STATE OF MARYLAND

BEFORE THE COMMISSION ON JUDICIAL DISABILITIES

IN THE MATTER OF:	*	
		CJD 2018-009
JUDGE DEVY PATTERSON RUSSELL	*	
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OPPOSITION TO PURPORTED MOTIONS

Investigative Counsel replies in opposition to the two purported motions contained within the body of the Response of Judge Russell ("Respondent") to the charges in this matter, and requests that the Chair of the Commission on Judicial Disabilities ("Commission") strike these motions or, in the alternative, deny them, and in support states as follows:

"Motion to Dismiss"

1. The first purported motion is stylized as a "Motion to Dismiss." The Rules governing proceedings before the Commission do not contemplate or permit a motion to dismiss. Rule 18-407(c) unambiguously provides that Respondent is entitled to file a "response" to the charges in this matter. Nowhere in the Rules, however, is a provision allowing a motion to dismiss prior to the hearing on charges. Proceedings before the Commission on charges may only be dismissed pursuant to Rule 18-407(j) after a hearing. Accordingly, Investigative Counsel respectfully requests that the "Motion to Dismiss" contained in the Response be stricken.

2. To the extent the Commission intends to entertain the "Motion to Dismiss" contained in the Response, the same fails to provide any grounds upon which to dismiss this matter and should be denied. Respondent presents four theories by which she contends that the alleged procedural history of this matter prior to the filing of charges warrants dismissal of this matter:

statute of limitations, laches, issue and fact preclusion, and fundamental fairness. All four arguments fail.

3. Neither limitations nor laches is applicable in this matter. Assuming, arguendo, that the three-year statute of limitations in civil actions or the equitable doctrine of laches could apply to proceedings before the Commission, such defenses are not applicable against the State of Maryland when it is operating in its sovereign capacity. Central Collection Unit, State of Md. v. Atlantic Container Line, Ltd., 277 Md. 626, 628-29, 356 A.2d 555, 557 (1976) (limitations), Salisbury Beauty Schools v. State Bd. of Cosmetologists, 268 Md. 32, 63-64, 300 A.2d 367, 384-85 (1973) (laches), see, generally, State of Md. Cent. Collection Unit v. Gettes, 321 Md. 671, 675, 584 A.2d 689, 691 (1991). The Commission is a unit of the State of Maryland created by the Maryland Constitution in Article IV, Part I, Sections 4A and 4B. The Maryland Constitution vests the Commission with the authority to "investigate complaints against any judge" and "conduct hearings concerning such complaints." Md. Const. Art. IV, § 4B(a)(1). The Commission is vested, by Rule, with the authority to determine when and how to enforce the Code of Judicial Conduct. Md. Const. Art. IV, § 4B(a)(5), Rule 18-401, et seq. There is no question that its functions and actions are wholly within the sovereign powers of the State. Accordingly, the defenses of limitations and laches do not apply, and these arguments are unavailable to Respondent.

4. Additionally, the three-year statute of limitations cited by Respondent applies only to "a civil action at law." CTS. & JUD. PROC. § 5-101. "[P]roceedings before [the Commission] are neither civil nor criminal in nature; they are merely an inquiry into the conduct of a judicial officer, the aim of which is the maintenance of the honor and dignity of the judiciary

and the proper administration of justice rather than the punishment of the individual." In re Diener, 268 Md. 659, 670, 304 A.2d 587, 594 (1973).[1]

5. Respondent also claims that the doctrine of laches bars this matter from proceeding based upon an alleged procedural history that is not supported beyond Respondent's bare allegations. Investigative Counsel is precluded by Rule 18-409(a)(2) from addressing any of the factual allegations of Respondent. Even if Investigative Counsel was permitted to address these allegations, doing so is unnecessary as, in addition to being unavailable to Respondent in a matter before the Commission, Respondent's claim of laches otherwise fails on its face.

6. Laches "applies when there is an unreasonable delay in the assertion of one's rights." Liddy v. Lamone, 398 Md. 233, 244, 919 A.2d 1276, 1283 (2007). Here, laches would apply to an unreasonable delay on the part of *Investigation Counsel* to assert *her* "rights." However, Respondent's allegations of delay concern information allegedly available to and actions allegedly taken by individuals other than Investigative Counsel. At no point does Respondent allege that Investigative Counsel was aware of the matters detailed in the charges "beginning in 2015", but instead attempts to attribute the knowledge of others to Investigative Counsel. Beyond this, Investigative Counsel is, again, prohibited from discussing proceedings in this matter prior to the filing of charges pursuant to Rule 18-409(a)(2).

7. Respondent next contends that this matter is barred by the doctrines of collateral estoppel and/or res judicata. Neither doctrine is applicable to this matter. Respondent concedes this by stating, at the outset, that the doctrines are "not a perfect theoretical fit." Response, p. 6. The doctrines of res judicata and collateral estoppel speak in terms of suits, causes of action, and

[1] Nor is there any other statute of limitations available for proceedings before the Commission by statute or in the Maryland Rules. In fact, the 199th Report of the Standing Committee on Rules of Practice and Procedure has proposed a provision for the handling of "stale" claims. This new rule is pending before the Court of Appeals.

parties, all terms inapplicable to actions before the Commission. However, even the strained reading of these doctrines advocated by Respondent fails to apply in this matter.

8. Res judicata applies when "the second suit is between the same parties and is upon the same cause of action." MPC, Inc. v. Kenny, 279 Md. 29, 32, 367 A.2d 486, 489 (1977). The test for determining whether two actions rest upon the same "cause of action" "is whether the same evidentiary facts would sustain both actions." Id. at 33, 367 A.2d at 489. There is no dispute that the facts determined by the Commission in CJD 2016-189 would not sustain this matter. The charges in this matter contain different allegations, witnesses, and actions. It is, plainly, a different "cause of action."

9. Likewise, the doctrine of collateral estoppel is inapplicable to this matter. In fact, collateral estoppel itself is not a bar to an action *per se*, but instead merely holds that "in a second suit between the same parties, even though the cause of action is different, any determination of fact, which was actually litigated in the first case, is conclusive in the second case." MPC, Inc. v. Kenny, 279 Md. 29, 32, 367 A.2d 486, 489 (1977). As such, its use can be both offensive and defensive. The doctrine has a clearly defined, four-part test to determine its applicability, the first of which being, "Was the issue decided in the prior adjudication identical with the one presented in the action in question?" Colandrea v. Wilde Lake Cmty. Ass'n, Inc., 361 Md. 371, 391, 761 A.2d 899, 909 (2000). In order for collateral estoppel to have any effect in this matter, Respondent would have to proffer a finding of fact in CJD 2016-189 that would be likewise applicable in this matter. She cannot. As the factual questions at issue in this matter were not previously litigated, collateral estoppel does not apply.

10. Finally, Respondent contends that this matter is barred by "fundamental fairness" because of an alleged "procedural advantage" gained by Investigative Counsel. Respondent was

afforded all of the rights and procedures due to her under the Maryland Rules governing matters before the Commission. The basis for the claim that Investigative Counsel was aware of the conduct at issue in this matter four years ago is not articulated by Respondent. Neither is the alleged "procedural advantage" beyond the mere claim that not having to defend the present allegations in CJD 2016-189 somehow impaired her defense in that case due to evidentiary rulings that she alleges Investigative Counsel conspired with the Commission to ensure. This claim is baseless.

"Motion to Recuse"

11. The second purported motion is stylized as a "Motion to Recuse." As indicated by the Memorandum and Order attached to the Response as Exhibits A and B, the Commission has already considered the arguments put forward by Respondent in said "Motion." The independent decisions of the Commission members who are to preside over this matter as detailed in those exhibits are now the "law of the case" in this matter. Accordingly, Investigative Counsel respectfully requests that the "Motion to Recuse" be stricken.

12. Even if the Commission were to entertain Respondent's arguments, it must do so through the lens of the "strong presumption" that judges are "impartial participants in the legal process." Regan v. State Bd. of Chiropractic Examiners, 355 Md. 397, 410, 735 A.2d 991, 998 (1999) (quoting Jefferson-El v. State, 330 Md. 99, 107, 622 A.2d 737, 741 (1993)). Whether to recuse in any given case is a choice vested in each individual Commission member, and their choices have been made. There is no basis upon which to reconsider them. Additionally, contrary to Respondent's assertion, the Maryland Constitution only provides procedural mandates for the filling of a vacancy on the Commission for the remainder of a former member's term (as opposed to a vacancy during a hearing on charges) or when a judge has recused from a matter

involving that judge's own conduct. Md. Const. Art. IV, § 4A(f); Md. Const. Art. IV, § 4B(a)(4). Neither situation is applicable here. In fact, the absence of a procedure for appointing a substitute member in the event of a recusal that would inhibit the Commission's ability to form a quorum underscores the need for the application of the doctrine of necessity.

WHEREFORE, Investigative Counsel respectfully requests that Respondent's purported "Motion to Dismiss" and "Motion to Recuse" be stricken, or, in the alternative, denied, and for such other and further relief as the nature of this cause may require.

Respectfully submitted,

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