The Governor's Council for Judicial Appointments
State of Tennessee
Application for Nomination to Judicial Office

Name: Samuel Francis Robinson III

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INTRODUCTION

The State of Tennessee Executive Order No. 41 hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application questionnaire. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website www.tncourts.gov). The Council requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit original (unbound) completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with electronic or scanned signature via email to debra.hayes@tncourts.gov, or via another digital storage device such as flash drive or CD.

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

I presently run a solo law practice, Samuel F. Robinson III, Attorney at Law, in Chattanooga.

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

2002; BPR No. 022261

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

Georgia – 10/26/2004; GA Bar no. 140820; my license is currently active

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any state? If so, explain. (This applies even if the denial was temporary).

No.

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

Office of Hamilton County District Attorney; 2001-2002; Intern

Robinson Law Firm; 2002-2008; General practice attorney

Samuel F. Robinson III, Attorney at Law; 2008-present; solo practitioner

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

N/A

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

2002-2008: 85% criminal defense; 15% domestic relations

2008-present: 50% criminal defense; 40% personal injury; 10% domestic relations

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Council needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Council. Please provide detailed information that will allow the Council to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application.

I am a trial attorney. I spent the first 3 years of my practice in the Hamilton County Criminal and Sessions Courts taking appointments in case types ranging from traffic offenses to first-degree murder. I also took appointments in the Hamilton County Juvenile Court representing parents whose children had been declared dependent and neglected, and as a guardian *ad litem* for dependent and neglected children. In those first 3 years, I was in court nearly every day. In 2007, I tried a DUI case in Div. II of the Hamilton County Circuit Court before the Honorable Rebecca Stern. In 2008, my father (Samuel. F. Robinson Jr.) retired from private practice and took a job as a Specialist at the Workers' Compensation Division of the Tennessee Department of Labor and Workforce Development. At that time, I took over our firm's civil practice, while maintaining my criminal practice, and have since represented people in all types of personal injury cases including motor vehicle accidents, workers' compensation cases, slip-and-fall accidents, and healthcare liability cases. I have settled many workers' comp cases at the Benefit Review Conference ("BRC") level and have tried one workers' comp case in the Bradley County Chancery Court before the Honorable Jerri S. Bryant. I was successful in that case and the employer appealed to the Tennessee Supreme Court Workers' Compensation Panel, who affirmed the Chancellor's decision declaring the claimant permanently and totally disabled. On February 4-6, 2015, I tried a slip-and-fall case against Memorial Hospital in Div. II of the

Hamilton County Circuit Court before the Honorable Jeffrey Hollingsworth. I have also tried a criminal case in the Catoosa County, Georgia Superior Court before the Honorable Jon Bolling Wood, and have tried a methamphetamine-manufacturing case in the United States District Court for the Eastern District of Tennessee before the Honorable Harry S. Mattice Jr, in which I won acquittals in 3 of the 4 charges indicted. I am a hard worker and have never felt as though I was unprepared in the course of a trial or other hearing. Throughout my time as an attorney, I have maintained my criminal practice, but have stopped regularly taking court appointments in Criminal Court because I now generally work on a retained basis in criminal cases, and because I have branched into civil practice. Nonetheless, I do believe that my experience taking so many court appointments in Criminal Court during my first 3 years in practice provided me with a solid foundation upon which I have based the development of my overall practice. Now 12+ years into the practice of law, I believe that I have the skill set I need to become an effective judge.

9. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

State of Tennessee v. Michael Kevin Condra: Hamilton County Criminal Court, Div. II; Hon. Rebecca Stern; Docket No. 258771; I was sole defense counsel in this DUI jury trial.

State of Georgia v. Robert Franklin Barbee: Catoosa County, GA Superior Court; Hon. Jon Bolling Wood; Docket No.s 06-2625W, 06-2626W, and 062627W; I was sole defense counsel in this triple-burglary jury trial.

United States of America v. Robert Klein: United States District Court for the Eastern District of Tennessee; Hon. Harry S. Mattice Jr.; Docket No. 1:07-CR-62; I was sole defense counsel in this methamphetamine-manufacturing case that we tried before a jury.

George Edwards v. Velma Childs, et al.: Bradley County Chancery Court; Hon. Jerri S. Bryant; Docket No. 2001-CV-149; I was sole plaintiff's counsel in this workers' compensation case which we tried before the Chancellor. Opinion from the Tennessee Supreme Court Workers' Compensation Panel attached as Exhibit "A."

Barbara and Bobby Skiles v. Memorial Hospital: Hamilton County Circuit Court; Hon. Jeffrey Hollingsworth; Docket No. 12-C-575; I was sole plaintiffs' counsel in this slip-and-fall jury trial.

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved,

11. whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each

case; and (4) a statement of the significance of the case.

In 2013, I sat for Hamilton County General Sessions Court Judge Christie Mahn-Sell on two occasions. On the first occasion, the docket consisted of traffic violations and criminal cases and, on the second occasion, I presided over a case involving a motor vehicle traffic accident.

12. Describe generally any experience you have of serving in a fiduciary capacity such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

Early in my practice, I was appointed a guardian *ad litem* to dependent and neglected children in the Hamilton County Juvenile Court. As this was roughly 12 years ago, I do not presently recall how many such children I was appointed to represent. Also early in my practice, Chancellor Frank Brown of the Hamilton County Chancery Court appointed me to represent people who were involuntarily committed to Moccasin Bend Mental Health Institute in their hearings regarding their continued commitment.

13. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Council.

I have been a general practitioner/trial attorney for over 12 years now. Throughout that time, I have maintained my criminal practice, as I have always enjoyed helping people charged with crimes. When a person is charged with a crime, it is a very scary experience for the vast majority of people. Helping those people navigate through the legal system and do what they have to do to turn their lives around and become better citizens is the most rewarding experience I have had as an attorney, and one of the most rewarding experiences of my life. I am passionate about helping people in all kinds of cases, but especially in criminal cases, as that area has provided the foundation of my practice and what I have based the expansion of my abilities as an attorney into other areas. My experience working in so many different areas, in addition to criminal law, in two states and in federal court, is what I believe provides me with the foundation that I need to be a judge. I would not apply for this position if I did not feel as though I were qualified for it, and I am confident that I have the experience necessary to become a judge, the skills to understand the complexities of the position, and the work-ethic to perform the tasks presented by the job and the lawyers that come before the court at a high level.

14. List all prior occasions on which you have submitted an application for judgeship to the Governor's Council for Judicial Appointments or any predecessor commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

This is my first application for judgeship at the state level.

EDUCATION

15. List each college, law school, and other graduate school that you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

University of Alabama: 8/1990 – 12/1992; obtained general education and core-curriculum credits. I left to transfer to UTC.

University of Tennessee – Chattanooga: 1/1993 – 8/1995: Bachelor of Arts (Communications); Minor in Spanish

Valparaiso University School of Law: 8/1998 – 5/2001: *Juris Doctor*; Concentration: Litigation

PERSONAL INFORMATION

16. State your age and date of birth.

I am 42 and my date of birth is 5/13/1972.

17. How long have you lived continuously in the State of Tennessee?

I grew up on Signal Mountain, and moved to Chickamauga, GA when I got married in 2003. I moved back to Signal Mountain on March 31, 2010. Therefore, I will have lived in Tennessee for 5 years on March 31, 2015.

18. How long have you lived continuously in the county where you are now living?

I will have lived in Hamilton County continuously for 5 years on March 31, 2015.

19. State the county in which you are registered to vote.

Hamilton County

20. Describe your military service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state

whether you received an honorable discharge and, if not, describe why not.

N/A

21. Have you ever pled guilty or been convicted or are you now on diversion for violation of any law, regulation or ordinance? Give date, court, charge and disposition.

11/21/2000; Porter County, Indiana Superior Court; Driving while impaired; guilty

22. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No.

23. Please state and provide relevant details regarding any formal complaints filed against you with any supervisory authority including, but not limited to, a court, a board of professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you.

I have had 1-2 complaints with the Consumer Assistance Program ("CAP") of the Tennessee Board of Professional Responsibility ("BOPR") but I denied wrongdoing, and was able to resolve those quickly and without discipline. I do have one complaint currently pending with the Tennessee BOPR and have again denied any wrongdoing in that case, as well. I have spoken to another attorney who was involved in the underlying case and he agrees that I have done nothing to warrant any form of discipline, and he will testify to that should the BOPR contact him about it. I have never been disciplined in any way by any board of professional responsibility, and maintain a "B" rating with the Martindale-Hubbell attorney rating service for very high legal abilities and ethics.

24. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

No.

25. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

No.

26. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

No.

27. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices that you have held in such organizations.

From 2005-2008, I was a member of the vestry of the Episcopal Church of the Nativity in Ft. Oglethorpe, GA. I am also a member of the Tennessee Episcopal Laymen's Conference and attend their conference on Monteagle Mountain every August. I am also active with the Episcopal Young Churchmen ("EYC") chapter at St. Timothy's Episcopal Church in Signal Mountain, TN.

28. Have you ever belonged to any organization, association, club or society that limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.

    a. If so, list such organizations and describe the basis of the membership limitation.

    b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

No.

ACHIEVEMENTS

29. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices that you have held in such groups. List memberships and responsibilities on any committee of professional associations that you consider significant.

Chattanooga Bar Association: 2002 – present

Tennessee Bar Association: 2002 – present

American Bar Association: 2002 – present

Tennessee Association for Justice: 2002 – present

Chattanooga Association of Criminal Defense Attorneys: 2002 – present

Georgia Bar Association: 2004 – present

Federal Bar Association: 2014 – present

National Association of Consumer Advocates: 2014 – present

30. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school that are directly related to professional accomplishments.

N/A

31. List the citations of any legal articles or books you have published.

N/A

32. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

Please see attached Exhibit "B"

33. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

In December, 2014, I submitted an application for Magistrate Judge in the United States District Court for the Eastern District of Tennessee. This is an appointed position.

34. Have you ever been a registered lobbyist? If yes, please describe your service fully.

No.

35. Attach to this questionnaire at least two examples of legal articles, books, briefs, or other legal writings that reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

Please see attached Exhibits "C' and "D." Both are briefs that I have written.

ESSAYS/PERSONAL STATEMENTS

36. What are your reasons for seeking this position? ***(150 words or less)***

I want to serve the people of Hamilton County the way that my family has for about the last 80 years. In around 1930, my grandfather, Samuel F. Robinson, Sr. became a pharmacist and opened Lookout Mountain Pharmacy, which he ran for 60 years. My father, Samuel F. Robinson Jr., was a trial attorney in Chattanooga for nearly 40 years, and served on the Hamilton County Commission from 1978-1982. My mother, Sally Robinson, was an integral part of the development of the Chattanooga riverfront, and the downtown as a whole, for over 20 years, and served on the Chattanooga City Council from 2001–2013. I have provided professional legal services to the people of Hamilton County for over 12 years. I believe that the best way I can do my part to serve the people of Hamilton County and honor my family's tradition of service would as a Criminal Court Judge.

37. State any achievements or activities in which you have been involved that demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. ***(150 words or less)***

I have represented between 400 and 500 people from court-appointments alone, and believe that speaks to my commitment to equal justice under the law. It has always been my goal to provide my client with the best representation possible, regardless of whether I have been retained by the client or appointed by the Court, and believe that I have achieved that goal for all of the people I have represented in my 12+ years in practice. Additionally, I try to handle at least one case on a *pro bono* basis each year, and find myself doing *pro bono* work in many of my retained cases as part of my overall representation of my client, as well.

38. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. ***(150 words or less)***

I seek the Hamilton County Criminal Court – Division II – judgeship. This court handles criminal cases and appeals from the criminal division of the Hamilton County General Sessions Court. Our Judicial District (the 11th) has 3 judges on the bench. I have a solid foundation in criminal defense, at all stages of the proceedings, which will provide me with the knowledge and experience necessary to be an effective and thorough judge with the ability to keep the docket moving smoothly, and while providing all persons who come before the Court with equal justice

under the law, as guaranteed by the Constitution.

39. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? ***(250 words or less)***

1. I would continue Judge Stern's Drug Court, and would try to expand it to the other divisions of the Court.
2. I would work with local leaders in brainstorming ideas to address the serious crime-related problems our community is facing such as the emergence of gangs and the rise of violent crime in Chattanooga.
3. I would speak before legislative bodies to help make these ideas a reality.
4. I would go to local schools and other community organizations to interact with youth about the programs that we have created to help them steer clear of drugs and violence so that they have the best chance to succeed in life. I believe that *interaction* with youth by getting to know them and engaging them through "community challenges" that could be created by our County Commission and General Assembly would be best ways to begin to instill in them skills they can use to avoid peer pressure and negative behaviors.
5. I would organize community college campus tours to give inner-city youth a prelude to college life so that they could see that college is an achievable goal for them through Governor Haslam's "Tennessee Promise" scholarship program. This innovative program is a great way to increase the percentage of college graduates in Tennessee, but would be most effective if local leaders would interact with local youth *while they are in high school* to push them into the program, and into college. I would counsel students once they are in college to help them push through to graduation.

40. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Council in evaluating and understanding your candidacy for this judicial position. ***(250 words or less)***

I began my practice in 2002 with my father who was, and continues to be, a mentor to me. Also, being close to my parents while my mother was on the Chattanooga City Council has helped me learn how to handle the complexities of public office. I intend to bring all my energy, effort, dedication, perseverance, and whatever time and work is necessary to do this job well, as I have done since I began practicing law over 12 years ago. I believe that my references will attest that I am a competent and hard-working attorney with a solid character and, when I appear in court, I am prepared and conduct myself in a professionally-responsible and courteous manner.

I believe that my extensive background in handling a variety of cases, in both the criminal and civil areas, in so many different courts over the years and at all stages of their respective procedures has prepared me to take this next logical step in my career. My experience has taught me the importance of judicial temperament, patience, and consideration of differing views which judges exercise before ruling. The experiences of my life have distilled in me a conviction that

we must be stronger tomorrow than we are today. My hope is that this panel will weigh these cornerstones as foundations in my life and find that I have the kind of temperament which is appropriate for a judge.

41. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. ***(250 words or less)***

Yes. I would uphold the law even if I disagree with its substance. Often times, judges have to put aside their personal opinions of what the law should be and enforce the law as it is written, and this is what I would do. An example of laws with which I disagree are mandatory minimum sentencing laws in certain federal drug cases. I have represented many people in federal court who are facing such mandatory minimums and I personally believe that such sentences are not effective at curtailing drug abuse in our society. As such, the enormous amount of taxpayer money that is spent enforcing such laws each year could go into better, more effective programs like drug courts, programs which help develop and maintain families such as parenting classes for young and/or first-time parents, cost-effective day-care programs so that people can afford to work and send their child to day-care, and "community challenge" programs like physical-fitness challenges or educational challenges which would give local community leaders forums through which to reach out to local youth and interact with them. It is my opinion that these types of programs are the best way to combat the ongoing drug problems which continue to plague people and communities in America today. However, until more of those programs are available, the law must be enforced as it is written, and as a judge, I would do this.

REFERENCES

42. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Council or someone on its behalf may contact these persons regarding your application.

A. **The Honorable Rebecca Stern**; Hamilton County Criminal Court Judge – Div II; Hamilton County Courts Building, Third Floor; 600 Market Street, Chattanooga, TN 37402 (423) 209-7560
B. **The Honorable Barry Steelman**, Hamilton County Criminal Court Judge – Div. I; Hamilton County Courts Building, Third Floor; 600 Market Street, Chattanooga, TN 37402 (423) 209-7574
C. **The Honorable Rob Philyaw**, Hamilton Co. Juvenile Court Judge, Hamilton County Juvenile Court, 1600 East 3rd Street, Chattanooga, TN 37404; (423) 209-5100
D. **Claire Reishman**; Academic Dean (retired) at St. Andrew's – Sewanee School;
E. **Doug Cameron**:

AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the [Court] Hamilton County Criminal Court of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended questionnaire with the Administrative Office of the Courts for distribution to the Council members.

I understand that the information provided in this questionnaire shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Council may publicize the names of persons who apply for nomination and the names of those persons the Council nominates to the Governor for the judicial vacancy in question.

Dated: 2/26, 20 15.

Signature

When completed, return this questionnaire to Debbie Hayes, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

THE GOVERNOR'S COUNCIL FOR JUDICIAL APPOINTMENTS
ADMINISTRATIVE OFFICE OF THE COURTS

511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY
TENNESSEE BOARD OF JUDICIAL CONDUCT
AND OTHER LICENSING BOARDS

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information that concerns me, including public discipline, private discipline, deferred discipline agreements, diversions, dismissed complaints and any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, the Tennessee Board of Judicial Conduct (previously known as the Court of the Judiciary) and any other licensing board, whether within or outside the State of Tennessee, from which I have been issued a license that is currently active, inactive or other status. I hereby authorize a representative of the Governor's Council for Judicial Appointments to request and receive any such information and distribute it to the membership of the Governor's Council for Judicial Appointments and to the Office of the Governor.

Samuel Francis Robinson III
Type or Print Name


Signature

2/25/15
Date

022261
BPR #

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

UNITED STATES OF AMERICA	)	
	)	Docket no. 1:07-cr-62
v.	)	
	)	Judge Mattice
ROBERT KLEIN	)	
Defendant.	)	

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR JUDGMENT OF ACQUITTAL

COMES Defendant Robert Klein (hereafter "Klein"), by and through counsel Samuel F. Robinson III and, pursuant to Fed.R.Crim.P. 29; 21 U.S.C. §843(a)(6); U.S. v. Campbell, 350 Fed.Appx. 989 (6th Cir., 2009); Jackson v. Virginia, 443 U.S. 307 (1979); United States v. Hughes, 505 F.3d 578, 592 (6th Cir.2007); U.S. v. Argo, 23 Fed.Appx. 302 (6th Cir., 2001); and the other authorities cited herein, files this memorandum of law in support of his Motion for Judgment of Acquittal (doc. 147) filed September 29, 2009.

I. STANDARD OF REVIEW AND LAW

In ruling on a motion for judgment of acquittal, the Court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." U.S. v. Campbell, 350 Fed.Appx. 989 (6th Cir., 2009) (quoting Jackson v. Virginia, 443 U.S. 307 (1979). "The appellate court must view all evidence and resolve all reasonable inferences in favor of the government." United States v. Hughes, 505 F.3d 578, 592 (6th Cir.2007) (citing Jackson v. Virginia). In doing so, however, the court cannot independently weigh the evidence nor substitute its judgment for that of the jury. Id. (citations omitted). "This standard is a great

obstacle to overcome, and presents the appellant in a criminal case with a very heavy burden." Hughes, 505 F.3d at 592 (citing United States v. Winkle,477 F.3d 407, 413 (6th Cir.2007) and United States v. Jackson, 473 F.3d 660, 669 (6th Cir.2007)). The critical inquiry on review of the sufficiency of evidence to support criminal conviction must be not simply to determine whether jury was properly instructed, but to determine **whether record evidence could reasonably support a finding of guilt beyond a reasonable doubt**; the relevant question is **whether, after viewing evidence in light most favorable to prosecution, any rational trier of fact could have found the essential element of the crime beyond a reasonable doubt**. Id. [Emphasis added].

A. 21 U.S.C. §843(a)(6) states as follows:

(a) Unlawful acts

It shall be unlawful for any person knowingly or intentionally –

(6) to possess... any equipment, chemical, product, or material which may be used to manufacture a controlled substance or listed chemical, knowing, intending, or having reasonable cause to believe, that it will be used to manufacture a controlled substance.... 21 U.S.C. §841(a)(6). To convict a person of [a violation of 21 USC §] 843(a)(6)... the government is required to prove: (1) that the defendant possessed chemicals, products, materials, or equipment which could have been used to manufacture a controlled substance; and (2) that at the time of such possession, the defendant knew, intended, or had reasonable cause to believe that the items would be used to manufacture a controlled substance. U.S. v. Argo, 23 Fed.Appx. 302 (6th Cir., 2001).

II. PROCEDURAL BACKGROUND

The Defendant wishes to remind the Court, at the outset of the Court's review of this motion, that the government moved for dismissal of its indictment against co-defendants Thomas Kell ("Kell") and William Jess Tennant, Jr. ("Tennant") in the days leading up to trial against the Defendant.

As the court will recall, at the execution of the search warrant, finished methamphetamine product was found in co-defendant Dennis Best's ("Best") room, which is detached from the main areas of the clubhouse, and Kell and Best, through counsel, filed motions to suppress which were extensively litigated before Magistrate Judge Lee. After this Court reviewed Judge Lee's R&R, this Court denied the motion as to Best but sustained it as to Kell. During the time that the motions were pending, Best remained in custody, as he was not granted pretrial release and, therefore, was confined from May 16, 2007 until January 12, 2010. On September 21, 2009, the government moved for dismissal of all charges against co-defendant Best except a violation of 18 USC §924(c) as part of a plea agreement. As a result, the only defendant named in the indictment who the government maintained was guilty as charged in the indictment was Defendant Klein, except that the government moved for dismissal of Count 1, Conspiracy to Manufacture Methamphetamine, as to Defendant Klein on the first day of the trial in this case.

III. SUFFICIENCY OF THE EVIDENCE

A. Equipment, Chemicals, Products or Materials Found

First of all, Defendant contends the government failed to live up to its burden of proof beyond a reasonable doubt that the following items were in any way associated with the

manufacture of methamphetamine. The Defendant's basis for this contention is twofold. The first and most substantial basis is the jury's verdicts of "not guilty" as to Count 2 (Attempt to manufacture methamphetamine); Count 3 (Controlling a building/residence while knowingly and intentionally using the same for the manufacture of methamphetamine – hereafter "Meth House statute"); and Count 5 (Possession of firearms in furtherance of counts 2 and 3).

The second basis for Defendant's contention is the fact that the Defendant and other witnesses called by the defense provided substantial, reasonable, and perfectly legal explanations for the listed items, which resulted in the jury finding the Defendant not guilty of counts 2, 3, and 5.

The list is as follows:

1. **Photograph of pill bottle containing dark-colored substance** (government exhibit 28) – **found in the first bedroom** to the left of the LFMC club entrance.
    a. The defendant testified that the black substance in the bottle was likely shavings from the inside of a motorcycle engine, which he regularly kept for purposes of later comparison after finishing a motorcycle repair job;
        i. Please see trial transcript at 225-226 and 230-231.
2. **14 boxes pseudoephedrine** (as seen on government exhibit 2, a DVD of the execution of the search warrant);
    a. The defendant proved he suffered from chronic and ongoing sinus/allergy problems and also testified that, in the months leading up to the "raid" in this case, he knew of a new Tennessee law which was going to closely monitor the sale of pseudoephedrine products in Tennessee. He further testified that he didn't like giving out personal information to stores, etc. so they could later contact him and, therefore, he "stocked up" on the medicine.
        i. Please see trial transcript at 231-234.
3. **Photograph of Spice Classics bottle without contents displayed** (government exhibit 32);
    a. This exhibit showed nothing but a perfectly legal item.
        i. Please see trial transcript at 239.
4. **3 bottles isopropyl alcohol** (listed in government exhibit 1, inventory of items seized in execution of search warrant);
    a. This exhibit showed nothing but a perfectly legal collection of items;
5. **Photograph of 2 mayonnaise jars containing liquid** (government exhibit 34);
    a. As there were no lab reports on the substances contained in these jars, the government failed to prove what, exactly, was inside them. The defendant contends that it is possible that (a) they contained one of literally hundreds of

similar, legal solvents found inside the clubhouse or (b) were transported to the house from a known "meth cook" in Georgia without the defendant knowing what they were or where they came from.

i. Please see trial transcript at 212-214 and 243-247.

6. **Mayonnaise jar containing white powder** (listed in government exhibit 1, inventory of items seized in execution of search warrant);
   a. As there were no lab reports on the substance contained in this jar, the government failed to prove what, exactly, was inside it. The government's own expert witness admitted that it had the same consistency and look as any other crushed pills (such as aspirin) which are perfectly legal.
      i. Please see trial transcript at 71.
7. **24 oz Scope mouthwash bottle containing clear liquid** (listed in government exhibit 1, inventory of items seized in execution of search warrant);
   a. This exhibit showed nothing but a perfectly legal item.
      i. Please see trial transcript at 199.
8. **Case of DD Bean matches** (as seen in the DVD of the execution of the search warrant and listed on inventory of search warrant);
   a. This exhibit showed nothing but a perfectly legal item. The defendant testified that he bought these matches in bulk at Wal-Mart or Sam's Club because he and other members of the club regularly used matches for numerous reasons in repairing motorcycles, as well as for smoking tobacco, which was allowed in the clubhouse.
      i. Please see trial transcript at 222-223 and 249-250.
9. **Photograph of 2 black film canisters without contents displayed** (government exhibit 31);
   a. This exhibit showed nothing but a perfectly legal item as the government failed to even provide a picture of the contents of these canisters and the defendant testified that they very likely could have contained red powdered motorcycle paint for use in "powder coating" – a manner of painting motorcycles.
      i. Please see trial transcript at 250-252.
10. **1 empty container of Coleman fuel – 1 gallon size** (listed in government exhibit 1, inventory of items seized in execution of search warrant) – found in the **basement**;
    a. This exhibit showed nothing but a perfectly legal item sitting next to a container of paint thinner of the exact same size and shape, as well as a collection of painting supplies, all of which were found in the basement of the clubhouse.
11. **1 container of mineral spirits – Crown brand – ½ full** (listed in government exhibit 1, inventory of items seized in execution of search warrant) – found in the **basement**;
    a. This exhibit showed nothing but a perfectly legal item.
12. **3 32 oz bottles hydrogen peroxide** (listed in government exhibit 1, inventory of items seized in execution of search warrant – found in the **basement**);
    a. This exhibit showed nothing but a perfectly legal item. The Defendant testified that he regularly used hydrogen peroxide to mix 50/50 with water and gargle with because he regularly got cuts and abrasions in his mouth from an accident on a small bulldozer several years prior.

i. Please see trial transcript at 198 and 217.

13. **1 32 oz Witch Hazel ½ full** (listed in government exhibit 1, inventory of items seized in execution of search warrant) – found in the **basement**;
    a. This exhibit showed nothing but a perfectly legal item.
14. **1 18 oz container Red Devil lye ¼ full** (listed in government exhibit 1, inventory of items seized in execution of search warrant) – found in the **basement**;
    a. This exhibit showed nothing but a perfectly legal item.
15. **1 32 oz container Drano** (listed in government exhibit 1, inventory of items seized in execution of search warrant) – found in the **basement**;
    a. This exhibit showed nothing but a perfectly legal item.
16. **1 Pyrex glass measuring cup** (listed in government exhibit 1, inventory of items seized in execution of search warrant) – found in the **basement**;
    a. This exhibit showed nothing but a perfectly legal item.
17. **1 32 oz. container Acetone ½ full** (listed in government exhibit 1, inventory of items seized in execution of search warrant) – found in the **basement**;
    a. This exhibit showed nothing but a perfectly legal item.
18. **Box of jars and jugs with hose fittings** (listed in government exhibit 1, inventory of items seized in execution of search warrant) – found in the **basement**;
    a. This exhibit showed nothing but a perfectly legal item. This dusty old collection of jars, hoses, etc was found in the basement of the clubhouse in a box.
19. **2 gallons muriatic acid** (listed in government exhibit 1, inventory of items seized in execution of search warrant) – found in the **basement**;
    a. This exhibit showed nothing but a perfectly legal item. The defendant testified that he used muriatic acid to clean the concrete floors in the clubhouse.
        i. Please see trial transcript at 208 and 219-221.
20. **Glad plastic container iodine** (listed in government exhibit 1, inventory of items seized in execution of search warrant) – found in the **basement**;
    a. This exhibit showed nothing but a perfectly legal item.
21. **Powder scales** (government exhibit 3);
    a. This exhibit showed nothing but a perfectly legal item. The defendant testified that he had this in connection with a can of black gunpowder which was in Room 1 of the clubhouse.
        i. Please see trial transcript at 182-183.
22. **Plastic baggies** (government exhibit 4);
    a. This exhibit showed nothing but a perfectly legal item. The defendant testified the he had these baggies for use with his extensive coin collection, pictures of which were provided to the jury.
        i. Please see trial transcript at 188.
23. **All guns and ammunition** (government exhibits 9 and 11-22);
    a. This exhibit showed nothing but items which were legally in the possession of the defendant.
        i. Please see trial transcript at 191 - 196.
24. **Photo of gun safe** (government exhibit 30);
    a. This exhibit showed nothing but a perfectly legal item.
        i. Please see trial transcript at 191 and 227 -230

As the Court will recall, the government destroyed the vast majority of its own evidence, apparently pursuant to HAZ-MAT regulations, after execution of the search warrant in this case without even saving samples of the items. As a result, no laboratory ever identified exactly what the destroyed items were and, therefore, the government was unable to prove beyond a reasonable doubt that the items were methamphetamine-related. The jury's verdict regarding Count 2 (Attempt to Manufacture Methamphetamine), Count 3 ("Meth house statute"); and Count 5 (Possession of firearms in furtherance of drug trafficking crimes) proves this contention.

The only item which the government proved beyond a reasonable doubt to be methamphetamine-related was one mayonnaise jar containing dissolved pseudoephedrine (aka "pill wash"). The only reason that this item was tested by someone with the requisite credentials and knowledge in chemistry to definitively identify it at all was because the government's own "expert witness," Cleveland Police Department Detective Duff Brumley ("Detective Brumley"), wrongly identified this item as "meth oil." (please see trial transcript at 62 and 74). As a result of this misidentification, Detective Brumley sent a sample of the liquid to the Tennessee Bureau of Investigation for analysis thinking it contained methamphetamine. As indicated in government exhibit 24, Detective Brumley was wrong, as the sample came back positive for liquid pseudoephedrine and not "meth oil."

Additionally, Detective Brumley wrongfully identified what the government later claimed was iodine as red phosphorous in the DVD of the execution of the search warrant (government exhibit 2), despite the fact that the two substances have very different textures and one is black (iodine) while the other is red (phosphorous) (please see trial transcript at 71-73).

As a result of the government's failure to live up to its burden of proof as to all items it seized except the one sample of "pill wash," the Defendant will henceforth address that item in

applying the 2-prong analysis required for conviction under 21 USC §843(a)(6) and as described in Argo, *supra*. While the Defendant does not admit, nor will anyone ever know, whether the other items which were brought in with the "pill wash" from the home of Paige were other methamphetamine precursors (the 2 other mason jars of liquid and one mason jar of a crushed, white powder), because those items were in the same type or very similar containers as the one in which the "pill wash" was found, and because Ed Davenport testified that those items were with the "pill wash" when he brought them in to the clubhouse, Defendant will treat those items collectively as the "mason jars" henceforth.

B. Knowing and Intentional Conduct Defined

As there appears to be no concrete definition of "knowing" or "intentional" conduct recommended in the Sixth Circuit Pattern Jury Instructions, an excerpt from Wharton's Criminal Law is illustrative of how the aforementioned definitions have evolved over the years and how they are presently defined in the Model Penal Code.

> "In the ordinary case, an evil deed, without more, does not constitute a crime; a crime is committed only if the evil doer harbored an evil mind. This idea is traditionally expressed in the maxim, "actus non facit reum, nisi mens sit rea." Reducing it to its simplest terms, a crime consists in the concurrence of prohibited conduct and a culpable mental state. Each crime, of course, has its own type of culpable mental state (often called "mens rea").
> The common law and many penal codes—as well as some judicial decisions—use a variety of terms to describe culpable mental states: Intentionally, purposely, designedly, knowingly, maliciously, willfully, wantonly, general intent, specific intent, scienter, fraudulently, corruptly, recklessly, negligently, gross neglect, gross negligence, culpable negligence, and criminal negligence. Many of such terms are used indiscriminately and, to a large extent, are not defined; whatever light is shed on the meaning of defined terms becomes obscured by the failure to define seemingly synonymous terms; some terms are used interchangeably but not always consistently; the meanings of some terms overlap or shade into one another; and terms are not sharply distinguished one from another to show that some differ in kind while others differ only in degree.
> In order to promote clarity and precision in defining offenses, consistency and symmetry in expression and analysis, and efficiency in administrative implementation, many states, stimulated and guided in large measure by the American Law Institute's Model Penal Code, have completely revised their penal codes. **Perhaps the most significant contribution of**

the Model Penal Code to penal law reform has been the idea of using only four culpable mental states and of defining such mental states in the "general part" thereby permitting their application to the definitions of the relevant offenses in the "special part". The culpable mental states adopted by the Model Penal Code are: purposely, knowingly, recklessly, and negligently.

Such mental states have been defined typically by statute as follows: (1) "A person acts **purposely** with respect to a material element of an offense when his **conscious object is to cause the result or engage in the conduct that comprises the element**." (2) A person acts **knowingly** "with respect to his conduct or to circumstances surrounding his conduct when he is **aware of the nature of his conduct or the existing circumstances**. A person acts **knowingly** ... with respect to a result of his conduct when he is **aware that his conduct is reasonably certain to cause the result.**"

Wharton's Criminal Law, Part I: General Principles, Chapter 3: The Act and Mental State; Section 27: The Mental State (citations omitted).

21 USC 843(a)(6)

It shall be unlawful for any person knowingly or intentionally –

(6) to possess... any equipment, chemical, product, or material which may be used to manufacture a controlled substance or listed chemical knowing, intending, or having reasonable cause to believe, that it will be used to manufacture a controlled substance or listed chemical in violation of this subchapter or subchapter II of this chapter....

1. Prong 1: Knowing or intentional possession of any equipment, chemical, product, or material which may be used in the manufacture of [methamphetamine]

While there appears to be no jury instruction regarding the specific "knowingly" cited from in the Sixth Circuit Court of Appeals Jury Instructions, the common usage among other circuits is that the act was done **"voluntarily and intentionally, not because of mistake or accident."** Federal Jury Practice and Instructions, Part II: General Instructions for Federal Criminal Cases, Chapter 17: Mental State, Section 17.04: "Knowingly" – Defined. [Emphasis added]. The term "knowingly," as used in these instructions to describe the alleged state of mind of Defendant, means that **he was conscious and aware of his action, realized what he was doing or what was happening around him, and did not act because of ignorance, mistake, or accident**. Id. [Emphasis added].

Additionally, there appears to be no recommended jury instruction for the term "intentionally" in the Sixth Circuit, either. However, the term is frequently used synonymously with the term "willfully," as that word incorporates a form of the verb "intend" in its definition. The term "willfully," as used in Federal Jury Practice and Instructions, is to describe the alleged state of mind of Defendant when he/she **knowingly performed an act, deliberately and intentionally ["on purpose"] as contrasted with accidentally, carelessly, or unintentionally**. Federal Jury Practice and Instructions, Part II: General Instructions for Federal Criminal Cases, Chapter 17: Mental State, Section 17.05: "Willfully" – Defined.

As evidenced by the jury's verdicts of "not guilty" as to Count 2 – Attempt to manufacture methamphetamine; Count 3 – "Meth house statute"; and Count Five – Firearm possession in furtherance of drug trafficking crimes, the government failed to prove that the Defendant's possession of the mason jars was knowing or intentional, and the jury apparently did not believe beyond a reasonable doubt that any of the other items that the government seized were methamphetamine-related. Defendant does not dispute the fact that the mason jars were in his room, nor does he dispute that one did, in fact, contain pseudoephedrine. However, even when the evidence is taken in the light most favorable to the government as is required by Jackson v. Virginia, the defendant contends that no reasonable juror could conclude that he possessed the mason jars "knowing that they could be used to manufacture methamphetamine," or "intending to possess them purposefully, with knowledge that they could be used to manufacture methamphetamine," thereby making his possession of them "intentional." On the contrary, the proof at trial showed that the Mr. Klein possessed the items as a result of Ed Davenport obtaining the items from Vance Paige, a "meth cook" in Georgia, and placing the items in Klein's room without knowing what they were (please see trial transcript at 348-355).

Davenport testified that the reason he placed them in Klein's room in the first place was because he (Davenport) did not know what they were and thought that Klein could identify them and dispose of them properly, if necessary, because club members did not make a habit out of pouring unknown solvents and other substances out onto the ground. As a result, the Defendant had the type of possession which Federal Jury Practice and Instructions uses to define what is *not* "intentional" possession: accidental, careless, or unintentional possession.

Mr. Klein makes the same argument regarding whether he possessed the mason jars "knowing" that they could be used in the manufacture of methamphetamine because the government failed to prove that he was "conscious and aware" that one of the jars contained pseudoephedrine and the government never rebutted defense witnesses' contention that Klein acted because of "ignorance, mistake, or accident." The proof at trial showed that Klein did not even realize that Davenport had even placed the item in his room when Davenport initially brought it over (re: "what was happening around him"). What the proof did show was that, when Klein did come to know the items were in his room, he was ignorant of what they was as he was under the mistaken belief that they could be one of the literally hundreds of different solvents and/or powder substances found in the house used in motorcycle care and maintenance. Here again, this type of knowledge is the exact opposite of what is described as "knowing" conduct by Federal Jury Practice and Instructions.

Such possession certainly does not constitute "knowing" or "intentional" possession and the government did not offer any proof to rebut Davenport's testimony about how the sample came into the clubhouse. Because the government failed to properly rebut the evidence offered by the Defendant, they failed to live up to their burden of proving that Klein's possession of the

item was "knowing" or "intentional," which is the first required element for conviction under 21 USC §843(a)(6).

2. Prong Two: Knowing, intending, or having reasonable cause to believe, that [the items] will be used to manufacture a controlled substance or listed chemical in violation of this subchapter or subchapter II of this chapter

(a) Knowing or Intentional Possession

The Defendant also avers that no reasonable juror could conclude that he knew, intended, or had reasonable cause to believe that the mason jars would be used to manufacture methamphetamine, even when the evidence is taken in the light most favorable to the government. First of all, the Defendant could not have known that the items would be used to manufacture methamphetamine if he did not know what they were. Also, he also could not have intended to manufacture methamphetamine with them without knowledge of what they were. Again, the government did not offer any proof at all that indicated the Defendant acted knowingly or intentionally with regard to these items. The Defendant, on the other hand, showed the jury exactly where the items came from and how they came into his possession without him knowing what they were. As the Court will recall, Ed Davenport, Vickie Davenport, and Trey Aycock all testified about Vance Paige being convicted of manufacturing methamphetamine in Whitfield County, Georgia; being placed in the Georgia Department of Corrections for a term of 10 years; and about Davenport cleaning out a full-sized school bus and trailer that were packed with what most people would consider "junk" and moving a substantial amount of it into the Limited Few Clubhouse. The government was unable to elicit from Ed Davenport any statement that Davenport told Klein where he had obtained the items. As a result, the only proof offered to the jury at trial was that Klein did not know where the items had come from, nor what they were.

Finally, the Defendant would like to draw the Court's attention to the word "will" in the second prong of 21 USC 843(a)(6) ("knowing, intending, or having reasonable cause to believe that [the items] **will** be used to manufacture [methamphetamine]). The use of the word "will," as opposed to "could" or "may" indicates the legislature only intended to include in the class of people who can be convicted under this law those who have possession of items which **will**, at some point, be used to manufacture controlled substances. In this case, the government offered no proof that the items seized would be used to manufacture methamphetamine at some point in the future. Granted, the item could have been used to manufacture methamphetamine, if taken through the extensive process about which Detective Brumley testified, but no proof was offered to show that they *would* be so used. As a result of a lack of such evidence, no reasonable juror could come to the conclusion that the Defendant is within the class of people guilty of this crime based upon knowing or intentional possession of the stated item.

(b) "Having Reasonable Cause to Believe"

The only way the jury could have possibly convicted the Defendant of a violation of 21 USC §843(a)(6) is if they thought he had reasonable cause to believe that the items would be used to manufacture methamphetamine. The Defendant again draws the Court's attention to the use of the word "will" in this part of the statute. Additionally, there was no proof offered by the government that Ed Davenport, or anyone else, told Klein that the items which were placed in his room had come from the home of a "meth cook." As a result, no proof was offered which indicates that Klein had any reason whatever to believe that the items even could be used to manufacture methamphetamine. The simple truth is that Mr. Klein did not know what substance in the mason jars was. The jars were in a box with a collection of other items that Davenport

placed in Klein's room without Klein's knowledge. Therefore, Klein had no "cause to believe," reasonable or otherwise, that the items were methamphetamine-related and the jury wrongfully applied the proof, or lack thereof, to the law in this case, thereby reaching the wrong conclusion as to count 4 of the superseding indictment. As a result, the Court should overturn the jury's verdict at to count 4.

IV. FACTUAL DISPARITY IN CASE LAW

In conducting research to determine what specifically constitutes a violation of 21 USC §843(a)(6), defense counsel has read several cases which effectively portray the great disparity in the amount of proof that was used to convict the defendants in those cases versus the amount of proof offered in this case. Two cases in particular demonstrate the great factual disparity between the proof that warrants a conviction under 21 USC §843(a)(6) and the proof offered here, which does not.

a. **U.S. v. Swafford**, 512 F.3d 833 (6th Cir., 2008) (the defendant sold iodine to roughly 20 admitted "meth cooks" for several years in quantities that could not possibly be used for any legal purpose, coupled with other facts that showed the defendant knew he was engaging in illegal conduct such as the defendant only accepting cash for such transactions and engaging in methamphetamine "trade talk," asking about finished product, etc.); and

b. **US v Walls**, 293 F.3d 959 (6th Cir. 2002) (There was evidence that methamphetamine was being cooked in [a co-defendant's] garage that day. Police found not only materials and equipment used to manufacture methamphetamine, but also liquids containing methamphetamine and pseudoephedrine. Walls had a used coffee filter with methamphetamine residue on it in his pocket. Also, Red Devil lye and the head to a propane torch were found in the

car Walls had parked in Tucker's driveway). US v. Walls (293 F.3d 959 (6th Cir., 2002). [Emphasis added].

WHEREFORE, based upon the foregoing, the Defendant prays that the Court will overturn the jury's verdict and adjudicate him not guilty of Count 4 of the superseding indictment pursuant to Rule 29 of the Federal Rules of Criminal Procedure.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing on the Court's electronic filing system on this the 5th day of May, 2010.

By: *Samuel F. Robinson III*

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION PANEL
EASTERN DIVISION AT KNOXVILLE

GEORGE WAYNE EDWARDS	)	
	)	Docket Number
Plaintiff/Appellee	)	E2012-02592-WC-R3-WC
	)	
v.	)	
	)	Bradley County Chancery Court
VELMA CHILDS, et al.	)	Docket No. 2011CV149
	)	
Defendant/Appellants	)	

BRIEF OF APPELLEE

ORAL ARGUMENT REQUESTED

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STATEMENT OF FACTS

Plaintiff George Edwards was born in Spring City, TN on February 20, 1953. (Tr. 36). George's father also worked in logging, and George followed in his father's footsteps when, at age 15, after completing the 7th grade, George quit school and began working with his father in logging. (Tr. 36-37). Because he quit school so early, George never learned to read or write, and still cannot to this day. (Tr. 37). Since age 15, George Edwards has worked in logging almost exclusively, and testified that he has "spent his life being a logger." (Tr. 38).

Mr. Edwards testified that one day in 2007, he met Velma Childs ("Mrs. Childs"), the owner and operator of Triple C Fiber Logging (aka "Childs Logging"), at a parts store and asked her for a job. (Tr. 39). Two to three days later, Mr. Edwards went to work for Mrs. Childs, alongside her son, Tim Childs (hereafter "Mr. Childs" or "Tim Childs"), who was also George's supervisor. (Tr. 39 and 40). Mr. Edwards testified that his job duties involved driving a "skidder" and "cutting pine" and, later, "hardwood." (Tr. 40). Mr. Edwards stated that, in the regular course of work, after Tim Childs would cut a tree down, he, Mr. Edwards, would use the chainsaw that the company provided to trim the limbs off the fallen tree (Tr. 42). After he had trimmed the branches off the tree with the chainsaw, Mr. Edwards would use the skidder to drag the tree to the loader. (Tr. 42). Tim Childs would then load the tree into a truck to be hauled away. (Tr. 42). Mr. Edwards testified that Tim Childs provided him with a chainsaw and that no one ever told him not to operate a chainsaw. (Tr. 41 and 43). At the end of each workday, Tim Childs would take the chainsaw he had given George with him until the next day, at which time he would give the chainsaw to Mr. Edwards again and the two men would again go to work in the manner described herein. (Tr. 43).

The issue of whether the employer provided the chainsaw or Mr. Edwards brought his own chainsaw came up at trial, with the employer making the claim that Mr. Edwards brought his own chainsaw to work and Mr. Edwards denying the same. That issue will be more thoroughly covered below.

In the month after his hire, Mr. Edwards and Tim Childs worked in this manner throughout the workday. (Tr. 40). On November 8, 2007, Mr. Edwards suffered the injury which is the basis of this case. (Tr. 44). On that date, Mr. Edwards and Tim Childs were was working in the same manner as described herein. Tim Childs' was cutting down a tree, but his chainsaw ran out of gas. (Tr. 45). Therefore, Mr. Childs told Mr. Edwards to "go over there and try to push the tree down" [that Mr. Childs had partially cut] while Mr. Childs walked over to the loader. (Tr. 44). So, George did as he was told and went to try to push the tree down using the skidder, but was unable to. (Tr. 44-45). Therefore, George went back to the loader to retrieve the chainsaw which had been provided to him by Mr. Childs so that he could finish cutting down the tree. (Tr. 45-46). When George arrived back at the tree with the chainsaw provided him, he cranked up the saw and lowered it to finish cutting the tree down. (Tr. 46) As George did so, the saw hit a bush and kicked back into his face, causing the saw to tear into his face and create a deep and severe laceration from his upper brow to his lower jaw. (Tr. 46). Feeling severe pain immediately and seeing a large amount of blood rush from his face, George took his shirt off and put it up to his face to try to stop the bleeding. (Tr. 46). George then immediately ran over to where Tim Childs was and told Childs about the injury, and Mr. Childs drove him to the Skyridge Hospital emergency room for treatment. (Tr. 47).

When Mr. Edwards arrived at Skyridge, Dr. Kenneth McCarley performed surgery on him to sew his face back together. (Tr. 47). However, Dr. McCarley was unable to operate on Mr. Edwards' eye, so Mr. Edwards was flown by medical helicopter to Vanderbilt University Medical Center for surgery to close the lids of his right eye (Tr. 47). After receiving treatment at Vanderbilt, Mr. Edwards returned to Chattanooga and went under the care of Dr. Jody Abrams, which lasted roughly 2 years. (Tr. 47-48). During that 2 year period, Dr. Abrams performed roughly 8 surgeries on Mr. Edwards.(Tr. 48). After he was finished with his treatment with Dr. Abrams, Mr. Edwards began treating with Dr. Molly Seal, who performed tests on Mr. Edwards and provided the impairment rating to Mr. Edwards' eye in this case. (Tr. 49).

Roughly two weeks after the date of injury in this case, Mr. Edwards returned to his old job at Childs Logging and worked for about one week, but then quit. (Tr. 49). Mr. Edwards testified that the reason he quit working was because his "eye kept hurting and bothering [him] so much that [he] couldn't work with it." (Tr. 49). He stated, "I couldn't stand it. I didn't know it was hurt as bad as it was, you know, and I didn't want to quit because I like to work with [the Childs] and they were good people." (Tr. 50). He felt as though he "had to quit" because he "just couldn't take [his] eye doing that on [him]." (Tr. 50). When he came back to work, Mr. Edwards had fresh stitches in his face and a patch over his eye. (Tr. 50). At that point, he informed Tim Childs that he "couldn't stand the pressure" and he was "going home." (Tr. 50). Mr. Childs, his supervisor, made no offer of light duty. (Tr. 50). Mr. Edwards did not discuss issue with Velma Childs, but did tell his supervisor, Tim Childs. (Tr. 50-51).

Mr. Edwards testified that the injury to his face has resulted in permanent numbness in his face and that he sometimes has "shooting pain" in his face. (Tr. 51). Regarding his eye injury, he testified that the eye "hurts all the time." (Tr. 51). He stated that the pain in his face and the

numbness in his face affects his ability to work in logging and it is distracting to him during the workday. (Tr. 51). He stated that his eye will become so bloodshot that he cannot see out of it for as long as a week before it clears up a little bit. (Tr. 52). He stated that he feels as though the condition in his eye also affects his ability to work in logging, or any job. (Tr. 52). He stated that, in spite of the injuries, he has had to work in logging because it is his only means of making money, so he "does what he has to." (Tr. 52-53). Mr. Edwards stated that he has worked "part-time, off and on," one to three days per week (Tr. 53-54), but that he does not feel safe working in logging, and only does so because he "has got bills to pay." (Tr. 53). It is stipulated that QBE Specialty Insurance stopped Mr. Childs' temporary total disability benefits on November 19, 2009 and, in her Final Decree, Chancellor Bryant ordered the employer to pay the temporary benefits in arrears, which the company still has not done. Final Decree in *Edwards v. Childs et al.* Bradley County Chancery Court docket no. 2011-CV-149 at 6.

During the time he was treating, Dr. Abrams placed work restrictions on Mr. Edwards of no lifting over 40 pounds and no working in a dusty environment without safety goggles that seal to his face (please see collective "Exhibit A" which contains Dr. Abrams' restrictions and the job description provided by the employer indicating that the job entails working in "dust"). Mr. Edwards testified that, based upon his experience, a chainsaw weighs about 40 pounds and logging is generally a "dusty environment." (Tr. 55). When asked if operating a skidder involves lifting 40 pounds or more, Mr. Edwards replied, "[w]ell, if you're just driving a skidder, it wouldn't, but if you're having to run a chain saw, too, you know. You've got a chain saw to run. That's about 40 pounds. (Tr. 75). Mr. Edwards stated again that operating a chainsaw was part of his job as a skidder operator. (Tr. 76).

On August 20, 2009, Dr. Abrams added a restriction that Mr. Edwards not engage in work requiring depth perception, at heights, or with machinery. (Please see "Exhibit A"). Mr. Edwards testified that logging involves all of those things. (Tr.56-57). On November 5, 2010, Dr. McCarley provided an impairment rating of 6% to the body as a whole based upon his application of the *AMA Guides to the Evaluation of Permanent Impairment, 5th Ed.* (Deposition of Dr. Kenneth McCarley at 10 and as provided in medical records from Cleveland Head and Neck Clinic). Although this was Dr. McCarley's first impairment rating, he did state that he believed, to a reasonable degree of medical certainty, that this rating was correct and in compliance with the *AMA Guides to the Evaluation of Permanent Impairment, 5th Ed.*, as described more fully *infra.* This rating was not contradicted by the expert opinion of a witness for the defense at trial.

After Dr. Abrams released Mr. Edwards from his care, he declined to provide an impairment rating to Mr. Edwards' eye injury because he was "moving out of the Chattanooga area" Deposition of Dr. Seal at 4. Therefore, in the fall of 2009, Dr. Abrams referred Mr. Edwards to Dr. Molly Seal for the rating, and Dr. Seal took over Mr. Edwards' treatment while this case was pending. *Id* at 7. In doing so, Dr. Seal conducted a complete eye exam on Mr. Edwards and discussed it with Dr. Abrams. *Id.* At that time, there was a concern that a cataract could be causing Mr. Edwards' decrease in vision. *Id.* However, after conducting the exam, Dr. Seal came to the conclusion that Mr. Edwards' decrease in vision was more related to the tearing that he was having from the trauma to his lacrimal system. *Id.* at 8. Dr. Seal went into further detail about the condition, but attributed all of Mr. Edwards' problems with the eye to the trauma he suffered while working for Childs Logging on November 8, 2007. *Id.* At 8-10.

On September 12, 2012, the parties conducted Dr. Seal's deposition. In the course of her deposition, Dr. Seal stated that she had re-done her studies on Mr. Edwards in the days leading up to the deposition and that she believed that, based upon those studies, Mr. Edwards' permanent impairment was 14% to the whole person (*Id.* at 11). This rating, too, was not contradicted by the expert opinion of a witness for the defense at trial.

On May 14, 2012, Dr. William A. Wray conducted a vocational impairment consultation with Mr. Edwards. Dr. Wray testified at trial and his Summary Report was introduced as an exhibit to his testimony without objection. (Please see attached "Exhibit B"). In conducting his evaluation, Dr. Wray noticed that Mr. Edwards was "not able to independently complete a paper-and-pencil, vocational information document" and that Mr. Edwards "pulled papers from his wallet" to provide Dr. Wray with his phone number and Social Security number, etc." Exhibit B at 2.

After conducting his evaluation, Dr. Wray made the following findings in his report:

- Mr. Edwards' formal testing of academic skills reveals performance on an early elementary school (developmental) level. Exhibit B at 2.
- Mr. Edwards cannot read or compute math beyond a very early elementary school level. *Id.* at 3.
- From a vocational access perspective, the most limiting restriction arises from safety issues associated with post-injury, monocular vision. *Id.*
- Although Mr. Edwards reports that he has continued to work independently and on a part-time basis as a logger, this line of employment poses an unacceptably high risk of injury for an individual with functional vision in only one eye. *Id.*

- Mr. Edwards should not operate machinery posing physical hazards to self and others. *Id.*
- Mr. Edwards should not work at heights and he should not engage in work exposing him to chemical, electrical, explosive, or other hazards. *Id.*
- Mr. Edwards presents with no transferable job skills from prior vocational background and training, *Id.* at 4.
- Careful, item-by-item, review of QEQ II 2.0, unskilled, job listings produces no reasonable match for an individual who cannot read and who cannot accurately compute basic addition and subtraction.
- Due to injuries sustained in the workplace on November 8, 2007, Mr. George Edwards is found to be fully (100%) vocationally impaired. *Id.*

The Defendants offered no expert opinion to contradict the opinion of Dr. Wray, either. Therefore, the only expert opinion the trial Court had before it were the opinions of the Plaintiff's experts ("With the 40-pound lifting restriction and not using heavy machinery and not being around dust and height, the doctor feels it's not safe fore him to return to work in logging, and I have no countervailing testimony." Hon. Jerri S. Bryant, Memorandum Opinion in *Edwards v. Childs, et al.* Bradley County Chancery Court docket number 2011-CV-149, October 26, 2012). Basing her decision largely on those opinions, and making a specific finding that Mr. Edwards was a credible witness without making such finding as to the defense witnesses, on October 26, 2012 the Honorable Jerri S. Bryant announced her ruling that Mr. Edwards was permanently and totally disabled as a result of his on-the-job injury which is the subject of this case and awarded him all benefits to which he was entitled under the Tennessee Workers'

Compensation Act consistent with that finding. ("Mr. Edwards is the Plaintiff. I find Mr. Edwards to be believable. I find him to be credible. And I believe that it was part of his job to use a chain saw. And so the defense that he was acting outside the course and scope of his employment is overruled." Memorandum Opinion of Hon. Jerri S. Bryant at 5).

The parties submitted a Final Decree consistent with the Chancellor's finding, which was signed and filed on November 5, 2012. The defendants then filed a timely appeal of that decision.

II(a) The Issue of Who Provided the Chainsaw

A dispute over who provided the chainsaw that injured the Plaintiff came up at trial. As stated, the employer claimed that Mr. Edwards brought his own chainsaw to the job site and Mr. Edwards claimed that Tim Childs provided him with a chainsaw each morning before work. This issue is important because, if the employer provided the chainsaw, the Plaintiff's claim that part of his job was trimming limbs off of fallen trees with a chainsaw becomes more credible. On the other hand, if the employer did not provide the chainsaw, then it bolsters the defense's claim that Mr. Edwards was only permitted to operate a skidder and no other equipment, including a chainsaw. This factual dispute is material to whether the Plaintiff was afforded a "meaningful return to work" because, if his job involved operating a chainsaw, then that requirement was outside his lifting restrictions, which is a factor in determining whether the employer's post-injury offer of employment was "meaningful."

In reference to the issue of who provided the chainsaw, the following exchanges took place:

DIRECT EXAMINATION OF VELMA CHILDS BY MS. GREUTER

MS. GREUTER Did you ever at any point tell George Edwards that he needed to operate a chain saw on the job?

MRS. CHILDS No, ma'am, I did not.

Ms. GREUTER Did you ever tell George Edwards at some point he needed to bring his chain saw to the job?

MRS. CHILDS No, I did not.

MS. GREUTER When you were having – you indicated you had a conversation with Mr. Edwards about using the chain saw?

MRS. CHILDS Yes.

MS. GREUTER You know about when this was?

MRS. CHILDS It was probably about two weeks before he got hurt.

MS. GREUTER Was this in person or on the phone?

MRS CHILDSIn person. I usually didn't see George until Friday afternoon is when we pay up on Friday afternoons. And I told him, I said, George, I need to speak to you. I said, Tim has informed me that he's having a problem with you bringing your tool truck and your tools to the job site and **you want to use your saw**. We can't have that. I said, you are a skidder operator. We don't need nobody else using a chain saw.

MS. GREUTER Did Mr. Edwards indicate he understood that?

MRS. CHILDS Well, he told me that – he said, I've used one for years, I know what I'm doing. I said, but not ours.

MS. GREUTER And did you have any other conversations with him before he got

hurt after that?

MRS CHILDSNo.

- Tr. 119-120

CROSS-EXAMINATION OF VELMA CHILDS BY MR. ROBINSON

MR ROBINSON And basically the overall goal of your business is to cut timber, load it up, and sell it to make a profit; is that right?

MRS. CHILDS Yes.

MR. ROBINSON And you want to do that in an efficient manner if possible, right?

MRS. CHILDS Yes.

MR. ROBINSON And if one person can't complete a portion of the job, if it will speed things up, then you want the other person to step in and pick up the slack; is that a fair statement?

MRS CHILDSNo.

MR ROBINSON So you would rather slow business down then?

MRS CHILDSYes, for a safety matter. We have truck drivers are truck drivers only. [*sic*] The only one that operates multiple pieces of equipment would be our two sons. They run the cutter that cuts the trees and if one has to be sawed down, they run the chain saw and plus they're going to the timber and they the load that truck.

MR ROBINSON I understand, ma'am. But like a truck driver, for instance, is not certified as a master logger, is he?

MRS CHILDSNo, he is not.

MR ROBINSON So he's not allowed to run a chain saw or –

MRS CHILDSNo, he's not.

MR ROBINSON – any other piece of equipment on the property, right? A skidder operator, in this case, George Edwards, is a master logger, right?

MRS CHILDSHe says. I didn't see the paperwork. I took his word for it.

MR ROBINSON Okay. As far as you know, he is. And you don't have anything indicating that he's not; is that true?

MRS CHILDSNo.

MR ROBINSON Okay. So he is authorized under the law to operate a chain saw, is he not?

MRS CHILDSIf he wants to.

MR ROBINSON Okay. And there were two saws on this job site. One of those – the saw that George got injured with – belonged to Triple C Fiber, is that right?

MRS CHLIDSI'm not sure. I was not on the job site.

MR. ROBINSON Do you recall the set of interrogatories, the list of questions that I sent to you through Ms. Greuter? There was a second set that I sent to you. I can let you look at them if you would like. Do you recall answering these interrogatories? If I may approach the witness.

MRS CHILDSYes.

MR ROBINSON Okay. Thank you ma'am. And I'm going to read to you interrogatory number 13 and I'll let you look at it after I read it, if you would like, to make sure I read it correctly. Please state to whom the chain saw belonged when the plaintiff – which the plaintiff was operating when he injured himself and if any defendant is currently in possession of the same, please state its current whereabouts and whether it is still being used. You answered

here the chain saw belonged to "Tim Childs;" is that correct where I underlined?

MRS CHILDS Yes.

MR ROBINSON And you know you were under oath when you answered these interrogatories?

MRS CHILDS Yes.

MR ROBINSON Okay. So do you still maintain that you don't know who the chain saw belonged to having looked at that?

MRS CHILDS Sir, it's been so long. I would say that's probably right.

MR ROBINSON Okay. So you think now the chain saw belonged to Triple C Fiber?

MRS CHILDS Yes.

- Tr. 129-132

The fact that the Plaintiff was able to force the defense to admit that the *employer* had provided a chainsaw for Mr. Edwards to use proved that trimming the limbs off of fallen trees was a part of Mr. Edwards' job as a "skidder operator." A side-effect of this exchange was that Velma Childs' credibility was irreparably damaged in the mind of Chancellor Bryant, leading the Chancellor to state, when she orally announced her ruling, that Mr. Edwards was a credible witness (please see Memorandum Opinion in *Edwards v. Childs, et al.* at 3). She made no such specific credibility finding as to either of the defense witnesses.

II(b) The Issue of What Job Mr. Edwards Performed on his Return to Work at Childs Logging

In determining the specific job that the Plaintiff came back to after his injury, the following exchange took place:

CROSS EXAMINATION OF VELMA CHILDS BY MR. ROBINSON

MR ROBINSON Okay. When he came back to work after he was injured and you said he gave you something that showed he was released to work within a couple of weeks of this horrific injury, he went back to doing the same job he was doing when he got hurt, right?

MRS. CHILDS Yes.

Through these two exchanges, Velma Childs came to admit that the chainsaw that George Edwards used had been provided by the employer, which lends weight to Mr. Edwards' testimony that part of his job was cutting limbs off of fallen trees. She also admitted that, when he returned to work after his injury, he returned to the same job he had been doing when he got hurt. Both of these items of evidence are material regarding whether Mr. Edwards was afforded a "meaningful return to work." The fact that he was returned to the same job he held prior to the injury is important because the duties associated with that job were outside work restrictions placed upon him by his doctors.

III. ARGUMENT

1. APPELLANT'S FIRST ARGUMENT

PLAINTIFF'S ACTIONS IN FAILING TO REMAIN EMPLOYED WITH DEFENDANT EMPLOYER WERE NOT REASONABLE, AND THEREFORE HIS PERMANENT PARTIAL INDEMNITY AWARD SHOULD HAVE BEEN LIMITED TO THE LOWER MULTIPLIER CAP UNDER T.C.A. § 50-6-241(d)(1)(A)

APPELLEE'S RESPONSE

The issue of whether Mr. Edwards was afforded a "meaningful return to work" was raised as a defense at trial, and immediately after the trial was over, Chancellor Bryant stated the following:

THE COURT: All right. Counsel, I would like you all to do a little bit more research for me. It's kind of unusual. I don't usually do this, but that last issue about "return to work," I want to see if you can find any case law. I'm not asking for a brief. I'm not asking for a law review article written by you, but if there is a case or something that's close to on point concerning these facts and "return to work," I would like to see it.

This statement shows that Chancellor Bryant was especially concerned with the issue of whether Mr. Edwards was or was not afforded a "meaningful return to work," as she took that specific issue under advisement after trial and ordered counsel to provide case law to support their respective positions on the issue. In response to the Chancellor's request, both attorneys submitted letters and cases by the deadline she set. The Plaintiff's letter, its attachments, and the cases the undersigned submitted is attached hereto as collective "Exhibit C" which is incorporated herein by reference. Plaintiff respectfully requests that the Court read the letter that was submitted to Chancellor Bryant in regard to this issue.

As stated in the attached letter, there are three factors that have been adopted by the appellate courts in determining whether a person has been afforded a meaningful return to work. Those factors are:

1. Whether the injury rendered the employee unable to perform the job;

2. Whether the employer refused to accommodate work restrictions arising from the injury; and

3. Whether the injury caused too much pain to permit the continuation of the work.

> - *Williamson v. Baptist Hosp. of Cocke Cnty., Inc.*, 361 S.W.3d 483, 488 (Tenn., 2012).

In making this determination, the Court must assess the reasonableness of the employer in attempting to return the employee to work and the reasonableness of the employee in failing to

return to work. *Tryon v. Saturn Corp.*, 354 S.W.3d 321, 238 (Tenn., 2008). The Tennessee Supreme Court has emphasized two factors in determining the reasonableness of an employer's offer of re-employment:

1. The ability of the employee to perform the offered employment; and

2. The willingness of the employer to accommodate the work restrictions imposed by the employee's attending physician.

- *Dowd v. Cassens Transp. Co.* 2007 LEXIS 237 (Tenn., 2006).

In regard to the first factor from *Williamson, supra*, as stated in the above "Statement of Facts," George Edwards testified that he was unable to perform the job because it was just too hard on him. Believing Mr. Edwards to be a credible witness, Chancellor Bryant believed him as to this assertion and credited him for having satisfied that factor in the analysis.

Second, in regard to whether the employer refused to accommodate work restrictions arising from the injury, witnesses for both parties testified that the job George Edwards returned to after his injury was the same one he had been performing prior to the injury. Because that job entailed the use of a chainsaw, it was outside his 40 lb. lifting restriction that was in place at the time. Therefore, this factor is satisfied, as well.

Finally, the issue of whether the injury caused too much pain to permit the continuation of work, counsel would again refer the Court to the testimony of George Edwards and the specific credibility finding by the trial court in her Memorandum Opinion. Also, the parties testified that Mr. Edwards' return to work occurred within a few weeks of the injury. Given the horrific nature of the way the injury occurred, as well as the extensive and drawn-out treatment period involving some 10 surgeries, the Court can likely understand how it would be extremely painful for the Plaintiff to return to the type of work he was doing with such an injury within

such a short amount of time.

Applying the "reasonableness" test from *Tryon* and *Dowd*, it is unreasonable for the employer to require an employee to perform work which is outside his restrictions (i.e. operating a chainsaw and working in a dusty environment). Mr. Edwards testified that he was unable to perform the offered employment, and it was and remains established that the only job the employer had to offer was the same job that Mr. Edwards held prior to his injury, which involved operating a chainsaw that was provided by the employer to trim limbs from fallen trees. Therefore, the employer's acts were "unreasonable" and offer of employment was not "meaningful." It is actually very commendable that Mr. Edwards was able to last as long as he did in his injured condition.

Accordingly, the Court should affirm the trial court's rulings as to this issue.

2. APPELLANT'S SECOND ARGUMENT

THE TRIAL COURT ERRED IN ACCEPTING THE TESTIMONY OF DR. KENNETH MCCARLEY AS CREDIBLE IN DETERMINING ANATOMICAL IMPAIRMENT RATED TO FACIAL DISFIGUREMENT

APPELLEE'S RESPONSE

In a workers' compensation case, judicial review is *de novo* upon the record accompanied by a presumption that the judgment is correct unless the evidence preponderates against it. Tenn. R. App. P. 13(d), *Tomlin v. FRB*, 2006 LEXIS 332 (Tenn. Supreme Court Workers' Compensation Panel, 2006). To that end, the court's review is in depth but the court cannot substitute its judgment for that of the trial judge. *Tenn. Code Ann.* § 50-6-225(e)(2) as cited in *Tomlin*. Because the Workers' Compensation Act is a remedial statute it must be given an equitable construction, see *Tennessee Code Annotated* section 50-6-116, as to persons entitled to

its benefits and as to its terms and provisions. *Id.* [citations omitted]. As stated by the Tennessee Supreme Court in *Thomas v. Aetna Life & Cas. Co.*, 812 S.W.2d 278, 283 (Tenn. 1991), the medical testimony should not be evaluated in total isolation, but "must be considered in conjunction with the lay testimony of the employee as to how the injury occurred and the employee's subsequent condition." *Id.* Medicine is not an exact science. *Tomlin* at 20.

To provide uniformity and fairness for all parties in determining the degree of anatomical impairment sustained by the employee, a physician, chiropractor, or medical practitioner who is permitted to give expert testimony in a Tennessee court of law and who has provided medical treatment to an employee or who has examined or evaluated an employee seeking workers' compensation benefits shall utilize the applicable edition of the *AMA Guides* as established in § 50-6-102 .... T.C.A. § 50-6-204(d)(3)(A). No anatomical impairment or impairment rating, whether contained in a medical record, medical report, including a medical report pursuant to § 50-6-235(c), deposition, or oral expert opinion testimony shall be accepted during a benefit review conference or admissible into evidence trial of a workers' compensation matter unless the impairment is based on the applicable edition of the *AMA Guides*.... T.C.A. § 50-6-204(d)(3)(B). It is well settled that when medical testimony differs, it is within the sound discretion of the trial judge to determine which expert testimony to accept. *Curran v. New Generations, Inc.* 2007 Tenn. LEXIS 141 (Tenn. Supreme Court, Workers' Compensation Panel, 2007). The trial court has the discretion to accept the opinion of one medical expert over another, *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333, 335 (Tenn. 1996); *Johnson v. Midwesco,* 801 S.W.2d 804, 806 (Tenn. 1990), and while a treating physician's testimony is entitled to considerable weight, no rule of law requires a trial court to accept the testimony of the treating physician over any other conflicting medical testimony. *Id.* Although a doctor's degree of certainty is relevant to the

weighing of the expert medical testimony, doctors are not required to state their opinions to a reasonable degree of medical certainty in workers' compensation cases. *Id.* The Workers' Compensation laws should be liberally construed to promote and adhere to the (purposes of the Workers' Compensation) Act of securing benefits to those workers who fall within its coverage. *Id.* Nonetheless, the burden of proving each element of his cause of action rests upon the worker in every Workers' Compensation case. *Id.* All reasonable doubts as to the causation of an injury and whether the injury arose out of the employment should be resolved in favor of the employee. *Id.* An award may properly be based upon medical testimony to the effect that a given incident could be the cause of the employee's injury, when there is also lay testimony from which it reasonably may be inferred that the incident was in fact the cause of the injury. *Id.* The element of causation is satisfied where the injury has a rational, causal connection to the work. *Id.*

When a dispute as to the degree of medical impairment exists, either party may request an independent medical examiner from the commissioner's registry. T.C.A. § 50-6-204(d)(5).

In Dr. McCarley's deposition, the following exchanges occurred:

MR. ROBINSON Does he have permanent impairment as a result of this injury?

DR. MCCARLEY The last time I saw him, he had some numbness in the area where the laceration was. There's a nerve that comes out in that region that, I imagine, it did hit.

MR. ROBINSON Okay. And I would think he has scarring, of course?

DR MCCARLEY Yes.

MR ROBINSON He has a permanent scar on his face?

DR MCCARLEY Un-huh. (Moves head up and down).

MR ROBINSON Do you know how – does that scar start in his forehead and extend all the way down to his jawbone?

DR MCCARLEY I don't think it goes all the way down to the jawbone. It's more in this region (indicating).

MR ROBINSON Let the record reflect that he's pointing to his cheek, his left cheek.

DR MCCARLEY Yes.

MR ROBINSON Okay. At some point, I think, you were asked to provide an opinion as to what his rate of impairment is?

DR MCCARLEY Right.

MR ROBINSON And did you consult with the *AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition?*

DR MCCARLEY Yes.

MR ROBINSON This is a fifth-edition case. I just want to emphasize that. And did you come to an opinion about what that rate of impairment was?

DR MCCARLEY Yes. And that's not something I do very often, so I wouldn't say it's the greatest opinion in that regard.

MR ROBINSON But you were able to reach an opinion about it, right?

DR MCCARLEY Yes, sir.

MR ROBINSON And what is you opinion about his permanent impairment?

DR MCCARLEY Looking at other cases they described, they did not describe the numbness, but they did talk about the scarring. The way I read the

charts, it was a 6 percent impairment to the whole person.

- Deposition of Kenneth McCarley, M.D. at 9-10.

MR ROBINSON And are all of the opinions that you've given – do you feel comfortable in saying those opinions are provided to a reasonable degree of medical certainty?

DR MCCARLEY Yes, sir.

- *Id.* at 11-12

MR ROBINSON You have stated that you believe your rating is correct to a reasonable degree of medical certainty. Do you stand behind that?

DR MCCARLEY Yes, sir.

- *Id.* at 30.

In his deposition, Dr. McCarley stated no less than three times that he believed his rating was correct to a reasonable degree of medical certainty, although such standard is not required under Tennessee Workers' Compensation law and *Curran*. Although Dr. McCarley was not completely confident in his rating, the case law on this subject, provided *supra*, is clear. Medicine is not an exact science and Dr. McCarley followed the mandates and procedures of T.C.A. § 50-6-204 in that (1) he is permitted to give expert testimony in a Tennessee court of law; (2) he provided treatment to Mr. Edwards and evaluated him; and (3) he followed the *AMA Guides to the Evaluation of Permanent Impairment, 5th Ed.* as required.

Additionally, although they had ample opportunity to do so, the defense never utilized the Independent Medical Exam procedure authorized at T.C.A. § 50-6-204(d)(5). Therefore, the only doctor whose rating was offered at trial was Dr. McCarley's. Following the mandates of *Tomlin*, (as cited in *Thomas v. Aetna Life & Cas. Co.)*, the medical testimony "should not be evaluated in total isolation, but must be considered in conjunction with the lay testimony of the employee as to how the injury occurred and the employee's subsequent condition." *Tomlin* at 22. Both Mr. Edwards and Dr. William Wray, the vocational expert who testified at trial, testified extensively about Mr. Edwards' facial scarring, numbness, and pain, and they way those affected his ability

to work. Dr. Wray's testimony about this issue was as follows:

MR ROBINSON Okay. As far as your review of the record is concerned, did the records indicate to you that he has permanent numbness and/or pain in his face as a result of this?

DR WRAY As I read the records, he has permanent nerve damage, which makes – which can cause the sensory dysfunction in the face, which means numbness and not regular feeling and my understanding is that because the eye socket was rebuilt, that these in turning eyelashes are going to continue to grow and cause problems. Again, he reported to me he was having pretty regular pain in that right eye.

MR ROBINSON And do you think that – the numbness and pain and the eyelash issue and all that would have an affect [*sic*] on his ability to work?

DR WRAY Yes. As I testified earlier, I think it's another factor making it unsafe for him to do a lot of work, especially the kind of work that he's done in the past because his attention will be – will suffer from pain issues and from sensory impairment issues.

MR ROBINSON Okay. So just disassociating the numbness and the pain in the face from the eye for a moment, disability in the eye, do you believe that the permanent nerve damage in the face by itself would affect his ability to work?

DR. WRAY I think it contributes to distractability which contributes to hazards in the workplace, yes.

- Tr. 29-30.

Given the remedial nature of the workers compensation law and the requirement that it be given an equitable construction, coupled with the fact that Dr. McCarley was the only expert offered at trial to give an impairment rating as to the disability stemming from the scarring, nerve severance, and alternating numbness and pain in Mr. Edwards' face, Chancellor Bryant's

decision to accept his rating was entirely reasonable. It is well settled that when medical testimony differs, it is within the sound discretion of the trial judge to determine which expert testimony to accept. Essentially, the trial court has the discretion to accept the opinion of one medical expert over another. In this case, Chancellor Bryant was not given the opportunity to accept the opinion of an expert other than Dr. McCarley's because the defense never offered any expert opinion on this, or any other, issue. Dr. McCarley may not have been 100% confident in his rating, but it is the only one that was offered at trial. Additionally, the expert's opinion does not have to be to a reasonable degree of medical certainty, anyway. In spite of that, Dr. McCarley did state he believed his opinion to a reasonable degree of medical certainty. Therefore, the evidence does not come close to preponderating against Chancellor Bryant's decision, and the Court should overrule the appellant's argument as to this issue.

3. APPELLANT'S THIRD ARGUMENT

THE TRIAL COURT ERRED IN DETERMINING THAT PLAINTIFF WAS PERMANENTLY AND TOTALLY DISABLED

3(a): Whether Plaintiff was "Totally Incapacitated" from Working and Proof to Support

Once again, the defendant makes a claim that should be supported by the opinion of an expert, but is not. Plaintiff, on the other hand, offered the expert opinion of vocational disability expert and psychologist Dr. William Wray, who made specific findings that Mr. Edwards was "100 percent vocationally disabled" and that he was "totally incapacitated from working."

T.C.A. § 50-6-207(4)(B) states the following:

> "When an injury not otherwise specifically provided for in this chapter totally incapacitates the employee from working at an occupation that brings the employee an income, the employee shall be considered totally disabled and for such disability shall be paid as provided in subdivision (4)(A)....
> In the course of the Dr. Wray's in-court testimony, the following exchange took place:

DIRECT EXAMINATION BY MR. ROBINSON

DR WRAY Some of the restrictions Dr. Jody Abrams on January 7, 2009, advised that Mr. Edwards – in order to work, he must wear safety goggles that's [*sic*] to the face. She added that she was not sure how safe he was when using machinery.

MR ROBINSON I'm sorry, Dr. Abrams, I believe, is male. I'm sorry. Just so you are aware.

DR WRAY Okay. I'm sorry.

MR ROBINSON You were using the wrong pronoun.

DR WRAY Yes. Dr. Abrams stipulated Mr. Edwards – this was on February 16th not lift over 40 pounds and not work in a dusty environment unless fitted with safety glasses which seal to the face. I keep calling him a she. I'm sorry.

On August 20th, 2009, Dr. Abrams added the restriction that Mr. Edwards engage in no work requiring depth perception. I have a note from Dr. David Gerkin saying that Mr. Edwards would require ongoing opthalmological care due to the future and chronic exposure to the in-turning eyelashes.

MR ROBINSON Okay.

DR WRAY Those are essentially the restrictions which I used.

MR ROBINSON Okay. Thank you. Okay. And how do you – how do you believe those restrictions affect his employability?

DR WRAY Well, I essentially followed the process – fairly methodological process where I considered his education, his reading skills, his math skills, his reasoning, his lifting restrictions. Now, he had a 40-pound lifting restriction from a back injury prior to this, so he was already restricted there, so that did not change that.

Looking through the database, which was current at the time for the greater Chattanooga area, which would include the area where he lives in Spring City, essentially what it gave me were very limited unskilled jobs. When I analyzed those one by one using a work that's used for that, I found really no jobs that he could fit in terms of his reading problems, math problems, reasoning problems, lifting problems. I was hard-pressed to find anything there.

To back it up, I looked at jobs listed in the Times Free Press looking for possibilities. I contacted a couple of staffing agencies, just listed the restrictions and essentially go nowhere with that. I basically concluded from that analysis that he has no reasonable access, much of that due to safety issues.

MR ROBINSON Okay. Just expand upon that a little bit, the safety issues. What would create a safety concern?

DR WRAY Well, there's several components to that. Once, he got this sensory impairment to the face and the pain, which is distracting. So people have pain problems and physical issues that distract them. It means they should be very careful with dangerous kind of work. The limitations of the eye, particularly the depth perception. So he's worked as a woodsman and now he's likely to trip or misjudge where he's stepping if he's out in rough terrain, so it becomes – even though he's gone back and done some of this type of work, it's my opinion that it's really too dangerous to him as he would risk hurting others as well as trying to do work where depth perception was involved. That's really the only kind of work he's ever done except some very brief helping a relative out with some concrete work at one time. So this is the – essentially all he's ever done.

MR ROBINSON Do you believe in your expert opinion that he has reasonably transferable job skills?

DR WRAY I do not.

MR ROBINSON Okay. And just to make it clear, do you believe that there are any job opportunities available locally to him –

DR WRAY I do not.

MR ROBINSON – given his disabled condition?

DR WRAY I can identify no reasonable job opportunity for him.

MR ROBINSON Okay. Do you know how old he is?

DR WRAY He's going to turn 60 on February 20th.

MR ROBINSON Okay.

THE COURT February 20th, is that what you said?

DR WRAY Let me double check. February 20th.

THE COURT So he's 59 today?

DR WRAY He is.

MR ROBINSON And I assume it's your testimony you don't believe he reads and writes on an eighth grade level?

DR WRAY He does not.

MR ROBINSON Okay. All of that being said, have you come to a percentage of his vocational disability?

DR WRAY Yes. I found that he was fully vocationally impaired, 100 percent vocationally impaired. I find no reasonable opportunity for this man with the limitations and problems he has to access employment locally.

MR ROBINSON And do you base that on the injury in this case which took place on, I believe, it was November 8th, 2007?

DR WRAY It's based on the injuries he sustained with the chain saw, but it's also based on his background, abilities, and experiences, what he brings to the table. So in other words, if this was a gentleman who could read and write fairly well, even with some of these restrictions, he would have some access. But what he brings to the table when he was hurt, he can't fall back on those kinds of jobs because he lacks those skills. He would not be able to even fill out a job application without assistance.

MR ROBINSON Okay. Do you believe – that being said, do you believe that he is totally incapacitated from working?

DR WRAY That's my opinion, yes.

- Tr. 11-16.

Applying the test for permanent and total disability as set out in T.C.A. § 50-6-207(4)(B), first, the two injuries at issue in this case for which plaintiff's counsel obtained two disability ratings (disability to the right eye at 14% to the body as a whole and facial scarring/numbness at 6% to the body as a whole) are not specifically listed in Chapter 6 of Title 50. Applying the second prong from 50-6-207(4)(B), Dr. Wray was the only expert offered at trial, and he testified that Mr. Edwards was "totally incapacitated" from working in logging. A simple reading of

chapter 6 indicates that the two injuries are not specifically listed, and Chancellor Bryant believed Dr. Wray to be a credible witness. Also, because the code section states that, if the two requirements are satisfied, the court "shall" make a finding of permanent and total disability, the trial court has no discretion *not* to find the claimant permanently and totally disabled if the two requirements are met. Therefore, Chancellor Bryant's finding of permanent and total disability in this case was entirely appropriate and proper.

3(b): Mr. Edwards' Return to Work in Logging for Employers other than Childs

The fact that an employee is employed after the injury in the same type of employment does not, *per se*, preclude a court from making a finding of permanent and total disability but such employment is to be considered along with other factors in determining if an employee is employable in the open labor market. *Rhodes v. Capital City Ins. Co.*, 154 S.W. 3d 43, 46-47 (Tenn., 2004). Mr. Edwards testified that, in spite of the injuries, he has had to work in logging because it is his only means of making money, so he "does what he has to." (Tr. 52-53). Mr. Edwards stated that he has worked "part-time, off and on," one to three days per week (Tr. 53-54), but that he does not feel safe working in logging, and only does so because he "has got bills to pay." (Tr. 53). It is stipulated that QBE Specialty Insurance stopped Mr. Childs' temporary total disability benefits on November 19, 2009 and, in her Final Decree, Chancellor Bryant ordered the employer to pay the temporary benefits in arrears, which the company still has not done. Basically, Mr. Edwards had to work the only way he knew how because the insurance company wrongfully cut-off his TTD benefits. His choice was either take the risk of getting hurt working in logging or starve and lose everything he had. He chose to take the risks associated with logging so that he would not lose everything he owned.

Dr. Wray was asked about this issue in his testimony, which included the following:

REDIRECT BY MR. ROBINSON

MR ROBINSON Okay. There's been testimony or you've heard that [Mr. Edwards] has continued to work. He's tried to work, right?

DR WRAY That's my understanding, yes

MR ROBINSON Does that make it okay for him to continue working indefinitely, in your opinion, in logging?

DR WRAY Actually, there's a continuum. If somebody has a traumatic injury, one continuum would be some traumatized, they don't get out of the house, which is not good. The other continuum, which is not good, would be to ignore the problem and keep going even though you have problems that really could cause some serious danger. I really see him as falling into that category, that his judgment may not be the best in terms of what he might try even though he has limited function.

MR ROBINSON I think you're referring to the latter category?

DR WRAY I'm saying this gentleman has continued to try to do some things that really for safety reasons, in my opinion, he should not be trying.

- Tr. 27-28.

Considering all other factors about which Mr. Edwards and Dr. Wray testified in addition to the fact that he has done some work in logging since his injury, in accordance with *Rhodes*, the decision Chancellor Bryant made regarding this issue should be affirmed.

3©: Mr. Edwards' "Move to Maryland"

In its brief, the defense claims that Mr. Edwards "moved to Maryland so that his wife could be with her grandchildren." Brief of Appellant at 24. Mr. Edwards never "moved to

Maryland." His in-court testimony about this issue was as follows:

DIRECT BY MR. ROBINSON

MR ROBINSON At some point, you went to Maryland, right?

MR. EDWARDS Because my wife is up there and her grandkids, her daughter and her kids and she wanted to go up there.

MR ROBINSON Okay. Did you work while you were in Maryland?

MR. EDWARDS Some.

MR ROBINSON Did you go to Maryland to work in logging?

MR. EDWARDS No. No, I didn't. I went up there to visit her grandkids.

Mr. Edwards never testified that he "moved" to Maryland and maintains his residence in the State of Tennessee.

V. FRIVOLOUS APPEAL

"A frivolous appeal is one that is 'devoid of merit such that it had no reasonable chance of succeeding.'" *Henderson v. SAIA, Inc.*,318 S.W.3d 328, 341 (Tenn. 2010) (quoting *Clark v. Nashville Mach. Elevator Co.*, 129 S.W.3d 42, 50 n. 4 (Tenn. 2004)).The intent of the legislature to encourage early resolution of workers' compensation cases is unmistakable. *Ferrell v. APAC-Tennessee, Inc.*, 2000 Tenn. LEXIS 722 (Tenn. Special Workers' Comp. App. Panel Dec. 1, 2000). Employers will no longer be permitted to starve an employee into submission by withholding temporary disability benefits or medical benefits. *Id.* Instead, if such benefits are withheld in bad faith, significant penalties may be imposed by the courts. *Id.* Parties are encouraged to resolve cases in an early and efficient manner. *Id.* If cases cannot be resolved by

settlement through the mediation process established by the legislature, trial courts are directed to give workers' compensation cases precedence on the docket. *Id.* Finally, if cases are appealed frivolously or for the purpose of delay, penalties may be imposed. *Id.* Appellate courts should not stifle the right to appeal by imposing penalties if a case raises a legitimate factual or legal issue. *Id.* **Conversely, the appellate courts should not be timid about imposing penalties for frivolous appeals when there is raised no legitimate factual or legal issue, especially if, on the factual issue raised, the trial court has made a specific credibility finding.** *Id.* [Emphasis added]. Parties in workers' compensation cases are not to play games, but instead parties must consider seriously the rights and duties created by workers' compensation law. *Id.* Significant rights which affect peoples lives are at stake. *Id.* Where there is no reasonable basis for appeal, penalties should be vigorously applied by the appellate court if the legislative intent is to be given life. *Id.*

When an appeal in a workers' compensation case had no reasonable chance of success and the material issues raised by the appeal were issues of fact with material evidence supporting the trial judge's findings on those issues, the appeal was frivolous and appellee was entitled to damages under [T.C.A. 27-1-122]. *Liberty Mut. Ins. Co. v. Taylor*, 590 S.W.2d 920, 1979 Tenn. LEXIS 523 (Tenn. 1979); *Bailey v. Knox County*, 732 S.W.2d 597, 1987 Tenn. LEXIS 1006 (Tenn. 1987). *Tenn. Code Ann.* § 27-1-122 states as follows:

> When it appears to any reviewing court that the appeal from any court of record was frivolous or taken solely for delay, the court may, either upon motion of a party or of its own motion, award just damages against the appellant, which may include, but need not be limited to, costs, interest on the judgment, and expenses incurred by the appellee as a result of the appeal.

Tenn. Code Ann. 50-6-225 (h), states as follows:

> When a reviewing court determines pursuant to a motion or *sua sponte* that an appeal of an employer or insurer is frivolous, or taken for purposes of delay, a penalty may be assessed by such court, without remand, against the appellant for liquidated damages.
> T. C. A. 50-6-225 (h) (West, 2012).

Moore v. City of Manchester is a worker's compensation appeal which the Court deemed frivolous and imposed a liquidated damages award pursuant to T.C.A. § 50-6-225(h). In *Moore*, the employee was notified that her sister had been hurt in a fall and, therefore, left work to go see about her sister. As she was approaching her car in the employer's parking lot, the employee fell and broke her wrist. The employer denied the claim, claiming that the employee was on a personal errand. The trial court found for the employee. The employer appealed, and the Supreme Court Panel referred counsel for the employer to *McCurrey v. Container Corp. of America* 982 S.W. 2d 841, 845 (Tenn., 1998) which sets out a bright-line test for injuries that occur in the employer's parking lot. The Court found the appeal to be frivolous and ordered the employer to pay the employee a penalty under T.C.A. § 50-6-225(h) of $2500.00.

In this case, ever since November 19, 2009, the day the insurance company wrongfully cut off Mr. Edwards' TTD benefits, this employer and its insurance carrier have tried to "starve George Edwards into submission."

All of the issues that were raised in the Brief of Appellant were addressed at trial and all are frivolous (i.e. they are so devoid of merit that they have no reasonable chance of success). The Appellant's first issue ("meaningful return to work") is frivolous because that issue boils down to whether the trier of fact believed that George Edwards' job included operating a chainsaw to trim branches from fallen trees. Chancellor Bryant made a specific credibility finding that George Edwards was a credible, believable witness (please see Memorandum

Opinion of the Honorable Jerri S. Bryant, October 26, 2012 at 3). Because this Court cannot replace its judgment with the trial court's when the trial court saw and heard testimony of witnesses in court, the Court cannot grant an appeal based upon a factual dispute when the factual evidence regarding that issue was heard in court by the trial judge. Therefore, this issue should be deemed frivolous.

The second issue (whether Dr. McCarley's rating is credible) is also frivolous because the defense offered no expert opinion to contradict Dr. McCarley's rating, and Dr. McCarley testified that he (1) was competent to testify as an expert witness in a Tennessee court of law; (2) he had treated the person for whom he was providing the rating; and (3) he followed the correct edition of the *AMA Guides* when he did the rating. Had the defense offered its own expert as to the impairment from the scarring and disability in Mr. Edwards' face, this would be a legitimate argument for appeal.

Finally, the third issue (whether Mr. Edwards should have been found PTD) is also frivolous because, again, there was no expert opinion offered by the defense to contradict the opinion of Dr. Wray, and Dr. Wray testified that George Edwards was "totally incapacitated" from doing a job that brings him income. He also testified extensively about Mr. Edwards' education level, etc. Had countervailing expert opinion been offered at trial, then this, too, would be a legitimate issue for appeal.

This is the kind of appeal that Tennessee law expressly prohibits, as stated in *Ferrell.* Accordingly, Childs Logging and QBE Specialty Insurance have qualified themselves for the kind of penalty described in *Ferrell* and in *Tenn. Code Ann.* 50-6-225 (h). Therefore, counsel respectfully requests that the Court impose a liquidated damages penally of five-thousand dollars ($5000.00) in accordance with T.C.A. 50-6-225(h) and remand the case to the trial court for a

determination as to other damages plaintiff has suffered as a result of the filing of this appeal, including court costs, attorney's fees, and expenses..

IV. CONCLUSION

This case tells the tale of a real-life tragedy - and not just based upon the terrible injury which the plaintiff suffered alone. While the injury is horrendous, this case involves the death of a person's livelihood; the only livelihood that person has even known and the livelihood that has supported his family and him for over forty years. George Edwards is the type of person for whom Permanent Total Disability under the Tennessee Workers' Compensation Act was created. He cannot read. He cannot write. He cannot do even basic arithmetic and he has no job skills other than those he has acquired in his chosen career. Yet he is exceptionally skilled at that one trade he has practiced all of his life: logging. The problem for him is, because of the horrific, bloody, and gruesome injury he suffered while working for the defense logging companies on November 8, 2007, he is totally incapacitated from working in logging any more, and he has proven that in a court of law. He testified that, in spite of his injury, he "likes to log" and it would be "really hard to quit" because he "can't see good [*sic*] enough now" and logging is "a part of [his] life." Tr. 57. He has carried his burden of proof and respectfully requests that the Court affirm the trial court's ruling in this case and provide the other relief requested herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I served a true and exact copy of the foregoing document upon opposing counsel by placing the same in the United States Mail addressed as follows with sufficient postage affixed thereto to carry it to its destination:

Allen-Kopet PLLC
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This _____ day of _____, 20_____.

_____
Samuel F. Robinson III