

BEFORE THE ALABAMA COURT OF THE JUDICIARY

IN THE MATTER OF:
STATE OF ALABAMA JUDICIAL INQUIRY COMMISSION

V.

THE HONORABLE TRACIE A. TODD
CIRCUIT JUDGE, BIRMINGHAM DIVISION,
CRIMINAL DIVISION, JEFFERSON COUNTY, ALABAMA

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FILED
DEC 10 2021
COURT OF THE JUDICIARY
Rebecca C. Oates
Secretary
Case # 58

RENEWED MOTION TO DISMISS AND MOTION TO VACATE AND SET ASIDE THE COURT'S VERDICT BASED ON A LACK JURISDICTION

Comes now, Judge Tracie A. Todd, by and through counsel, and requests this Honorable Court to vacate and set aside its finding at the conclusion of the trial. As a basis for this motion, we submit that the Alabama Judicial Inquiry Commission (Commission) lacked requisite jurisdiction to commence an investigation against Judge Todd based on an unverified complaint filed by the Jefferson County District Attorney's Office. As a result, this honorable Court lacked the requisite jurisdiction to adjudicate the Commission's Complaint at trial.

Procedural Background and Evidence Presented at Trial

On or about December 22, 2017, the Jefferson County District Attorney's Office, by and through interim District Attorney T. Michael Anderton, filed an ethics complaint against Judge Tracie A. Todd with the Commission. Anderton's complaint was filed within three weeks of Judge Todd requesting that a "problematic" Deputy District Attorney not return to her courtroom, and ahead of Judge Todd's 2018 reelection bid. Despite the heavy publicity and scrutiny in the media and legal community, Judge Todd was reelected to a second term without opposition from a challenger. The Commission investigated Judge Todd for nearly three years before filing this

Complaint with the Court of the Judiciary in April, 2021. Judge Todd remained in office during the investigation, executing her duties adjudicating felony and misdemeanor offenses.

On April 30, 2021, Judge Todd petitioned the Court to dismiss the Complaint in part because the Court lacked jurisdiction. (*See Exhibit 1: Defendant's Brief in Support of The Petition to Dismiss*). On June 22, 2021 the Court denied Judge Todd's petition in part because the allegations of subject matter jurisdiction were not clear and that there was no evidence that the issue of jurisdiction was raised with the Commission during its investigation. On July 2, 2021, Judge Todd petitioned the Court to reconsider the denial and presented evidence that the allegations related to subject matter jurisdiction were raised during the Commission's Investigation. (*See Exhibit 2: Petition for Relief and Motion to Reconsider*). Judge Todd also presented evidence that the events alleged in the Complaint occurred nearly seven years ago, and were widely publicized. The Commission had several years to remedy the flawed complaint based, but did not. Instead, the Commission improperly commenced an investigation based on an unverified complaint in violation of Alabama law. On July 9, 2021, this honorable Court denied Judge Todd's petition and motion to reconsider.

Trial commenced in this cause on November 15, 2021 through November 16, 2021. The Court went into recess and resumed on December 1, 2021 and December 2, 2021. Judge Todd preserved the record by petitioning the Court for a directed verdict at the close of the Commission's case-in-chief and at the close of Judge Todd's case-in-chief.

At trial, DDA Gonzalez testified on cross examination that interim District Attorney Danny Carr, Chief DDA Joe Roberts, DDA Patrick Lamb, and DDA Drew Herring were responsible for assisting him with drafting the complaint. The complaint drafted by interim DA Danny Carr, Chief DDA Joe Roberts, DDA Lamb, DDA Herring and DDA Gonzalez, in turn, became the foundation

of the Commission's Complaint. However, the evidence presented at trial clearly revealed that the District Attorney's complaint was filed by T. Michael Anderton. Based on the evidence presented at trial, DA Anderton was not involved in the events as alleged or in drafting the complaint. Based on the evidence, DA Anderton served only as an impermissible signatory on the complaint, who had no knowledge of the allegations or the events related thereto. In fact, evidence was presented to this Court that DA Anderton not only lacked the requisite knowledge for filing a complaint with the Commission, but that he did not read the complaint before signing and filing it. Arguably, DA Carr, Chief DA Roberts, DDA Lamb, DDA Herring and DDA Gonzalez attempted to insulate themselves from the legal ramifications of submitting an unverified, accusatory complaint by qualifying the supplied verification through DA Anderton. DA Anderton, in his official capacity, attested that the included allegations and statements of fact were "true and correct to the best of my knowledge, information and belief." Such a verification is insufficient under Alabama law, and is contradicted by the evidence presented at trial.

The record at trial is undisputed, the subject complaint filed by the District Attorney was in fact based on rank unverified hearsay. But for Judge Todd exercising her authority to maintain the integrity of the court by asking DDA Gonzalez not to return, the evidence showed that the District Attorney's Office would not have colluded to file a complaint with the Commission. But for the District Attorney's unverified complaint, the Commission would not have proceeded against Judge Todd.

The burden was on the Commission to establish that its investigation comported with Alabama law. The trial record is clear, it did not. It was established that the District Attorney's Complaint was not verified by its signatory, DA Anderton. There was no evidence that any member of the Commission or its staff filed a verified complaint, which is an indispensable

requisite for instituting proceedings against Judge Todd. The Commission instead relied on an expansion of the authority granted to it and the District Attorney's Office in conflict with well-established Alabama law.

Therefore, we respectfully submit that this Court lacked the indispensable subject matter jurisdiction to adjudicate the Commission's Complaint, that in turn, lacked the subject matter jurisdiction to commence an investigation based entirely on the District Attorney's unverified complaint. We further request that the Court reconsider its previous rulings, and vacate its judgement based on the evidence and lack thereof at trial as required under Alabama law.

The Complaint and the Court's Ruling are based on a retaliatory, unverified complaint filed by the District Attorney's Office

"Proceedings may be instituted by the commission *only* upon a verified complaint filed either by a member of the public or by a member of the commission or the commission's staff." *Ala. Rules of Procedure of Judicial Inquiry Commission Rule 6(a)*. "The veritable laundry list of mandatory, investigation-related duties cast upon the Commission by the Alabama Rules governing the Judicial Inquiry Commission (Commission) Rule 6 follows upon, and results from, the filing of a verified complaint 'by a member of the public or by a member of the [Commission] or the [Commission's] staff.' *Commission Rule 6.A*. In other words, it is the filing of a complaint with the Commission that invokes the Commission's jurisdiction." *Steenland v. Alabama Judicial Inquiry Com'n*, 87 So.3d 535, 542- 43 (Ala. 2012). "It is clear [...], by reading the statute as a whole and giving effect to the language of the section in its entirety, the legislature intended the filing of a verified complaint with the Commission to be a jurisdictional matter without which the Commission has no authority to institute proceedings." *Alabama Surface Min. Reclamation Commission v. Jolly*, 373 So.2d 855, 857-58 (1979). "Where verification is required, it should be by the party, rather than by the attorney, unless the attorney has personal knowledge of the facts

alleged.” *Ala. R. Civ. P. 11, Committee Comments on 1973 Adoption*. “Every action shall be prosecuted in the name of the real party in interest.” *Ala. R. Civ. P. 17(a)*. ““A statute must be considered as a whole and every word in it made effective if possible.”” *Custer v. Homeside Lending, Inc.*, 858 So.2d 233, 245 (Ala. 2003), quoting *Alabama State Bd. of Health v. Chambers County*, 335 So.2d 653, 654-55 (Ala.1976); see also *McCausland v. Tide-Mayflower Moving & Storage*, 499 So.2d 1378, 1382 (Ala.1986).

Black’s Law Dictionary defines “verification” as “a formal declaration made in the presence of an authorized officer, such as a notary public, by which one swears to the truth of the statements in the document.” The attempt of the District Attorney’s Office to rely on a qualified verification to institute these proceedings should fail and this investigation should be dismissed. “A verification which is improperly based on information and belief is insufficient to entitle the verifying party to relief because the verification is qualified in nature.” *Ballinger v. Bay Gulf Credit Union*, 51 So.3d 528, 529; see also *Muss v. Lennar Fla. Partners I, L.P.*, 673 So. 2d 84, 85 (Fla. 4th DCA 1996); *Barton v. Circuit Court of the Nineteenth Judicial Circuit*, 659 So. 2d 1262, 1263 (Fla. 4th DCA 1995); *Thompson v. Citizens Nat’l Bank of Leesburg, Fla.*, 433 So. 2d 32, 33 (Fla. 5th DCA 1983).

The fact that a qualified verification is improper for failing to include a statement that the attester has personal knowledge of the facts alleged is not unique to the Florida cases cited above and to Black’s Law Dictionary’s basic definition of the term. Support can be found in the Committee Comments to Rule 11 of the Rules of Civil Procedure equating a verification to an affidavit. “Rule 65 permits verification of the complaint where a temporary injunction is sought; the verified complaint then can be regarded as an affidavit. Where verification is required, it should be by the party, rather than by the attorney, unless the attorney has personal knowledge of the facts

alleged.” *Ala. R. Civ. P. 11, Committee Comments on 1973 Adoption; accord Kessler v. Gillis*, 911 So.2d 1072, (2004) (“An affidavit premised on ‘information and belief’ does not meet the personal-knowledge requirement of Rule 56(e), *Ala. R. Civ. P. Ex parte Head*, 572 So.2d 1276, 1279 (*Ala. 1990*)”).

With this substantive procedural deficiency present, the Commission was without jurisdiction to consider the allegations in the District Attorney’s complaint. Accordingly, the District Attorney’s qualified verification is deficient and these proceedings should have been dismissed by the Commission. In other words, it is the filing of a complaint with the Commission that invokes the Commission’s jurisdiction.” *Steenland v. Alabama Judicial Inquiry Com’n*, 87 So.3d 535, 542- 43 (*Ala. 2012*). “It is clear [...], by reading the statute as a whole and giving effect to the language of the section in its entirety, the legislature intended the filing of a verified complaint with the Commission to be a jurisdictional matter without which the Commission has no authority to institute proceedings.” *Alabama Surface Min. Reclamation Commission v. Jolly*, 373 So.2d 855, 857-58 (1979).

As established at trial, these retaliatory proceedings were due to be dismissed at the outset based on fatal procedural deficiencies going to the Commission’s jurisdiction. Judge Todd raised these issues with the Commission at the outset of the investigation. (*See attachment 1*). Because the Commission was without jurisdiction to proceed as it elected, the Court was therefore without jurisdiction to adjudicate the Commission’s Complaint, and the Court’s ruling in this matter is due to be vacated and set aside with prejudice.

Respectfully submitted by Counsel for Judge Todd:

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We hereby certify that we have on this 10th day of December 2021 electronically filed the foregoing with the Court of the Judiciary, and that we have further served a copy by placing the same in the U.S. mail postage pre-paid, and properly addressed as follows:

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Respectfully Submitted,

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