapter 7A. Supreme Court authority is consistent with this interpretation, ruling that "we are of the opinion that ratification of the [Constitutional] amendment carried with it an expression of the will of the people that the Constitution be amended so as to empower the Legislature to confer upon [the Supreme] Court original jurisdiction over the censure and removal of judges." In re Martin, 295 N.C. 291, 299-300, 245 S.E.2d 766, 771-72 (1978).

As the State Bar's own rules recognize, judicial misconduct is to be reported to and governed by the Judicial Standards Commission, not the State Bar. See 27 NCAC 02 Rule 8.3 (when a judge violates "applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office [an attorney] shall inform the North Carolina Judicial Standards Commission[.]" (emphasis supplied). Final authority to discipline judges lies solely with the

Supreme Court. In re Hayes, 356 N.C. 389, 398, 584 S.E.2d 260, 266 (2002). If the DHC lacks the authority to remove a sitting judge or justice of the General Court of Justice, it strains logic to conclude that it would have jurisdiction to discipline a judge or justice just so long as it did not impose the discipline of active suspension or disbarment.

Therefore, the State Bar is not statutorily authorized to impose discipline against a sitting judge for the conduct of such a judge. Indeed, any adverse action taken by the DHC with respect to Judge Tillett's law license would violate the separation of powers clause, as the Constitution specifically provides for the procedure by which a judge or justice is to be disciplined, and the State Bar is not part of that process.

IV. THE STATE BAR'S ACTION IS AN IMPERMISSIBLE COLLATERAL ATTACK ON THE JSC'S DISCIPLINARY PROCEEDING.

The State Bar's present action is an impermissible collateral attack on the JSC's previously determined disciplinary proceeding.

Collateral attacks on final judgments are not permitted in North Carolina. Clayton v. N. Carolina State Bar, 168 N.C. App. 717, 719, 608 S.E.2d 821, 822 (2005). A collateral attack is "one in which a plaintiff is not entitled to the relief demanded in the complaint unless the judgment in another action is adjudicated invalid." Id. (quotations omitted). A collateral attack is "an attempt to avoid, defeat, or evade it, or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking it." Id. (quotations omitted) (emphasis supplied).

The JSC's public reprimand is a final judgment. Id. "[A] final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court". The State Bar, however, is seeking to avoid, defeat, or evade the JSC's public

reprimand by pursuing his removal from the judiciary through either an active suspension or disbarment.[3] The State Bar is not authorized by law to attack the JSC's Order of Public Reprimand. As such, the State Bar's prosecution of Judge Tillett is an improper collateral attack. Judge Tillett is therefore entitled to judgement as a matter of law.

CONCLUSION

Nearly two (2) years after the JSC issued its Public Reprimand, the State Bar filed a complaint against Judge Tillett based on the same conduct which resulted in the JSC's Public Reprimand. The JSC is comprised, *inter alia,* of four (4) members of the State Bar elected by the State Bar Council. Both the JSC and the State Bar are agents of the State. The same facts and legal issues alleged in the State Bar's complaint have already been fully adjudicated by the JSC's issuance of a Public Reprimand, and its conclusion that Judge Tillett's conduct was minor. So has the discipline of Judge Tillett. Accordingly, the disciplinary action by the State Bar is barred by the doctrines of *res judicata* and/or estoppel; the State Bar is otherwise estopped; the State Bar lacks jurisdiction; and the State Bar may not collaterally attack the final judgment of the JSC.

The DHC should therefore grant Judge Tillett's motion for summary judgment and dismiss this case with prejudice.

Respectfully submitted, this the 25th day of November, 2015.

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Norman W. Shearin
N.C. State Bar No.: 3096
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[3] The undersigned does not waive any argument with respect to whether an active suspension or disbarment would result in the State Bar's desired result.

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CERTIFICATE OF SERVICE

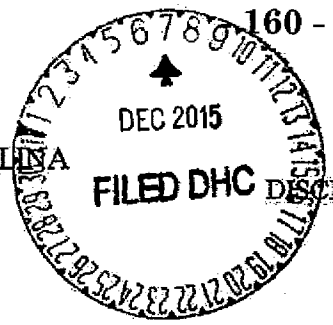
This is to certify that the undersigned has this date served a copy of the foregoing **MOTION FOR SUMMARY JUDGMENT** upon the parties by depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service, addressed as follows:

G. Patrick Murphy
Jennifer A. Porter
The North Carolina State Bar
217 East Edenton Street
Raleigh, NC 27611
Attorney for Plaintiff

This the 25th day of November, 2015.

David P. Ferrell

4833-0668-5992, v. 2



STATE OF NORTH CAROLINA

WAKE COUNTY

BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
15 DHC 7

THE NORTH CAROLINA STATE BAR, Plaintiff v. JERRY R. TILLETT, Attorney, Defendant	PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF LAW

NOW COMES, the North Carolina State Bar ("State Bar"), by and through Deputy Counsel G. Patrick Murphy and Jennifer A. Porter, responding to Defendant's Motion for Summary Judgment filed on November 25, 2015. In support of its request that Defendant's motion be denied and that summary judgment be granted for Plaintiff, Plaintiff states as follows:

1. In order for a defendant to be entitled to summary judgment, the defendant must show "that the claimant cannot prove the existence of an essential element of his claim, *Best v. Perry*, 41 N.C. App. 107, 254 S.E.2d 281 (1979), or cannot surmount an affirmative defense which would bar the claim." *Dickens v. Puryear*, 302 N.C. 437, 453, 276 S.E.2d 325, 335 (1981).
2. In his motion, Defendant has not asserted that Plaintiff cannot prove the existence of an essential element of the State Bar's claims. Instead, Defendant argues that various defenses bar Plaintiff's claims, to wit: *res judicata*; collateral estoppel; equitable estoppel; quasi-estoppel; judicial estoppel; lack of subject matter jurisdiction; and impermissible collateral attack. However, he has not, and cannot, show that Plaintiff

cannot surmount those affirmative defenses. Plaintiff will address each affirmative defense in the order listed above, and then will address two items regarding offensive use of collateral estoppel at the end.

Res judicata

3. Defendant claims the reprimand issued to Defendant by the Judicial Standards Commission (JSC) for his violation of the Code of Judicial Conduct bars the State Bar under the doctrine of *res judicata* from proceeding with its allegations before the DHC that Defendant violated the North Carolina State Bar Rules of Professional Conduct, based upon the same underlying conduct.

4. Under the doctrine of *res judicata,* a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privities. *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004). For Defendant to establish that Plaintiff's claim is barred by *res judicata,* Defendant "must show (1) a final judgment on the merits in an earlier suit, (2) an identity of the cause of action in both the earlier and the later suit, and (3) identity of parties or their privities in the two suits." *Gregory v. Penland,* 179 N.C. App. 505, 510, 634 S.E.2d 625, 629 (2006) (internal quotation and citation omitted). Defendant has failed to meet the second and third requirements for *res judicata.*

5. The cause of action in the JSC action was the alleged violations of the Code of Judicial Conduct. The cause of action in the DHC case is the alleged violations of the Rules of Professional Conduct. These claims are distinct, involving the application of two different sets of standards, and therefore there is no identity of cause of action.

6. Defendant cites *Matter of Mitchell,* 88 N.C. App. 602, 364 S.E.2d 177 (1988) to support his *res judicata* claim, noting the Court's reasoning that, "[i]n our jurisprudence it is axiomatic that no one ought to be twice vexed for the same cause." *Id.*, 88 N.C. App. at 604, 364 S.E.2d at 179. While that policy statement is sound, the facts of *Mitchell* are distinguishable and the case does not support finding the elements for application of *res judicata* are met in this case. In *Mitchell*, a police officer faced two separate disciplinary proceedings and was twice suspended for violating the same departmental residency requirement in the police department's Rules of Conduct based on the same facts. In contrast, the State Bar's case against Defendant alleges a violation of the Rules of Professional Conduct while the JSC discipline was for a violation of the Code of Judicial Conduct. The State Bar's case involves a separate, distinct legal cause of action from that which was before the JSC. Accordingly, Defendant is not being twice vexed for the same cause of action, and the doctrine of *res judicata* does not apply.

7. Furthermore, the JSC proceeding and the DHC case do not involve the same parties or their privities. Defendant does not allege that the two actions involve the same parties, but rather that the State Bar is in privity with the JSC. "The prevailing definition that has emerged from our cases is that 'privity' for purposes of *res judicata* and collateral estoppel 'denotes a mutual or successive relationship to the same rights of property.'" *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 416-17, 474 S.E.2d 127, 130 (1996) (quoting *Settle v. Beasley*, 309 N.C. 616, 620, 308 S.E.2d 288, 290 (1983)). "In general, privity involves a person so identified in interest with

another that he represents the same legal right." *Id.* (internal citations omitted) The Court further noted:

> Privity is not established, however, from the mere fact that persons may happen to be interested in the same question or in proving or disproving the same state of facts, or because the question litigated was one which might affect such other person's liability as a judicial precedent in a subsequent action.

Id. (emphasis added) (internal citations omitted)

8. Mere status as a state agency does not place all state agencies in privity with each other. There must be an identity of rights and interests. *Frinzi,* 344 N.C. at 416-17, 474 S.E.2d at 130. Defendant cannot establish that the State Bar is in privity with the Judicial Standards Commission. The two agencies are distinct entities, established by different statutes for different purposes. Defendant cites the case of *State By and Through New Bern Child Support Agency, ex rel. Lewis v. Lewis,* 311 N.C. 727, 319 S.E.2d 145 (1984), in support of his argument, noting that privity was found between the State and one of its agencies. But that case is clear that privity was found not based merely upon the nature of the parties, but rather based upon the identity of interests. The Court held:

> ". . . the parties here are identical or at least in privity. Here the state instituted a criminal action against defendant for nonsupport and succeeded. Five years later, the state [by and through New Bern Child Support Agency] again brought suit, this time in the form of a civil action against defendant for reimbursement of public assistance pay for the support of his two children and for an order directing defendant to provide continued support. The state herein is the same party which challenged defendant in the prior suit, pursuing its same financial interest in securing support payments by a parent for his children in both actions.

Id., 311 N.C. at 734, 319 S.E.2d at 150.

9. Privity is not established between different parties in different actions simply because both parties may be interested in the same question or set of facts; the parties must share a legal interest. *Frinzi,* 344 N.C. at 416-17, 474 S.E.2d at 130. As stated in *Masters*, "[o]ne is 'privy,' when the term is applied to a judgment or decree, whose interest has been legally represented at the trial." *Masters v. Dunstan*, 266 N.C. 520, 526, 124 S.E.2d 574, 578 (1962) (internal citation omitted).

10. The JSC and the State Bar are distinct entities. They are created under different statutes, with legal rights and authority coming from different statutes and regulations. They were created for distinct purposes, and apply different standards to address different harms. Although in certain circumstances, such as this case, the two entities may be interested in the same facts, as noted above this does not constitute privity.

11. Contrary to the argument of Defendant, the State Bar Council's role in appointing four lawyer members of the JSC who sit in judgment in the JSC proceedings does not establish privity, either. The State Bar appointees are not representatives of the State Bar. They are simply peers with the other members of the JSC appointed by other parties. They participate in the JSC's adjudication, applying the Code of Judicial Conduct to the matters before them. They do not appear as a party before the JSC. They do not advocate any position on behalf of the State Bar in JSC proceedings. They do not report to the State Bar. They do not litigate before the JSC the issue of whether the State Bar's Rules of Professional Conduct were violated. The State Bar is not legally represented at JSC proceedings through those members of the JSC.

12. Defendant has failed to establish that the JSC proceeding and the DHC case involve the same cause of action or that the parties are the same or in privity in the two cases. Accordingly, Defendant has failed to establish that the State Bar is precluded under the doctrine of *res judicata* from pursuing discipline of Defendant for violation of the Rules of Professional Conduct. Defendant has failed to show that the State Bar cannot surmount this affirmative defense and thus failed to show he is entitled to summary judgment based upon this defense.

Collateral Estoppel

13. Under the doctrine of collateral estoppel, "the determination of an issue in a prior judicial or administrative proceeding precludes the relitigation of that issue in a later action, provided the party against whom the estoppel is asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding." *Whitacre*, 358 N.C. at 15, 591 S.E.2d at 880 (citations omitted) (emphasis added).

14. Historically, mutuality of parties was required for application of collateral estoppel. Mutuality of parties, also referred to as mutuality of estoppel, meant that both parties in the pending litigation in which collateral estoppel was being asserted had to be bound by the prior judgment for which preclusive effect was sought. *Parklane Hosiery Co. Inc. v. Shore*, 439 U.S. 322, 326-7, 99 S.Ct. 645, 649 (1979). *See also Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 429, 349 S.E.2d 552, 557 (1986) and *Rymer v. Estate of Sorrells*, 127 N.C. App. 266, 268-69, 488 S.E.2d 838, 840 (1997) (both citing *King v. Grindstaff*, 284 N.C. 348, 200 S.E.2d 799 (1973)). This meant that both parties in the pending litigation had to have been either parties to

the earlier suit or in privity with the parties. *McInnis*, 318 N.C. at 429, 349 S.E.2d at 557.

15. In the 1986 *McInnis* case, the Supreme Court of North Carolina noted that "the modern trend in both federal and state courts is to abandon the requirement of mutuality for collateral estoppel, subject to certain exceptions, as long as the party to be collaterally estopped had a full and fair opportunity to litigate the issue in an earlier action." *Id.*[1] *See also Rymer*, 127 N.C. App. at 268-69, 488 S.E.2d at 840.

16. The United States Supreme Court abandoned the mutuality requirement for application of collateral estoppel in federal courts, allowing non-mutual defensive use in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 91 S.Ct. 1434 (1971), and non-mutual offensive use under certain circumstances in *Parklane*, 439 U.S. at 331, 333, 99 S.Ct. at 651-52. The Supreme Court acknowledged that "[a]lthough neither judges, the parties, nor the adversary system performs perfectly in all cases, the requirement of determining whether the party against whom estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard." *Parklane*, 439 U.S. at 328, 99 S.Ct. at 650 (citing *Blonder-Tongue*, 402 U.S. at 329, 91 S.Ct. at 1443).

17. Non-mutual defensive collateral estoppel is where the defendant seeks to estop the plaintiff from relitigating issues the plaintiff previously litigated and lost against another defendant. *Parklane*, 439 U.S. at 329, 99 S.Ct. at 650. Thus, for non-mutual defensive collateral estoppel, the plaintiff has to be the same party or in privity with a

[1] It is this movement away from mutuality of parties that was stated by the North Carolina Court of Appeals in *Rymer v. Estate of Sorrells*, 127 N.C. App. 266, 268-69, 488 S.E.2d 838, 840 (1997), and to which the State Bar and by the Court of Appeals referred in the unpublished case referenced by Defendant, *North Carolina State Bar v. Gilbert*, No. COA 14-1139, May 5, 2015, 2015 WL 2061988.

party to the prior litigation, having had a full and fair opportunity to litigate the issue. *Id.*; *see also McInnis*, 318 N.C. at 434, 349 S.E.2d 560.

18. Non-mutual offensive collateral estoppel is where the plaintiff seeks to estop a defendant from relitigating issues the defendant previously litigated and lost against another plaintiff. *Parklane*, 439 U.S. at 329, 99 S.Ct. at 650. Thus, for non-mutual offensive collateral estoppel, the defendant has to be the same party or in privity with a party to the prior litigation, having had a full and fair opportunity to litigate the issue. *Id.*, 439 U.S. at 326, 99 S.Ct. at 649.

19. In summary, there are two approaches in applying collateral estoppel. There is the traditional formulation, which requires mutuality of parties – both parties have to be the same or in privity with the parties in the prior action. Second, there is the modern trend of allowing non-mutual application, where only the party against whom collateral estoppel is asserted must be the same or in privity with a party in the prior litigation.

20. Defendant appears to suggest that the move away from mutuality of parties would allow collateral estoppel to be asserted by a defendant against a plaintiff who was not a party or in privity with a party in the prior litigation. This is not accurate. To the contrary, such a position is directly disavowed by the United States Supreme Court in the *Blonder-Tongue* case, in which the Court held: "Some litigants – those who never appeared in a prior action – may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits stopping them despite one or more existing

adjudications of the identical issue which stand squarely against their position." *Blonder-Tongue*, 402 U.S. at 329, 91 S.Ct. at 1443.

21. Any argument that collateral estoppel could be asserted by a defendant against a plaintiff who was not a party or in privity with a party in the prior litigation is also contrary to the Supreme Court of North Carolina's discussion in *McInnis* of the rationale for abandoning the mutuality requirement. The Supreme Court of North Carolina summarized the rationale as expressed in the case of *Bernhard v. Bank of America*, 19 Cal.2d 807, 122 P.2d 892 (1942), in part as follows: "[t]he requirements of due process forbade the assertion of a plea of collateral estoppel against a litigant unless he was a party or in privity with a party to the earlier suit, but no comparable reason existed for requiring that the litigant asserting the plea be bound by the former adjudication." *McInnis*, 318 N.C. at 433-34, 349 S.E.2d at 559.

22. As discussed above, the State Bar was not a party to, or in privity with, any party in Defendant's JSC proceeding. Defendant argues collateral estoppel should apply to Plaintiff because the State Bar Council has a role in appointing members to the Judicial Standards Commission. This argument ignores the plain language in the cases cited above that the party against whom estoppel is asserted needs to have enjoyed a full and fair opportunity to litigate the issue in the earlier proceeding. Plaintiff had no opportunity to litigate or be heard on any issue in the JSC's discipline of Defendant.

23. Defendant has failed to establish that the State Bar is precluded under the doctrine of collateral estoppel from pursing discipline of Defendant for violation of the Rules of Professional Conduct. Accordingly, Defendant has failed to show that the State Bar

cannot surmount this affirmative defense and thus failed to show he is entitled to summary judgment based upon this defense.

Equitable Estoppel

24. The doctrine of equitable estoppel applies when a party's words or conduct induced another to believe certain facts exist, and such other rightfully relied and acted on such belief, such that he would be prejudiced if the first party is allowed to deny the existence of such facts. *Whitacre*, 358 N.C. at 16-17, 591 S.E.2d at 881.

25. Defendant identifies certain ethics opinions issued by the Ethics Committee of the State Bar as the statements of the State Bar that induced him to believe the State Bar did not have authority to discipline an attorney serving as judge. However, the ethics opinions he discusses make no statements regarding the State Bar's disciplinary authority, and he did not rightfully rely on them for that proposition.

26. The State Bar issues ethics opinions as a service, to assist and provide guidance to attorneys on ethical obligations and on the application of and compliance with the Rules of Professional Conduct. 27 N. C. Admin. Code, Chapter 1, Subchapter D, Section .0100, *Procedures for Ruling on Questions of Legal Ethics*. As referenced in the ethics opinions from which Defendant quotes, the Ethics Committee does not opine on the application of or compliance with the Code of Judicial Conduct. Furthermore, the rules applicable to the Ethics Committee and the actions taken by the Ethics Committee are unrelated to, and do not affect, the statutory disciplinary authority of the State Bar.

27. The ethics opinions cited by Defendant make no statements regarding the State Bar's disciplinary authority, and he did not rightfully rely on them for that proposition.

Accordingly, Defendant has failed to establish that the State Bar is estopped under the doctrine of equitable estoppel in this case.

Quasi-estoppel

28. Quasi-estoppel applies when a party has accepted a transaction or instrument and accepted benefits under such to estop such party from taking a later position inconsistence with the prior acceptance of that transaction or instrument. *Whitacre*, 358 N.C. at 18, 591 S.E.2d at 881-82.

29. Defendant claims "[t]he doctrine of quasi-estoppel applies in that the State Bar is not now permitted to ignore the Order of Public Reprimand issued by the JSC and the benefit derived by the public from the Public Reprimand." (Defendant's Motion and Memorandum in Support of Motion for Summary Judgment, p. 9).

30. As stated in *Whitacre*, "[q]uasi-estoppel requires mutuality of parties; the doctrine may not be asserted by or against a 'stranger' to the transaction that gave rise to the estoppel." *Whitacre*, 358 N.C. at 19, 591 S.E.2d at 882 (internal citations omitted).

31. The State Bar had no role in the issuance of the Public Reprimand by the JSC to Defendant for his violation of the Code of Judicial Conduct and, as discussed previously, was not in privity with the JSC in Defendant's disciplinary proceeding. Accordingly, there is no acceptance by the State Bar of any transaction or instrument or any benefit derived thereunder by the State Bar upon which the doctrine of quasi-estoppel may be invoked against the State Bar.

Judicial Estoppel

32. The doctrine of judicial estoppel prevents a party from taking inconsistent positions in the same or related litigation. *Price v. Price*, 169 N.C. App. 187, 191, 609 S.E.2d

450, 452 (2005) (internal quotation and citation omitted), *quoted in Estate of Means v. Scott Electric Co. Inc.*, 207 N.C. App. 713, 701 S.E.2d 294 (2010). As stated in *The North Carolina State Bar v. Gilbert*, 189 N.C. App. 320, 663 S.E.2d 1 (2008):

> Judicial estoppel requires proof of three elements: (1) the party's subsequent position is clearly inconsistent with an earlier position; (2) the earlier position was accepted by a court, thus creating the potential for judicial inconsistencies; and (3) the change in positions creates an unfair advantage or unfair detriment.

Id., 189 N.C. App. at 328, 663 S.E.2d 7 (citing *Whitacre*, 358 N.C. at 29, 591 S.E.2d at 888-89). The Court in *Whitacre* noted that judicial estoppel requires discretionary weighing of the relevant factors and not rote application of inflexible prerequisites or formulas. *Whitacre*, 358 N.C. at 25, 591 S.E.2d at 886. Of these three factors, the only factor consistently required in the case law forming the basis for the above compilation of factors is that the prior statement of the party in a judicial proceeding be inconsistent with a subsequent statement by the same party in a judicial proceeding. *Whitacre*, 358 N.C. at 29 n.7, 591 S.E.2d at 887 n.7 (noting that for the doctrine to apply, there must be "'true inconsistency' such that the two statements 'cannot be reconciled;' statements that are "directly inconsistent;" statements of a nature that the "'truth of one position must necessarily preclude the truth of the other position'").

33. Defendant identifies the State Bar's position as stated in paragraph 18 on page 12 of its Motion for Summary Judgment as the statement inconsistent with the State Bar's prior statements regarding the requirements for application of collateral estoppel in the 2015 unpublished *Gilbert* case (*North Carolina State Bar v. Gilbert*, No. COA 14-

1139, May 5, 2015, 2015 WL 2061988). (Defendant's Motion and Memorandum in Support of Motion for Summary Judgment, p. 9).

34. Paragraph 18 on page 12 of Plaintiff's Motion for Summary Judgment states, "A plaintiff asserting collateral estoppel need not be the same party as, or in privity with, the plaintiff in the prior action. *Id.* [*Parklane*, 439 U.S. at 331] This holding has been adopted and applied in North Carolina. *Rymer v. Estate of Sorrells*, 127 N.C. App. 266, 269 (197) (North Carolina 'law allows a non-mutual party to assert offensive collateral estoppel.')"

35. Defendant claims what the State Bar stated in paragraph 18 of its Motion for Summary Judgment is inconsistent with the following statement in its brief in the 2015 *Gilbert* case: "A plaintiff asserting collateral estoppel need not be in privity with the plaintiff in the prior action, as North Carolina law no longer requires mutuality of parties for invocation of collateral estoppel, whether offensive or defensive." *Rymer v. Estate of Sorrells*, 127 N.C. App. 266, 269, 488 S.E.2d 838, 840 (1997).

36. First, the *Gilbert* case is not the same or related litigation to the current case. Second, there is no inconsistency in these two statements of the State Bar. In both, the State Bar is referring to the move away from the traditional requirement of mutuality of the parties for application of collateral estoppel to the allowance of non-mutual collateral estoppel (asserted by a party who was not a party or in privity with a party in the prior litigation against one who was a party or in privity with a party in the prior litigation) in modern jurisprudence, as discussed previously.

37. Defendant has failed to establish that the State Bar has taken a position in prior related litigation that is inconsistent with a position taken by the State Bar in this case. Defendant has thus failed to establish that the State Bar is estopped under the doctrine of judicial estoppel in this case and cannot show that the State Bar could not surmount this defense. Accordingly, Defendant is not entitled to summary judgment based upon this defense.

Lack of Subject Matter Jurisdiction

38. The cornerstone of Defendant's argument on jurisdiction is that original and exclusive jurisdiction to discipline judges rests with the Supreme Court of North Carolina, through the procedures established in Chapter 7A, Article 30 of the North Carolina General Statutes and exercised with the JSC created therein (collectively referenced hereinafter by reference to the judicial disciplinary authority and/or jurisdiction of the Supreme Court). None of the authorities cited by Defendant, however, state that this jurisdiction is exclusive or precludes other legal consequences for the same conduct. Defendant cites *In re Martin*, 295 N.C. 291, 254 S.E.2d 766 (1978) and *In re Inquiry Concerning a Judge*, 356 N.C. 389, 584 S.E.2d 260 (2002) in his argument. These cases, however, address the relationship between the Supreme Court and the JSC, as well as the authority of the Legislature to confer original jurisdiction upon the Supreme Court to censure or remove a judge or justice. They do not address the State Bar's jurisdiction over licensed attorneys[2]. Although a bill was introduced in the General Assembly that would add "exclusive jurisdiction" language to N.C. Gen. Stat. § 7A-374.1 (Purpose of Article 30), N.C. Gen. Stat. § 84-23(a)

[2] When used in this section on jurisdiction, "State Bar" refers to the agency as a whole, which administers discipline through the Council, the Grievance Committee, and the Disciplinary Hearing Commission.

(Powers of State Bar Council), and N.C. Gen. Stat. § 84-28(a) (State Bar Discipline), that language does not exist in the current versions of these statutes. *Compare* N.C. Gen. Stat. §§ 7A-374.1, 84-23(a), 84-28(a) *and* Senate Bill 323.

39. Chapter 84 of the General Statutes grants the State Bar "the authority to regulate the professional conduct of licensed lawyers," and states that "any attorney admitted to practice law in this State is subject to the disciplinary jurisdiction of the [State Bar] Council." N.C. Gen. Stat. §§ 84-23(a) and 84-28(a). N.C. Gen. Stat. § 84-28(b) states "[t]he following acts or omissions by a member of the North Carolina State Bar . . . shall constitute misconduct and shall be grounds for discipline whether the act or omission occurred in the course of an attorney client relationship or otherwise." The State Bar's disciplinary authority encompasses all licensed attorneys and is not limited to conduct engaged in by licensed attorneys while practicing law. *See e.g.* N.C. Gen. Stat. §§ 84-23 and 84-28. *See also* Rule 0.1 of the North Carolina State Bar Rules of Professional Conduct, *Preamble: A. Lawyer's Professional Responsibilities*, 27 N.C. Admin. Code, Chapter 2, Rule 0.1, Comment [3] ("there are Rules that apply to lawyers who are not active in the practice of law").

40. As members of the State Bar, attorneys serving as North Carolina judges are at all times subject to the Rules of Professional Conduct. During their tenure in judicial office, attorneys serving as judges are also subject to the requirements of the Code of Judicial Conduct. Such lawyer's obligations under the Code of Judicial Conduct are in addition to—not in lieu of—his obligations under the Rules of Professional Conduct. Attorneys may be subject to multiple disciplinary authorities for the same conduct. *See e.g.* Rule 8.5(a) of the North Carolina State Bar Rules of Professional

Conduct, 27 N.C. Admin. Code, Chapter 2 ("A lawyer may be subject to the disciplinary authority of both North Carolina and another jurisdiction for the same conduct"); N.C. Gen. Stat. § 84-28(e) ("Any attorney admitted to practice law in this State who is disciplined in another jurisdiction shall be subject to the same discipline in this State."); *and* 27 N.C. Admin. Code, Chapter 1, Subchapter B, § .0116 (reciprocal discipline procedures for attorneys disciplined in another jurisdiction or in federal court).

41. Because a lawyer serving as judge must conform his behavior to both the Code of Judicial Conduct and the Rules of Professional Conduct, misconduct by such a lawyer may constitute separate violations of the Code of Judicial Conduct and the Rules of Professional Conduct and both the Supreme Court and the State Bar would have authority to address the respective violations. For example, this occurred in the case of Mark H. Badgett, whose conduct violated both the Code of Judicial Conduct and the Rules of Professional Conduct, resulting in discipline by both the Supreme Court and the State Bar. *North Carolina State Bar v. Badgett*, No. COA10-1200, 2011 WL 2226426 (N.C. Ct. App. Jun. 7, 2011); *State Bar v. Badgett*, 09 DHC 6.

42. The focus of discipline imposed by the Supreme Court upon a judge is to address "wilful misconduct in office, wilful and persistent failure to perform his duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute." N.C. Const. Art. IV, Sec. 17(2), implemented in Article 30 of Chapter 7A. The focus of discipline imposed by the State Bar upon an attorney for violations of the Rules of Professional Conduct is to address the harm and potential harm done to

clients, the profession, members of the public, and the administration of justice. *See* N.C. Gen. Stat. § 84-28(c); *The North Carolina State Bar v. Talford*, 356 N.C. at 636-638, 576 S.E.2d at 312-313. It is worthwhile to note that the Supreme Court, pursuant to N.C. Const. Art. IV, Sec. 17(2) and N.C. Gen. Stat. § 7A-376, addresses a specific type of conduct prejudicial to the administration of justice in disciplining judges and justices – that which brings the judicial office into disrepute – while the State Bar addresses a broad range of conduct prejudicial to the administration of justice in disciplining lawyers.

43. In this case, Defendant's behavior goes beyond the type of conduct prejudicial to the administration of justice that brings the judicial office into disrepute. Defendant's conduct would warrant discipline by the State Bar whether engaged in by a lawyer in the course of representing a client or working for the government or by a lawyer serving as a judge. Examples drawn from prior discipline issued by the State Bar include the following: *State Bar v. Janice P. Paul*, 12 DHC 33, stayed suspension of assistant district attorney for having law enforcement institute baseless charges to achieve a goal of Ms. Paul's; *In re: John Constantinou*, 93G1212, reprimand for conduct including obtaining medical records for an improper purpose and through improper means; *In re: Lisa N. Rogers*, 03G0559, censured for representation in case despite personal conflict of interest and in manner prejudicial to the administration of justice. Exercise of the State Bar's disciplinary authority is appropriate for Defendant's conduct, for the protection of the public, addressing the harm and potential harm such conduct by attorneys pose to clients, the profession, members of the public, and the administration of justice.

44. Defendant argues that since the DHC does not have the authority to remove a sitting judge, it cannot logically have jurisdiction to impose suspension or disbarment upon an attorney serving as judge, since this would impact the attorney's ability to continue serving as a judge. (Defendant's Motion and Memorandum in Support of Motion for Summary Judgment, p. 11) By this argument, Defendant continues to improperly intermingle two distinct disciplinary regiments, judicial discipline and attorney discipline. The possibility that discipline imposed by the State Bar might have a collateral effect on Defendant's ability to serve as judge does not divest the State Bar of jurisdiction to act upon violations of the Rules of Professional Conduct and impose the discipline it is authorized by statute to impose upon attorneys.[3]

45. Defendant cites to Rule 8.3 of the North Carolina Rules of Professional Conduct in his argument. (Defendant's Motion and Memorandum in Support of Motion for Summary Judgment, p. 10) His argument overlooks the exact language of the rule as well as the context of the section he quotes, however. Rule 8.3(b) states in full: "A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the North Carolina Judicial Standards Commission or other appropriate authority." 27 N.C. Admin. Code, Chapter 2, Rule 8.3(b). To paraphrase, a known violation of the Code of Judicial Conduct is to be reported to the JSC or other appropriate authority. The preceding subsection of the rule addresses known violations of the Rules of Professional Conduct. Rule 8.3(a) states: "A lawyer who

[3] Although the issue was not raised on appeal, the Court of Appeals affirmed the DHC's Order disbarring Judge James Ethridge, while a sitting judge, for conduct that occurred before he was appointed a judge. *North Carolina State Bar v. Ethridge*, 188 N.C. App. 653, 657 S.E.2d 378 (2008). Judge Ethridge eventually resigned from the bench after entry of the DHC's Order.

knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the North Carolina State Bar or the court having jurisdiction over the matter." 27 N.C. Admin. Code, Chapter 2, Rule 8.3(a). Rule 8.3(a) addresses reporting violations of the Rules of Professional Conduct, and Rule 8.3(b) addresses reporting violations of the Code of Judicial Conduct. Certain types of conduct by a lawyer serving as judge could be a violation of both the Rules of Professional Conduct and the Code of Judicial Conduct and could thereby trigger the reporting requirements of both Rule 8.3(a) and 8.3(b), requiring reporting to both the State Bar for a violation of the Rules of Professional Conduct and to the JSC for a violation of the Code of Judicial Conduct. The reporting requirements of Rule 8.3 do not support Defendant's position.

46. The State Bar's jurisdiction to discipline attorneys is established by statute and there is no exclusion for attorneys serving as judges. This judicial role simply adds another body with a distinct disciplinary jurisdiction to the entities which might act upon misconduct by such attorney. Defendant cannot establish that the State Bar lacks subject matter jurisdiction and thus cannot show that the State Bar cannot surmount this affirmative defense. Accordingly, Defendant is not entitled to summary judgment based upon this defense.

Impermissible Collateral Attack

47. As stated by the North Carolina Court of Appeals, "A collateral attack is one in which a party is not entitled to the relief requested unless the judgment in another action is adjudicated invalid. A collateral attack on a judicial proceeding is an attempt to

avoid, defeat, or evade it, or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking it." *In re Webber*, 201 N.C. App. 212, 219, 689 S.E.2d 468, 474 (2009)(internal citations and quotation marks omitted).

48. The State Bar's attorney disciplinary proceeding against Defendant is not a collateral attack upon the JSC's judicial disciplinary proceeding or its Order of Public Reprimand.

49. The State Bar does not wish to have the JSC's Order of Public Reprimand adjudicated invalid; to the contrary, it has argued in its Motion for Summary Judgment that the JSC's Order of Public Reprimand should be recognized and given preclusive effect for the issues determined therein that are relevant in this proceeding.

50. Furthermore, the State Bar's attorney disciplinary proceeding is not an incidental proceeding not provided by law for the express purpose of attacking the JSC's Order of Public Reprimand. To the contrary, the State Bar's attorney disciplinary proceeding is a necessary independent proceeding, authorized by statute, to address issues not addressed by the JSC, to wit: whether Defendant's conduct violated the North Carolina State Bar Rules of Professional Conduct and to determine what attorney discipline, if any, should be imposed.

51. Defendant cannot establish that the current attorney disciplinary proceeding is an impermissible collateral attack upon the JSC's Order of Public Reprimand. Defendant has thus not established that there is an affirmative defense that the State Bar cannot surmount and accordingly is not entitled to summary judgment on this basis.

Response Regarding Non-Mutual Offensive Use of Collateral Estoppel

52. In *McInnis*, the Supreme Court of North Carolina recognized that the developing trend in the application of the doctrine of collateral estoppel was away from requiring mutuality of the parties, and moving to allowing the party asserting collateral estoppel to not have been a party or in privity with a party in the prior litigation. The Supreme Court went on to apply non-mutual collateral estoppel in the case before it, which involved non-mutual defensive use of collateral estoppel (use by a defendant of a prior judgment against a plaintiff where the defendant was not a party or in privity to a party in the prior lawsuit but the plaintiff was). *McInnis*, 318 N.C. at 429, 433-34, 349 S.E.2d at 557, 559. The North Carolina Court of Appeals in the 1997 *Rymer* case recognized the same trend and applied it to the case before it, allowing non-mutual offensive use of collateral estoppel. 127 N.C. App. at 268-69, 488 S.E.2d at 840. The North Carolina Court of Appeals again recognized that mutuality of parties was no longer required when invoking either offensive or defensive collateral estoppel in *In re Foreclosure Under That Deed of Trust Executed by Azalea Garden Bd. & Care, Inc.*, 140 N.C. App. 45, 56, 535 S.E.2d 388, 396 (2000).

53. Defendant argues that in a per curium decision in the case of *Sawyers v. Farm Bureau Ins. of N.C.*, 360 N.C. 158, 622 S.E.2d 490 (2005), which summarily referenced the Court of Appeals' six page dissenting opinion on various topics, the Supreme Court of North Carolina has somehow issued a specific holding regarding non-mutual collateral estoppel. Yet the sentence from the dissent that Defendant isolates and wishes to cast as a holding of the Supreme Court was dicta in the dissent, did not fully capture the state of the law in North Carolina at the time, and would be contrary to the

trend the Supreme Court previously recognized in *McInnis* and as it was applied by the North Carolina Court of Appeals in *Rymer* and acknowledged in *Azalea*.

54. The *Sawyers* case involved an insured, Ms. Sawyers, suing an uninsured motorist in Florida. She served Farm Bureau Insurance of N.C., Inc., through which she had uninsured motorist coverage, with the complaint and summons in the case pursuant to N.C. Gen. Stat. § 20-279.21(b)(3). This statute pertains to the procedures under which an insurer is bound by the final judgment in such a case if served. After being served, Farm Bureau filed a motion to dismiss for lack of personal jurisdiction. Ms. Sawyers and Farm Bureau entered into a joint motion for dismissal without prejudice to dismiss Farm Bureau from the Florida action, stating that the insured would re-file the action in North Carolina, pursuant to Rule 41(a)(1) of the North Carolina Rules of Civil Procedure. Ms. Sawyers subsequently filed a lawsuit against Farm Bureau, but not within one year of the dismissal in the Florida action. The parties filed motions for summary judgment in the North Carolina action. The trial court granted Farm Bureau's motion for summary judgment and denied Ms. Sawyers' motion. *Sawyers v. Farm Bureau Ins. of N.C.*, 170 N.C. App. 17, 612 S.E.2d 184 (2005).

55. The Court of Appeals reversed the trial court's grant of Farm Bureau's motion for summary judgment and remanded for trial on the merits. *Sawyers*, 170 N.C. App. at 26, 612 S.E.2d at 191. Judge Steelman dissented, stating he:

> would affirm the trial court based upon four theories, each which was pled before the trial court and argued before this court: (1) Farm Bureau was not a party to the action at the time the judgment was entered; (2) the statute of limitations had expired before plaintiff instituted this action; (3) Farm Bureau is not bound by the doctrine of *res judicata*; and (4) equitable estoppel.

Sawyers, 170 N.C. App. at 28, 612 S.E.2d at 192. Notably, the doctrine of collateral estoppel was not listed as one of the bases upon which Judge Steelman would have affirmed the trial court.

56. In the course of discussing *res judicata*, which had been asserted by Ms. Sawyers, Judge Steelman mentions collateral estoppel, although it was not discussed in the majority opinion, not at issue in the case, and not one of the bases for Judge Steelman's conclusions. Accordingly, Judge Steelman's statements regarding collateral estoppel are dicta and are not to be relied upon. As stated by the Supreme Court of North Carolina, "[l]anguage in an opinion not necessary to the decision is *obiter dictum* and later decisions are not bound thereby." *Trustees of Rowan Technical College v. J. Hyatt Hammond Associates, Inc.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985), and cases cited therein.

57. In the course of his discussion regarding collateral estoppel, Judge Steelman stated the following:

> In *McInnis*, the North Carolina Supreme Court held that it would no longer require mutuality of estoppel where collateral estoppel is used defensively; that is, "as long as the party to be collaterally estopped had a full and fair opportunity to litigate the issue in the earlier action,' there is no requirement of mutuality. *Id.* at 432-35, 349 S.E.2d at 559-60. However, the mutuality requirement still applies when collateral estoppel is used offensively and for all applications of *res judicata*.

Sawyers, 170 N.C. App. at 30-31, 612 S.E.2d at 193-94. It is this last sentence upon which Defendant relies to assert that mutuality is still required for offensive use of collateral estoppel.

58. Judge Steelman cites no authority for his statement that the mutuality requirement still applies when collateral estoppel is used offensively. The footnote he includes

after this statement in his dissent solely addresses the mutuality requirement for *res judicta*. *Sawyers*, 170 N.C. App. at 30-31 and n.7, 612 S.E.2d at 193-94 and n.7.

59. As noted above, Judge Steelman's statement fails to fully capture the state of the law in North Carolina at the time regarding non-mutual offensive collateral estoppel. In the *McInnis* case, the Supreme Court of North Carolina recognized that the trend away from requiring mutuality of the parties was occurring with both offensive and defensive use of collateral estoppel. Although the Court only went on to address the defensive use of collateral estoppel that was before it, it did not hold that mutuality was still required for offensive use; it made no holding regarding offensive use. However, the rationale that the Supreme Court had cited with approval in *McInnis* applied to both offensive and defensive use of collateral estoppel, and accordingly the Court of Appeals in *Rymer* applied the Supreme Court's rationale to the offensive collateral estoppel before it and held mutuality of parties was not required for either offensive or defensive use of collateral estoppel in North Carolina. 127 N.C. App. at 268-69, 488 S.E.2d at 840. This statement of the law of North Carolina was recited by the Court of Appeals in the 2000 *Azalea* case, 140 N.C. App. at 56, 535 S.E.2d at 396. Both *Rymer* and *Azalea* had been issued and were good law at the time of Judge Steelman's dissent.

60. Although there have been North Carolina cases subsequent to *McInnis* and *Rymer* that used the traditional formulation of the requirements for application of collateral estoppel including mutuality of the parties[4], there has been no case overturning *Rymer* and no express statement or holding of the Supreme Court of North Carolina that

[4] See e.g. *State v. Summers*, 351 N.C. 620, 528 S.E.2d 17 (2000).

mutuality of parties is required for offensive use of collateral estoppel but not for defensive use of collateral estoppel. Additionally, *Rymer* has been cited and relied upon in recent cases by the Court of Appeals for the proposition that mutuality of parties is not required for offensive or defensive collateral estoppel.[5] Accordingly, the holding in *Rymer* is still the state of the law in North Carolina, as acknowledged by the North Carolina Court of Appeals in 2000 in the *Azalea* case and in 2015 in the unpublished *Gilbert* case.

61. It is simply not tenable to attribute as the holding of the Supreme Court of North Carolina one sentence in a six page dissent, that failed to fully capture the state of the law in North Carolina on the issue and that was dicta in the dissent. When the Supreme Court of North Carolina held in its per curiam decision that it reversed the Court of Appeals for the reasons stated in Judge Steelman's dissent, this is more reasonably understood as a reference to the four theories upon which Judge Steelman stated he would affirm the trial court, namely "(1) Farm Bureau was not a party to the action at the time the judgment was entered; (2) the statute of limitations had expired before plaintiff instituted this action; (3) Farm Bureau is not bound by the doctrine of *res judicata*; and (4) equitable estoppel." *Sawyers*, 170 N.C. App. at 28, 612 S.E.2d at 192.

62. It is the State Bar's position that its Motion for Summary Judgment contains accurate statements concerning the law applicable to non-mutual offensive application of collateral estoppel, and that such application is permitted in North Carolina.

Response Regarding Effect of Application of Non-Mutual Offensive Collateral Estoppel

[5] See e.g. the unpublished opinions in *Gilbert*, COA 14-1139, May 5, 2015, 2015 WL 2061988, and in *Good v. Omega V, LLC*, 749 S.E.2d 113, COA 12-1490, August 20, 2013, 2013 WL 4460028.

63. Defendant argues that if the DHC grants summary judgment in favor of the State Bar based upon collateral estoppel, then the State Bar must also be bound by the JSC's legal conclusion and punishment, citing N.C. Gen. Stat. § 7A-374.2, such that only an admonition could be imposed upon Defendant for minor conduct. (Defendant's Motion and Memorandum in Support of Motion for Summary Judgment, p. 7) This argument ignores one of the fundamental requirements for application of collateral estoppel, however, which is identity of issues. *King*, 284 N.C. at 358, 200 S.E.2d at 806.

64. The Supreme Court of North Carolina set forth the following requirements that must be met to show the existence of identity of issues, for collateral estoppel to apply to specific issues: "(1) the issues to be concluded must be the same as those involved in the prior action; (2) in the prior action, the issues must have been raised and actually litigated; (3) the issues must have been material and relevant to the disposition of the prior action; and (4) the determination made of those issues in the prior action must have been necessary and essential to the resulting judgment." *Id.* (internal citations omitted)

65. The first factor requires that the issues to be concluded in the present action be the same as those involved in the prior action. If they are, and the other requirements are met, then those issues in the present action that are identical to those in the prior action are deemed established by the prior judgment. *Id.*, 284 N.C. at 360, 200 S.E.2d at 808 (issues of actionable negligence and imputability of negligence to another in present action established through collateral estoppel by judgment in prior action involving same issues).

66. The conduct of Defendant and whether such conduct constitutes conduct prejudicial to the administration of justice are issues that are present in the pending disciplinary case and that were present and determined in the JSC proceeding. These are the issues established by the JSC Order of Public Reprimand by collateral estoppel.

67. Whether Defendant's conduct violated the Code of Judicial Conduct and what judicial discipline under Chapter 7A of the General Statutes was appropriate were at issue in the JSC proceeding but are not at issue in the present attorney discipline case. Accordingly, there is no identity of issues, and thus those issues are not established by collateral estoppel in this case.

68. Whether Defendant violated the North Carolina State Bar Rules of Professional Conduct and, if so, what attorney discipline under N.C. Gen. Stat. § 84-28 is appropriate were not at issue in the JSC proceeding. Accordingly, there is no identity of issues on these two issues and they cannot be established by the JSC Order of Public Reprimand by collateral estoppel in this case.

WHEREFORE, for the reasons set out in Plaintiff's Motion for Summary Judgment and in this Response and Memorandum, Plaintiff respectfully requests the Hearing Panel deny Defendant's Motion for Summary Judgment and enter summary judgment for Plaintiff.

Respectfully submitted, this the 7th day of December 2015.

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CERTIFICATE OF SERVICE

This is to certify that the foregoing Response to Defendant's Motion For Summary Judgment and Memorandum of Law was served on counsel for Defendant by depositing it in the United States Mail, postage prepaid to the following address:

Mr. Norman W. Shearin
Mr. David P. Ferrell
Mr. Kevin A. Rust
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The foregoing was also served by e-mail to the following e-mail addresses:

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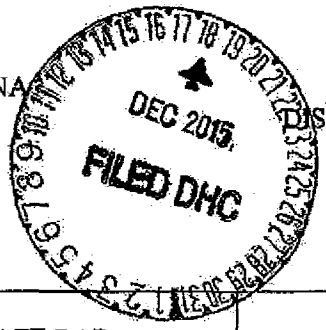
This the 7th day of December 2015.

Jennifer A. Porter
Deputy Counsel



STATE OF NORTH CAROLINA WAKE COUNTY	BEFORE THE DISCIPLINARY HEARING COMMISSION OF THE NORTH CAROLINA STATE BAR 15 DHC 7
THE NORTH CAROLINA STATE BAR, Plaintiff v. JERRY R. TILLETT, Attorney, Defendant	**ORDER**

THIS MATTER was considered by a Hearing Panel of the Disciplinary Hearing Commission composed of Joshua W. Willey, Jr., Chair, and members Barbara B. Weyher and Michael S. Edwards upon the parties' motions for summary judgment. Plaintiff was represented by G. Patrick Murphy and Jennifer A. Porter. Defendant was represented by Norman W, Shearin, David P. Ferrell, and Kevin A. Rust. Pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, the Hearing Panel finds there are no genuine issues of material fact and that Plaintiff is entitled to judgment as a matter of law on the issue of whether Defendant violated Rule 8.4(d) of the North Carolina State Bar Rules of Professional Conduct. Accordingly, the Hearing Panel grants Plaintiff's motion for summary judgment, denies Defendant's motion for summary judgment and enters judgment for Plaintiff.

THEREFORE, the Hearing Panel concludes as a matter of law that Defendant violated Rule 8.4(d) of the North Carolina State Bar Rules of Professional Conduct. The Hearing Panel reserves for hearing the issue of what discipline, if any, is appropriate. The sole remaining issue in the case is what discipline, if any, is appropriate for the violation of Rule 8.4(d) for which judgment is hereby entered.

Signed by the Chair with the consent of the other Hearing Panel members, this the 15 day of December, 2015.

Joshua W. Willey, Jr., Chair
Disciplinary Hearing Panel

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Order denying the Defendant's motion for summary judgment and granting the Plaintiff's motion for summary judgment filed in The North Carolina State Bar v. Jerry R. Tillett 15DHC7 was served upon Defendant's attorneys by depositing a copy of the Order denying the Defendant's motion for summary judgment and granting the Plaintiff's motion for summary judgment in the United States Mail, postage prepaid at the following address and address of record and by email to nshearin@vanblk.com, krust@vanblk.com and dferrell@vanblk.com:

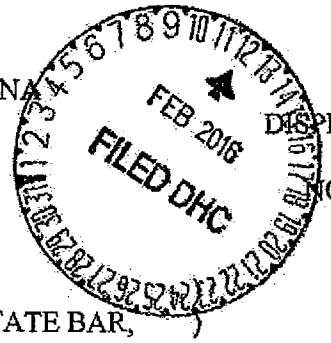
Norman Shearin
Kevin Rust
David Ferrell
P. O. Box 2599
Raleigh, NC 27602

The undersigned hereby further certifies that the foregoing Order denying the Defendant's motion for summary judgment and granting the Plaintiff's motion for summary judgment filed in The North Carolina State Bar v. Jerry R. Tillett 15DHC7 was served upon the Plaintiff by email to pmurphy@ncbar.gov and jporter@ncbar.gov . The Plaintiff has agreed to be served only by email.

This the 18th day of December, 2015.

Dottie Miani

Dottie Miani, Clerk
Disciplinary Hearing Commission



STATE OF NORTH CAROLINA WAKE COUNTY	BEFORE THE DISCIPLINARY HEARING COMMISSION OF THE NORTH CAROLINA STATE BAR 15 DHC 7
THE NORTH CAROLINA STATE BAR, Plaintiff, v. JERRY R. TILLETT, Defendant.	**MOTION AND MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT ON DISCIPLINE AND REQUEST FOR HEARING AND ORAL ARGUMENT**

NOW COMES, Defendant, Jerry R. Tillett ("Judge Tillett"), by and through counsel, and moves the Disciplinary Hearing Commission ("DHC"), pursuant to Rule 56 of the Rules of Civil Procedure, for an order granting Summary Judgment as to discipline. All materials previously filed herein are incorporated by reference, and the State Bar's action against Judge Tillett should be dismissed. Those arguments are explicitly incorporated herein by references and not waived. Judge Tillett shows as follows unto the Hearing Panel of the DHC in support thereof:

I. THE PRESENT EFFORT BY THE STATE BAR TO REMOVE JUDGE TILLETT VIOLATES THE SEPARATION OF POWERS CLAUSE.

The State Bar does not dispute that it is seeking to cause the removal of Judge Tillett from his duly elected position as a Superior Court Judge in the First Judicial District by revoking or suspending his law license. This case therefore violates the separation of powers clause of the Constitution of North Carolina. See N.C. Const. art. I, § 6

The Constitution of North Carolina provides that "[t]he legislative, executive, and supreme court judicial powers of the State government shall be forever separate and distinct from each

other." The "separation of powers clause requires that . . . one branch will not prevent another branch from performing its core functions." State Ex. Rel McCrory v. Berger, ___ N.C. ___, No. 113A15 (2016) (slip opinion, pg. 3). "The clearest violation of the separation of powers clause occurs when one branch exercises power that the constitution vests exclusively in another branch." Id. at slip opinion pg. 19.

The Constitution exclusively vests the power to remove a Superior Court Judge through a legislative based impeachment process and through an additional procedure prescribed by the Legislature. N.C. Const. art. IV, § 17. The Legislature prescribed the procedure in the Judicial Standards Act, codified in Article 30 of Chapter 7A of the General Statutes. Nowhere does the Judicial Standards Act permit the State Bar to remove a sitting Superior Court Judge. Moreover, Article IV of the Constitution which speaks directly to judicial removal provides no express or implied authority for the State Bar to cause the removal of a judge. Had the Legislature intended to give the State Bar that authority, it simply could have done so under Article IV, Section 2 of the Constitution of North Carolina. This it did not do.

As such, the continued prosecution of Judge Tillett violates the separation of powers clause because the State Bar is attempting to usurp the power explicitly delegated by the Constitution to the legislative and judicial branches (through the Judicial Standards Act).[1]

II. THE PANEL IS BOUND BY THE JSC'S FINDING OF MINOR CONDUCT UNDER THE DOCTRINE OF COLLATERAL ESTOPPEL.

The Judicial Standards Commission ("JSC") issued a public reprimand on March 8, 2013. A copy of that public reprimand is incorporated herein by reference.

[1] The DHC itself likewise violates the separation of powers clause based upon the appointments by the legislature of members to the DHC. See McCroy v. Berger.

A public reprimand is issued by the JSC only where the a judge has "engaged in **conduct prejudicial to the administration of justice, but that misconduct is minor**[.]" N.C. Gen. Stat. § 7A-374.2 (2007) (emphasis supplied).[2] Thus, the JSC has already determined that Judge Tillett engaged in conduct prejudicial to the administration of justice, but that such misconduct was minor. These are the exact issues presented in this case: (1) whether Judge Tillett's conduct was prejudicial to the administration of justice; and if so, (2) the severity of such conduct. This Panel has already determined the first issue in favor of the State Bar based upon the issuance of the JSC's public reprimand. This Panel is likewise bound by the JSC's determination that the misconduct was minor in nature. The DHC may therefore only issue an admonition to Judge Tillett. See N.C. Gen. Stat. § 84-28(c)(5) (an "admonition" is "a written form of discipline imposed in cases in which an attorney has committed a minor violation of the Rules of Professional Conduct.")

The alleged Rule of Professional Conduct (RPC) violation at issue here is Rule 8.4(d), which prohibits conduct prejudicial to the administration of justice. The JSC has already determined that Judge Tillett's conduct, while prejudicial to the administration of justice, was minor in nature. N.C. Gen. Stat. § 7A-374.2. This Panel found, and the State Bar conceded, that the "conduct prejudicial to the administration of justice" is the same standard under Chapter 7A as it is under Chapter 84. (MSJ[3] ¶ 36). This Panel is therefore bound by the JSC's finding that such conduct was minor in nature as well. See, e.g., Simms v. Simms, 195 N.C. App. 780, 782, 673 S.E.2d 753, 755 (2009) (holding that where collateral estoppel applies, "a court will be precluded from issuing findings of fact and conclusions of law contrary to the previous disposition") (emphasis supplied); State v. Summers, 351 N.C. 620, 626, 528 S.E.2d 17, 22 (2000) (legal conclusions previously adjudicated are binding under doctrine of collateral estoppel).

[2] The statute was amended in 2013, but it retained that a public reprimand is for minor misconduct.
[3] "MSJ" refers to the State Bar's Motion for Summary Judgment.

In an effort to avoid this result, the State Bar has argued that there is not an identity of issues between the JSC's findings and the issues to be addressed by this Panel. Setting aside momentarily the State Bar's inconsistent approach on this issue as it relates to liability versus discipline, the State Bar's arguments on this point do not accurately reflect the law. In oral argument to this Panel, the State Bar repeatedly asserted that only "identical" legal issues are issues are to be given preclusive effect on summary judgment, and therefore, the finding of "minor conduct" by the JSC should be ignored. (Hearing T. p. 130: 22-25). In fact, the State Bar argued that the issues raised before the JSC and this Panel "have to be very exact[.]" (Hearing T. p. 131:1-3).

First, even if that were the law, and it is not,[4] the exact same issues that are before the DHC have already been conclusively addressed by the JSC; i.e., whether Judge Tillett's conduct was prejudicial to the administration of justice, and if so, whether the conduct was minor (or worse) in nature. The State Bar conceded at oral argument that "[t]he issue before the JSC is, was the conduct minor" and that the "issue before the DHC in considering an admonition is whether the attorney committed a minor violation" of the RPC. (Hearing T. p. 134:10-17). As discussed above, the JSC reviewed Judge Tillett's conduct to determine whether that conduct was prejudicial to the administration of justice, which is the exact same issue presented to this Panel. Thus, even under the State Bar's analysis, there is an identity of issues. Second, the authority relied upon by the State Bar to argue that only "very exact" issues are to be given preclusive effect, stands for the exact opposition position.

[4] Indeed, if it were the law, it escapes logic to conclude that partial summary judgment in the favor of the State Bar would be appropriate on liability (whether Judge Tillettt's conduct was prejudicial to the administration of justice) but not as to punishment (the severity of the conduct that was prejudicial to the administration of justice).

At oral argument, the State Bar relied upon King v. Grindstaff, 284 N.C. 348, 358, 200 S.E.2d 799, 806 (1973) for the proposition that the issues decided must meet an incredibly high specificity requirement in order for those issues to be given preclusive effect in subsequent litigation. (See, e.g., Hearing T. 134:18-135:2; 152:6-24; 154:13-17). This is not the holding in King. In King, the Supreme Court set out the elements to apply collateral estoppel, which include that "[t]he issues to be concluded must be the same as those involved in the prior action[.]" Id. The State Bar concedes that if this element is satisfied, for purposes of collateral estoppel, the identity of issues element has been satisfied. (RMSJ[5] ¶¶ 64-65). The King Court actually rejected the argument that only "very exact" issues are to be given preclusive effect under the doctrine of collateral estoppel. King, 284 N.C. at 359, 200 S.E.2d at 807.

In King, the employer of a motorist that caused an injury argued that it should not be held liable because the prior federal court action did not make a specific finding that the negligent driver "was acting the course and scope of his employment at the time of the collision" Id. The Supreme Court rejected this argument because the federal court would have been "compelled to find" that such an employee-employer relationship existed, even though the federal court did not say so specifically. Id. The Supreme Court stated that "[w]hile the Federal judgments do not set out in detail the specific fact that [the employee] was acting in the scope of his employment at the time of the collision, when a judgment does not set forth in detail the facts found by the court, it is presumed that the court upon proper evidence found the essential facts necessary to support the judgment entered." Id (emphasis supplied). Collateral estoppel "prevails as to matters essentially connected with the subject matter of the litigation and necessarily implied in the final judgment, although no specific finding may have been made in reference thereto." Id. (emphasis supplied).

[5] "RMSJ" is in reference to the State Bar's responsive pleading to Judge Tillett's Motion for Summary Judgment.

Moreover, the Supreme Court held that "[i]f the record of the former trial shows that the judgment could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties." Id. Further still, the Supreme Court held, in determining "what issues were determined by the judgment in a prior action," that "the court in the second action is free to go beyond the judgment roll, and may examine the pleadings and the evidence in the prior action." Id. (emphasis supplied). If the prior court "made no express findings on issues raised by the pleadings or the evidence, the [subsequent] court may infer that in the prior action a determination appropriate to the judgment rendered was made as to each issue that was so raised and the determination of which was necessary to support the judgment." Id. at 360, 200 S.E.2d 799, 807-08 (emphasis supplied).

The holding and reasoning in King is a far cry from the arguments articulated by the State Bar to this Panel. In fact, King quite clearly supports Judge Tillett's position that if the Panel believes it is bound by the JSC's order of public reprimand (and this Panel has so found), then it is likewise bound by the finding that Judge Tillett's misconduct was minor in nature. The State Bar's arguments to the contrary must therefore be rejected, and the doctrine of collateral estoppel applies to all issues decided in the JSC's public reprimand.

In fact, the State Bar appears to largely agree with the preclusive effect of the JSC's public reprimand. The State Bar has successfully argued to this Panel that "**the JSC's Order of Public Reprimand should be recognized and given preclusive effect for the issues determined therein that are relevant to this proceeding.**" (RMSJ ¶ 49) (emphasis supplied). Further, the State Bar also conceded that "[t]he conduct of Defendant and whether such conduct constitutes conduct prejudicial to the administration of justice are present in the pending disciplinary case and that were present and determined by the JSC proceeding." (RMSJ ¶ 66) (emphasis supplied).

Further still, the State Bar argued in its motion for summary judgment that "[b]oth the JSC proceeding and the disciplinary proceeding **concern the same conduct of Defendant's** and **the nature of that conduct** as prejudicial to the administration of justice" (MSJ ¶ 23) (emphasis supplied). It is simply not credible for the State Bar to argue that the nature of Judge Tillett's conduct is not an issue in both the JSC proceeding and this proceeding, when it has taken the exact opposite position in its successful motion for summary judgment.

Accordingly, this Panel is bound by the legal conclusions set out in the JSC's order of public reprimand, which include a finding of minor conduct, for the purposes of imposing punishment.

III. THE STATE BAR IS BARRED BY THE DOCTRINE OF JUDICIAL ESTOPPEL FROM DENYING THE PRECLUSIVE EFFECT OF THE JSC'S PUBLIC REPRIMAND.

The State Bar has taken several positions in this litigation that are not only inconsistent, but are irreconcilable. The State Bar is therefore barred by the doctrine of judicial estoppel from disputing the preclusive effect of the JSC's order of public reprimand.

The doctrine of "[j]udicial estoppel forbids a party from asserting a legal position inconsistent with one taken earlier in the same or related litigation." Price v. Price, 169 N.C. App. 187, 191, 609 S.E.2d 450, 452 (2005) (emphasis supplied).[6] Judicial estoppel "prevents the use of 'intentional self-contradiction . . . as a means of obtaining unfair advantage in a forum provided for suitors seeking justice.'" Id.

[6] Prior to the decision in Price, the Supreme Court held that judicial estoppel does not apply to inconsistent legal position. Whitacre P'ship v. Biosignia, Inc., 358 N.C. 1, 32, 591 S.E.2d 870, 890 (2004). The Court in Price, however, was addressing inconsistent legal positions "in the same or related litigation" not different litigation that was at issue in Whitacre. The Price Court was aware of Whitacre and in fact relied upon it in applying the doctrine of judicial estoppel in that case.

In Price, for example, the Court of Appeals exercised its discretion and barred the defendant from asserting an inconsistent legal positions as to whether a Guilford County Court order should be given preclusive effect. Id. at 192, 609 S.E.2d at 454. There, the defendant argued to a state court in Washington that a March 1994 order in Guilford County was conclusive on the issue of child support. Id. Defendant, however, also argued to the Guilford County Court that child support order should be vacated because service was improper. Id. The Court of Appeals prohibited the defendant from taking these inconsistent positions, and therefore rejected his arguments that service was improper. Id. In short, the defendant in Price was bound by his argument as to the validity and enforceability of the Guilford County order that he made in a state court in Washington.

Similar procedural facts are present in this case. The State Bar has argued successfully and repeatedly in this litigation that the JSC's order of public reprimand should be given preclusive effect. For example, the State Bar argued to this Panel that "**the JSC's Order of Public Reprimand should be recognized and given preclusive effect for the issues determined therein that are relevant to this proceeding.**" (RMSJ ¶ 49) (emphasis supplied). Further, the State Bar also conceded that "[t]he conduct of Defendant and whether such conduct constitutes conduct prejudicial to the administration of justice are present in the pending disciplinary case and that were present and determined by the JSC proceeding." (RMSJ ¶ 66) (emphasis supplied). Further still, in support of its motion for summary judgment, the State Bar argued the following: (1) "[t]he prior findings in the JSC Reprimand . . . should be given preclusive effect in this proceeding" (MSJ ¶ 13); (2) "[b]oth the JSC proceeding and the disciplinary proceeding concern the same conduct of Defendant's and the nature of that conduct as prejudicial to the administration

of justice" (MSJ ¶ 23); and (3) [p]reclusive effect should be given to the findings of the JSC Reprimand" (MSJ ¶ 29).

Directly contrary to these positions, the State Bar is also arguing that the JSC's public reprimand should not be given preclusive effect. (RMSJ ¶¶ 63-68). This is contrary to the State Bar's successful arguments made to this very Panel, and the State Bar should therefore be judicially estopped from denying the preclusive effect of the JSC's public reprimand.

In short, as the State Bar has clearly articulated the proper outcome on this motion: **"the JSC's Order of Public Reprimand should be recognized and given preclusive effect for the issues determined therein that are relevant to this proceeding."** (RMSJ ¶ 49) (emphasis supplied). The State Bar should therefore be judicially estopped from denying the preclusive effect of the JSC's finding of minor conduct.

IV. THIS ACTION SHOULD BE DISMISSED.

The Panel lacks jurisdiction to hear this matter, and if it has such jurisdiction, the doctrines of collateral estoppel and/or *res judicata* bar the State Bar's prosecution of Judge Tillett. In addition, the State Bar should be estopped from prosecuting Judge Tillett even to the extent collateral estoppel and/or *res judicata* do not apply. These arguments have been fully briefed and argued to this Panel and are therefore not set out in detail here. Judge Tillett's previously filed motion for summary judgment is incorporated herein by reference. As such, Judge Tillett should receive no discipline from the Panel and the proceeding should be dismissed.

REQUEST FOR ORAL ARGUMENT AND HEARING

Judge Tillett requests that the Panel grant to him an in-person hearing with oral argument on this dispositive motion.

CONCLUSION

In sum, for the reasons previously raised in Judge Tillett's motion for summary judgment, and those discussed above, this matter must be dismissed. If this Panel is disinclined to grant such relief, it is still bound by the JSC's order of public reprimand which concluded that Judge Tillett's misconduct, while prejudicial to the administration of justice, was minor in nature. Put differently, as the State Bar has argued: "**the JSC's Order of Public Reprimand should be recognized and given preclusive effect for the issues determined therein that are relevant to this proceeding.**" (RMSJ ¶ 49) (emphasis supplied). The Panel may therefore only impose a written admonition against Judge Tillett, rendering further hearings on this matter unnecessary. Judge Tillett respectfully request the Panel grant his motion for summary judgment as to discipline.

Respectfully submitted, this the 10th day of February, 2016.

David P. Ferrell
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Norman W. Shearin
N.C. State Bar No.: 3096
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E-mail: dferrell@vanblk.com
Attorneys for Defendant Jerry R. Tillett

CERTIFICATE OF SERVICE

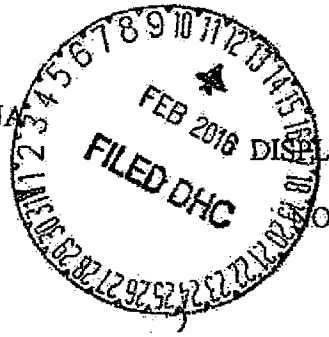
This is to certify that the undersigned has this date served a copy of the foregoing **MOTION AND MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT ON DISCIPLINE AND REQUEST FOR HEARING AND ORAL ARGUMENT** upon the parties by depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service, addressed as follows:

G. Patrick Murphy
Jennifer A. Porter
The North Carolina State Bar
217 East Edenton Street
Raleigh, NC 27611
Attorney for Plaintiff

This the 10th day of February, 2016.

Kevin A. Rust

4837-1698-1804, v. 2



STATE OF NORTH CAROLINA	BEFORE THE DISCIPLINARY HEARING COMMISSION OF THE NORTH CAROLINA STATE BAR 15 DHC 7
WAKE COUNTY	
THE NORTH CAROLINA STATE BAR, Plaintiff, v. JERRY R. TILLETT, Defendant.	**MOTION AND REQUEST FOR A CONFERENCE TO NARROW THE ISSUES TO BE PRESENTED AND HEARING ON SUMMARY JUDGMENT**

NOW COMES, Defendant, Jerry R. Tillett ("Judge Tillett"), by and through counsel, and moves the Disciplinary Hearing Commission ("DHC"), pursuant to 27 N.C.A.C. 01B 0114(i) for an in-persons conference to narrow the issues for the disciplinary hearing and for a hearing on Judge Tillett's motion for summary judgment as to discipline.

Pursuant to 27 N.C.A.C. 01B 0114(i), the Chairperson of the DHC, may order that a conference be held "before the date set for commencement of the hearing for the purposes of obtaining admissions or otherwise narrowing the issues presented by the pleadings. As expressly contemplated by the State Bar's rules, the conference can, among other things: simplify the issues to be presented; limit the number of witnesses; and such other matters that may be necessary to "expedit[e] the orderly conduct and disposition of the proceeding." Id.

The present case requires such a conference, as the State Bar appears set on conducting a multi-day evidentiary hearing, despite this Panel's on-the-record discussion of what it anticipates to take place. A multi-day hearing does not serve the interest of judicial economy, as these matters have all been conclusively resolved by the JSC's order of public reprimand. If the State Bar intends to put on multiple witnesses, however, Judge Tillett is entitled to know the names of such witnesses

and be afforded an opportunity to depose those witnesses. Further, depending on the identity of such witnesses, Judge Tillett may call rebuttal witnesses. As such, a conference is necessary to set reasonable limits on the State Bar's prosecution of Judge Tillett, or in the alternative, to afford Judge Tillett a full and fair opportunity to adequately defend himself.

Without waiving the foregoing, an evidentiary hearing on discipline is unnecessary, and Judge Tillett requests an in-person hearing on his motion for summary judgment as to discipline. The Panel has already stated "[w]e aren't going to relitigate the facts that were determined by Judicial Standards . . . Judicial Standards had findings as far as what the wrongful conduct was, had findings as far as his remorse and so forth" at the previous hearing. (T. p. 168:4-9). The JSC already found Judge Tillett's conduct to be minor in nature. There is therefore no need for an evidently hearing as to discipline, and Judge Tillett's dispositive motion as to discipline will resolve what discipline may be imposed in advance of any evidentiary hearing. It is therefore requested that a hearing be granted on Judge Tillett's dispositive motion. Judge Tillett anticipates that such a hearing will last less than two (2) hours.

WHEREFORE, Judge Tillett respectfully requests that this Panel grant his request for a conference to, among other things, narrow the issues to be presented at any disciplinary hearing, and to conduct a hearing on Judge Tillett's dispositive motion as to discipline.

Respectfully submitted, this the 10th day of February, 2016.

David P. Ferrell
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Norman W. Shearin
N.C. State Bar No.: 3096
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Attorneys for Defendant Jerry R. Tillett

CERTIFICATE OF SERVICE

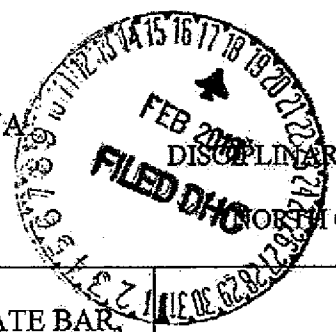
This is to certify that the undersigned has this date served a copy of the foregoing **MOTION AND REQUEST FOR A CONFERENCE TO NARROW THE ISSUES TO BE PRESENTED AND HEARING ON SUMMARY JUDGMENT** upon the parties by deposit a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service, addressed as follows:

G. Patrick Murphy
Jennifer A. Porter
The North Carolina State Bar
217 East Edenton Street
Raleigh, NC 27611
Attorney for Plaintiff

This the 10th day of February, 2016.

Kevin A. Rust

4851-8180-0493, v. 1



STATE OF NORTH CAROLINA WAKE COUNTY	BEFORE THE DISCIPLINARY HEARING COMMISSION OF THE NORTH CAROLINA STATE BAR 15 DHC 7
THE NORTH CAROLINA STATE BAR, Plaintiff v. JERRY R. TILLETT, Attorney, Defendant	PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION AND REQUEST FOR A CONFERENCE TO NARROW THE ISSUES TO BE PRESENTED AND HEARING ON SUMMARY JUDGMENT

NOW COMES, the North Carolina State Bar ("State Bar"), by and through Deputy Counsel G. Patrick Murphy and Jennifer Porter, responding to Defendant's Motion and Request for a Conference to Narrow the Issues to be Presented, and Hearing on Summary Judgment filed on February 12, 2016. The State Bar contends the Chair, in his discretion, should deny Defendant's motion. In support of the State Bar's position, the undersigned respectfully submit the following:

PROCEDURAL HISTORY

Plaintiff filed its Complaint in this case on March 6, 2015. On March 19, 2015, the Vice-Chair of the DHC entered an order pursuant to 27 N.C.A.C. 1B §.0114 directing the parties to conduct a pre-hearing conference in the case. On or about May 1, 2015, Defendant served Plaintiff with his First Set of Interrogatories, Requests for Production of Documents and Requests for Admission to Plaintiff. The State Bar served its responses to Defendant's discovery requests on or about June 12, 2015 and has supplemented its responses since that time.

On September 9, 2015, Plaintiff filed a Motion for Summary Judgment asking the Panel to enter summary judgment finding Defendant violated Rule 8.4(d) of the Rules of Professional Conduct, and to order a hearing on the issue of what discipline, if any, is appropriate for the violation. On November 25, 2015, Defendant filed a Motion and Memorandum in Support of Summary Judgment asking the Panel to dismiss Plaintiff's case based on numerous grounds. After oral arguments on December 15, 2015, the Panel granted Plaintiff's summary judgment motion and denied Defendant's motion. In its Order, the Panel stated that the sole remaining issue for hearing in this case is what discipline, if any, is appropriate for Defendant's violation of Rule 8.4(d) under the Rules of Professional Conduct.

On February 12, 2016, Defendant filed the motion that is the subject of this response, and a second motion for summary judgment in a separate filing. In his motion for a conference and hearing, Defendant asks the DHC to hold an in-person conference pursuant to 27 N.C.A.C. 1B §.0114(i). Defendant asserts that an in-person conference is necessary because 1) the State Bar appears set on conducting a multi-day evidentiary hearing despite this Panel's on-the-record discussion of what it anticipates to take place; 2) Defendant is entitled to know the names of witnesses that Plaintiff intends to call at the dispositional phase hearing and to have the opportunity to depose those witnesses; and 3) a conference is necessary to set reasonable limits on the State Bar's prosecution of Defendant. Defendant also requests that the Panel hold oral argument on his second motion for summary judgment. For the reasons discussed below, Defendant's motion should be denied.

ARGUMENT

Defendant's motion is made pursuant to 27 N.C.A.C. 1B §.0114(i). The rule provides:

> At the discretion of the chairperson of the hearing panel, and upon five days' notice to parties, a conference may be ordered before the date set for commencement of the hearing for the purpose of obtaining admissions or otherwise narrowing the issues presented by the pleadings. Such conference may be held before any member of the panel designated by its chairperson, who shall have the power to issue such orders as may be appropriate. At any conference which may be held to expedite the orderly conduct and disposition of any hearing, there may be considered, in addition to any offers of settlement or proposals of adjustment, the following:
>
> (1) the simplification of the issues;
> (2) the exchange of exhibits proposed to be offered in evidence;
> (3) the stipulation of facts not remaining in dispute or the authenticity of documents;
> (4) the limitation of the number of witnesses;
> (5) the discovery or production of data;
> (6) such other matters as may properly be dealt with to aid in expediting the orderly conduct and disposition of the proceeding.
>
> The chairperson may impose sanctions as set out in Rule 37(b) of the N.C. Rules of Civil Procedure against any party who willfully fails to comply with a prehearing order issued pursuant to this section.

The Panel's Order granting Plaintiff's summary judgment motion reserved for hearing the issue of what discipline, if any, is appropriate for Defendant's violation of Rule 8.4(d). The Vice-Chair's March 19, 2015 scheduling order was entered pursuant to 27 N.C.A.C. 1B §.0114 and directs the parties to hold a pre-hearing conference not less than 21 days before the hearing for the purpose of "obtaining admissions or otherwise

narrowing the issues presented by the pleadings." Because the Vice-Chair has already directed the parties to meet for the purposes enumerated in 27 N.C.A.C. 1B §.0114(i), there is no need for a conference with the Panel or a member thereof. In announcing its decision on the motions for summary judgment, the Panel gave the parties direction on the remaining disciplinary hearing and noted that the parties can present witnesses at the hearing and if the witnesses have relevant information the Panel will consider it. Moreover, 27 N.C.A.C. 1B §.0114(w) provides notice to parties in a disciplinary hearing of evidence and factors a panel is required to consider relevant to the discipline to be imposed. Based on the foregoing, Defendant's motion pursuant to 27 N.C.A.C. 1B §.0114(i) for a conference with the Panel should be denied.

Next, Defendant requests oral argument on his second motion for summary judgment. In Plaintiff's response to Defendant's second motion, Plaintiff has set forth the reasons Defendant's second motion is without merit. 27 N.C.A.C. 1B §.0114(j) provides the parties with notice that motions may be decided on the basis of written submissions. The legal reasoning for denial of Defendant's second motion for summary judgment is fully presented in Plaintiff's written submission. Accordingly, there is no need for oral argument on Defendant's latest motion for summary judgment.

CONCLUSION

Based on the reasons argued above, the Chair should deny Defendant's motion for a conference and request of oral argument.

WHEREFORE, Plaintiff respectfully requests that the Chair deny Defendant's motion for an in-person pre-hearing conference, and oral argument on Defendant's second motion for summary judgment.

This the 18th day of February, 2016.

G. Patrick Murphy

G. Patrick Murphy, Deputy Counsel
State Bar #10443

Jennifer Porter, Deputy Counsel
State Bar #30016

The North Carolina State Bar
P. O. Box 25908
Raleigh, NC 27611
(919) 828-4620
Attorneys for Plaintiff

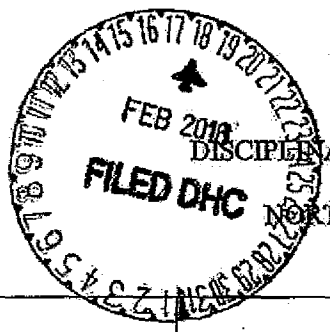
CERTIFICATE OF SERVICE

This is to certify that the foregoing Motion and Request for a Conference to Narrow the Issues to be Presented and Hearing on Summary Judgment was served on Defendant by depositing it in the United States Mail, postage prepaid to Defendant's counsel, Norman Shearin, David P. Russell and Kevin A. Rust at the following address:

Vandeventer Black, LLP
PO Box 2599
Raleigh, NC 27602-2599

This the 18th day of February, 2016.

G. Patrick Murphy
Deputy Counsel
North Carolina State Bar
P.O. Box 25908
Raleigh, NC 27611



STATE OF NORTH CAROLINA WAKE COUNTY	BEFORE THE DISCIPLINARY HEARING COMMISSION OF THE NORTH CAROLINA STATE BAR 15 DHC 7
THE NORTH CAROLINA STATE BAR, Plaintiff v. JERRY R. TILLETT, Attorney, Defendant	PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON DISCIPLINE

NOW COMES, the North Carolina State Bar ("State Bar"), by and through Deputy Counsel G. Patrick Murphy and Jennifer A. Porter, responding to Defendant's Motion for Summary Judgment on Discipline filed on February 12, 2016[1]. In support of its request that Defendant's motion be denied, Plaintiff states as follows:

1. Rule 56(c) of the North Carolina Rules of Civil Procedure provides that summary judgment will be granted "if the pleadings, depositions answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law."

2. Defendant appears to be asserting that he is entitled to imposition of an admonition as a matter of law.

[1] Defendant interjects arguments for dismissal of the case in his Motion for Summary Judgment on Discipline. This case is past the adjudicatory phase, however, and is at the disposition phase. *See North Carolina State Bar v. Adams*, 769 S.E.2d 406, 410 (2015) (citing *North Carolina State Bar v. Talford*, 356 N.C. 626, 634, 576 S.E.2d 305, 311 (2003) on the two phases of attorney discipline cases). While Plaintiff continues to oppose any and all arguments for dismissal, Defendant's arguments have already been addressed and denied by the DHC and Plaintiff will not re-address them in this response. The only issue currently before the DHC is the determination of the appropriate discipline, and Plaintiff will confine its arguments to the disposition phase.

Separation of Powers

3. Defendant's first argument appears to be that it would be a violation of the separation of powers clause of the Constitution of North Carolina for the DHC to impose any discipline that would impact Defendant's ability to serve as judge. The argument is essentially the same as his prior jurisdictional arguments, arguing that authority to remove a judge from the bench was given to the Legislature by the Constitution and to the Supreme Court under Article 30 of the North Carolina General Statutes, but not to the North Carolina State Bar. Defendant concludes by arguing the State Bar[2] is attempting to usurp the power to remove judges that was delegated to the Legislature by the Constitution and to the Supreme Court by the Legislature.

4. To the contrary, Plaintiff is acting pursuant to the statutory authority given to it by the Legislature in North Carolina General Statute § 84-28 in seeking imposition of attorney discipline upon Defendant. Likewise, the DHC will be acting pursuant to the statutory authority granted to it in N.C. Gen. Stat. § 84-28 and § 84-28.1 in making its ruling on what discipline, if any, is appropriate and in imposing such discipline. Although Plaintiff has not yet made any argument to the DHC regarding what discipline would be appropriate in this case, when it does so it will be for a discipline expressly authorized under N.C. Gen. Stat. § 84-28. That the imposition of statutorily authorized attorney discipline may have collateral effects does not divest the DHC of the authority to impose that discipline.

5. Moreover, discipline imposed by the DHC under N.C. Gen. Stat. § 84-28 does not, by itself, have any affect on a judge's ability to continue serving as a judge. It is only action taken by the Governor under a separate statute, N.C. Gen. Stat. § 7A-410, that would cause any effect.

[2] It is not clear if Defendant is referring to Plaintiff or the DHC.

Collateral Estoppel

6. Defendant's second basis for asserting that he is entitled to imposition of an admonition as a matter of law is collateral estoppel.

7. Defendant argues the DHC is bound under the doctrine of collateral estoppel to impose no greater discipline than an admonition in this case, based upon the Reprimand issued to Defendant by the Judicial Standards Commission (JSC). While this shorthand expression of collateral estoppel that speaks in terms of the tribunal being bound is not uncommon, as illustrated in the *Simms v. Simms* case Defendant cites, it fails to articulate a crucial requirement for the doctrine's applicability. Collateral estoppel cannot apply unless the party against whom it is raised can be bound by the prior determination at issue. The doctrine of collateral estoppel applies to parties, and cannot operate otherwise to bind a tribunal.

8. As stated by the Supreme Court of North Carolina, "Broadly speaking, 'estoppel is a bar which precludes a person from denying or asserting anything to the contrary of that which has, in contemplation of law, been established as the truth.'" *Whitacre Partnership v. Biosignia Inc.*, 358 N.C. 1, 13, 591 S.E.2d 870, 879 (2004) (quoting 28 Am. Jur. 2d *Estoppel and Waiver* §1 (2000))(emphasis added). Previously, in *State v. Summers*, the Supreme Court held:

> The doctrine of collateral estoppel is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally. When a fact has been agreed upon or decided in a court of record, neither of the parties shall be allowed to call it in question, and have it tried over again at any time thereafter, so long as the judgment or decree stands unreversed.

State v. Summers, 351 N.C. 620, 622-23, 528 S.E.2d 17, 20 (2000) (internal quotations and citations omitted) (emphasis added). *See also McInnis & Associates, Inc. v. Hall*, 318 N.C. 421, 432, 349 S.E.2d 552, 558 (1986) ("McInnis may be bound by this determination [in prior

judgment] despite the fact that it was erroneous" where he had the opportunity to be heard and to procedures to obtain relief).

9. That the doctrine of collateral estoppel operates to bind a party from relitigating an issue is most evident in the cases discussing the prohibition against binding a party to a judgment from a proceeding in which that party had no opportunity to previously litigate the issue. As stated by the Supreme Court of North Carolina, under the doctrine of collateral estoppel, "the determination of an issue in a prior judicial or administrative proceeding precludes the relitigation of that issue in a later action, provided the party against whom the estoppel is asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding." *Whitacre*, 358 N.C. at 15, 591 S.E.2d at 880 (citations omitted) (emphasis added).

10. Defendant does not address this requirement. He appears to contend that because the State Bar got the benefit of collateral estoppel to estop Defendant from relitigating facts set out in the JSC order in the adjudicatory phase of this case, the order must likewise bind the State Bar in the disposition phase. This logic, however, is contrary to well-established law.

11. The requirement that a party cannot be estopped unless it had a full and fair opportunity to litigate the issue in the prior proceeding is a matter of fundamental fairness. As stated by the United States Supreme Court:

> Some litigants – those who never appeared in a prior action – may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position."

Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 329 (1971).

12. Collateral estoppel cannot bind a party to a determination of an issue in a judgment from a prior case if that party did not have the opportunity to litigate the issue in the prior case. *See e.g. Blonder-Tongue Laboratories*, 402 U.S. at 329; *Whitacre*, 358 N.C. at 15, 591 S.E.2d at 880; *McInnis*, 318 N.C. at 433-34, 349 S.E.2d at 559-60. Accordingly, to collaterally estop Plaintiff by the JSC Reprimand, Defendant must first establish that Plaintiff was a party or in privity with a party to the JSC proceeding in which the Reprimand was issued.

13. The State Bar was not a party to the JSC proceeding in which the JSC issued Defendant a Reprimand. The JSC proceeding was initiated under N.C. Gen. Stat. § 7A-377, the only participants were the JSC and Defendant, and the only possible basis for discipline was a violation of the North Carolina Code of Judicial Conduct. N.C. Gen. Stat. §§ 7A-374.1, 7A-376, 7A-377. There was no opportunity for the State Bar to intervene in or otherwise become a party to the JSC proceeding. There was no opportunity for the State Bar to present its evidence and arguments on whether Defendant violated the North Carolina State Bar Rules of Professional Conduct or on what attorney discipline under N.C. Gen. Stat. § 84-28 might be appropriate. There was also no opportunity for the State Bar to be heard on the appropriate characterization of Defendant's conduct.

14. Neither was the State Bar in privity with the JSC. As stated by the Supreme Court of North Carolina, "[o]ne is 'privy,' when the term is applied to a judgment or decree, whose interest has been legally represented at the trial." *Masters v. Dunstan*, 256 N.C. 520, 526, 124 S.E.2d 574, 578 (1962) (internal citation omitted). The North Carolina State Bar and the JSC are distinct entities, established by different statutes for different purposes, and the State Bar's interests were not legally represented in the JSC proceeding as discussed above. The State Bar has already addressed in detail in prior filings the lack of privity with the JSC, including in

its response to Defendant's Motion for Judgment on the Pleadings and in its response to Defendant's adjudicatory phase Motion for Summary Judgment, and incorporates all such prior discussions here as if fully set forth herein.

15. Because Plaintiff was not a party to or in privity with a party to the JSC proceeding, it cannot be collaterally estopped by the judgment from that proceeding. This is an issue of fundamental fairness and of due process. *Blonder-Tongue Laboratories*, 402 U.S. at 329; *Whitacre*, 358 N.C. at 15, 591 S.E.2d at 880; *McInnis*, 318 N.C. at 433-34, 349 S.E.2d at 559-60.

16. The analysis of whether Plaintiff is collaterally estopped from pursuing discipline other than an admonition against Defendant need go no further. Even if all of the other elements for application of collateral estoppel are met, the doctrine does not and cannot apply against a party who had no opportunity to previously litigate the matter.

17. However, it is not the case that all of the other elements for application of collateral estoppel are met. Defendant has also failed to establish the necessary identity of issues.

18. Defendant suggests that Plaintiff is exaggerating the requisite degree of the identity of issues, but precise identity of issues is fundamental to application of the doctrine of collateral estoppel. Whereas *res judicata* operates to estop relitigation of all issues that were or could have been litigated in the prior action, collateral estoppel operates to estop relitigation only of the point or question actually litigated and determined in the prior action. *McInnis*, 318 N.C. at 427-28, 349 S.E.2d at 556. It is not enough to note the presence of the word "minor" in both the definition of a JSC reprimand and the description of an admonition in N.C. Gen. Stat. § 84-

28(c) to establish the requisite identity of issues. Minor is just the adjective; the nouns also matter.

19. "An estoppel by judgment arises when there has been a final judgment or decree, necessarily determining a fact, question, or right in issue, rendered by a court of record and of competent jurisdiction, and there is a later suit involving an issue as to the identical fact, question, or right theretofore determined . . . ." *King v. Grindstaff*, 284 N.C. 348, 355, 200 S.E.2d 799, 805 (1973) (quoting *Masters v. Dunstan*, 256 N.C. at 524, 124 S.E.2d at 576) (internal quotations and citations omitted) (emphasis added).

20. To determine whether the mandatory identity of issues is present, the Supreme Court in *Grindstaff* articulated the following requirements:

> In determining whether collateral estoppel is applicable to specific issues, certain requirements must be met: (1) The issues to be concluded must be the same as those involved in the prior action; (2) in the prior action, the issues must have been raised and actually litigated; (3) the issues must have been material and relevant to the disposition of the prior action; and (4) the determination made of those issues in the prior action must have been necessary and essential to the resulting judgment.

Id., 284 N.C. at 358, 200 S.E.2d at 806. None of these requirements are satisfied in this case.

21. Defendant is proposing that the issue of whether an admonition is the appropriate attorney discipline to be imposed in this case be considered concluded by the JSC's Reprimand, because a reprimand is given upon a finding that the judicial misconduct is minor pursuant to N.C. Gen. Stat. § 7A-376 and § 7A-374.2 and because an admonition is given for a minor violation of the Rules of Professional Conduct under N.C. Gen. Stat. § 84-28(c).

22. However, the determination of whether an admonition is the appropriate attorney discipline to impose is not made in a vacuum, solely dependent upon the word "minor." As stated by the Supreme Court of North Carolina:

> it is clear to this Court that each level of punishment in the escalating statutory scheme: (1) requires its own particular set of factual circumstances in order to be imposed, and (2) is measured in light of how it will effectively provide protection for the public. Thus, upon imposing a given sanction against an offending attorney, the DHC must provide support for its decision by including adequate and specific findings that address these two key statutory considerations.

North Carolina State Bar v. Talford, 356 N.C. 626, 638, 576 S.E.2d 305, 313 (2003) (emphasis added).

23. The Court in *Talford* reviewed the circumstances that must be present under N.C. Gen. Stat. § 84-28(c) for each level of discipline. Regarding admonition, it stated: "Subsection (c)(5), 'Admonition,' is the least serious punishment and results in 'a written form of discipline imposed in cases in which an attorney has committed a minor violation of the Rules of Professional Conduct.' Thus, the parameter of conduct that merits this discipline is a 'minor violation of the Rules.' *Id.*, 356 N.C. at 636, 576 S.E.2d at 312.

24. The regulations of the State Bar set out factors to be considered in imposing discipline, including factors to consider in determining whether a violation of the Rules of Professional Conduct is minor.

25. For example, specific factors are set out in the regulation concerning Grievance Committee procedures that must be considered by the Grievance Committee in determining whether a violation of the Rules is minor. 27 N.C. Admin. Code 1B § .0113(k)(3) states:

> Admonition Factors – Factors that shall be considered in determining whether the violation of the Rules is minor and warrants issuance of an admonition include, but are not limited to, the following:
> (A) lack of prior discipline for the same or similar conduct;
> (B) recognition of wrongful nature of conduct;
> (C) indication of reformation;
> (D) indication that repetition of misconduct not likely;
> (E) isolated incident;
> (F) violation of the Rules of Professional Conduct in only one matter;

(G) lack of harm or potential harm to client, administration of justice, profession, or members of the public;
(H) efforts to rectify consequences of conduct;
(I) inexperience in the practice of law;
(J) imposition of admonition appropriately acknowledges the minor nature of the violation(s) of the Revised Rules of Professional Conduct;
(K) notification contemporaneous with the conduct at issue of the wrongful nature of the conduct resulting in efforts to take remedial action;
(L) personal or emotional problems contributing to the conduct at issue;
(M) successful participation in and completion of contract with Lawyer's Assistance Program where mental health or substance abuse issues contributed to the conduct at issue.

26. Moreover, 27 N.C. Admin. Code 1B § .0114(w) sets forth factors that must be considered by the DHC in imposing discipline, including the following in 27 N.C. Admin. Code 1B § .0114(w)(3):

> General Factors – In all cases, any or all of the following factors shall be considered in imposing the appropriate discipline:
> (A) prior disciplinary offenses in this state or any other jurisdiction, or the absence thereof;
> (B) remoteness of prior offenses;
> (C) dishonest or selfish motive, or the absence thereof;
> (D) timely good faith efforts to make restitution or to rectify consequences of misconduct;
> (E) indifference to making restitution;
> (F) a pattern of misconduct;
> (G) multiple offenses;
> (H) effect of any personal or emotional problems on the conduct in question;
> (I) effect of any physical or mental disability or impairment on the conduct in question;
> (J) interim rehabilitation;
> (K) full and free disclosure to the hearing panel or cooperative attitude toward the proceedings;
> (L) delay in disciplinary proceedings through no fault of the defendant attorney;
> (M) bad faith obstruction of the disciplinary proceedings by intentionally failing to comply with rules or orders of the disciplinary agency;

(N) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
(O) refusal to acknowledge wrongful nature of conduct;
(P) remorse;
(Q) character or reputation;
(R) vulnerability of victim;
(S) degree of experience in the practice of law;
(T) issuance of a letter of warning to the defendant within the three years immediately preceding the filing of the complaint;
(U) imposition of other penalties or sanctions;
(V) any other factors found to be pertinent to the consideration of the discipline to be imposed.

27. There is no evidence that the JSC considered or made any determination on whether Defendant's conduct violated the North Carolina State Bar Rules of Professional Conduct, on whether any such violation was a minor violation of the Rules of Professional Conduct, on the two key statutory factors set out in *Talford* for imposition of attorney discipline, or on the factors listed in 27 N.C. Admin. Code 1B § .0113(k)(3) or § .0114(w). There are no explicit findings in the JSC Reprimand addressing any of these issues, nor would they have been inherently included in the JSC's determination that the conduct was minor and warranted a judicial reprimand. *Cf. Grindstaff*, 284 N.C. at 359, 200 S.E.2d at 807 (issue of whether employee acting within scope of employment a necessary element of the prior court's finding that the employer was liable and was thus deemed determined in the prior court's judgment).

Conclusion

28. The State Bar was not a party or in privity with a party to the JSC proceeding and had no opportunity to litigate its issues in that prior proceeding. For that reason alone, the State Bar cannot be estopped from having its first opportunity to litigate its issues, here in this proceeding. Additionally, even if the requisite identity of parties existed, Defendant has also failed to establish the required identity of issues. Defendant has failed to establish the necessary

requirements for collateral estoppel, and has failed to establish that Plaintiff can properly be estopped by the JSC Reprimand.

29. Furthermore, the DHC is required by regulation to consider the factors set out in 27 N.C. Admin. Code 1B § .0114(w) before imposing discipline. Therefore, imposition of discipline by summary judgment based solely upon the JSC Reprimand and without consideration of these factors would be in contravention of the DHC's regulatory obligations and not an action to which Defendant is entitled as a matter of law.

WHEREFORE, Plaintiff respectfully requests the Hearing Panel deny Defendant's Motion for Summary Judgment on Discipline.

Respectfully submitted, this the 18 day of February, 2016.

G. Patrick Murphy
Deputy Counsel
The North Carolina State Bar
P.O. Box 25908
Raleigh, NC 27611
919-828-4620
Attorney for Plaintiff

Jennifer A. Porter
Deputy Counsel
The North Carolina State Bar
P.O. Box 25908
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919-828-4620
Attorney for Plaintiff

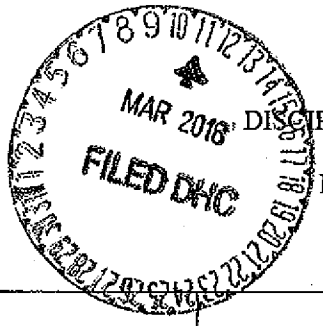
CERTIFICATE OF SERVICE

This is to certify that the foregoing Plaintiff's Response to Defendant's Motion for Summary Judgment on Discipline was served on counsel for Defendant by depositing it in the United States Mail, postage prepaid to the following address:

Mr. Norman W. Shearin
Mr. David P. Ferrell
Mr. Kevin A. Rust
VANDEVENTER BLACK LLP
Post Office Box 2599
Raleigh, NC 27602-2599

This the 18 day of February, 2016.

Jennifer A. Porter
Deputy Counsel



STATE OF NORTH CAROLINA

WAKE COUNTY

BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
15 DHC 7

THE NORTH CAROLINA STATE BAR,

Plaintiff

v.

JERRY R. TILLETT, Attorney,

Defendant

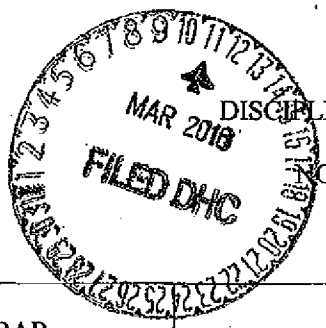
ORDER DENYING DEFENDANT'S SECOND MOTION FOR SUMMARY JUDGMENT

THIS MATTER is before the Hearing Panel of the Disciplinary Hearing Commission, composed of Joshua W. Willey, Jr., Chair, Barbara B. Weyher, and Michael S. Edwards, upon Defendant's Second Motion for Summary Judgment filed February 12, 2016; the Hearing Panel finds that there are genuine issues of material fact as to what discipline, if any, is appropriate in this case, and that Defendant is not entitled to judgment in his favor as a matter of law . Accordingly, the Hearing Panel finds that Defendant's Second Motion for Summary Judgment should be denied.

IT IS NOW, THEREFORE, ORDERED, ADJUDGED, AND DECREED THAT DEFENDANT'S SECOND MOTION FOR SUMMARY JUDGMENT FILED FEBRUARY 12, 2016 SHALL BE, AND THE SAME HEREBY IS, DENIED.

Signed by the Chair with the consent of the other Hearing Panel members, this the 8th day of March, 2016.

Joshua W. Willey, Jr., Chair
Disciplinary Hearing Panel



STATE OF NORTH CAROLINA

WAKE COUNTY

BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
15 DHC 7

THE NORTH CAROLINA STATE BAR,

Plaintiff

v.

JERRY R. TILLETT, Attorney,

Defendant

ORDER DENYING DEFENDANT'S REQUEST FOR HEARING AND ORAL ARGUMENT ON SECOND MOTION FOR SUMMARY JUDGMENT

THIS MATTER is before the Hearing Panel of the Disciplinary Hearing Commission, composed of Joshua W. Willey, Jr., Chair, Barbara B. Weyher, and Michael S. Edwards, upon Defendant's Request that he have an in-person hearing with oral argument on the Motion for Summary Judgment filed February 12, 2016; it appears that the issues have been fully briefed by both parties; that the factual and legal basis for the parties' respective positions with respect to the Motion has been fully set forth in Defendant's Motion and Plaintiff's Response, and that an in-person hearing and oral argument would not be helpful to the Panel in deciding the issues raised by the motion, and that Defendant's Request for Hearing should, therefore, be denied.

IT IS THEREFORE ORDERED, IN THE CHAIR'S DISCRETION, THAT DEFENDANT'S REQUEST FOR IN-PERSON HEARING AND ORAL ARGUMENT ON THE MOTION FOR SUMMARY JUDGMENT FILED FEBRUARY 12, 2016 SHALL BE, AND THE SAME HEREBY IS, DENIED.

Signed by the Chair with the consent of the other Hearing Panel members, this the 8th day of March, 2016.

Joshua W. Willey, Jr., Chair
Disciplinary Hearing Panel

STATE OF NORTH CAROLINA

WAKE COUNTY

BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
15 DHC 7

THE NORTH CAROLINA STATE BAR, Plaintiff v. JERRY R. TILLETT, Attorney, Defendant	**ORDER ON MOTION FOR CONFERENCE TO NARROW ISSUES**

THIS MATTER is before the Hearing Panel of the Disciplinary Hearing Commission, composed of Joshua W. Willey, Jr., Chair, Barbara B. Weyher, and Michael S. Edwards, upon Defendant's Motion and Request for a Conference to Narrow the Issues to be Presented, filed February 12, 2016; having considered Defendant's Motion and Request, it appears that the factors to be considered by the Panel in determining discipline are clearly set forth in 27 N.C.A.C. 1B § .0114(w), and that an in-person conference to narrow the issues for the disciplinary hearing is not necessary. However, Defendant's Motion suggests that Plaintiff has not revealed the identity of witnesses it reasonably expects to call on the issue of discipline; that Plaintiff did not directly respond to that suggestion in its response to Defendant's Motion.

It is, therefore, ordered, in the discretion of the Panel, that:

1. That Defendant's Motion and Request for a Conference to Narrow the Issues, filed February 12, 2016, shall be, and the same hereby is, denied.

2. Plaintiff shall, within 10 days of this Order, file a list of witnesses it reasonably anticipates that it may call on the issue of discipline.

3. Within 10 days thereafter, Defendant shall file a list of any additional witnesses he reasonably anticipates he may call on the issue of discipline.

4. The Clerk shall provide the Panel with a copy of the lists of potential witnesses.

This the 8th day of March, 2016.

Joshua W. Willey, Jr., Chair
Disciplinary Hearing Panel

STATE OF NORTH CAROLINA

WAKE COUNTY

BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
15 DHC 7

THE NORTH CAROLINA STATE BAR,

Plaintiff,

v.

JERRY R. TILLETT,

Defendant.

MOTION TO DISMISS AND FOR APPROPRIATE RELIEF AND REQUEST FOR HEARING AND ORAL ARGUMENT

NOW COMES, Defendant, Jerry R. Tillett ("Judge Tillett"), by and through counsel, and moves the Disciplinary Hearing Commission ("DHC"), pursuant to 27 N.C.A.C. §§ 01b .0114(j); 01B .0109(6), Rules 37 and 41 of the North Carolina Rules of Civil Procedure, and this Panel's inherent authority, for an order dismissing the State Bar's complaint against Judge Tillett with prejudice. In support thereof, Judge Tillett shows unto the Panel as follows:

1. The Judicial Standards Commission ("JSC") conducted an investigation of Judge Tillett's conduct alleged by the State Bar in its complaint herein. As stated in the Order of Public Reprimand issued by the JSC ("Reprimand"), the JSC investigation commenced on February 16, 2012, and lasted some twelve months.

2. The JSC investigation produced transcripts, documents, and notes from interviews with approximately fifty individuals.

3. Upon information and belief, the State Bar unlawfully and improperly obtained the JSC's files and other JSC documents regarding the inquiry as to Judge Tillett, including but not limited to, communications protected by the attorney-client privilege and/or work-product doctrine, without authorization from the JSC or Judge Tillett ("Tillett Confidential Files"). See

Affidavit of J. Christopher Heagarty, attached hereto and incorporated herein by reference as **Exhibit A.**

4. Upon information and belief, the State Bar improperly and unlawfully obtained the Tillett Confidential Files and privileged communications prepared by the JSC attorney, and unlawfully and improperly utilized such files and privileged communications to initiate a grievance and prosecute the captioned disciplinary proceeding.

5. Judge Tillett is informed and believes that the Tillett Confidential Files were ostensibly procured by the State Bar based on representations that it sought to pursue a grievance against Dan L. Merrell initiated by Steven D. Michael, the chair of the DHC, on behalf of the Town of Kill Devil Hills. See **Exhibit B** attached hereto.

6. Upon information and belief, a representative of the State Bar and/or the DHC, in unlawfully delivering the Tillett Confidential Files to the State Bar, wrote a note that accompanied the JSC file with words to the effect of: "After all of that, all they gave him was a public reprimand!" Ex. A., ¶ 11.

7. Further, under no lawful or proper circumstances should the State Bar possess the JSC attorney's original, hand-written notes and his legal analysis prepared for the JSC. The State Bar's possession of these documents violates, among other things, N.C. Gen. Stat. § 7A-377(a1) (2007) and is conduct that is substantially prejudicial to the administration of justice. The State Bar's said conduct taints the entire disciplinary process against Judge Tillett.

8. The Tillett Confidential Files, including the JSC attorney notes, were and are confidential. The State Bar knew that the Tillett Confidential Files were declared by statute to be confidential. N.C. Gen. Stat. § 7A-377(a1) (2007). A copy of the statute is attached as **Exhibit C.**

9. Despite such knowledge, the State Bar has improperly and unlawfully retained the Tillett Confidential Files, and attorney-client communications. Moreover, the State Bar has deliberately and intentionally failed to acknowledge in discovery herein that it has the Tillett Confidential Files. See Excerpts from the State Bar's Response to Defendant's First Request for Production No. 3 and Response to Defendant's Second Request for Production of Documents No. 1.; see also the State Bar's objection to Defendant's subpoena in a related Superior Court case. These documents are attached hereto as **Exhibit D**.

10. Unless waived by the judge, "all papers filed with and proceedings before the Commission, including any investigation that the Commission may make, are confidential[.]" N.C. Gen. Stat. § 7A-377(a1) (2007) (emphasis supplied).[1]

11. Under applicable law, "no person shall disclose information obtained from [JSC] proceedings or papers filed with or by the [JSC], except as provided herein." Id. (emphasis supplied). The papers are likewise exempt from disclosure under the Public Records Act in Chapter 132. Id.

12. Judge Tillett has not waived the confidential nature of the JSC file. Ex. A., ¶ 14.

13. Upon information and belief, a representative of the State Bar and/or the DHC unlawfully obtained the Tillett Confidential Files for the improper purpose of causing the State Bar to investigate and prosecute Judge Tillett.

14. Further, upon information and belief, the State Bar knew that the Tillett Confidential Files were by law confidential, that it acquired them unlawfully and improperly.

15. The State Bar should not have instituted disciplinary proceedings against Judge Tillett under these circumstances. The Tillett Confidential Files were improperly and unlawfully

[1] Subsequent amendments were made in 2013, which altered how public reprimands were addressed. However, this change does not alter or otherwise affect the statutorily mandated confidentiality of Judge Tillett's JSC files.

obtained. The State Bar, upon information and belief, has used the unlawfully obtained Tillett Confidential Files to investigate, instigate a grievance, file a complaint, and improperly and unlawfully prosecute Judge Tillett to force his removal from the superior court bench.

16. The law is well-settled that "[a]ll courts are vested with inherent authority to do all things that are reasonably necessary for the proper administration of justice." *Couch v. Private Diagnostic Clinic*, 146 N.C. App. 658, 665, 554 S.E.2d 356, 362 (2001) (quotations omitted). Likewise, "the trial court also retains inherent authority to impose sanctions for discovery abuses beyond those enumerated in Rule 37." *Cloer v. Smith*, 132 N.C. App. 569, 573, 512 S.E.2d 779, 782 (1999).

17. Based on the State Bar's unlawful and improper acquisition of the Tillett Confidential Files, and because the State Bar has prosecuted Judge Tillett based, *inter alia*, upon such JSC files, considerations of due process and fairness to Judge Tillett dictate that this proceeding be dismissed with prejudice.

18. The State Bar's conduct is prejudicial to the administration of justice, and is a significant violation of Judge Tillett's due process rights. Such constitutional violations require the Panel to dismiss the complaint against Judge Tillett with prejudice.

19. Nothing short of dismissal can cure the unlawful and improper conduct of the State Bar and resulting harm to Judge Tillett.

20. Judge Tillett respectfully requests that the captioned disciplinary proceeding against him be dismissed with prejudice, and that the State Bar be ordered to pay Judge Tillett's attorneys' fees, incidental expenses, and costs incurred herein.

REQUEST FOR ORAL ARGUMENT AND HEARING

Judge Tillett requests that the Panel grant to him an in-person hearing with oral argument on this dispositive motion.

WHEREFORE, for the reasons stated herein, the Panel should dismiss this disciplinary proceeding with prejudice, and award to Judge Tillett his reasonable attorneys' fees, expenses, and costs incurred.

Respectfully submitted, this the 24th day of May, 2016.

Norman W. Shearin
N.C. State Bar No.: 3096
E-mail: nshearin@vanblacklaw.com
Kevin A. Rust
N.C. State Bar No.: 35836
E-mail: krust@vanblacklaw.com
VANDEVENTER BLACK LLP
Post Office Box 2599
Raleigh, North Carolina 27602-2599
Telephone: (919) 754-1171
Facsimile: (919) 754-1317
Attorneys for Defendant Jerry R. Tillett

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served a copy of the foregoing **MOTION TO DISMISS AND FOR APPROPRIATE RELIEF AND REQUEST FOR HEARING AND ORAL ARGUMENT** upon the parties by depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service, addressed as follows:

G. Patrick Murphy
Jennifer A. Porter
The North Carolina State Bar
217 East Edenton Street
Raleigh, NC 27611
Attorney for Plaintiff

This the 24th day of May, 2016.

Kevin A. Rust

4838-7899-6270, v. 2

STATE OF NORTH CAROLINA

WAKE COUNTY

BEFORE THE
DISPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
15 DHC 7

THE NORTH CAROLINA STATE BAR,

Plaintiff,

v.

JERRY R. TILLETT,

Defendant.

AFFIDAVIT OF J. CHRISTOPHER HEAGARTY

J. Christopher Heagarty, being first duly sworn, deposes and says:

1. I have personal knowledge of the matters described herein or am otherwise competent to testify as to the same.

2. I am the former Commission Counsel and Executive Director of the North Carolina Judicial Standards Commission ("JSC").

3. While serving as Commission Counsel in 2013, I worked with the JSC in review of allegations of judicial misconduct by Judge Jerry R. Tillett ("Judge Tillett"). As part of this review, I had extensive knowledge of the contents of the JSC's investigative file in this matter, including the investigative report, correspondence from witnesses and from attorneys representing Judge Tillett, court documents pertaining to the matters under investigation, copies of media accounts of the incidents under investigation as well and my own legal work product prepared to assist the JSC in review of this matter.

4. At some time during the spring of 2013, after the Public Reprimand was entered by the JSC that addressed Judge Tillett on March 8, 2013, I was asked by Paul Ross, the

executive director of the JSC at that time, to make a copy of information in the JSC's file on Judge Tillett, and was told that someone from State Bar was going to pick it up.

5. I copied information from the Tillett investigative file, mostly taken from the JSC investigative report.

6. I took the information I had compiled and gave it to the secretary of the JSC with the understanding that it was to be picked up by a representative of the State Bar.

7. At some point in the fall or winter of 2014, after Paul Ross resigned and I became the executive director of the JSC, Patrick Murphy, an attorney with the State Bar, and another attorney represented of State Bar came to see me in the JSC office to discuss Judge Tillett.

8. Murphy had in his possession a white loose-leaf notebook. Inside the notebook was a typed time-line of the case I had never seen before. Behind the time line was a copy of the JSC investigative report on Judge Tillett. The notebook contained information beyond the investigative report, including my original hand written attorney notes, a confidential legal analysis of the disciplinary case against Judge Tillett that I had prepared for the Commission members, and other correspondence from the investigative file. I was stunned to see that Mr. Murphy's notebook included original documents, not copies, from the JSC, including my original handwritten attorney notes. Those notes and my confidential legal analysis prepared for the Commission were protected by the attorney-client privilege and were not included in the information I had copied for the State Bar.

9. I asked Mr. Murphy where he had obtained this information. He stated to me that he did not know how the State Bar came to be in possession of the notebook with my

original attorney notes, and asked me if I knew how the State Bar came into possession of this notebook. I told him that I did not know.

10. The notebook Mr. Murphy brought to my office that day was not a copy of the information I prepared for the State Bar, and I would not have copied my handwritten attorney notes or my confidential legal analysis because I considered them privileged attorney-client documents and/or protected attorney work-product.

11. The notebook Mr. Murphy bought to my office also had a detailed time-line of the case that I had neither prepared nor seen before being shown the notebook by Mr. Murphy. I distinctly remember that the time-line ended with a typed conclusion at the bottom of the page that stated, in summary, something to the effect of "After all of that, all they gave him was a public reprimand!"

12. I am certain that the timeline was not a document I had produced nor one I had seen anywhere within the JSC investigative file. I remember this well because I thought it was very unusual as everything else in the notebook had been part of the JSC's file on Judge Tillett, but I had never seen this document before. Further, I remember it said "they", not "we" or "the Commission", which suggested someone else had prepared it. Finally, I remember the phrase "all they gave him" because it implied that the disciplinary action against Judge Tillett was insufficient, yet it was the feeling of myself and, as best I was aware, of the JSC members, that the Public Reprimand was a satisfactory resolution of the case against Judge Tillett.

13. Mr. Murphy kept the notebook and did not return it to me after the meeting. I did not request its return, though I was puzzled about its origin and I considered asking for the return of my personal notes. I reported the meeting to the JSC Chairwoman, Judge Wanda Bryant, and described the notebook and its contents to her.

14. During my time at the JSC, Judge Tillett did not waive his right of confidentiality regarding the investigative file in this matter that he retained under the North Carolina General Statutes and Rules of the Judicial Standards Commission.

Further, the Affidavit sayeth not.

This the 20th day of May, 2016.

J. CHRISTOPHER HEAGARTY

SWORN TO subscribed before me
this 20th day of May, 2016.

Janice M Spadorcia
NOTARY PUBLIC Janice M Spadorcia
My commission expires: 5/13/17

[Official Seal]

JANICE M SPADORCIA
NOTARY PUBLIC
WAKE COUNTY, NC
My Commission Expires 5/13/17

4838-9525-9184, v. 2

Merrell complaint byTown of Kill Devil Hills

Steve Michael [Michael@ncobxlaw.com]

Sent: Tuesday, March 19, 2013 2:30 PM
To: Carmen Bannon (cbannon@ncbar.gov)
Cc: Katherine Jean (kjean@ncbar.gov); Debbie Diaz; Murphy, Shawn; Quidley, Mary
Attachments: bizhubb20130319124953.pdf (552 KB)

Carmen:

I do not know if you have seen the statement of charges against Judge Tillett which is attached and in which Mr. Merrell is mentioned several times. On page 4, paragraph 6, according to Judge Tillett, Mr. Merrell and the judge "colluded" on which personnel files to demand and Mr. Merrell suggested several additional personnel files the judge might want to view including the Town Manager, none of which had any relevancy to the issue being considered. I assume you have read the affidavits from the Town concerning the circumstances of the serving of the order for the files and Mr. Merrell's legal advice to the Town and individuals that they had no choice or options except to comply. The order does not reflect that it was entered by consent and the Town vigorously disputes that Mr. Merrell was authorized to consent and it is a fact he never informed anyone of the purported consent or that he decided a hearing on the seizure of the files was not in the Town's best interest. On page 8, paragraph 13, Mr. Merrell faxed Judge Tillett a copy of the memo suggesting new personnel policies to Judge Tillett (policies which were never adopted) which resulted in the Toby Fitch Order that was ultimately stricken by the Court of Appeals. We contend Mr. Merrell was clearly working against the interest of his clients, failed to advise his clients properly and in fact gave advice contrary to law and their expressed wishes and has disclosed information in violation of the Rules of Professional Responsibility (you already have the affidavits he signed and which were filed in the officer's lawsuit against the Town). The Town asks that these matters be investigated. Should you need the complaints in a different form, let me know and we will be happy to comply.

Steve

Steven D. Michael
Sharp, Michael,Graham & Baker, LLP
4417 N. Croatan Highway
P.O. Drawer 1027
Kitty Hawk, North Carolina 27949
Telephone No. (252)261-2126 ext. 229
Facsimile No. (252)261-1640
E-mail: michael@ncobxlaw.com

Please visit our new website at www.ncobxlaw.com.

adjudication of "willful misconduct in office" by the Supreme Court in a proceeding instituted by the Judicial Standards Commission, in which the judge or justice involved has been accorded due process of law and his guilt established by "clear and convincing evidence," is equivalent to an adjudication of guilt of "malpractice in any office" as used in N.C. Const., Art. VI, § 8. Therefore, the legislature acted within its power when it made disqualification from judicial office a consequence of removal for willful misconduct under this section. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

When Judge May Be Disqualified from Future Office. — When a judge is removed for "mental or physical incapacity" upon the recommendation of the Judicial Standards Commission, the remedy allowed by statute is limited to removal from office. On the other hand, when a judge is removed for reasons other than incapacity, this section (like N.C. Const., Art. IV, § 17, which it was intended to supplement), provides for both removal and disqualification from future judicial office. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

VII. LOSS OF RETIREMENT BENEFITS.

Loss of Retirement Benefits Is Additional Sanction. — In addition to the sanctions which follow removal by impeachment (loss of office and disqualification to hold further judicial office), this section imposes an additional sanction, the loss of retirement benefits. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

The constitutional source for the remedy of loss of retirement benefits does not lie in the impeachment provisions of N.C. Const., Art. IV, § 4, but in N.C. Const., Art. IV, § 8, which gives the General Assembly the power to "provide by general law for the retirement of Justices and Judges." Under this power the General Assembly may condition retirement benefits upon good conduct in office. Thus, the General Assembly acted well within its constitutional authority when it provided in this section that a judge who is removed from office for cause other than mental or physical incapacity shall receive no retirement compensation. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

Right to Recover Contributions to Retirement Fund. — Loss of retirement benefits as the result of the removal of a judge from office for cause other than mental or physical incapacity does not mean that the judge forfeits his right to recover the contributions which he paid into the fund. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

VIII. FUNCTION OF COMMISSION.

The Commission can neither censure nor remove a judge. It functions as an arm of the court to conduct hearings for the purpose of aiding the Supreme Court in determining whether a judge is unfit or unsuitable. In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978).

The Commission can neither censure nor remove a judge. It is an administrative agency created as an arm of the court to conduct hearings for the purpose of aiding the Supreme Court in determining whether a judge is unfit or unsuitable. To that end, it is authorized to investigate complaints, hear evidence, find facts, and make a recommendation thereon. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

Focus of Inquiry for Commission. — Whether the conduct of a judge can fairly be characterized as "private" or "public" is not the inquiry that the Judicial Standards Commission needs to make; rather, the proper focus is on, among other things, the nature and type of conduct, the frequency of occurrences, the impact which knowledge of the conduct would likely have on the prevailing attitudes of the community, and whether the judge acted knowingly or with a reckless disregard for the high standards of the judicial office. In re Martin, 302 N.C. 299, 275 S.E.2d 412 (1981).

The recommendations of the Commission are not binding upon the Supreme Court, which will consider the evidence on both sides and exercise its independent judgment as to whether it should censure, remove or decline to do either. In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978); In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978); In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Each case arising from the Commission is to be decided upon its own facts. In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

§ 7A-377. Procedures.

(a) Any citizen of the State may file a written complaint with the Commission concerning the qualifications or conduct of any justice or judge of the

General Court of Justice, and thereupon the Commission shall make such investigation as it deems necessary. The Commission may also make an investigation on its own motion. The Commission may issue process to compel the attendance of witnesses and the production of evidence, to administer oaths, and to punish for contempt. No justice or judge shall be recommended for censure, suspension, or removal unless he has been given a hearing affording due process of law.

(a1) Unless otherwise waived by the justice or judge involved, all papers filed with and proceedings before the Commission, including any investigation that the Commission may make, are confidential, and no person shall disclose information obtained from Commission proceedings or papers filed with or by the Commission, except as provided herein. Those papers are not subject to disclosure under Chapter 132 of the General Statutes.

(a2) Information submitted to the Commission or its staff, and testimony given in any proceeding before the Commission, shall be absolutely privileged, and no civil action predicated upon that information or testimony may be instituted against any complainant, witness, or his or her counsel.

(a3) If, after an investigation is completed, the Commission concludes that a letter of caution is appropriate, it shall issue to the judge a letter of caution in lieu of any further proceeding in the matter. The issuance of a letter of caution is confidential in accordance with subsection (a1) of this section.

(a4) If, after an investigation is completed, the Commission concludes that a public reprimand is appropriate, the judge shall be served with a copy of the proposed reprimand and shall be allowed 20 days within which to accept the reprimand or to reject it and demand, in writing, that disciplinary proceedings be instituted in accordance with subsection (a5) of this section. A public reprimand, when issued by the Commission and accepted by the respondent judge, is not confidential.

(a5) If, after an investigation is completed, the Commission concludes that disciplinary proceedings should be instituted, the notice and statement of charges filed by the Commission, along with the answer and all other pleadings, are not confidential. Disciplinary hearings ordered by the Commission are not confidential, and recommendations of the Commission to the Supreme Court, along with the record filed in support of such recommendations are not confidential. Testimony and other evidence presented to the Commission is privileged in any action for defamation. At least five members of the Commission must concur in any recommendation to censure, suspend, or remove any judge. A respondent who is recommended for censure, suspension, or removal is entitled to a copy of the proposed record to be filed with the Supreme Court, and if the respondent has objections to it, to have the record settled by the Commission's chair. The respondent is also entitled to present a brief and to argue the respondent's case, in person and through counsel, to the Supreme Court. A majority of the members of the Supreme Court voting must concur in any order of censure, suspension, or removal. The Supreme Court may approve the recommendation, remand for further proceedings, or reject the recommendation. A justice of the Supreme Court or a member of the

Commission who is a judge is disqualified from acting in any case in which he is a respondent.

(b) Repealed by Session Laws 2006-187, s. 11, effective January 1, 2007.

(c) The Commission may issue advisory opinions to judges, in accordance with rules and procedures adopted by the Commission.

(d) The Commission has the same power as a trial court of the General Court of Justice to punish for contempt, or for refusal to obey lawful orders or process issued by the Commission.

History.

1971, c. 590, s. 1; 1973, c. 808; 1989 (Reg. Sess., 1990), c. 995, s. 2; 1997-72, s. 2; 2006-187, s. 11.

Legal Periodicals.

For note on the Judicial Standards Commission, see 54 N.C.L. Rev. 1074 (1976).

For survey of 1977 law on professional responsibility and the administration of justice, see 56 N.C.L. Rev. 871 (1978).

For note discussing the power of the North Carolina Supreme Court to remove state judges in the context of In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978), see 14 Wake Forest L. Rev. 1187 (1978).

For article, "The Discipline and Removal of Judges in North Carolina," see 4 Campbell L. Rev. 1 (1981).

CASE NOTES

Commission's procedures are required to meet constitutional due process standards, since a judge's interest in continuing in public office is an individual interest of sufficient importance to warrant constitutional protection against deprivation. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Because of the severe impact which adverse findings by the Judicial Standards Commission and censure or removal by the Supreme Court may reasonably be expected to have upon the individual, fundamental fairness entitles the judge to a hearing which meets the basic requirements of due process. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Due Process Not Violated by Commission's Functions. — The combination of investigative and judicial functions in the Judicial Standards Commission does not violate a respondent's due process rights under either the federal or North Carolina Constitutions, since it is an administrative agency created as an arm of the court, and any alleged partiality of the Commission is cured by the final scrutiny of the Supreme Court. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Section 7A-376 in Pari Materia. — The provisions of this section and G.S. 7A-376 are parts of the same enactment, relate to the same class of persons, and are aimed at suppression of the same evil. The statutes are therefore in pari materia and must be construed accordingly. In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978).

A proceeding begun before the Judicial Standards Commission is neither a civil nor a criminal action. Such a proceeding is merely an inquiry into the conduct of one exercising judicial power to determine whether he is unfit to hold a judgeship. Its aim is not to punish the individual but to maintain the honor and dignity of the judiciary and the proper administration of justice. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

The function of the Commission is to conduct hearings upon complaints filed against judges and justices, to find facts and make recommendations so as to bring before the Supreme Court the questions of whether a judge or justice should be censured or removed in order to maintain proper administration of justice, public confidence in the judicial system and the honor and integrity of judges. In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978).

Powers of Commission. — The Judicial Standards Commission is empowered by this section to investigate complaints, compel the attendance of witnesses and the production of evidence, conduct hearings which afford due process of law, and make recommendations to the Supreme Court about what disciplinary action, if any, should be taken. In re Renfer, 345 N.C. 632, 482 S.E.2d 540 (1997).

Article Does Not Vest Absolute Discretion in Commission. — There is no merit in the contention that this Article illegally vests unguided and absolute discretion in the Judicial Standards Commission to choose which complaints to investigate and what evidence it will accept. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

The quantum of proof required in proceedings before the Commission of this

STATE OF NORTH CAROLINA WAKE COUNTY	BEFORE THE DISCIPLINARY HEARING COMMISSION OF THE NORTH CAROLINA STATE BAR 15 DHC 7
THE NORTH CAROLINA STATE BAR, Plaintiff v. JERRY R. TILLETT, Attorney, Defendant	PLAINTIFF'S ANSWERS TO DEFENDANT'S FIRST SET OF INTERROGATORIES, PLAINTIFF'S RESPONSES TO DEFENDANT'S FIRST REQUESTS FOR PRODUCTION OF DOCUMENTS, AND PLAINTIFF'S RESPONSES TO DEFENDANT'S FIRST REQUESTS FOR ADMISSION TO PLAINTIFF

NOW COMES Plaintiff and hereby serves upon Defendant the following answers, responses and objections to Defendant's First Set of Interrogatories, Requests for Production of Documents and Requests for Admission to Plaintiff.

GENERAL OBJECTIONS

1. Plaintiff objects to the "Definitions" contained in Defendant's First Set of Interrogatories, Requests for Production of Documents and Requests for Admission to the extent that they vary the standard usage of the English language; purport to impose ambiguous, overly broad, or unduly burdensome demands or duties; or seek to require information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

2. Plaintiff objects to the "Definitions" contained in Defendant's First Set of Interrogatories, Request for Production of Documents and Requests for Admission, as well as to the Interrogatories and Requests themselves, to the extent that they seek disclosure of information (a) protected by attorney-client privilege, (b) prepared in anticipation of litigation for trial and subject to the work product doctrine, or (c) otherwise protected from discovery by an

Additionally, and without waiving the above objections, the following are individuals Plaintiff believes have interviewed persons with firsthand knowledge and the agency for which they conducted the interview(s):

NAME	AGENCY
Timothy Batchelor	North Carolina State Bar
Glenn Joyner	Judicial Standards Commission
F.Blaine Hicks	SBI
D.L. German, Jr.	SBI
E.D. Lowery	SBI

2. Identify all persons known to you who say there is a causal connection between the incident on April 4, 2010 involving Tillett's son and the misconduct of Tillett alleged in the Complaint.

ANSWER: **OBJECTION. Plaintiff OBJECTS to the interrogatory because it calls for information that is: (1) irrelevant and not reasonably calculated to lead to the discovery of admissible evidence; (2) attorney work product; or (3) counsel's mental impressions, conclusions, opinions or legal theories. Without waiving said objections, Plaintiff states that persons known to it to have firsthand knowledge of the matters alleged in its Complaint are listed above.**

3. Identify documents and other proofs you say are clear, cogent and convincing evidence of Tillett's conduct alleged in the Complaint.

ANSWER: **OBJECTION. Plaintiff OBJECTS to the interrogatory because it calls for information that is: (1) irrelevant and not reasonably calculated to lead to the discovery of admissible evidence; (2) attorney work product; or (3) counsel's mental impressions, conclusions, opinions, legal theories, and assessment of what satisfies a legal**

standard. Without waiving said objections, Plaintiff lists and is providing the documents in the attached table. Plaintiff notes specifically that, pursuant to the above objections, it is not identifying or providing written notes of interviews, notes of interviewers, investigation reports, counsel reports, or statements from individuals other than Defendant that were made subsequent to the occurrence of the events at issue in the Complaint and that are not at issue in or generated during the matters set forth in the Complaint or the contemporaneous related civil litigation. Plaintiff has disclosed the names of all persons known to it to have firsthand knowledge of the matters at issue and that list includes all persons for whom the State Bar is aware there are written notes of interviews.

4. Describe any conduct alleged in the Complaint for which Tillett was not disciplined by the JSC.

ANSWER: **OBJECTION. Plaintiff OBJECTS to the interrogatory because it calls for information that is: (1) irrelevant and not reasonably calculated to lead to the discovery of admissible evidence or (2) counsel's mental impressions, conclusions, opinions or legal theories. Without waiving said objections, Plaintiff states Defendant was disciplined as a judge by the JSC for violating the Code of Judicial Conduct and bringing the judicial office into disrepute. The complaint before the DHC in this case alleges violations of the Rules of Professional Conduct and seeks discipline against Defendant as an attorney, addressing harm and/or potential harm to the public, the profession, clients, and/or the administration of justice.**

5. Do you say that Tillett's conduct alleged in the Complaint was other than minor

legal theories. Without waiving said objections, Plaintiff specified the conduct at issue and the associated alleged violations of the Rules of Professional Conduct in its Complaint.

26. Identify those person(s) who say that the presence of the Dare County Sheriff outside Tillett's chambers during the January 5, 2012 meeting with Parrish and Lamb was to arrest Parrish?

ANSWER: **OBJECTION. Plaintiff OBJECTS to the interrogatory because it is vague, overly broad and unduly burdensome, and because it calls for information that is: (1) attorney work product; or (2) counsel's mental impressions, conclusions, opinions or legal theories. Without waiving said objections, Plaintiff states it cannot know the identity of all persons who might say the presence of the Dare County Sheriff outside Defendant's chambers during the January 5, 2012 meeting with Parrish and Lamb was to arrest Parrish but that all persons known to it to have knowledge of the matters alleged in its Complaint are listed above.**

RESPONSES TO REQUESTS FOR PRODUCTION

1. Documents which are clear, cogent and convincing evidence of Tillett's conduct alleged in paragraphs 4 and 5 of the Complaint.

RESPONSE: **OBJECTION. Plaintiff OBJECTS to the request because it calls for counsel's mental impressions, conclusions, opinions, legal theories, and assessment of what satisfies a legal standard. Without waiving said objections, Plaintiff provides herewith the documents identified in answer to Interrogatory #3.**

2. Documents which are clear, cogent and convincing evidence of Tillett's conduct

alleged in paragraphs 8-10 of the Complaint.

RESPONSE: **OBJECTION. Plaintiff OBJECTS to the request because it calls for counsel's mental impressions, conclusions, opinions, legal theories, and assessment of what satisfies a legal standard. Without waiving said objections, Plaintiff provides herewith the documents identified in answer to Interrogatory #3.**

3. Documents which are clear, cogent and convincing evidence of Tillett's conduct alleged in paragraphs 11-24 of the Complaint.

RESPONSE: **OBJECTION. Plaintiff OBJECTS to the request because it calls for counsel's mental impressions, conclusions, opinions, legal theories, and assessment of what satisfies a legal standard. Without waiving said objections, Plaintiff provides herewith the documents identified in answer to Interrogatory #3.**

4. Documents which are clear, cogent and convincing evidence of Tillett's conduct alleged in paragraphs 29 and 30 of the Complaint.

RESPONSE: **OBJECTION. Plaintiff OBJECTS to the request because it calls for counsel's mental impressions, conclusions, opinions, legal theories, and assessment of what satisfies a legal standard. Without waiving said objections, Plaintiff provides herewith the documents identified in answer to Interrogatory #3.**

5. Documents which are clear, cogent and convincing evidence of Tillett's conduct alleged in paragraphs 34-35 of the Complaint.

RESPONSE: **OBJECTION. Plaintiff OBJECTS to the request because it calls for counsel's mental impressions, conclusions, opinions, legal theories, and assessment of what satisfies a legal standard. Without waiving said objections, Plaintiff provides herewith the documents identified in answer to Interrogatory #3.**

29. Following Britt's suspension, Parrish discussed with Britt's attorney the possibility that he would file a petition for Britt's removal.

RESPONSE: **Admitted that on 28 September 2011, Mr. Parrish discussed with Ms. Patricia Holland, Chief Britt's attorney, the petition for Chief Britt's removal he had drafted and his discomfort with it because the matter seemed like a personnel issue rather than anything criminal or unlawful. Further admitted that Mr. Parrish and Ms. Holland had subsequent conversations during which Mr. Parrish discussed that the filing of a petition for Chief Britt's removal was not warranted.**

30. By letter dated November 1, 2011 Tillett referred the complaints against Britt to Fitch.

RESPONSE: **Admitted that Defendant sent Judge Fitch a letter dated 1 November 2011 with complaint letters regarding Chief Britt that stated Defendant wrote to Judge Fitch "to refer to you for your consideration and handling as deemed appropriate matters and complaints against Kill Devil Hills, Town, Police Chief Gary Britt."**

This the 12 day of June, 2015.

G. Patrick Murphy
Deputy Counsel
State Bar No. 10443
The North Carolina State Bar
P.O. Box 25908
Raleigh, NC 27611
919-828-4620
Attorney for Plaintiff

Jennifer A. Porter
Deputy Counsel
State Bar No. 30016
The North Carolina State Bar
P.O. Box 25908
Raleigh, NC 27611
919-828-4620
Attorney for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Plaintiff's Answers to Defendant's First Set of Interrogatories, Plaintiff's Responses to Defendant's First Request for Production of Documents and Plaintiff's Responses to Defendant's First Request for Admission to Plaintiff were served upon the Defendant by sending it first class mail to the address below on 12 June 2015:

Norman W. Shearin
Vandeventer Black LLP
P.O. Box 2599
Raleigh, NC 27602

The disk(s) containing documents will be hand-delivered on 15 June 2015.

This the 12 day of June, 2015.

Jennifer A. Porter
Deputy Counsel
The North Carolina State Bar

STATE OF NORTH CAROLINA WAKE COUNTY	BEFORE THE DISCIPLINARY HEARING COMMISSION OF THE NORTH CAROLINA STATE BAR 15 DHC 7
THE NORTH CAROLINA STATE BAR, Plaintiff v. JERRY R. TILLETT, Attorney, Defendant	PLAINTIFF'S RESPONSE TO DEFENDANT'S SECOND REQUEST FOR PRODUCTION OF DOCUMENTS TO PLAINTIFF

NOW COMES Plaintiff and responds to Defendant's second request for the production of documents as follows:

1. All correspondence or communication, in whatever form, including e-mail, by and between the North Carolina State Bar and the Judicial Standards Commission from 2010 until the present.

RESPONSE: **OBJECTION. Plaintiff OBJECTS to this request because it is vague and overly broad, and because it calls for documents that are irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving said objections, Plaintiff provides the documents identified in answer to Interrogatory #3 of Plaintiff's response to Defendant's First Set of Interrogatories, Requests for Production of Documents and Requests for Admission to Plaintiff.**

This the 12th day of June, 2015.

G. Patrick Murphy
Deputy Counsel
State Bar No. 10443
The North Carolina State Bar
P.O. Box 25908
Raleigh, NC 27611
919-828-4620
Attorney for Plaintiff

Jennifer A. Porter
Deputy Counsel
State Bar No. 30016
The North Carolina State Bar
P.O. Box 25908
Raleigh, NC 27611
919-828-4620
Attorney for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Plaintiff's Response to Defendant's Second Request for Production of Documents to Plaintiff was served upon the Defendant by depositing it on 12 June 2015 with the United States Postal Service in a postage prepaid envelope addressed to Defendant's counsel as follows:

Norman W. Shearin
Vandeventer Black LLP
P.O. Box 2599
Raleigh, NC 27602

The disk(s) containing documents will be hand-delivered on 15 June 2015.

This the 12th day of June, 2015.

Jennifer A. Porter
Deputy Counsel
The North Carolina State Bar

NORTH CAROLINA DARE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 15 CVS 486
JERRY R. TILLETT, Plaintiff, v. NORTH CAROLINA STATE BAR and NORTH CAROLINA JUDICIAL STANDARDS COMISSION, Defendants.	**OBJECTION AND MOTION TO QUASH TO SUBPOENA**

L. Thomas Lunsford II, Secretary and Executive Director of the State Bar, through undersigned counsel, hereby objects and moves to quash the subpoena *duces tecum* addressed to him and served on him 1 October 2015 pursuant to Rule 45(c)(3), (5) of the Rules of Civil Procedure.

1. L. Thomas Lunsford II is the Executive Director and Secretary of the North Carolina State Bar, and the custodian of records for the State Bar. In those capacities, Mr. Lunsford has authorized and directed the undersigned counsel to act on his behalf in contesting the validity of a subpoena served upon him by Plaintiff, Jerry R. Tillett, in the above-referenced case.

2. On 1 October 2015, Mr. Lunsford was served with a subpoena directing him to produce the following at the Wake County Courthouse, Courtroom 10C by 9:30 am on 2 October 2015:

> All "original" documents the State Bar obtained or received from the JSC related to or involving the JSC Inquiry no. 12-013A regarding Jerry R. Tillett, including but not limited to, all memorandum, correspondence, notebooks, notes, investigation summaries, interview notes or summaries, and/or electronically stored information that in anyway relates to the JSC Inquiry no. 12-013A.

3. Mr. Lunsford objects to the subpoena, including for the following reasons:

a. The subpoena subjects the State Bar to an undue burden or expense. *See* N.C. R. Civ. P. 45(c)(3)(b).

b. The subpoena is otherwise unreasonable or oppressive. *See* N.C. Rule Civ. P. 45(c)(3)(d). Among other things, Plaintiff may not use a Rule 45 subpoena to circumvent the limitations and procedural safeguards provided by Rule 34 of the Rules of Civil Procedure (regarding production of documents in discovery), to circumvent proceedings in the Disciplinary Hearing Commission, or that may be otherwise protected from disclosure.

c. The subpoena is unreasonable in scope and seeks items that are not properly subject to subpoena under Rule 45.

4. Based on the foregoing, pursuant to Rule 45(c), Mr. Lunsford objects and moves to quash the Subpoena.

This the 12th day of October, 2015.

Alan W. Duncan

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N.C. State Bar No. 8736
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Counsel for Defendant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was served by first class mail and electronic mail upon the following:

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This the 12th day of October, 2015.

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