

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

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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.

Member, Harris Shelton Hanover Walsh, PLLC, Memphis, Tennessee. I have been employed by the firm and its predecessor since 1979.

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

I was licensed to practice law in Tennessee in 1979. My TN B.P.R. Number is 6683.

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.

Tennessee, B.P.R. No. 6683; Date of Licensure: October 6, 1979; 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).

I have practiced law from 1979 to the present. I began my practice with Hanover, Walsh, Jalenak & Blair, PLLC ("Hanover Walsh") and became a member of the firm in 1985. I became a member of Harris Shelton Hanover Walsh, PLLC ("Harris Shelton") in 2005 when Hanover Walsh merged with Harris, Shelton, Dunlap, Cobb & Ryder, PLLC.

I was appointed to the position of Special Master ("Special Master") of the Chancery Court of Tennessee for the Thirtieth Judicial District at Memphis (the "Chancery Court") in November 2010 by sitting Chancellors Walter L. Evans, Arnold B. Goldin and Kenny W. Armstrong. I served in that position through January 2015. Since then I have served as a Special Master upon special assignment by the Chancery Court.

I was a member of a Tennessee limited liability company named NewSwank Aircraft, LLC ("NewSwank") from 2004 to 2011. A friend and I formed NewSwank to facilitate the purchase of a Cessna 172 aircraft to allow our sons to accumulate flight time in their pursuit of careers as commercial pilots. I sold my interest in NewSwank in 2011.

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.

I have been employed as an attorney continuously since my licensure.

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.

My present law practice is a civil practice concentrated in the area of commercial litigation. I serve commercial clients, insurance companies, small businesses, not-for-profit corporations, multi-employer pension and welfare trusts, municipalities and individuals by providing legal advice and litigation services. The matters in which I have been engaged in recent years have involved commercial matters, including breach of contract claims and claims of tortious commercial conduct in state and federal courts and in arbitration (40%); claims for copyright infringement (10%); disputes involving decedents' trusts (10%); transactional and ethical matters (10%); and claims arising from the enforcement of ERISA obligations (5%). Each of the percentages above is an approximate estimate of my time engaged in each area.

During my service as Special Master for the Chancery Court, and thereafter upon special assignment, I have devoted roughly one-quarter of my total work to that engagement. It has been in that capacity that I have been given an opportunity to develop and employ the skills that are needed in a good judge, including appropriate demeanor, temperament, consistency, diligence and the application of sound legal principles. As Special Master I also gained experience in areas that were outside the concentration of my own legal practice, including domestic relations litigation.

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 have detailed in response to Question 10 below my involvement as Special Master in specific cases. While not required to do so by the Court, I kept detailed time records of

my work as Special Master, which I performed in addition to my private practice. In my first full year as Special Master, I devoted 214.3 hours to my engagements as Special Master in 2011; in 2012 – 174.3 hours; in 2013 – 250.7 hours; in 2014 – 111.8 hours; and in 2015 through March – 159.2 hours.

The Chancellors typically have referred matters to me as Special Master for report pursuant to TENN. R. CIV. P. 53. Commonly the litigants in these cases would find it financially difficult to afford the services of a private master. My work as Special Master has consisted primarily of hearing contested proof and presenting reports and recommendations, including the preparation of detailed fact findings and conclusions of law in matters involving issues such as discovery disputes, child custody, accountings of monies received and owed, contractual disputes, allocation of insurance proceeds among injured minors, and competing claims of heirs to family-owned real property. I have conducted numerous reference hearings related to municipal and county tax sales.

When acting as Special Master, it has been my goal to prepare Reports that are thorough and accurate with respect to the facts at issue and consistent with applicable legal principles. These Reports set forth the detailed factual findings that I have made and the legal principles at issue so that the Chancellors have been fully informed as to the basis for my findings, and so as to allow the litigants an opportunity to file exceptions to my findings. As Special Master I took an oath, as have the Chancellors, to uphold the Constitution of the United States and the Constitution of the State of Tennessee. I have endeavored to be fair, impartial and engaged and to assist the Chancellors with the performance of their judicial function. *See Smith v. UHS of Lakeside, Inc.*, 439 S.W.3d 303 (Tenn. 2014) (hereinafter “*UHS of Lakeside*”). I have sought to prepare Reports and perform my tasks in a timely manner so as to expedite the progress of each case.

As Special Master I have gained experience that should prove to be invaluable if I am appointed to be Chancellor. I have had experience in managing the matters referred to me, each of which have been, in effect, a case within a case. Also, the Reports reflect my ability to perform an important task now required of trial judges in Tennessee. In bench trials prior to July 1, 2009, trial judges were only required to make specific findings of fact and conclusions of law upon request. TENN. R. CIV. P. 52.01 now requires trial courts to make these findings in non-jury cases regardless of a request by either party. *See Lovelace v. Copley*, 418 S.W.3d 1, 34-35 (Tenn. 2013). In the event that the trial court does not make the required findings and conclusions, litigants face a more likely prospect that the trial court’s judgment may be reversed, vacated and remanded on appeal, greatly increasing the total cost of litigation. As a trial judge, I would strive to avoid such outcomes.

In addition to the cases specifically mentioned below, the Chancellors assigned a number of additional tasks to me as Special Master, each of which reflects on the range of my experience in Chancery matters. As a neutral I have mediated cases involving proposed modifications to Permanent Parenting Plan Orders relating to child custody and education and contract disputes regarding construction contracts (both referred by Chancellor Armstrong) and have mediated disputes concerning contested ownership of church

property on assignment from Chancellor Kyle. I have inspected premises to evaluate whether equipment had become fixtures on the property on assignment by Chancellor Evans; reviewed for Chancellor Evans several alternate scenarios involving the potential sale of a marital residence in which the property had been impressed with an IRS tax lien; made recommendations in a reference from Chancellor Armstrong that were later accepted by the parties and the Court regarding the proportional recovery that should be allotted to victims injured in a collision between a day care van and an SUV when the sole insurer had tendered its policy limits; conducted a hearing after remand from the Court of Appeals in a construction contract case in which the matter finally was resolved after the defendant had put on proof before me regarding the remaining issue on remand; and conducted a hearing regarding the identity and value of automotive tools and parts allegedly misappropriated by one dirt-track racing enthusiast from another. The matter came to a conclusion before the submission of my report following the accidental death of the plaintiff.

I have 35 years of experience in the private practice of law, devoted primarily to trial practice in both state and federal courts.

The Courts in which I have practiced are as follows, including dates of admission:

Tennessee State Courts, October 6, 1979

United States District Court, Western District of Tennessee, April 4, 1980.

United States District Court, Middle District of Tennessee, September 9, 1987.

United States District Court, Eastern District of Tennessee, October 27, 1987.

United States Court of Appeals for the Sixth Circuit, September 15, 1981.

United States Supreme Court, November 15, 1982.

I have also been admitted *pro hac vice* or as otherwise permitted in cases before the United States District Courts for the Eastern District of Michigan, the Eastern District of Arkansas and the Northern District of Mississippi.

I have been lead counsel in jury trials in the Circuit Court of Tennessee for the Thirtieth Judicial District at Memphis and the United States District Court for the Western District of Tennessee.

My Chancery Court practice has been extensive. Of special note, from 2007 to 2013 I actively pursued claims related to restoration of cemetery and funeral trust funds associated with the Forest Hill Cemeteries of Memphis that had been stolen by the owners and their associates in 2004 and 2005. This theft placed at risk the pre-need funeral arrangements paid for by over 13,000 citizens of Shelby County and caused the future of the cemetery properties to be in doubt. This litigation had special significance to

me as my parents are buried in one of the Forest Hill Cemeteries. It was essential that the Cemeteries should remain viable and open.

My law partner, Max Shelton, was appointed as Receiver of the cemeteries by Chancellor Arnold B. Goldin in 2007. The State of Tennessee had sought the appointment of a receiver after deficiencies in the trust funds were discovered in an administrative audit. As counsel for Mr. Shelton, I worked as part of a team of lawyers and assistants, including the highly capable staff of the Attorney General's office. I personally prepared civil pleadings against those responsible, sought and obtained temporary injunctions, argued for and obtained civil contempt remedies against a former officer, negotiated tolling agreements with potential corporate defendants, negotiated terms of settlement by which millions of dollars in trust fund assets were recovered and placed back into trust, represented the Receiver in numerous evidentiary hearings, argued multiple additional motions before the Chancery Court and argued before the Tennessee Court of Appeals, prepared extensive timelines involving key facts and transactions by which trust funds were transferred out of trust, interviewed and deposed key witnesses, briefed and argued successfully that the United States District Court for the Western District of Tennessee should stay putative class action lawsuits pending the conclusion of the Receivership proceedings based on *Burford* abstention principles, prepared extensive proposed findings of fact and conclusions of law in aid of the Receiver's motions for summary judgment based on the entirety of the record, argued successfully that the Receiver was entitled to a civil judgment against the key defendants in an amount in excess of \$25 million and assisted the Receiver in proceedings by which the cemetery and funeral assets were sold in a court-approved sale.

We later filed suit on behalf of the Receiver in Chancery Court against the employer of one of the co-conspirators. This action was removed to Federal Court by the defendant based on diversity of citizenship jurisdiction and then ordered to arbitration. Due to my familiarity with the matters at issue, The federal court granted the defendant's motion to compel arbitration. In the interim, the cemetery and funeral home had been sold by the Receiver to a public corporation which acquired the Receiver's claims against the employer. I was engaged as Tennessee counsel for the buyer in proceedings before a FINRA arbitration panel. In that context, I assisted Indiana co-counsel in the preparation of the claims for arbitration, including extensive pre-hearing discovery and preparation for hearing on the merits. The claims were resolved by settlement.

Over the course of my legal career, I have represented a wide variety of clients in regard to multiple areas of the law. As lead counsel, I recently defended a claim of tortious interference with business relationships in a construction setting, arguing in federal district court that the case was subject to be dismissed under the authority of *Bell Atlantic Corp. v. Twombly* for failure to plead either direct or inferential allegations with respect to all the material elements of the claim; I obtained summary judgment in an action filed against a labor organization by one of its members alleging negligence, breach of contract, outrageous conduct and breach of duty of fair representation; I successfully briefed and argued on appeal to the Tennessee Court of Appeals that a claim against an employer was barred after no motion to substitute party was made within the ninety day

period set out in TENN. R. CIV. P. 25.01, mandating dismissal of the case with prejudice and resulting in the reversal of the Circuit Court's judgment; I tried, briefed and successfully upheld on Sixth Circuit appeal a jury verdict enforcing promissory notes on behalf of an assignee under "shelter rule" of Tennessee law despite defendant's contention that plaintiff was not a holder of the notes when the action was commenced; defended the owner of a shopping center in a jury trial involving a claimed violation of the lease terms regarding a similar business conducted by another tenant; and I obtained trial court judgment and briefed and argued successfully on appeal that a lender had conformed to the Uniform Commercial Code in repairing a repossessed aircraft and conducting a commercially reasonable sale. Other cases have included claims for and advice concerning: accountings by trustees and other fiduciaries; claims of breach of contract, tortious interference with contractual relations and prospective economic advantage; breach of fiduciary duty; application of Tennessee Consumer Protection Act; bad faith refusal to pay insurance claims; copyright infringement of musical compositions, motion pictures, and photographs posted on the internet; alleged violation of the Tennessee Personal Rights Protection Act; enforcement of employer agreements to pay employee benefits to multiemployer plans established and maintained pursuant to ERISA; awards of attorney's fees to prevailing parties pursuant to statute; requests for awards of exemplary damages; violations of covenants not to compete; issues of due process and personal jurisdiction over foreign entities; enforcement of foreign judgments; products liability actions; wrongful death claims arising from varied factual circumstances, including alleged health care liability actions and alleged negligence including failure to comply with ASTM standards and failure to inspect contents of intermodal container; removal of lawsuits to federal court based on federal question jurisdiction and/or diversity of citizenship jurisdiction; review of Reports of Examination by administrative examiners; indemnity claims pursuant to industry-wide uniform agreement; determination of entitlement of broker to commission income; negotiation of employment agreements, separation agreements and stock repurchase agreements involving corporate officers; claims pursuant to Federal Debt Collection Practices Act; housing discrimination claims; mechanics lien issues; adversary proceedings in bankruptcy; interpleader actions on behalf of interpleading plaintiffs and claimants; declaratory judgment claims; conciliation agreements with Tennessee Human Rights Commission resolving housing discrimination complaints; avoidance of fraudulent transfers; post-foreclosure proceedings; establishment of constructive or resulting trusts; hospital liens; advising client of likelihood of success on the merits of prospective tax refund litigation; negotiation of assurance of voluntary compliance agreement with Division of Consumer Affairs of Tennessee Department of Commerce and Insurance; claims for breach of transfer and presentment warranties pursuant to Articles 3 and 4 of the Uniform Commercial Code in circumstances in which forgery and alteration of commercial instruments were at issue; matters involving "litigation holds" in the context of pending litigation; and enforcement of terms and conditions of Small Business Administration loans.

As co-counsel, I have litigated or settled a variety of claims, including: breach of contract claims against a liability insurer regarding claims of violation of terms of negotiated settlement; statutory interpretation of "any willing pharmacy" statute in context of mail

order pharmacies; claims pursuant to the Real Estate Settlement Procedures Act; environmental claims relating to alleged negligence in regard to provision of environmental impact statement; declaratory judgment on validity and applicability of Solid Waste Disposal Act regarding landfill proposals; claims pursuant to Tennessee Prompt Pay Act; claims against public performance bonds; claims seeking restitution; claims for establishment of prescriptive easements; claims for enforcement of partnership agreements; claims for breach of fiduciary duties and for accountings; applications for temporary restraining order, attachment pro corpus, and temporary injunction based on fraud; putative class actions involving antitrust allegations; declaratory judgment proceedings regarding obligations of foreclosing creditor to owner of fee; predatory lending practices; construction delay; products liability; wrongful death resulting from (a) bridge collapse following scouring of creek bed; and (b) electrocution of assembly line employee engaged in product testing; seniority issues related to memorandum of understanding between governmental entity and public employee union; alleged public nuisances involving fire losses during period of strike of public employees; statutory interpretation regarding delegation of eminent domain power to privately owned utilities; determination of merits of claim pursuant to employment practices liability insurance following denial of coverage, including interpretation of Tennessee Insurance Trade Practices Act; misappropriation of trade secrets; rights of minority shareholder of closely held corporation operating franchise restaurants; waiver of right to jury trials under rules of civil procedure; enforcement of guaranty agreements; challenges to validity of annexation ordinance; intentional and negligent misrepresentation; entitlement of parties to domestic litigation to conduct discovery in connection with TENN. R. CIV. P. 60.02 motions; matters of permissive intervention and intervention as of right; reach of Public Records Act to matters in litigation; and modification of protective orders regarding discovery previously taken.

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

As mentioned above, I served as counsel for the Receiver in the Forest Hill Cemetery litigation. The outcome of this matter was of great benefit to thousands of families who had purchased pre-need cemetery contracts as well as to families, like my own, whose loved ones are buried at one of the three Forest Hill cemeteries in Memphis, as the trust funds recovered in the lawsuit included those for the maintenance and improvement of the cemetery properties. Many people have expressed to me how they have been personally benefited by the result.

Early in my career I was involved in a case that began modestly as an injunction hearing before the United States District Court in Memphis resulting in an adverse outcome and an unsuccessful appeal to the Sixth Circuit. Our client then successfully petitioned for writ of certiorari to the United States Supreme Court. Our firm argued the case before the Court together with the Solicitor General and obtained a positive outcome on the merits in *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984). The case involved issues related to the implementation of a layoff proposal by the City of Memphis and had implications for civil rights issues and the enforcement of consent decrees. I was given

the opportunity to draft the appellate briefs at each stage, to assist lead counsel, Allen S. Blair, as he prepared for oral argument and to sit at counsel table at the oral argument in the Supreme Court with Mr. Blair and Solicitor General Rex Lee. I also vividly recall that the Supreme Court granted the petition for certiorari on the day that my first child was born. Because the case was relatively high-profile in nature and Mr. Blair was unavailable that morning, I received many calls from news organizations seeking comment after my wife and I had been up all night during her labor and delivery. All matters relating to that case remain in my memory as a very special and rewarding experience for me, both personally and professionally.

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, 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.

As noted above, I became the Special Master of the Chancery Court by appointment in November 2010. Given that under our constitutional system the courts in Tennessee that comprise the Judicial Branch of state government are the sole repositories of judicial power, judges must be capable of exercising the “high judicial function” of explaining why a particular result is correct based on the applicable legal principles. *See UHS of Lakeside*, 439 S.W.3d at 312 (citation omitted). What follows is a detailed description of a number of those cases deemed noteworthy enough by the Chancellors to require references pursuant to Rule 53 to resolve a portion of the issues in the cases. The cases considered below are in descending order by date.

City of Memphis v. Karen Lesley, Shelby Chancery No. CH-11-1858-2 (“*Lesley*”) (Report attached as Exhibit A). Officer Lesley’s employment as a police officer with the City of Memphis had been terminated without a pre-termination hearing. Chancellor Goldin ruled that the City had violated Officer Lesley’s right to procedural due process. The Court of Appeals affirmed. On remand Chancellor Goldin entered an order ruling that Officer Lesley was entitled to certain damages for the period between her discharge and reinstatement by the Civil Service Commission. On October 31, 2014, Chancellor Jim Kyle referred the issues of Officer Lesley’s reimbursement entitlement and post-judgment interest relief to me as Special Master.

As Special Master, I heard contested proof and argument regarding health insurance premiums paid, medical costs accrued and the right of Officer Lesley to an award of statutory post-judgment interest on December 2, 2014. The parties requested additional time to conduct discovery regarding one of the issues involved in the case. Following a hiatus resulting from a death in the family of counsel for the City, a supplemental hearing was conducted on March 4, 2015. I filed my Report on April 6, 2015 setting forth factual findings and legal conclusions regarding the methodology to be employed in determining the appropriate back pay award due to Officer Lesley. My Report rejected both the

methodology suggested by Officer Lesley and the City regarding the calculation of post-judgment interest. Officer Lesley moved that the Chancery Court adopt the Report. On May 1, 2015, Chancellor Kyle entered an order granting Officer Lesley's motion and adopting the Report. The case required resolution of an issue of apparent first impression in Tennessee, whether post-judgment interest is due on the adjusted gross amount of back pay (net of outside earnings), or, in the alternative, the net amount that is due to be paid to the recipient of back pay after deductions for such items as Federal Tax and similar items which I resolved by reference to case law developed by federal courts in North Carolina and Illinois.

Lois Valeria Joyner Brown as Administrator ex rel. Estate of Claudie Vivian Joyner v. United States Department of Housing and Urban Development, et al., Shelby Chancery No. CH-12-1466-2 ("*Brown*") This matter was referred to me by Chancellor Goldin on August 8, 2013 for an accounting.

Brown involved a dispute among certain surviving siblings whose mother had died at the age of 104. During the final seven years of her life, the mother's financial affairs had been overseen by the youngest sibling. She had received a power of attorney from the mother and maintained a joint bank account in which the mother's social security checks were directly deposited. After the mother's death, an older sibling was appointed administrator of the mother's probate estate. The administrator sought an accounting of the mother's funds.

After I received proposed findings of fact and conclusions of law from the parties, my Report reviewed the facts in evidence and made a detailed accounting of the sums that had come into the control of the attorney in fact, distinguishing between those funds which had been spent by the attorney in fact for the benefit of the deceased mother and those for which the attorney in fact could not properly account over the seven year period at issue. In a subsequent order, Chancellor Goldin adopted the factual findings made in the Report. The significance of *Brown* is that it shows the my ability to perform a complex accounting when required to do so.

Mary Taylor Wright v. Elizabeth R. Bailey, Shelby Chancery No. CH-10-1966-2 ("*Wright*"). This matter was referred by Chancellor Goldin on February 27, 2013 for a hearing on the issues, among others, of liability and damages claimed by the counter-plaintiff against one of the counter-defendants. Following notice to the parties, I conducted an evidentiary hearing on April 8, 2013. On June 10, 2013 the parties submitted proposed findings of fact and conclusions of law to the Special Master. On September 23, 2013, I filed the Report of the Special Master in *Wright* with the Court.

The counter-plaintiff claimed that she was entitled to an award for monies paid and/or obligations incurred to preserve her interests in a house in which she and the counter-defendant claimed competing interests. The counter-plaintiff's deceased husband and the counter-defendant were siblings who each obtained an interest in the house at issue by intestate succession from their mother's estate. In a prior case, the Circuit Court had determined that the counter-defendant had engaged in a series of fraudulent acts in an

effort to deprive the counter-plaintiff of her interests in the property and awarded damages to the counter-plaintiff. In addition to the Circuit Court judgment, the counter-complaint in Chancery sought to further encumber the interests of the counter-defendant in the real property as a result of her satisfaction of the mortgage on the property. It also sought a monetary judgment for the counter-plaintiff's share of the lost rental income on the property. Finally, the counter-plaintiff sought an award of her attorney's fees pursuant to the common fund doctrine.

My Report found that the counter-plaintiff was entitled to encumber the interests of the counter-defendant to the extent of mortgage payments that she made on the house for the benefit of the counter-defendant. It further found that the counter-defendant was liable for a certain sum representing lost rental income on the property due to her actions. As to the counter-plaintiff's claim for attorney's fees pursuant to the common fund doctrine, the Report found that the common fund doctrine did not permit the Chancery Court to make an award of attorney's fees to the counter-plaintiff for attorney's fees incurred in a separate lawsuit. Further, the counter-plaintiff had failed to demonstrate that the legal services of her counsel had secured, augmented or preserved the real property for the benefit of the counter-defendant. My Report concluded that the entirety of the counter-plaintiff's claim under the common fund doctrine should fail. Additionally, the Report discussed and applied principles of claim preclusion, including res judicata. Subsequently the counter-plaintiff has moved the Chancery Court to adopt the Report. The significance of *Wright* lies in my application of principles of res judicata together with an analysis of the limitations of the common fund doctrine under Tennessee law.

Ivette Baldizon, et al. v. Roger Cranford, et al., Shelby Chancery No. CH-12-1566-1 ("*Baldizon*"). By order dated January 13, 2013, Chancellor Walter Evans directed me as Special Master to establish an escrow account in which all funds payable to a homeowner's association ("HOA") were to be deposited. Further, I was charged to collect and account for monthly HOA payments from each of the more than 45 residential properties within the HOA, to oversee the maintenance of the exterior of the residences, and to resolve any disputes that might arise relating to the maintenance of the exterior of the properties and common areas. I remained in constant communication with a Special Master's Committee formed by the Chancellor consisting of representatives of the plaintiffs and defendants, which represented rival slates of HOA officers. I was charged with casting the deciding vote in matters in which the representatives of the plaintiffs and defendants could not agree, a role in which I was required to act with great frequency.

A dispute arose as to whether the governing documents of the HOA required homeowners to fully pay all past-due HOA assessments as a precondition to voting in an election for officers of the HOA. In addition to those tasks which I had been directed to perform, the Chancellor referred to me for mediation on March 20, 2013 issues relating to voting eligibility in HOA officer elections. In three separate sessions, we attempted to mediate the issues of voter eligibility and reached impasse. I filed an interim report with the Court on May 16, 2013 reporting on those sessions.

After filing the interim report, I arranged a conference at which counsel for plaintiffs, counsel for defendants and I appeared before Chancellor Evans. At that conference the Court set a trial date on the issues of voter eligibility and directed me to give notice to the homeowners that an election would be held two weeks after the trial date. I provided the required notice of the date of the election of the Board of Directors of the HOA. Following the trial I oversaw an election at the site of the HOA office pursuant to the Court's instructions with the assistance of a number of Sheriff's Deputies. The election was conducted on August 7, 2013. On August 9, 2013 I filed the Special Master's Report and Certification of Election Results with the Court. On August 14, 2013, I prepared and submitted upon the Court's instructions an Order Certifying Election Results and a separate Order Dissolving Temporary Injunction which directed me to turn over all funds remaining in the HOA account remaining after payment of outstanding expenses and obligations to the newly elected HOA Board of Directors and which discharged me of further duties as Special Master. The Court entered these orders, I turned over the funds and was discharged from further duties in that matter. No appeal was taken from any of the rulings in *Baldizon*. In all, time records maintained by me indicate that I spent over 135 hours devoted to this matter alone. The significance of *Baldizon* lies in that attention to detail and dedication to early resolution of cases contributes to the determination of litigation in a just, speedy and cost efficient manner. See TENN. R. CIV. P. 1.

Clifton L. Smith, Jr. v. Nelson Smith III, et al., Shelby Chancery No. CH-11-1229-2 ("Smith"). This matter was referred to the Special Master by Chancellor Goldin by order dated April 9, 2012 for the purpose of making findings and conclusions, including an accounting. *Smith* presented issues regarding the rights and obligations among grandchildren who had received tenant-in-common interests in certain residential real property located in Memphis by intestate succession. The Chancellor referred fourteen factual issues to the Special Master. Following a prehearing conference with counsel on May 8, 2012, the Special Master conducted an evidentiary hearing on May 18, 2012. Following receipt and review of the hearing transcript, I filed the Report of the Special Master with the Court on July 18, 2012. Subsequently, the Court overruled and disallowed all exceptions and objections to the Report and approved, confirmed and adopted the Report in its entirety.

Smith presented issues regarding the continued occupation of real property by one of several co-tenants. After analyzing Tennessee law, the Report found that the continued occupation did not result in an "actual ouster" by the occupying co-tenant. The Report also concluded that the occupying co-tenant was obligated to pay fair rental value to the remaining co-tenants for her occupation and that she was not entitled to credit from her co-tenants for her personal services in managing and caring for the residential properties owned by the co-tenants. However, the occupying co-tenant was entitled to credit for property taxes, insurance premiums and repair and maintenance expenses that she had paid on the property which benefited the co-tenants. The significance of *Smith* is that it demonstrates how prompt judicial decision-making can bring to a fair conclusion a protracted dispute. Ultimately the resolution in *Smith* resulted in bringing to an end the expenditure of resources of all the litigants and laid the groundwork for a sale of the co-tenant real estate for the benefit of all co-tenants.

Regions Bank v. Centrepot International Logistics, Inc, et al., Shelby Chancery No. CH-10-0648-2 (“*Regions*”) (Report attached as Exhibit B). A motion to compel discovery was referred to the Special Master by Chancellor Goldin on February 24, 2012. Counsel argued the motion before the Special Master on March 15, 2012. On April 5, 2012, I filed the Report and Recommendation of the Special Master with the Court. Subsequently, Regions Bank moved the Court to adopt the Report and Recommendation in part. On June 22, 2012, the Chancery Court entered an order adopting the Report and Recommendation.

Regions presented issues regarding the entitlement of the counter-defendant to further or more definite responses to a number of interrogatories dealing with the identity of persons with knowledge of the claims at issue; the duty of the responding party to supplement responses should any material changes occur; the obligation of the responding party to provide the addresses of those persons who had knowledge of relevant facts; the identity of experts with whom the counter-plaintiff had consulted; the adequacy of responses to contention interrogatories; the amount of detail required in response to interrogatories inquiring into allegations of fraud and mistake; and the entitlement of the counter-defendant to an award of attorney’s fees. In presenting a proposed ruling on those issues, the Report and Recommendation analyzed the discovery provisions of the Tennessee Rules of Civil Procedure and cases decided thereunder as well as those federal authorities applying similar provisions of the Federal Rules of Civil Procedure. The moving party thereafter sought and obtained an order from the Court which required the counter-plaintiff to provide additional discovery as recommended by the Report and Recommendation. The significance of the Report and Recommendation is that it demonstrates my ability to analyze and articulate the rationale for rulings on technical issues involving the application of the Court Rules in discovery disputes.

Terezie Tolar Mosby v. William Michael Mosby, Shelby Chancery No. 02-1586-2 (“*Mosby*”) (Report attached as Exhibit C). On July 19, 2011, Chancellor Goldin contacted me and requested that I conduct a hearing that same day on parenting time. The order of reference was later entered by the Court on August 9, 2011. The reference required an accounting of days spent with each parent during preceding year pursuant to the Tennessee relocation statute, TENN. CODE ANN. § 36-6-108 to aid the Court in determining whether the petitioning parent’s petition to relocate should be granted. Following review of the hearing transcript, I filed the Report of the Special Master on September 9, 2011 applying the Tennessee Supreme Court’s test of substantially equal intervals of time articulated in *Kawatra v. Kawatra*, 182 S.W.3d 800 (Tenn. 2005).

Due to then-unresolved issues in the case law regarding whether a parent should be afforded credit for school hours for days in which evening time was spent with that parent, the Report provided alternative calculations dependent on the manner in which the Court might resolve that issue. After exceptions were filed by the petitioning parent, the Court denied her exceptions to the Report in their entirety. The Report in *Mosby* demonstrates diligence and attention to detail.

I have also rendered reports in matters involving: (1) accountings of unpaid commission income due to a former employee in regard to appeals on behalf of property owners of assessments of real property by the Office of the Shelby County Assessor, *Christopher Douglas v. Caruthers & Associates, Inc.*, No. CH-10-1858-2 (Reports dated November 5, 2012 and August 6, 2013), *see also Christopher Douglas v. Caruthers & Associates, Inc.* No. W2013-02676-COA-R3-CV, 2015 Tenn. App. LEXIS 250 (Tenn. Ct. App., Apr. 24, 2015); (2) accounting of damages suffered by a plaintiff as a result of the defendant's breach of contract, *Garland Goins v. J & L Express, et al.*, Shelby Chancery No. CH-07-0907-1 (Report dated January 3, 2012); and (3) accounting of "lawful charges" due to purchaser of a property at a tax sale during the period prior to redemption by record owner of real property, *Estate of Benjamin Goosby ex rel. Ron G. Nance v. Wesley Arije*, T.R.D. 9459-1 (Reports dated March 7, 2011 and November 2, 2011).

11. 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.

As Special Master, I have taken an oath to support the Constitution of the United States and of the State of Tennessee and to execute the duties of that office without prejudice, partiality or favor, to the best of my ability. As I carried out those duties, I have been constantly reminded of my high duty to the people to carry out that oath as best as I am able.

As a young lawyer, I was appointed conservator for an elderly person who was a resident at St. Peter's Villa in Memphis, Tennessee. My duties included visiting my ward frequently, paying all expenses of her care and treatment from her assets, and arranging for the sale of bank stock which she owned to pay for her expenses.

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

On March 4, 2015 the Tennessee Commission on Continuing Legal Education and Specialization petitioned the Supreme Court of Tennessee to certify me as an approved mentor attorney in accordance with Supreme Court Rule 21 and Regulation 5K. The Court approved the Commission's petition on March 30, 2015 and certified me as an Approved Mentor pursuant to Regulation 5K and Rule 21, Section 4.07 following a review of my standing to practice, the lack of any disciplinary actions against me, and the acknowledgement that I had completed initial mentor training

Following the selection of a new full-time Special Master by the Chancellors, Chancellor Oscar C. Carr, III contacted me on January 27, 2015 and requested that I undertake a new assignment as a TENN. R. CIV. P. 53 Special Master. He told me that he wanted me to assist the Court by conducting an *in camera* review of a sizeable set of documents. The documents had been produced in a declaratory judgment action styled *United Services Automobile Association v. Harry Ray Coleman, Jr., et al.*, Shelby Chancery No. CH-10-1641 (Report and Recommendation attached as Exhibit D). Chancellor Carr told me that

Chancellor Armstrong had told the parties before he became Judge of the Tennessee Court of Appeals that he wished for me to undertake the review, but that no order of appointment had been entered before Chancellor Armstrong left the bench.

I was honored to take on this task to assist the Court on a *pro bono* basis. The underlying facts involved an altercation between two adults in a parking lot outside a suburban restaurant. The assailant had shot and killed the victim with a handgun. The family of the victim filed a wrongful death action against the assailant and his spouse. The assailant's homeowners insurance carrier provided a defense in the wrongful death action under reservation of rights. The assailant was later convicted of second degree murder.

The insurance carrier filed a declaratory judgment action in the Chancery Court seeking a determination that the homeowner's policy did not provide coverage for the incident. The assailant and his spouse filed counterclaims for bad faith concerning the insurer's failure to pay the claim. The insurer moved for summary judgment on the issue of coverage. In response to discovery requests, the insurance carrier produced its claims file and underwriting file in redacted form and submitted a privilege log. In December 2013, Chancellor Armstrong entered an order staying bad faith discovery, but allowed discovery on the coverage issue to go forward. The Court required the insurer to produce its claims file and underwriting file to the Court in unredacted form for *in camera* review, but no further progress had occurred. On January 27, 2015, Chancellor Carr entered an order appointing me as Special Master and directing me to review the underwriting and claims files and make a Report and Recommendation concerning the documents and information to be produced in response to discovery from the defendants in the declaratory judgment action.

The Court provided me with 1598 pages of documents in both redacted and unredacted form from the insurer's files for my review. In view of the Court's rulings, I reviewed each redacted document to determine first whether it was privileged, and if not, whether it was legally relevant to the issue of coverage and should be produced. I also heard argument from the parties on February 26, 2015. Pursuant to the Court's instructions, I submitted my draft report to counsel for the parties on March 17 and filed my Report and Recommendation on March 27, 2015, which detailed my findings concerning the relevance of the documents to the issue of coverage, among other findings. (Exhibit D hereto)

13. 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.

I submitted an application for judgeship to the Governor's Commission on Judicial Appointments for the vacancy in Part III of the Chancery Court resulting from the appointment of the Honorable Kenny W. Armstrong to the Tennessee Court of Appeals. The Governor's Council met on September 10, 2014 to consider the applications for that

position. The Governor's Commission submitted my name to the Governor as a nominee for that position.

EDUCATION

14. 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.

Rhodes College, B.A. 1976 (joint degree in Economics and Political Science)
(attended 1972-1976)

Phi Beta Kappa (Rhodes College)

Omicron Delta Kappa honor society (Rhodes College)

Vanderbilt School of Law, J.D. 1979 (attended 1976-1979)

Associate Executive Editor Vanderbilt Law Review (Received Associate Editor's Award in 1979)

PERSONAL INFORMATION

15. State your age and date of birth.

I am 61 years of age. My date of birth is April 23, 1954.

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

I have lived in Tennessee my entire life.

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

I have been a resident of Shelby County my entire life.

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

Shelby County

19. 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.

I did not serve in the military.

20. 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.

No.

21. 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.

22. 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 know of no formal complaints that have been filed against me.

23. 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.

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

No.

25. 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.

I was named as a defendant in a lawsuit filed in the United States District Court for the Western District of Tennessee filed *pro se* by Theodore G. Cook in 1988. Mr. Cook had been a defendant in a lawsuit that J. Alan Hanover and I tried in Chancery Court in Shelby County on behalf of William F. Trimble in the mid-1980s. After Mr. Cook lost that lawsuit, he filed suit against a number of defendants, including the Honorable D. J. Alissandratos, former Chancellor of Part III of the Chancery Court of Shelby County, Glen Reid, Mr. Hanover and me. Mr. Cook's complaint asserted various federal claims. United States District Judge Julia Gibbons dismissed all federal claims asserted by Mr. Cook as frivolous pursuant to 28 U.S.C. § 1915(d). The District Court also declined to exercise jurisdiction over certain state claims asserted by Mr. Cook, which were not re-

asserted by Mr. Cook thereafter. The Sixth Circuit Court of Appeals affirmed on appeal. *See Cook v. Trimble*, 1989 WL 16189, 869 F.2d 1489 (6th Cir. 1989) (unpub.).

In the mid-1980s, I filed a suit in General Sessions Court in Shelby County against a driver who ran into my car in a commercial parking lot and left the scene of the accident after refusing to provide her insurance information to me. I obtained her tag number and later filed suit against the driver. I do not recall the docket number of the case or the name of the defendant. I obtained a civil judgment in the approximate amount of \$400.00.

26. 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.

Riveroaks Reformed Presbyterian Church, (Presbyterian Church of America)
Ruling Elder, 2011 to present; Trustee, January 2014 to present.

Downtown Kiwanis Club, 2014 to present

27. 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

28. 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.

Memphis Bar Association (1979 to present)
Tennessee Bar Association (1979 to present)
American Bar Association (2009 to present)
The Federalist Society (2014)

29. 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.

I was a candidate for Chancellor of Part II of the Chancery Court in the August 2014 general election. That position had been held by the Honorable Arnold Goldin, who was appointed by Governor Haslam to the Tennessee Court of Appeals. Judicial elections in Shelby County are nonpartisan. In the course of the campaign, 1383 active Shelby County attorneys participated in a Judicial Qualification Poll conducted by the Memphis Bar Association. Of the candidates for Chancellor of Part II, I was voted "most qualified" by 35.3 percent of those participating (versus 28.1%, 4.3% and 3.2% for the other three candidates; another 29.1% of the participants expressed no opinion, as instructed by the MBA for those who they did not know the candidates' qualifications or who had no opinion as to who was best qualified). I received the highest percentage of "most qualified" votes in that poll of any non-incumbent running for the office of Chancellor in Shelby County in the August 2014 election.

I have been AV rated by Martindale Hubbell since 2005, and have been recognized by Best Lawyers in America in the practice area of Commercial Litigation and by Mid-South Super Lawyers.

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

Case Comment, Constitutional Law—Confrontation Clause—Admission at Trial of Slain Informant's Prior Grand Jury Testimony Against Defendants Does Not Violate Confrontation Guarantee Despite Lack of Cross-Examination, 31 VAND. L. REV. 682 (1978)

31. 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.

None

32. 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.

I was an applicant for the office of Chancellor of Part III of the Chancery Court of Shelby County in 2014 when that office was vacated by the appointment of the Honorable Kenny W. Armstrong to the Tennessee Court of Appeals. I also was a candidate for the office of Chancellor of Part II of the Chancery Court of Shelby County in the August 2014 general election. I served as the Special Master of the Chancery Court of Shelby County from November 2010 to January 2015 by appointment of the sitting Chancellors.

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

No.

34. 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.

The attached Reports in cases before the Chancery Court are the product of my fact findings, research and analysis in their entirety:

City of Memphis v. Karen Lesley,
Shelby Chancery No. CH-11-1858-2
(Report dated April 6, 2015) (Exhibit A).

Regions Bank v. Centrepot International Logistics, Inc, et al.,
Shelby Chancery No. CH-10-0648-2
(Report dated April 5, 2012) (Exhibit B).

Terezie Tolar Mosby v. William Michael Mosby,
Shelby Chancery No. 02-1586-2
(Report dated September 9, 2011) (Exhibit C).

United Services Automobile Association v. Harry Ray Coleman, Jr., et al.,
Shelby Chancery No. CH-10-1641
(Report and Recommendation dated March 27, 2015) (Exhibit D).

ESSAYS/PERSONAL STATEMENTS

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

As a practicing attorney of thirty-five years and a life-long resident, I have seen first-hand how the Chancery Court touches the lives of the people of Memphis and Shelby County. I seek to become its next Chancellor, not for self, but in order to be a servant of the people. By training and experience, I believe that I am equipped to make the greatest impact for good within our community as a diligent and respectful Chancellor who fairly applies the law with equity to all parties who come before the Court. The Magna Carta says "To no one will we sell, to no one will we refuse or delay, right or justice." No more succinct statement can be made as to the proper role of our Court. You have my pledge that I will strive to fulfill that role if I am appointed to this position.

36. 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)*

Since 1948 all federal judges have taken an oath to “administer justice without respect to persons, and to do equal right to the poor and to the rich.” 28 U.S.C. § 453. In that spirit, as Special Master I committed myself to ensure that all persons were entitled to fair and thoughtful consideration of their legal rights, rich and poor alike. I served as Special Master in the *Coleman* case earlier this year on a *pro bono* basis, due to my respect for Chancellor Carr. I have participated in lawyer “phone-a-thons” sponsored by the young lawyers’ section of the local bar. I have also sought to be generous to my elderly neighbors and fellow church members who are in need of legal assistance, frequently providing legal advice and referring them to particularly skilled attorneys without charge for my time or involvement.

37. 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 appointment as one of the three Chancellors for Shelby County. I am ready for the challenges of this position. More than any other state court in Shelby County, the Chancery Court adjudicates business and employment controversies, municipal, county and state governmental issues, and applications for injunctive and other extraordinary relief. The Court also affects the lives of people through the adjudication of adoptions and domestic cases. I have endeavored to be fully familiar with recent Tennessee appellate opinions to be prepared to follow their precedent and to pay deference to legislation which our Courts are charged to apply. I will seek the counsel of my fellow Chancellors and that of the Judges of the Court of Appeals in furtherance of the integrity and efficiency of the Court. I would seek to be a diligent, hard-working and ethical Chancellor in all respects.

38. 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)*

My wife and I have been active in the life of our church, where I serve as an elder. We have sponsored a Ugandan child through Compassion International for many years. We are also involved in service to mothers, grandmothers and children in downtown Memphis.

The tragic circumstance that has led to this application process is a sad reminder that many members of our profession have silent pain in their lives. For my part, I would seek to provide a sounding-board for lawyers and judges who might benefit from a listening ear. I have recently have been certified by the Tennessee Supreme Court as a Mentor Attorney. I will seek to use these skills and encourage attorneys to take up this role. Helpfully, Court of Appeals Judge Clement recently cited a remarkable article written by Judge Michael Lyon, a Utah state court judge, entitled “Views from the Bench: Practices of Successful Lawyers Appreciated by Trial Judges.” In a very few pages, Judge Lyon offers excellent advice concerning motion and trial practice, professionalism and civility. I will offer similar advice, particularly to young lawyers.

39. 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 share a host of life experiences with my Shelby County neighbors. I grew up in Memphis and was educated in Memphis City Schools through elementary and high school. My parents and teachers instilled in me respect for others and the value of discipline and hard work. My high school's student body was composed almost equally of African-American and white students. I also worked full-time each summer in racially-mixed environments. I have empathy and respect for our fellow citizens from all walks of life.

I have been married for over 32 years to a gracious woman who has served as a pediatric nurse at Le Bonheur Children's Hospital beginning in 1975 and up to the present day. She also has started a ministry to underprivileged women in downtown Memphis. We are blessed to have three adult children, one of whom had successful open heart surgery in Memphis, and two grandchildren. I am an active elder in my church.

I have practiced law over the years with a diverse group of lawyers of various faiths and ethnicities all of whom I respect and admire. Ours has been as much an extended family as a law partnership. I have gained much more from these relationships than I deserve. With humility, my long-term relationships and life experiences enable me better to bring maturity and character to the bench. I would strive to be a Chancellor who is impartial and fair.

40. 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. As a judge it would be my duty to interpret and follow the law as passed by the legislature and interpreted by the appellate courts. In one reference as Special Master, I had misgivings that the statute at issue might unintentionally motivate inappropriate conduct. The statute creates a presumption that the parent with whom the children has spent substantially more time in the previous 365-day period is entitled to relocate and together with the children. There is a danger that the statute might disadvantage a parent who has been cooperative in visitation matters. I saw that the statute might have given an incentive to one to plot in advance to disadvantage the other parent by asking for more visitation time, while withholding an unspoken intention to relocate. However, in our constitutional system it is not the role of judges to apply their personal policy preferences. Rather, a judge strengthens respect for the judiciary by upholding the law and permitting the people through their elected representatives to make choices about the issues of the day. If the law is to be changed, it must be done in the first instance by the legislature or by interpretation of the appellate courts. Until the law is changed, courts have a duty to uphold the law with humility, even if the particular judge disagrees with the law. In my Report, I recommended that the Chancellor apply the statute as written, taking into consideration the prior appellate cases that had interpreted the statute.

REFERENCES

41. 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 Amy P. Weirich, District Attorney General, 30 th Judicial District,
B. The Honorable Mark H. Lutrell, Jr., Shelby County Mayor.
C. The Honorable David Lenoir, Shelby County Trustee,
D. Mary P. Wagner, Esq.,
E. John L. Ryder, Esq.,

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 Chancery Court of Tennessee for the Thirtieth Judicial District at Memphis, 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: May 21, 2015.


Signature

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



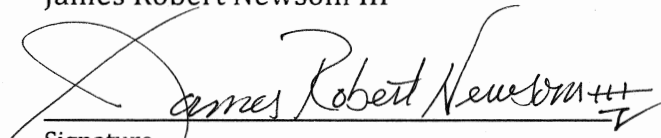
**THE GOVERNOR'S COUNCIL FOR JUDICIAL APPOINTMENTS
ADMINISTRATIVE OFFICE OF THE COURTS**

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.

James Robert Newsom III


Signature

May 21, 2015

BPR #6683

Please identify other licensing boards that have issued you a license, including the state issuing the license and the license number.

IN THE CHANCERY COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

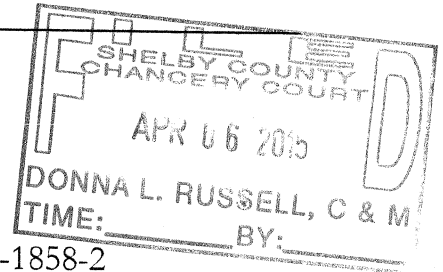
CITY OF MEMPHIS,

Petitioner,

THE CIVIL SERVICE COMMISSION
OF THE CITY OF MEMPHIS and
KAREN LESLEY,

Respondents.

No. CH-11-1858-2



REPORT OF THE SPECIAL MASTER ON
REFERENCE REGARDING
INSURANCE/MEDICAL REIMBURSEMENT
AND POST-JUDGMENT INTEREST

I. CASE HISTORY

The underlying facts and procedural history of this matter are set forth in *City of Memphis v. Lesley, et al.*, No. W2012-01962-COA-R3-CV, 2013 WL 5532732 (Tenn. Ct. App., Oct. 7, 2013). In brief, Petitioner City of Memphis (the “City”) terminated the employment of Respondent Officer Karen Lesley (“Officer Lesley”) on October 13, 2009. The City treated Officer Lesley as a probationary employee and did not provide a pre-termination hearing. *Id.* at *1. Officer Lesley timely sought review of her termination by the Memphis Civil Service Commission (the “Commission”). In April 2010 the Commission ruled that Officer Lesley was not entitled to a pre-termination

EXHIBIT A

hearing because she was a probationary employee. *Id.* On November 12, 2009, Officer Lesley filed a petition for a writ of certiorari in Chancery No. CH-09-2259-2 (“*Lesley I*”). *Id.* The Chancery Court reversed the Commission in February 2011, finding that Officer Lesley had already completed her probationary period at the time of her termination in October 2009. *Id.* The Court held that as a non-probationary employee, Officer Lesley had been entitled to due process protections, including a pre-termination hearing. *Id.* The City did not appeal from this ruling. *Id.* at *2.

On remand to the Commission, the City stipulated that Officer Lesley had not been given a pre-termination hearing in April 2010. The City sought to re-litigate before the Commission whether Officer Lesley had been a probationary employee in October 2009. *Id.* at *3. By order dated September 15, 2011, the Commission declined to reconsider that issue. The Commission further determined that Officer Lesley had been denied procedural due process at the time of her termination and reinstated Officer Lesley to her previous position of employment. *Id.* at *4. The City filed its Petition for Writ of Judicial Review and Supersedeas, in this action, Chancery No. CH-11-1858-2 (“*Lesley II*”), on November 10, 2011. Upon review of the administrative record, the Chancery Court affirmed the Commission’s reinstatement of Officer Lesley in its Findings of Facts and Conclusions of Law entered on August 17, 2012. The City filed a timely appeal.

The Court of Appeals held that the ruling of the Chancery Court in *Lesley I* had become final and that the City could not re-litigate the issue of whether Officer Lesley

was a probationary employee at the time of her termination in *Lesley II*. *Id.* at *10. The Court of Appeals found substantial and material evidence supported the Commission's findings that the City's failure to afford minimal constitutional due process safeguards violated Officer Lesley's right to procedural due process. *Id.* at *12. The Court of Appeals affirmed and remanded the case "for such further proceedings as might be necessary." *Id.* at *13.

On remand, the Chancery Court, the Honorable Arnold B. Goldin, presiding, heard Officer Lesley's "Petition to Enforce the Judgment of the Court" on July 2, 2014. In the Order on Respondent's Petition to Enforce the Judgment of the Court on July 24, 2014 (the "July 24, 2014 Order"), the Court ruled as follows:

1. The City's deduction of \$19,384.27, for health and life insurance premiums, from Lesley's back pay is proper to re-instate her coverage for the period of time from the date of her termination (October 13, 2009) to the date of her re-instatement (December 18, 2013).
2. The City is responsible for paying Leslie [sic] the total amount of her health and life insurance premiums paid, as well as all medical costs accrued by her, to other employers, to insurance companies, or to medical providers for the period of her termination (October 13, 2009) to her re-instatement (December 18, 2013).

3. Leslie [sic] is to be made whole from her discharge by the City of Memphis on October 13, 2009 and therefore Petitioner, Lesley, is entitled to post judgment interest on her back pay award from this Court's judgment date of August 17, 2012.

Id. at p. 1-2, ¶¶ 1-3.

The Chancery Court, the Honorable Jim Kyle presiding, referred “the issues of Lesley’s insurance/medical reimbursement entitlement and the amount of post judgment interest to the Special Master” on October 31, 2014. The Special Master conducted an evidentiary hearing pursuant to TENN. R. CIV. P. 53 on December 2, 2014.¹ *See* Hearing Transcript Vol. I. The Special Master conducted a supplemental hearing on March 4, 2015. *See* Hearing Transcript Vol. II.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Amounts Due for Insurance/Medical Reimbursement

The Chancery Court ruled on remand that the City is responsible for paying Officer Lesley the total amount of her health and life insurance premiums paid and all

¹ In advance of the December 2, 2014 hearing, the Special Master advised the parties by e-mail on November 12, 2014 that certain of his law partners had represented each of the parties in other matters. At the first meeting of the parties pursuant to TENN. R. CIV. P. 53.03(1) on November 14, 2014, counsel for the parties announced that the parties did not wish to seek the Special Master’s disqualification from this case. This was confirmed in the Remittal and Waiver Agreement executed by the parties, Hearing Exhibit 1.

below by provider. All costs listed below were paid by Officer Lesley unless otherwise noted:

1. North Internal Medicine -- \$280.00. Hearing Transcript Vol. I at pp. 10-11, 14, 16, 28-29, 33; Hearing Exhibit 2 and Exhibits 2 and 3 thereto.
2. Campbell Clinic -- \$335.00. Hearing Transcript Vol. I at pp. 16, 29, 33; Hearing Exhibit 2 and Exhibit 4 thereto.
3. Lakeside Hospital -- \$6,180.00. Hearing Transcript Vol. I at pp. 17-18, 29, 33; Hearing Exhibit 2 and Exhibit 5 thereto. Officer Lesley testified that she had been billed for services in the amount of \$6,180.00 (the "Lakeside Charges") that she received at Lakeside Hospital which were not covered by the City of Atoka, due to a mistake on Lakeside Hospital's behalf and that the Lakeside Charges had not been paid. Hearing Transcript Vol. I at pp. 35-37. The Lakeside Charges would have been paid by the City through its Employee Assistance Program ("EAP") had Officer Lesley been on the City's payroll. *Id.* The City stipulated at the supplemental evidentiary hearing that the Lakeside Charges will be fully paid without obligation on the part of Officer Lesley. Hearing Transcript Vol. II (March 4, 2015 Hearing) at pp. 7-9.
4. St. Francis Hospital Bartlett -- \$3,664.90. Hearing Transcript Vol. I at pp. 18, 30, 33; Hearing Exhibit 2 and Exhibit 6 thereto. Officer Lesley testified that she incurred total medical expenses of \$18,324.52 and that twenty

(20%) percent of said sum, that is, \$3,664.90, was the uncovered deductible amount which she had paid from her own funds. *Id.*

5. Methodist Hospital North -- \$228.00. Hearing Transcript Vol. I at pp. 18, 30, 33; Hearing Exhibit 2 and Exhibit 7 thereto. Officer Lesley testified that she incurred total medical expenses of \$1,733.00 and that \$228.00 was the uncovered deductible amount which she had paid from her own funds. *Id.*
6. Memphis Radiological P.C. -- \$228.00. Hearing Transcript Vol. I at pp. 18-19, 30-31, 33; Hearing Exhibit 2 and Exhibit 8 thereto.
7. Family and Cosmetic Dentistry -- \$500.00. Hearing Transcript Vol. I at pp. 19, 31, 33; Hearing Exhibit 2 and Exhibit 9 thereto.
8. Rural Metro Ambulance -- \$266.34. Hearing Transcript Vol. I at pp. 20, 31, 33; Hearing Exhibit 2 and Exhibit 10 thereto.
9. Baptist Memorial Hospital Group -- \$107.55. Hearing Transcript Vol. I at pp. 20-21, 31-33; Hearing Exhibit 2 and Exhibit 11 thereto.
10. Express Scripts -- \$92.00. Hearing Transcript Vol. I at pp. 21, 32-33; Hearing Exhibit 2 and Exhibit 12 thereto.

The sum of the above-enumerated medical costs that Officer Lesley incurred and paid, between her termination by the City and her reinstatement for which she has not received reimbursement totals \$5,701.79. It is assumed that the City will honor its commitment to hold harmless Officer Lesley from any obligation for the

Lakeside Charges, and that no award need be made in favor of Officer Lesley for those charges.

The City further contends that Officer Lesley is not entitled to reimbursement for out-of-pocket medical expenses such as co-pays (and likewise for medical expenses, if any there are, that she incurred, but for which she has not made payment) on the basis that she would have incurred those expenses had she worked for the City at the time the medical expenses were incurred. *See* Hearing Transcript Vol. II at pp. 16-17, 19-21. However, the July 24, 2014 Order has ruled on this point. That Order rules that “The City is responsible for paying Leslie [sic] the total amount of ... medical costs accrued by her, to other employers, to insurance companies, or to medical providers for the period of her termination (October 13, 2009) to her reinstatement (December 18, 2013).” July 24, 2014 Order at p. 1, ¶ 2. Thus the City’s argument on this point is contrary to the clear directive of the Court. The City is obligated to reimburse or hold harmless Officer Lesley for all such medical expenses accrued, paid or unpaid, including co-pays.

From the foregoing, the Special Master finds that Officer Lesley’s insurance/medical reimbursement entitlement from the City is \$14,159.75, the sum of the health insurance premiums which she paid during her employment with the City of Millington (\$8,457.96) and the medical costs that Office Lesley incurred in the period between her termination by the City and her reinstatement for which she has

cause, which was entered on August 17, 2012, is 5.25%. See <http://www.tncourts.gov/node/1232344> (published by the Tennessee Administrative Office of the Courts)(last accessed on April 6, 2015). Further, TENN. CODE ANN. § 47-14-122 provides that “Interest shall be computed on every judgment from the day on which the jury or the court, sitting without a jury, returned the verdict without regard to a motion for a new trial.”

The first issue raised is whether Officer Lesley is entitled to any award of post-judgment interest? The City argues that post-judgment interest should not be awarded to Officer Lesley because the Court’s Findings of Fact and Conclusions of Law dated August 17, 2012 did not set forth a particular monetary award. See Hearing Transcript Vol. I at pp. 45-46. This argument is contrary to established Tennessee law and the rulings of the Chancery Court.

Tennessee recognizes that an appellate court decision that modifies or reverses a trial court’s judgment is given retroactive effect to the day of the original trial court judgment. *Varnadoe*, 149 S.W.3d at 649. It follows that an appellate court decision that

(b) To assist parties and the courts in determining and applying the interest rate on judgments set forth in subsection (a) for the six-month period in which a judgment is entered, before or at the beginning of each six-month period the administrative office of the courts:

- (1) Shall calculate the interest rate on judgments that applies for the new six-month period pursuant to subsection (a);
- (2) Shall publish that rate on the administrative office of the courts’ web site; and
- (3) Shall maintain and publish on that web site the judgment interest rates for each prior six-month period going back to the rate in effect for the six-month period beginning July 1, 2012.

affirms a trial court's judgment likewise should be given effect to the day of the original trial court judgment. *See id.* Moreover, when factual determinations are necessary to calculate a judgment on remand, the effective date of the judgment is the date of the original judgment. *Id.*; *Cf. Caffey v. UNUM Life Ins. Co.*, 302 F.3d 576, 588 (6th Cir. 2002) (holding that pursuant to 28 U.S.C. § 1961 post-judgment interest runs from the date of any judgment that is not entirely set aside). While such a judgment must ascertain damages in a meaningful way (*see Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827 (1990)), such damages need not be reduced to a sum certain. *See Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 250 F.3d 482, 490 (6th Cir. 2001).

The Chancery Court's ruling that Officer Lesley is "entitled to post judgment interest on her back pay award from this Court's judgment date of August 17, 2012" (*See* July 24, 2014 Order at p. 2, ¶ 3) recognizes that Officer Lesley's back pay award was ascertainable in a meaningful way at the time of the entry of the Court's Findings of Fact and Conclusions of Law on August 17, 2012. The City's argument that Officer Lesley is not entitled to post-judgment interest because the amount of the judgment had not been calculated in the August 17, 2012 Findings of Fact and Conclusions of Law is not well taken, and must fail.

Having found that Officer Lesley is entitled to an award of post-judgment interest, the next question is on what basis should that award be calculated? Officer Lesley argues that her back pay entitlement should equal \$141,957.00 and that her award of post-judgment interest should be calculated on that basis. *See* Hearing

Transcript Vol. I at pp. 23, 25, 44, 50, 52-54; Hearing Exhibit 4. The City argues that if the Court should award Officer Lesley post-judgment interest, that award should be based on her award of net pay, \$64,523.51. Hearing Transcript Vol. I at p. 47. The Special Master finds that neither of these amounts is the correct amount on which the award of post-judgment interest should be based.

When an employee has been wrongfully terminated, the measure of damages is the amount the employee would have earned had the employer not dismissed her, less what would have been earned, or might have been earned with reasonable diligence. *Frye v. Memphis State Univ.*, 806 S.W.2d 170, 173 (Tenn. 1991). While the employee may recover the loss of wages, she has a duty to minimize this loss by seeking other employment. *Id.* In this instance, Officer Lesley obtained suitable alternative employment with the City of Millington and the Town of Atoka after her termination by the City. *See* Transcript Vol. I at pp. 10, 36; Exhibit 1 to Hearing Exhibit 2. Officer Lesley's earnings with the City of Millington and the Town of Atoka are properly deductible from her "Original Gross" (*see* Hearing Exhibit 3) to arrive at her "Adjusted Gross." *See* Hearing Transcript Vol. I at pp. 51-52.

In this case, the Court of Appeals issued its opinion and judgment on October 7, 2013, and issued the mandate on December 16, 2013. At that juncture, Officer Lesley had filed an individual Chapter 13 Bankruptcy Proceeding in the United States Bankruptcy Court for the Western District of Tennessee, Case No. 13-23671. Hearing Transcript Vol. I at pp. 34-35. By operation of bankruptcy law, Officer Lesley's back

pay entitlement had become an asset of Officer Lesley's Chapter 13 Bankruptcy Estate.

Using information provided by Officer Lesley relating to the income that she had received from her employment with the City of Millington and the City of Atoka as well as information from its own records regarding the income that Officer Lesley would have earned and the deductions that would have been made from her gross earnings but for her termination, the City prepared a one page settlement statement to reflect the amount of the City's back pay obligation (the "Settlement Statement"). Hearing Transcript Vol. I at pp. 51-52, 54; Hearing Exhibit 3.

The Settlement Statement specified Officer Lesley's: (a) Original Gross (\$232,372.87); (b) Outside Earnings (\$116,423.09) (relating to Officer Lesley's employment by the City of Millington and the Town of Atoka); (c) Adjusted Gross (\$115,949.78); (d) Federal Tax (\$15,699.57); (e) Medicare Tax (\$1,400.20); (f) Pension (\$14,942.23); (g) Medical (Health Insurance) (\$15,949.33); (h) Dental (\$2,976.87); (i) Vision (\$458.07); and (j) Net Pay (\$64,523.51). *Id.*

Using that data, Officer Lesley's counsel filed her Motion for Approval of Partial Compromise and Settlement and for Approval to Continue Representation Regarding Disputed Deductions from Debtor's Backpay Award in the Bankruptcy Case on February 5, 2014. Hearing Transcript Vol. II at pp. 5-6; Hearing Exhibit 6. The City submitted funds in the amount of \$64,523.51 to the Bankruptcy Trustee on February 6, 2014. Hearing Transcript Vol. I at pp. 47-48; Hearing Transcript Vol. II at

pp. 5-6; Hearing Exhibit 6, Order on Motion for Approval of Compromise and Settlement at p. 1, ¶ 1. The Bankruptcy Court, the Honorable Jennie D. Latta, United States Bankruptcy Judge presiding, approved the compromise and settlement in the amount of \$115,949.78 and the submission “after tax, pension and health deductions the amount of \$64,523.51” by order entered on March 12, 2014. Hearing Exhibit 6, Order on Motion for Approval of Compromise and Settlement.

Returning to Officer Lesley’s argument that her entitlement to post-judgment interest should be based on a back pay entitlement of \$141,957.00, her calculation suffers from a variety of defects. Unlike the computation contained on the Settlement Statement, Officer Lesley’s computation in Hearing Exhibit 4 is only for the period from her date of termination through the date of the Judgment of the Chancery Court – not through the date of her rehire by the City. Also, that computation is not adjusted for her earnings with the City of Millington and the Town of Atoka. Most significantly, however, Officer Lesley through her counsel represented to the United States Trustee that the “adjusted gross” compromise settlement of her back pay claim had been reached with the City in this case and that the resulting back pay award was \$115,949.78. *See* Hearing Exhibit 6, Order on Motion for Approval of Compromise and Settlement at p. 1, ¶ 1. The Special Master finds that this is the appropriate sum on which the calculation of post-judgment interest must be based.

For its part, the City contends that Officer Lesley is entitled, at most, to post-judgment interest on the Net Pay due to her (\$64,523.51) after deductions for Federal

Tax, Medicare Tax, Pension contributions, and insurance premiums for Medical, Dental and Vision coverage. For the reasons that follow, the Special Master concludes that the “Adjusted Gross” figure as reflected on the Settlement Statement is the correct figure against which Officer Lesley’s award of post-judgment interest is to be calculated.

The Tennessee Court of Appeals has recently instructed that “post-judgment interest is designed to compensate a successful plaintiff for the loss of the use of amounts awarded [her] following an adjudication of substantive law claims in [her] favor.” *Denning v. CSX Transp., Inc.*, No. M2012-0177-COA-R3-CV, 2013 WL 5569145 at *10 (Tenn. Ct. App., Oct. 9, 2013). “Accordingly, a party who enjoys the use of funds that should have been paid over to another party should pay interest on the retained funds.” *Clark v. Shoaf*, 302 S.W.3d 849, 858-59 (Tenn. Ct. App. 2008) (citations omitted); *see also* TENN. CODE ANN. § 47-14-122.

Although Tennessee has not yet had the opportunity to specifically address whether post-judgment interest is due on the adjusted gross amount of back pay (net of outside earnings) or, in the alternative, the net amount that is due to be paid to the recipient of back pay after deductions for such items as Federal Tax, Medicare Tax, pension contributions and insurance premiums for medical, dental and vision coverage, courts in other jurisdictions have done so. The leading case is *Littlejohn v. Null Mfg. Co.*, 619 F.Supp. 149, 151 (W.D.N.C. 1985). In *Littlejohn*, the district court considered whether, in a Title VII employment discrimination action, post-judgment

interest should be awarded on the gross award due to the plaintiff, or alternatively on the back pay award net of deductions for federal and state income taxes and FICA taxes. In ruling for the plaintiff, the court reasoned as follows:

The Defendant has unilaterally concluded what deductions for taxes allegedly should have been made in the Plaintiff's back pay award and has unilaterally elected to calculate interest on the net after these deductions. To allow the Defendant to pay less because of the Plaintiff's tax liability would give the Defendant a benefit it has not earned. The Defendant had the entire use of the money during the litigation. The Defendant did not withhold or pay any taxes on the Plaintiff's back pay during the litigation. If the back pay award had been paid into the Clerk's Registry during the appeal the Plaintiff would have earned interest on the entire sum. Further, the Plaintiff's tax liability is a matter between the Plaintiff and the respective taxing authority. The calculation of the Plaintiff's taxes would presumably include allowances for exemptions, deductions, etc. that the Plaintiff will elect to take based on her particular situation and may not consist of standard deductions and exemptions. Finally, since the Plaintiff is receiving her back pay in a lump sum rather than over the years she may incur a higher tax liability. Accordingly, the amount the Defendant owes the Plaintiff, including the calculation of interest, should not be reduced by deductions for the federal and state income taxes and FICA taxes.

Id. at 151 (citation omitted).

In *Artis v. U.S. Industry and Intern. Ass'n of Machinists and Aerospace Workers*, 822 F.Supp. 510, 511 (N.D. Ill. 1993), also a Title VII discrimination action, the district court followed *Littlejohn*. The court observed:

Defendant would achieve a windfall by having had the interim use of the amount of money that should have been withheld years ago. Defendant argues that it is unfair to order it to pay interest on the gross backpay award since plaintiff would not have received the withheld amounts (income taxes and other withholdings) even if the wages had been paid when they should have. However, as noted by the Seventh Circuit, if a choice must be made between "conferring a windfall on claimants or

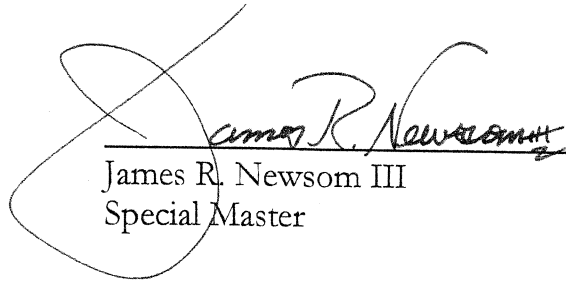
defendants, claimants are the logical choice.” *E.E.O.C. v. O’Grady*, 857 F.2d 383, 391 (7th Cir.1988).

Id.

While neither *Littlejohn* and *Artis* are binding on this Court, see *Townes v. Sunbeam Oster Co.*, 50 S.W.3d 446, 452 (Tenn. Ct. App. 2001) (“When a federal court undertakes to decide a state law question ... the state courts are not bound to follow the federal court’s decision.”); *Ottinger v. Stooksbury*, 206 S.W.3d 73, 79 (Tenn. Ct. App. 2006) (stating that decisions from other states may be persuasive authority but are not binding), the reasoning of the federal district courts in *Littlejohn* and *Artis* is consistent with the principles articulated by the Tennessee Court of Appeals in *Denning and Clark v. Shoaf*, that is, (1) that post-judgment interest is designed to compensate a successful plaintiff for the loss of the use of the amounts awarded and (2) that a party who enjoys the use of funds should pay interest on the retained funds.

Further, while *Littlejohn* and *Artis* considered only the amounts withheld for tax obligations, the principle applies equally to withholdings for pension contributions and insurance premiums for medical, dental and vision coverage. The Settlement Statement makes it clear that those amounts were paid on Officer Lesley’s behalf on February 6, 2014, at or about the time that the lump sum payment was made to the United States Trustee. Until that time, the City had the use of those funds from the Judgment Date, as shown above, it is concluded that the post-judgment interest must

Respectfully submitted,

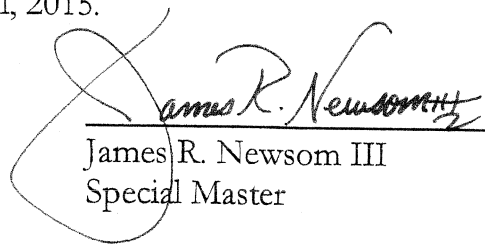


James R. Newsom III
Special Master

TENN. R. CIV. P. 53.04 CERTIFICATE

I hereby certify that pursuant to TENN. R. CIV. P. 53.04(1) I have this day filed the Report of the Special Master with the Clerk of the Court and have filed with it the original transcript and exhibits to the December 2, 2014 and March 4, 2015 hearings before the Special Master.

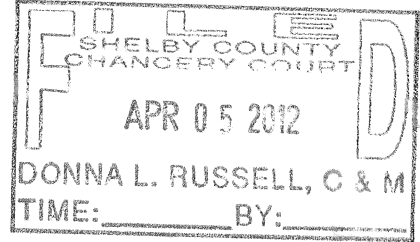
This 6th day of April, 2015.



James R. Newsom III
Special Master

IN THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

REGIONS BANK,)
)
 Plaintiff,)
)
 v.)
)
 CENTREPOT INTERNATIONAL LOGISTICS,)
 INC., TENNESSEE REVERSE LOGISTICS, LLC,)
 CONTRACT WAREHOUSE ASSOCIATES,)
 INC., CWA ACQUISITION, LLC, WILLIAM R.)
 FISHER AND MICHAEL R. NICLOSI)
)
 Defendants.)
)
 and)
)
 CONTRACT WAREHOUSE ASSOCIATES, INC.,)
 CWA ACQUISITION, LLC, WILLIAM R.)
 FISHER AND MICHAEL R. NICLOSI,)
)
 Counter-Plaintiffs,)
)
 v.)
)
 REGIONS BANK,)
)
 Counter-Defendant)



Case No. CH-10-0648-2

REPORT AND RECOMMENDATION OF THE SPECIAL MASTER

COMES NOW James R. Newsom III, court-appointed Special Master, pursuant to TENN. R. CIV. P. 53, and files this Report and Recommendation.

I. THE REFERENCE TO THE SPECIAL MASTER

On April 6, 2010, Plaintiff Regions Bank (“Regions”) filed a Verified Complaint for Money Damages, for Breach of Promissory Notes and Guaranty Agreements and for Injunctive Relief against Centrepot International Logistics, Inc. (“Centrepot”), Tennessee Reverse Logistics, LLC, Contract Warehouse Associates, Inc., CWA Acquisition, LLC, William R. Fisher and Michael R. Niclosi. Regions’ complaint generally alleges a breach of contract by Defendants in regard to certain promissory notes and guaranties. Regions further

sought injunctive relief relating to alleged false statements made in regard to certain Borrowing Base Certificates delivered to Regions in connection with the loan at issue. At the outset of the case, Regions obtained a limited temporary restraining order on April 7, 2010 which was later extended by the Court on April 22, 2010. On April 29, 2010, the limited temporary restraining order was dissolved by consent following the commencement of Centrepot's Chapter 7 Bankruptcy on April 26, 2010.

Defendants and Counter-Plaintiffs Contract Warehouse Associates, Inc., CWA Acquisition, LLC, William R. Fisher and Michael R. Niclosi ("Counter-Plaintiffs") filed their verified Answer and Counterclaim on August 23, 2011. Counter-Plaintiffs denied that Regions was entitled to relief against them and counterclaimed against Regions on the grounds of breach of contract, breach of covenant of good faith and fair dealing, fraud and negligent misrepresentation. Counter-Plaintiffs sought an accounting and an award of compensatory and punitive damages against Regions. Regions filed its Reply and Defenses to Counterclaim on September 27, 2011.

On October 3, 2011, Regions filed and served "Counter-Defendant's First Set of Interrogatories and Requests for Production of Documents to Counter-Plaintiffs" (the "Discovery Requests"). On November 3, 2011, Counter-Plaintiffs filed a motion to disqualify Regions' counsel of record. On December 1, 2011, the Court entered the "Order Holding in Abeyance Defendants/Counter-Plaintiffs Michael R. Niclosi's and William R. Fisher's Motion to Disqualify Plaintiff's Counsel as Counsel of Record and Granting Michael R. Niclosi's and William R. Fisher's Motion to Extend Date Within Which to Respond to Plaintiff's Discovery." That order allowed Counter-Plaintiffs until January 9, 2011 to respond to Regions' First Set of Interrogatories and Request for Production of Documents. Counter-Plaintiffs' "Response to Counter-Defendant's First Set of Interrogatories and

Request for Production of Documents” (the “Discovery Responses”) was filed on January 31, 2012. No scheduling order has been entered in this cause.

This matter is before the Special Master upon reference relating to “Plaintiff’s Motion to Compel Discovery Responses” filed by Regions against Counter-Plaintiffs on February 10, 2012. That motion seeks an order pursuant to TENN. R. CIV. P. 37, compelling Counter-Plaintiffs to provide full and complete answers to Interrogatories 3, 4, 5, 7, 8, 9, 11, 12, 13, 14, 15, 17, 18 and 19 and to produce all documents responsive to Request for Production 1; characterizes as incomplete and evasive Counter-Plaintiffs’ response to Interrogatories 11, 13, 15 and 19; and requests an award of its attorney’s fees incurred in bringing the motion. Upon reference, the Special Master heard argument from Regions and Counter-Plaintiffs on March 15, 2012.

II. SCOPE OF PERMISSIBLE DISCOVERY

In *Duncan v. Duncan*, 789 S.W.2d 557, 560-61 (Tenn. Ct. App. 1990), the Tennessee Court of Appeals provided the following guidance concerning the general scope of permissible discovery pursuant to the applicable Tennessee Rules of Civil Procedure:

The Tennessee Rules of Civil Procedure embody a broad policy favoring the discovery of any relevant, non-privileged evidence. *See* Tenn. R. Civ. P. 26.02(1); *Vythoulkas v. Vanderbilt University*, 693 S.W.2d 350, 357 (Tenn. Ct. App. 1985). Evidence need not be admissible to be discoverable. Thus, rather than undertaking the impossible task of defining all the circumstances that might require discovery to be limited, the rules leave it to the trial court’s discretion to decide upon the discovery restrictions that might become necessary in a particular case. *Strickland v. Strickland*, 618 S.W.2d 496, 501 (Tenn. Ct. App. 1981); 4 J. Moore, J. Lucas & G. Grotheer, *Moore’s Federal Practice* ¶ 26.67 (2d ed. 1989); 8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2036 (1970).

However, a trial court’s discovery decisions are not immune from appellate review simply because they are discretionary. In light of the rules’ broad policy favoring discovery, the party opposing discovery must demonstrate with more than conclusory statements and generalizations that the discovery limitations being sought are necessary “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” Tenn.

R. Civ. P. 26.03; *Loveall v. American Honda Motor Co.*, 694 S.W.2d 937, 939 (Tenn. 1985). A trial court should decline to limit discovery if the party seeking the limitations cannot produce specific facts to support its request.

A trial court should balance the competing interests and hardships involved when asked to limit discovery and should consider whether less burdensome means for acquiring the requested information are available. *Marrese v. American Academy of Orthopaedic Surgeons*, 706 F.2d 1488, 1493 (7th Cir. 1983); *Newsom v. Breon Laboratories, Inc.*, 709 S.W.2d 559, 560 (Tenn. 1986). If the court decides to limit discovery, the reasonableness of its order will depend on the character of the information being sought, the issues involved, and the procedural posture of the case. *Price v. Mercury Supply Co.*, 682 S.W.2d 924, 935 (Tenn. Ct. App. 1984); 8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2035 (1970).

Tennessee courts have recognized that the Tennessee Rules of Civil Procedure are modeled on the Federal Rules of Civil Procedure. While the federal courts' construction of federal rules analogous to our own is not binding, Tennessee courts may, and often do, look to federal courts' interpretation of comparable federal rules for guidance. *See, e.g., Redwing v. Catholic Bishop for the Diocese of Memphis*, No. W2009-00986-SC-R11-C, 2012 WL 604481, ___ S.W.3d ___, at *4 n. 4 (Tenn., Feb. 27, 2012).

TENN. R. CIV. P. 37.01 governs motions to compel discovery. The Rule provides in part:

A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) Appropriate Court. An application for an order to a party ... may be made to the court in which the action is pending.

(2) Motion. If ... a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. ...

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26.03.

(3) Evasive or Incomplete Answer. For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) Award of Expenses of Motion. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

III. ANALYSIS

A. Motion to Compel Discovery

Regions contends that the Court should compel Counter-Plaintiffs to provide full and complete responses to the Discovery Requests enumerated above. The Discovery Requests may be grouped into three categories: (1) those inquiring into the identity of persons with knowledge of the facts and the facts within the knowledge of each; (2) those inquiring into the identity of expert witnesses and their anticipated testimony; and (3) those requesting information concerning the contentions of Counter-Plaintiffs. The Special Master makes the following recommendations as to each:

1. Persons with Knowledge

The following interrogatories and responses relate to the identity of persons with knowledge of Counter-Plaintiffs' defenses to the Complaint and their claims as expressed in the Counterclaim:

3. With respect to each person identified in your Answer to Interrogatory No. 2 [which inquires into the identity of persons with knowledge of defenses and claims], please state or give the following:

(a) Whether such person has rendered an oral or written statement concerning the defense or claim, and, if so, designate which type, and identify each and every written statement from such person;

(b) Whether that person is presently employed, and if so, identify the present employer of that person; and

(c) A brief summary of the knowledge each such person has or claims to have regarding the defense or claim.

RESPONSE:

Counter-Plaintiffs refer Counter-Defendant [Regions] to the depositions of Michael R. Niclosi, William R. Fisher and Victoria Docauer given in this matter or in the matter styled *In the Matter of Centrepot International Logistics v. Cummins Engine Company* and *In the Matter of Centrepot International Logistics v. Spinnaker* and the Affidavit of Daniel T. Robinson, Jr.

4. With respect to any oral statements identified in your Answer to Interrogatory No. 3, please state whether any such oral statement was recorded, and, if so, please identify or state:

(a) The person, including his or her address and telephone number, making the oral statement;

(b) The person, including his or her address and telephone number, recording the oral statement;

(c) The date and place the oral statement was recorded;

(d) The type of recording instrument or apparatus used in recording the oral statement;

(e) The employer of the person recording the oral statement; and

(f) Whether the recording of the oral statement was transcribed, and if so, identify the person that transcribed the oral statement.

RESPONSE:

See Response to Interrogatory No. 3.

5. With respect to any written statements identified in your Answer to Interrogatory No. 3, please identify the following:

(a) The person, including his or her address and telephone number, who gave such written statement;

(b) The person, including his or her address and telephone number, who took such written statement;

(c) The date and place where the written statement was taken;

(d) The employer, including its address and telephone number, of the person making such written statement; and

(e) All persons, including their addresses and telephone numbers, who were provided a copy of such written statement.

RESPONSE:

See Response to Interrogatory No. 3.

9. Please provide the home and business addresses of Defendants Fisher and Niclosi and the names of their current employers.

RESPONSE:

Objection. Counter-Plaintiffs Niclosi and Fisher may be reached through their counsel. Additionally and/or alternatively, the information sought is neither relevant nor material and is not reasonably calculated to lead to the discovery of admissible evidence.

Counter-Plaintiffs' response to Interrogatory 2 identifies Messrs. Nicloi, Fisher, McNeese and Robinson and Ms. Docauer as persons with knowledge concerning the claims and defenses at issue. The response to Interrogatory 3 refers Regions to certain deposition testimony given by Messrs. Niclosi and Fisher and Ms. Docauer in two adversary proceedings in Bankruptcy Court, *Centrepot International Logistics, Inc., et al. v. Cummins Engine Co.*, Bankr. W.D. Tenn. Case No. 10-00326 and *Centrepot International Logistics, Inc., et al. v. Spinnaker Management Group, LLC*, Bankr. W.D. Tenn. Case No. 10-00299, and the Affidavit of Daniel T. Robinson, Jr.

Counter-Plaintiffs' somewhat cryptic response refers Regions to the deposition testimony and affidavit as stating the substance of the knowledge of those individuals regarding the defenses and claims at issue in this case. The unstated premise of this response, as confirmed at argument by counsel for Counter-Plaintiffs, is that Counter-Plaintiffs presently possess or have no knowledge of other oral or written statements made by persons with knowledge concerning the claims and defenses at issue. Counter-Plaintiffs' counsel indicated that the responses of Regions to Counter-Plaintiffs' pending discovery requests

might disclose the existence of other oral or written statements of which Counter-Plaintiffs are presently unaware.

The Special Master is advised that the deposition transcripts and affidavit referred to in Counter-Plaintiffs' responses are in the possession of both counsel. Counter-Plaintiffs expressed at argument that there is no need on their part to supplement the responses given – indicating that, to Counter-Plaintiffs' knowledge, the deposition testimony and affidavit referred to in their response accurately reflects the knowledge that each deponent or affiant has or claims to have regarding the defenses and claims at issue and that no further oral or written statements concerning the claims and defenses by persons with knowledge are now known to exist. This being the case, it is recommended that the Court deem Counter-Plaintiffs' response complete at this time, because reference by Counter-Plaintiffs to that deposition testimony in their response is a less burdensome means for Regions to acquire the requested information than the alternative of requiring Counter-Plaintiffs to summarize the material knowledge of each in the response. *See Duncan*, 789 S.W.2d at 561.

The Rules impose the obligation on responding parties of giving a response that it complete when made. To avoid prejudice to Regions, Counter-Plaintiffs should hereafter bear the burden of demonstrating that any material supplemental response they may make is based on facts that were unavailable to Counter-Plaintiffs when their initial response was made. Relevant to this, TENN. R. CIV. P. 26.05 requires a party who has responded to a discovery request with a response that was complete when made has no duty to supplement the response except:

(1) A party is under a duty seasonably to supplement the party's response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters; and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of that testimony.

(2) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which the party (A) knows that the response was incorrect when made; or (B) knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses also may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

As to the items enumerated in the Rule, a party has an absolute, continuing duty to supplement his responses with any material changes, without prompting. *See Hernandez, Kroone and Assoc., Inc. v. United States*, 2008 WL 4725433 (Fed. Cl. 2008), citing 6 James Wm. Moore, et al., *Moore's Federal Practice* § 26.131[3], at 26-302.1 (3d ed. 2007). Information is "material" if the failure to disclose may prejudice the other party. *Id.*, citing *Schreiber Foods, Inc. v. Beatrice Cheese, Inc.*, 402 F.3d 1198, 1205 (Fed. Cir. 2005). Counter-Plaintiffs have a duty to supplement without prompting to the extent required by TENN. R. CIV. P. 26.05. Counter-Plaintiffs acknowledge the existence of that duty. *See* Discovery Responses at p. 3, ¶ 4. Otherwise, Regions is entitled to rely on the deposition testimony given by Messrs. Niclosi and Fisher and Ms. Docauer and the affidavit of Mr. Robinson as setting forth a statement of the material facts known by those persons relating to the defenses and claims at issue.

One additional issue remains relating to the response to Interrogatory 9. Regions therein inquires as to the home and business addresses of Messrs. Fisher and Niclosi and the names of their current employers. Counter-Plaintiffs object to disclosure of this information. They contend that those persons may be reached through their counsel; that the information sought is neither relevant nor material and is not reasonably calculated to lead to the discovery of admissible evidence. Further, at argument, Counter-Plaintiffs argued that Regions seeks that information only in order to be able to execute on their assets in aid of a judgment against them.

Analyzing whether a discovery request is proper requires the balancing of numerous considerations. *Johnson v. Nissan North America, Inc.*, 146 S.W.3d 600, 605 (Tenn. Ct. App. 2004).

“There is no sharp line of demarcation which separates the field in which discovery may be freely pursued from that in which it is forbidden.” Cyc. Fed Proc. § 25.34 3rd Ed. (2001). These considerations include, “relevancy or reasonable possibility of information leading to discovery of admissible evidence; privilege; protection of privacy, property and secret matters; and protection of parties or persons from annoyance, embarrassment, oppression, or undue burden or expense.” *Id.* at § 25.34.

Id. Tenn. R. Civ. P. 26.02(1) strikes the balance in favor of disclosure in this instance, permitting “discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including ... the identity and location of persons having knowledge of any discoverable matter.” Counter-Plaintiffs do not contend that the location of Counter-Plaintiffs, that is, the residence and business address of Messrs. Fisher and Niclosi, is privileged information or that a protective order is needed to protect that information from public disclosure. The broad policy of the Tennessee Rules of Civil Procedure favoring the discovery of relevant, non-privileged evidence requires the disclosure of this information. A reasonable basis for that inquiry being shown, it should not be presumed that Regions seeks this information for an improper purpose. As a result, Counter-Plaintiffs should be required to disclose this information. It is recommended that the Court deny Regions’ motion to compel at this time insofar as it seeks further response to Interrogatories 3, 4 and 5, and that the Court grant Regions’ motion to compel insofar as it seeks further response to Interrogatory 9.

2. Expert Witnesses

The following interrogatories and responses relate to the identity of Counter-Plaintiff's expert witnesses:

7. Please identify each and every person you have consulted and expect to call as an expert witness at the trial of this case and with respect to each of those persons, please state the following:

- (a) The subject matter of which the expert is expected to testify;
- (b) The substance of the facts and opinions to which the expert is expected to testify; and
- (c) A summary of the grounds for each opinion of the expert.

RESPONSE:

See Response to Interrogatory No. 6. [Said Response is: "Objection. That decision is for counsel to make. Counter-Plaintiffs will comply with all Tennessee Rules of Civil Procedure and applicable Local Rules."]

8. With respect to each and every person identified in your Answer to Interrogatory No. 7, please state or give the following:

- (a) The name and address of each school, college or university where the person received special education or training in his or her field;
- (b) The dates when that person attended each such school, college or university;
- (c) The name or description of each degree that person received, including the date when each such degree was received, and the name of the institution from which it was received;
- (d) Whether that person is a member of any professional or trade association, and if so, please identify any such association;
- (e) When that person became a member of any professional or trade association, and whether that person has held any office in that association;
- (f) Whether that person has written any books, papers, or articles in his or her field, and if so, for each book, paper or article, state the following:
 - (i) the title and subject matter;
 - (ii) the name and address of each publisher; and
 - (iii) the date of each publication.
- (g) Whether the person is licensed by any governmental entity or authority to practice in his or her field, and if so, please state the following:
 - (i) the identity or authority by whom that person was licensed;
 - (ii) the date when that person was licensed;
 - (iii) the general requirements that the person had to meet to obtain the license; and
 - (iv) has the person fulfilled those requirements.

(h) The identity of all lawsuits, including the identity of the court, style of the case and docket number of the case in which the person has testified as an expert.

RESPONSE:

See Response to Interrogatory No. 6. [Said Response is: “Objection. That decision is for counsel to make. Counter-Plaintiffs will comply with all Tennessee Rules of Civil Procedure and applicable Local Rules.”]

Interrogatories 7 and 8 request information that relates to persons Counter-Plaintiffs “have consulted and expect to call as an expert witness at the trial of this case.” Interrogatory 7 (emphasis added). At argument, counsel for Counter-Defendants stated that no decision has yet been made concerning what expert witnesses Counter-Defendants intend to call as expert witnesses at the trial of this case.

TENN. R. CIV. P. 26.02(4)(B) states that a “party may not discover the identity of, facts known by, or opinions held by an expert who has been consulted by another party in anticipation of litigation.” Accordingly, Regions is not entitled to inquire into the identity of expert witnesses with whom Counter-Plaintiffs have consulted, if no determination has been made that Counter-Plaintiffs will call those persons as expert witnesses at the trial. As Counter-Plaintiffs contend, until Counter-Plaintiffs have reached a determination that they will call particular expert witnesses at the trial of this cause, Counter-Plaintiffs have no obligation to identify potential testifying expert witnesses. No scheduling order has been entered in this case which imposes a deadline for disclosure of expert witnesses or the closure of discovery. Therefore, it may not be said that Counter-Plaintiffs are yet obligated to or have waived their ability to call yet-unnamed expert witnesses at the trial if no decision has been made. Counter-Plaintiffs’ response recognizes their duty to comply with all Tennessee Rules of Civil Procedure and applicable Local Rules. Counter-Plaintiffs will also be obligated to

comply with the requirements of any scheduling order entered in this case. It is recommended that the Court deny Regions' motion to compel insofar as it seeks further response to Interrogatories 7 and 8 at this time.

3. Contention Interrogatories

a. Law Relating to Contention Interrogatories.

The remaining Discovery Requests under consideration include a number of contention interrogatories and a related document request. Each of the Discovery Requests tracks allegations made in the Counterclaim and requests information or documents relating to each. These contention interrogatories are considered below as follows: (1) those seeking information concerning averments of fraud or mistake; and (2) those seeking information concerning averments not of fraud or mistake.

It is first helpful to consider the permissible use of contention interrogatories. TENN. R. CIV. P. 33.02 provides in part:

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.

“Contention” interrogatories authorized by Rule 33.02 are interrogatories that seek to clarify the basis for or scope of an adversary’s legal claims. The general view is that contention interrogatories are a perfectly permissible form of discovery, to which a response ordinarily would be required. *Starcher v. Correctional Medical Sys., Inc.*, 144 F.3d 418, 421 n.2 (6th Cir. 1998) (addressing FED. R. CIV. P. 33(a)(2)).

Courts have found that the use of a contention interrogatory “is the quickest, most efficient, and most inexpensive way to obtain the required information. *Medtronic Sofamor*

Danek, Inc. v. Michelson, No. 01-2373, 2003 WL 23200025 at *1 (W.D. Tenn., Dec. 18, 2003) (Vescovo, M.J.). See also *Howard v. American Indus. Serv., Inc.*, No. M2001-02711-COA-R3-CV, 2002 WL 317691115 (Tenn. Ct. App., Dec. 11, 2002) (affirming dismissal as sanction for failure to respond to discovery requests and quoting trial court as ruling, “These contention interrogatories are at the heart of the lawsuit. The failure of the plaintiffs to provide specific meaningful answers is holding up the disposition of the lawsuit: the defendants do not know what to defend against.”)

The primary purpose of contention interrogatories is to narrow the issues for trial. *Linde v. Arab Bank, PLC*, No. CV-04-2799, 2012 WL 957970 at *1 (E.D. N.Y., Mar. 21, 2012). The court in *Linde* recently summarized the caselaw as follows:

Courts generally resist efforts to use contention interrogatories as a vehicle to obtain every fact and piece of evidence a party may wish to offer concerning a given issue at trial. *Id.* Thus courts do not typically compel responses to interrogatories that seek a catalog of all facts or all evidence that support a party’s contentions. Such interrogatories are not likely to narrow the issues, and will almost inevitably produce ... a mass of data that contains incidental, secondary, and perhaps irrelevant and trivial details. Rather, where interrogatories seek the factual support for a party’s contentions, courts have tended toward a middle ground, requiring parties to explain the factual bases for their contentions by providing the material facts upon which they will rely, but not a detailed and exhaustive listing of all the evidence that will be offered.

Id. (citations and internal quotations omitted).

Also, like its federal counterpart, TENN. R. CIV. P. 33.02 provides that “the court may order that a contention interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.” There is considerable authority for the view that the wisest general policy is to defer propounding and answering contention interrogatories until near the end of the discovery period. See, e.g., *Convergent Tech. Sec. Litig.*, 108 F.R.D. 328, 336 (N.D. Cal. 1985).

On the other hand, there are situations in which this general policy should give way to showings, in specific factual settings, that important interests would be advanced if answers were provided early to at least some contention interrogatories. Rule 33.02 recognizes that the courts have discretion, not to preclude entirely the early use of contention interrogatories, but to place a burden of justification on a party who seeks answers to these kinds of questions before substantial documentary or testimonial discovery has been completed. *Cf. Convergent Tech.*, 108 F.R.D. at 338. The court, in its discretion, may order responses to contention interrogatories, even in the early stages of discovery, where responses would assist in clarifying plaintiffs' allegations and identifying witnesses without imposing undue burdens on the responding party. *Strauss v. Credit Lyonnais, S.A.*, 242 F.R.D. 199, 234 (E.D. N.Y. 2007).

As to interrogatories inquiring into allegations of fraud or mistake, the additional consideration arises that a plaintiff may call upon the pleader to set forth at least the degree of particularization required by TENN. R. CIV. P. 9.02, *i.e.*, that "the circumstances constituting fraud or mistake shall be stated with particularity." A claim of fraud is deficient if the complaint fails to state with particularity an intentional misrepresentation of a material fact. *Kincaid v. SouthTrust Bank*, 221 S.W.3d 32, 41 (Tenn. Ct. App. 2006). This means "the time, place and content of the false misrepresentation, the facts misrepresented, and what was obtained or given up as a consequence of the fraud." *B-H Transp. Co. v. Great Atl. & Pac. Tea Co.*, 44 F.R.D. 436, 438 (N.D.N.Y. 1968), quoting 2A Moore's Fed. Prac. ¶ 9.03 (2d ed. 1968); *see also American Town Ctr. v. Hall 83 Assocs.*, 912 F.2d 104, 109 (6th Cir. 1990).

This particular pleading requirement is designed to enable defendants to respond specifically, at an early stage of the case, to potentially damaging allegations of immoral and criminal conduct. "The level of particularity required depends on, *inter alia*, the nature of the case and the relationship between the parties. Conclusory allegations that a defendant's

conduct was fraudulent and deceptive are not sufficient to satisfy the rule.” *BJC Health Sys. v. Columbia Cas. Co.*, 478 F.3d 908, 917 (8th Cir. 2007) (citations and internal quotation marks omitted). The practice of requesting such information by interrogatory has been viewed with approval:

[I]t is readily apparent that Golden Sky attempted to obtain by propounding an interrogatory the degree of particularity ordinarily required in the pleading of fraud in federal court pursuant to Rule 9(b) of the Federal Rules of Civil Procedure. ... Such an inquiry is to be applauded, for two reasons. First, it could eliminate the potential prejudice or surprise to the party responding to the fraud claim that might arise from the insertion at some point in the litigation of unexpected and unpleaded allegations of misrepresentations. Second, it could eliminate the delays that might be incurred by a challenge to the adequacy of the plaintiff’s pleading of fraud and the plaintiff’s attempt to replead the claim with the requisite particularity.

See Schaller Tele. Co. v. Golden Sky Sys., Inc., 139 F.Supp. 1071, 1099-1100 (N.D. Iowa 2001) (applying the Federal Rules). These concepts guide the recommendations below.

b. Requests Concerning Averments of Fraud or Mistake

Regions’ Interrogatories refer to the allegations of the Counterclaim and request information relating to each. Count III of the Counterclaim incorporates the allegations of Paragraphs 1 to 25 of the Counterclaim and makes further averments of “fraud/negligent misrepresentation” in Paragraphs 27 to 31. Moreover, the allegations of Paragraph 35 of the Counterclaim address allegations of “willful, intentional and malicious actions,” which allegedly support an award of punitive damages rooted in tortious conduct. As a result, the following Interrogatories, Production Request and Discovery Responses relate to contentions of fraud or mistake contained in the pleadings:

11. With respect to Paragraph 20 of the Counter-Complaint [alleging, *inter alia*, “improperly seeking and obtaining a Temporary Restraining Order based on incorrect/misstated facts provided by [Regions’] legal counsel Mr. McNeese and/or its Senior Vice President, Special Assets, Victoria Docauer]:

(a) Please identify, list, describe and explain [with date(s) of occurrences] (1) each of the alleged “incorrect/misstated facts” you contend

were provided by Mr. McNeese and/or Ms. Victoria Docauer; (2) how, by, to whom and in whose presence such were provided; (3) how each such incorrect/misstated fact constituted a material breach of the contracts referenced in such paragraph; and (4) the information provided to Mr. McNeese or Ms. Docauer by Mr. Robinson, as referenced in such paragraph, and how, to whom and in whose presence such information was provided; and

(b) Please identify the documents which you contend support your contentions in such paragraph.

RESPONSE:

(a)(1) The first notice that there was a misstated accounts receivable issue was when the subject lawsuit was filed. No bank official contacted Counter-Plaintiffs to determine the validity of the accusation or to review the bank's documents.

(a)(2) See Response to Interrogatory No. 11(a)(1).

(a)(3) By not allowing Counter-Plaintiffs the ability to review the documents and to correct any facts, if any.

(b) Discovery is ongoing. Any such documents are within the possession and control of Counter-Defendant.

13. With respect to Paragraph 23 of the Counter-Complaint [alleging that Regions "breached its duty of good faith and fair dealing by improperly seeking and obtaining a Temporary Restraining Order based upon incorrect/misstated facts"]:

(a) Please identify, list, describe and explain [with date(s) of occurrences] (1) each of the alleged incorrect/misstated facts you contend were provided by Mr. McNeese and/or Victoria Docauer; (2) how, by, to whom and in whose presence such were made; (3) how each such incorrect/misstated fact constituted a breach of Regions duty of good faith and fair dealing; and (4) the information provided to Mr. McNeese or Ms. Docauer by Mr. Robinson, as referenced in such paragraph, and how, to whom and in whose presence such information was provided; and

(b) Please identify the documents which you contend support your contentions in Paragraph 23 of the Counter-Complaint.

RESPONSE:

See Response to Interrogatory No. 12; Counter-Defendant's refusal to provide details of its accusations and its failure to allow Counter-Plaintiffs to review its records upon which it relied.

15. With respect to Paragraph 27 of the Counter-Complaint [alleging that "Mr. McNeese, along with employees of Regions, including, but not limited to, Victoria Docauer, made false statements of material fact including, but not limited to, the accuracy of Borrowing Base Certificates and

regarding the disposition of monies which allegedly did not pass through the lockbox.”]:

(a) Please identify, list, describe and explain [with date(s) of occurrences] the false statements referenced in such paragraph, and how, by, to whom and in whose presence such were made; and

(b) Please identify the documents which you contend support your contentions in Paragraph 27 of the Counter-Complaint.

RESPONSE:

Counter-Defendant never permitted Counter-Plaintiffs to determine the validity and/or accuracy of what it was relying upon. On several occasions, Counter-Plaintiffs resent the borrowing base certificate because they found errors therein.

17. Please identify the documents which you contend support your contentions in Paragraph 29 of the Counter-Complaint [asserting that Chancellor Evans “relied upon Regions’ and Mr. McNeese’s misrepresentations in granting Regions’ request for a Temporary Restraining Order.”].

RESPONSE:

See documents attached to the Complaint.

19. With respect to Paragraph 35 of the Counter-Complaint [alleging “willful, intentional and malicious actions of Regions, its counsel Mr. McNeese, and its employees including, but not limited to Senior Vice President, Special Assets, Victoria Docauer. The averments made in support of Regions request for Temporary Restraining Order were baseless and made with an obvious intention to cause harm.]:

(a) Please identify, list and describe the actions of Regions, its counsel Mr. McNeese and Regions’ employees which you contend were “willful, intentional and malicious” and which you contend were “baseless and made with an obvious intention to cause harm”; and

(b) Please identify the documents which you contend support your contentions in Paragraph 35 of the Counter-Complaint.

RESPONSE:

Based on the misrepresentations of Stan McNeese to Dan Robinson and the moving forward with the subject suit when Stan McNeese knew full well that Counter-Plaintiffs were without representation because of the conflict Evans Petree had with Counter-Defendant.

REQUESTS FOR PRODUCTION OF DOCUMENTS

REQUEST NO. 1:

Please produce all documents identified in your responses to the Interrogatories set forth above. In so doing, please identify which documents are responsive to which interrogatory.

RESPONSE:

See Responses, *supra*.

It is apparent from a close review of the above Interrogatories and Production Request that each relates to the same locus of fact. While paragraphs 20, 23, 27 and 35 of the Counterclaim (referred to in Interrogatories 11, 13, 15 and 19 respectively) are contained in different counts (i.e., Breach of Contract (¶20); Breach of Covenant of Good Faith and Fair Dealing (¶23); Fraud/Negligent Misrepresentation (¶27); and Punitive Damages (¶35)); each relate to the same alleged conduct. Those representations are said to relate to alleged false statements of material fact, “including, but not limited to, the accuracy of Borrowing Base Certificates and regarding the disposition of monies which allegedly did not pass through the lockbox.” Counterclaim at ¶ 27. Counter-Plaintiffs contend that “the averments made in support of Regions[] request for Temporary Restraining Order were baseless and made with an obvious intention to cause harm.” *Id.* at ¶ 35. Further, as noted above, the allegations of “fraud/negligent misrepresentation” in Count III of the Counterclaim incorporate the preceding factual allegations, involving the same set of operative facts, by reference.

For the reasons above, while they are not evasive for purposes of TENN. R. CIV. P. 37.01(3), the Discovery Responses to Interrogatories 11, 13, 15 and 17 are not sufficiently particular as to the content of the statements alleged to constitute fraud or mistake. Without more particularity in the Discovery Responses, Regions is justified in its assertion that it is uncertain as to the nature of the fraud or mistake alleged on its part against which it must

defend. Regions is entitled to seek that particularity through its motion to compel discovery in relation to these interrogatories. The Discovery Responses lack the requisite particularity.

As to the request for identification of documents contained in Interrogatories 11, 13, 15, 17 and 19 and Request for Production of Documents 1, Counter-Plaintiffs affirmed at argument that no other documents are presently known by them to be responsive in addition to those referred to in the responses.

Considering the foregoing, it is recommended that the Court grant Regions' motion to compel on this point and require Counter-Plaintiffs to state with particularity the substance of each material allegation to which Interrogatories 11, 13, 15, 17 and 19 inquire.

c. Requests Not Concerning Averments of Fraud or Mistake

The following contention interrogatories and responses do not specifically relate to averments of fraud or mistake contained in the pleadings:

12. With respect to Paragraph 21 of the Counter-Complaint [regarding damages relating to alleged breach of contract]:

(a) Please identify, list, describe and explain [with date(s) of occurrences] the damages you contend the Counter-Plaintiffs suffered as the direct result of the breach or breaches referenced in Paragraph 20 of the Counter-Complaint; and

(b) Please identify the documents which you contend support your contentions in such paragraph.

RESPONSE:

See Response to Interrogatory No. 18.

14. With respect to Paragraph 25 of the Counter-Complaint [regarding damages relating to alleged breach of covenant of good faith and fair dealing]:

(a) Please identify, list, describe and explain [with date(s) of occurrences] the damages you contend the Counter-Plaintiffs suffered as the direct result of the breach or breaches referenced in Paragraph 23 of the Counter-Complaint; and

(b) Please identify the documents which you contend support your contentions in Paragraph 25 of the Counter-Complaint.

RESPONSE:

The unwarranted action and misrepresentation by Mr. McNeese and Ms. Docauer caused Centrepot International Logistics, Inc. and in turn Niclosi and Fisher, as officers, directors, stockholders and guarantors, to lose its largest customer, Cummins, Inc., which directly precipitated the downfall/bankruptcy of Centrepot International Logistics, Inc., thereby calling into play the guarantees of Niclosi and Fisher of Centrepot debt.

18. With respect to Paragraph 31 of the Counter-Complaint [regarding damages relating to alleged fraud/negligent misrepresentation]:

(a) Please identify, list, describe and explain [with date(s) of occurrences] the damages you contend the Counter-Plaintiffs suffered as the result of acts described in paragraphs 27, 28 and 29 of the Counter-Complaint; and

(b) Please identify the documents which you contend support your contentions in Paragraph 29 of the Counter-Complaint.

RESPONSE:

The loss of Cummins, Inc. as a customer, which was the main asset of Centrepot. Centrepot was denied the ability to leverage this asset to re-establish the 13-year relationship, had Counter-Defendant restructured the loan. Ms. Docauer stated she “wanted to take the company [Centrepot] down.” This was heard by Fisher, Toni Parker, Madeline Greenwood, Niclosi and Stan McNeese.

The remaining Discovery Responses, relating to Interrogatories 12, 14 and 18, each relate to the damages claimed by Counter-Plaintiffs. The Discovery Responses disclose that Counter-Plaintiffs contend that Regions, through its actions, is responsible for the loss of Cummins, Inc. as a customer. This, Counter-Plaintiffs assert, precipitated the bankruptcy of Centrepot, thereby “calling into play the guarantees of Niclosi and Fisher of Centrepot debt.”

Counsel for Counter-Plaintiffs indicated at oral argument that its answers to these Interrogatories and the Production Request reflect the information available at the present time, with the exception of Counter-Plaintiffs’ response to Interrogatory 18, in which counsel acknowledged that a more complete answer might be provided. Therefore, it is

recommended that the Court require Counter-Plaintiffs to supplement their response to Interrogatory 18, to provide additional information now available. Because Counter-Plaintiffs' response to Interrogatory 12 refers to Counter-Plaintiffs' response to Interrogatory 18, it is recommended that the Court require Counter-Plaintiffs to supplement their response to Interrogatory 12 also. It is recommended that the Court deny Regions' motion to compel at this time insofar as it seeks further response to Interrogatory 14, unless additional information is presently available to Counter-Plaintiffs.


B. Request for Award of Expenses of Motion

Regions requests an award of the attorney's fees it incurred in bringing this motion pursuant to TENN. R. CIV. P. 37.01(4). In the event that a motion to compel is granted in part and denied in part, as recommended herein, the Rule provides that "the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner." *Id.* As Counter-Plaintiffs responded to the Discovery Requests, it is recommended that the Court deny Regions' request for an award of attorney's fees.

IV. CONCLUSION

It is recommended that the Court GRANT Regions' motion to compel insofar as it seeks further or more definite response to Interrogatory 9, 11, 12, 13, 15, 17, 18 and 19. It is recommended that the Court DENY Regions' motion to compel at this time insofar as it seeks further response to Interrogatories 3, 4, 7, 8 and 14. It is recommended that the Court DENY Regions' request for an award of attorney's fees.

Respectfully submitted,

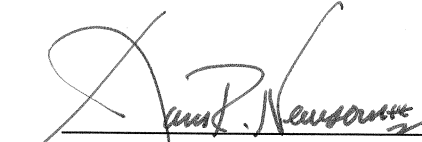


James R. Newsom III
Special Master

Date: April 5, 2012

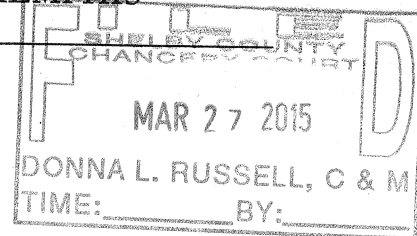
CERTIFICATE OF FILING

I hereby certify that pursuant to TENN. R. CIV. P. 53.04(1) I have filed the Report and Recommendation of the Special Master with the Clerk of the Court this 5th day of April, 2012.



James R. Newsom III
Special Master

IN THE CHANCERY COURT OF SHELBY COUNTY TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT, AT MEMPHIS



UNITED SERVICES)
AUTOMOBILE ASSOCIATION,)
)
Plaintiff,)

v.)

HARRY RAY COLEMAN, JR.,)
KATHERYN COLEMAN,)
JOHN C.F. SCHWERIN, as executor)
of the Estate of ROBERT F.)
SCHWERIN, JR., Deceased,)
and for and on behalf of all)
Wrongful Death Beneficiaries of)
ROBERT F. SCHWERIN, JR.,)
ROBERT L. SCHWERIN, III, and)
DALLAS EMILE SCHWERIN,)
)
Defendants.)

Docket Number
CH-10-1641
Part III

REPORT AND RECOMMENDATION

I. STATEMENT OF THE CASE

On June 22, 2009 John C.F. Schwerin, as Executor of the Estate of Robert L. Schwerin, Jr., Deceased, and for and on behalf of all wrongful death beneficiaries of Robert L. Schwerin, Jr., Robert L. Schwerin, III and Dallas Emile Schwerin (collectively referred to herein as the "Schwerin Defendants") filed a wrongful death action against Defendants Harry Ray Coleman, Jr. ("Mr. Coleman), Mary Katheryn Coleman ("Ms. Coleman") in the Circuit Court of Tennessee for the Thirtieth Judicial District at Memphis as *John C.F. Schwerin, as Executor of the Estate of Robert L. Schwerin, Jr., Deceased, et al. v. Harry Ray Coleman, et*

al., No. CT-002986-09, Div. III (the “Wrongful Death Lawsuit”). *See* Complaint in the Wrongful Death Lawsuit, USAA000625-638. The Schwerin Defendants sought compensatory and punitive damages against Mr. and Ms. Coleman arising from the death of Robert L. Schwerin, Jr. (“Mr. Schwerin”) on February 6, 2009.

Mr. Coleman was indicted for the second degree murder of Mr. Schwerin by the Shelby County Grand Jury in May 2009. Mr. Coleman was tried before a jury in the Criminal Court of Shelby County and convicted of second degree murder in July 2010. The Tennessee Court of Criminal Appeals affirmed Mr. Coleman’s conviction. *State of Tennessee v. Coleman*, No. W2011-01546-CCA-R3-CD, 2013 WL 427886 (Tenn. Crim. App., Aug. 7, 2012) (“*Coleman*”). The Tennessee Supreme Court denied Mr. Coleman’s application for permission to appeal on June 11, 2013. *See* Report of the Parties on the Status of the Case (January 23, 2015) at p. 2 (“Parties’ Report”).

USAA issued a homeowners policy of insurance to Mr. and Ms. Coleman which was in force and effect on February 6, 2009 (the “Policy”). USAA provided a defense to Mr. and Ms. Coleman in the Wrongful Death Lawsuit under reservation of rights. Parties Report at p. 2. Darryl D. Gresham, Esq. of Allen, Summers, Simpson, Lillie & Gresham, PLLC (“Allen Summers”) was retained to provide that defense. Parties’ Report at p. 2. Discovery was taken in the Wrongful Death Lawsuit. The claims of the Schwerin Defendants against Mr. and Ms. Coleman in the Wrongful Death Lawsuit were resolved by settlement in 2012 without the participation of USAA. *See id.* at p. 3.

USAA initiated this action by filing a Complaint for Declaratory Judgment against Mr. Coleman, Ms. Coleman and the Schwerin Defendants on September 9, 2010 (the "Complaint"). A certified copy of the Policy and "Reservation of Rights" letters from USAA dated March 11, 2009 and August 12, 2010 (the "Reservation of Rights Letters") are attached to the Complaint. USAA seeks a declaratory judgment that the Policy provides no coverage, no defense and no indemnity to Mr. Coleman and Ms. Coleman with respect to the Wrongful Death Lawsuit. Complaint at p. 5; Parties' Report at p. 2. The Schwerin Defendants, Mr. Coleman and Ms. Coleman answered separately. Each contend that they are the insureds (or third party beneficiaries) of the Policy, that there was coverage under the Policy for the claims asserted in the Wrongful Death Lawsuit, that USAA has breached its contract of insurance and that USAA has acted in bad faith by its failure to pay policy limits after demands were made upon USAA by Mr. and Ms. Coleman in violation of TENN. CODE ANN. § 56-7-105, Tennessee common law and the Tennessee Consumer Protection Act, TENN. CODE ANN. §§ 47-18-101, *et seq.*¹

¹ The Parties' Report points out that the Court has ruled that the Schwerin Defendants do not have standing to bring the claims that they had brought against USAA in the form of affirmative defenses. Parties' Report at p. 3. This Report and Recommendation refers to the Parties' Report and the record in this cause for further development of the status of the claims and defenses herein.

II. THE REFERENCE

On January 27, 2015, the Honorable Oscar C. Carr, III, Chancellor of Part III of the Chancery Court for the Thirtieth Judicial District at Memphis entered an Order of Appointment, Nunc Pro Tunc to August 12, 2014, which

ORDERED, that the Special Master is directed to make a determination as to what documents and information from the USAA underwriting an[d] claims files should be produced to the Defendants relating to the issue of coverage, and to provide a Report and Recommendation concerning the same to the Court....

Together with the Order of Appointment, the Court provided to the Special Master for review: (1) the Order on Motion Hearing September 13, 2013 entered in this cause on December 17, 2013; (2) the redacted and unredacted claims files referenced below, which had been delivered to the Court by USAA for *in camera* inspection; (3) the Parties' Report; and (4) correspondence from Gary K. Smith, Esq., counsel for the Schwerin Defendants, to the Court dated July 17, 2014.

The Order on Motion Hearing September 13, 2013 made a number of rulings which control the instant inquiry: (1) the Court granted the Motion of USAA to Stay Bad Faith Discovery and ruled the Alternative Motion of USAA for Protective Order to be mooted; (2) the Schwerin Defendants' Motion to Compel Discovery was granted with instructions as follows:

The Court orders USAA to produce the claim file and the underwriting file relating to this matter to the extent the contents thereof relate to the issue of coverage. The Court further orders USAA to submit the entirety of those files

to the Court for its *in camera* review. The Court will order USAA to produce any documents contained in the claims file or underwriting file that the Court determines are relevant to the issue of coverage but that were not previously produced by USAA. Save the foregoing, no further discovery is ordered at this time pending review by the Court;

and (3) the Motion of Katheryn Coleman to Hold Motion for Summary Judgment in Abeyance until Parties Have Completed Discovery, which was adopted by reference by the Schwerin Defendants, was granted in part and denied in part, in that the Court declined to set USAA's Motion for Summary Judgment for hearing at that time.²

Following the TENN. R. CIV. P. 53.03(1) first meeting on January 30, 2015, the Parties provided additional pleadings, discovery requests and correspondence to the Special Master for review and instruction. Among other documents, the Parties provided: (1) the Complaint; (2) Defendants' written discovery requests, the responses of USAA from which this matter proceeds and certain motion and responses relating to those requests; (3) a letter from Warren D. McWhirter, Esq. to the Court dated January 30, 2014 which identified documents from the USAA Claims File and Underwriting File which had been produced to counsel for Defendants in either unredacted or redacted form; and (4) a letter from Mr. McWhirter to Defendants' counsel dated July 16, 2014 which (a) provided additional unredacted documents from the USAA Underwriting File to Defendants and (b) enclosed a

² In the interim between the entry of the Order of Appointment and the filing of this Report and Recommendation, the Court has entered its Order Denying Motion to Reconsider Motion to Compel on March 17, 2015, declining to permit Defendants to seek Bad Faith Discovery from USAA at this time.

document entitled "Privilege Log" which asserted certain privileges and gave additional information as to documents previously redacted.

The "Privilege Log" states in part as follows:

It should be noted that all information which was not produced (either by redaction or by documents withheld) was done so in accordance with the Order of the Court dated December 17, 2013. All information not produced (either by redaction or documents withheld) was not produced inasmuch as the information did not relate to the issue of coverage. ...

Privilege Log at p. 1. Documents within the Underwriting File and the Claims File that were not produced, either by redaction or by documents withheld, are referred to herein as the "Documents Not Produced."

The Special Master has reviewed the Documents Not Produced in their unredacted form. Counsel for USAA, the Schwerin Defendants and Mrs. Coleman participated in a hearing before the Special Master on February 26, 2015 in which the factors to be used by the Special Master in addressing questions of relevance regarding the Documents Not Produced were argued. Counsel for USAA argue, among things, that the Policy is unambiguous, and provides no coverage, no defense and no indemnity in light of the "true facts." USAA relies on the entire Policy, and not only those provisions of the Policy referenced in the Reservation of Rights Letters. USAA has not been specific to this point as to which provisions require a finding by the Court that the Policy provides no coverage, no defense and no indemnity. Counsel for Defendants argue that the Policy is ambiguous. Defendants are not specific to this point as to the nature of the ambiguity that they contend

exists in the Policy, requiring coverage. Pursuant to the Court's instruction and TENN. R. CIV. P. 53.04(5), the Special Master submitted his draft Report and Recommendation to counsel for the Parties on March 17, 2015 and has received their comments prior to filing.

III. ANALYTICAL FRAMEWORK AND FINDINGS

TENN. R. CIV. P. 26.02 states the parameters of permissible discovery in Tennessee.

The Rule provides in part:

Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) **In General.** Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things, and electronically stored information, i.e. information that is stored in an electronic medium and is retrievable in perceivable form, and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Before a trial court may order matters divulged under Rule 26, it must make a threshold determinations in the following sequence: (1) Are the matters privileged?; and, (2) Are the matters relevant to the subject matter of the lawsuit? *See West v. Schofield*, No. M2014-00320-SC-R11-CV, 2015 WL 1044099, ____ S.W.3d ____ (Tenn. Mar. 10, 2015). The phrase "relevant to the subject matter involved in the pending action" is synonymous with

“germane” or “bearing on the subject matter.” *Id.* at *9. The subject matter of a case is not limited to the merits of the case because a variety of fact-oriented issues may arise during litigation that is not related to the merits. *Id.* Nevertheless, the information sought during discovery must have some logical connection to proving a claim or defense. *See id.*

As to the determination of what information is relevant for the purposes of Rule 26, it is helpful to examine the definition of relevance set forth in the Tennessee Rules of Evidence. *West* at *9. TENN. R. EVID. 401 defines “relevant evidence” as

... evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Id. Tennessee courts have observed that relevancy “is more loosely construed during discovery than it is at trial.” *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 220 n.25 (Tenn. Ct. App. 2002). The phrase “relevant to the subject matter involved in the pending action” has been construed “broadly to encompass any matter that could bear on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.” *Id.* citing *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978); *Hickman v. Taylor*, 329 U.S. 495, 501 (1947). As our Supreme Court recently stated:

[T]he crucial issue in determining the relevance of any particular information for the purposes of Rule 26, and therefore its discoverability, is whether it has (or will lead to information which has) some probative value *as to the subject matter involved in the pending action*. Accordingly, before compelling discovery under Rule 26, a trial court first must determine what is included in “the subject matter involved in the pending action.”

West at *9 (emphasis by the Court).

Even if a trial court determines that information sought pursuant to Rule 26 is not privileged and is relevant to the subject matter involved in the pending action, the trial court further should balance the specific need for the information against the harm that could result from disclosure of the information. *West* at *11. That determination involves the balancing of additional considerations, including the “protection of privacy, property and secret matters,” and the “protection of parties or persons from annoyance, embarrassment, oppression, or undue burden or expense.” *Id.* quoting *Johnson v. Nissan N. Am., Inc.*, 146 S.W.3d 600, 605 (Tenn. Ct. App. 2004).³

A. Privilege

West instructs trial courts that the first “threshold” determination to be made herein is whether the matters at issue are privileged, and should be withheld on that basis. The Privilege Log asserts that many of the Documents Not Produced consist of “Communication with Counsel and Work Product,” placing those privileges at issue.

Tennessee’s attorney-client privilege is rooted in the common law, and the codification in TENN. CODE ANN. § 23-3-105 embodies the common law rule. The statute provides:

³ Such balancing is outside the scope of the Reference.

No attorney, solicitor or counselor shall be permitted, in giving testimony against a client, or person who consulted the attorney, solicitor or counselor professionally, to disclose any communication made to the attorney, solicitor or counselor as such by such person, during the pendency of the suit, before or afterwards, to the person's injury.

Not all communications between attorneys and clients are confidential. In order to be privileged under the statute, the communication between an attorney and client must meet two requirements: (a) it must involve the subject matter of the representation, and (b) it must be made with the intent that the communication will be kept confidential. *State ex rel. Flowers v. Tennessee Trucking Ass'n Self-Insurance Group Trust*, 209 S.W.3d 602, 616 (Tenn. Ct. App. 2006).

While the statute addresses only the client's communication to the attorney, the privilege also applies to communication from the attorney to the client "when the attorney's communications are specifically based on the client's confidential communications or when disclosing the attorney's communications would, directly or indirectly, reveal the substance of the client's confidential communications." *Boyd*, 88 S.W.3d at 213. In addition, the Rules of Professional Conduct, TENN. R. SUP. CT. 8, RPC 1.6 governs confidentiality and encompasses "information relating to the representation of a client" as being confidential in nature.

Furthermore, Tennessee has adopted the work product doctrine, may operate to shield an attorney's work product from pretrial discovery. *See Boyd*, 88 S.W.3d at 218-19. The essential purpose of the work product doctrine is to protect an attorney's mental processes.

Id. at 222. *Boyd* addresses the “sequential steps with shifting burdens of proof that litigants and courts should follow when considering work product doctrine claims.” *Id.* at 220-222.⁴ The greatest protection is afforded to “opinion work product” which includes documents containing an attorney’s mental impressions, conclusions, opinions, or legal theories regarding pending litigation (that were prepared in anticipation of litigation). *Id.* at 221. Somewhat lesser protection is afforded to “ordinary or fact” work product, that does not “contain the mental impressions, conclusions, opinions, or legal theories regarding pending litigation.” *Id.*

Without prejudice to Defendants’ right to establish substantial need for the materials or inability to obtain the materials or their substantial equivalent by other means without undue hardship (as to work product), the following findings are made as to the Documents Not Produced with regard to privilege:

1. Communications Involving Mr. McWhirter and USAA

Warren D. McWhirter, Esq., his former firm, McWhirter, Wyatt & Elder, PLLC and his current law firm, Holley, Elder & McWhirter, P.C., have been engaged to represent USAA with regard to coverage issues and represents USAA in this lawsuit. Parties’ Report at p. 2. Utilizing the factors set forth above, it is found that the following matters are privileged

⁴ Although there is no Tennessee case on point, it appears that those factors should also guide the Court during an *in camera* review.

communications by and/or between USAA and Mr. McWhirter and should be protected from disclosure on the bases set forth below:

USAA000543 (1st and 2nd Redactions) (Attorney-Client Privilege);
USAA000544 (1st Redaction) (Attorney-Client Privilege; Fact Work Product);
USAA000544 (2nd Redaction) (Fact Work Product);
USAA000544 (3rd Redaction) (Attorney-Client Privilege);
USAA000545 (1st and 2nd Redaction) (Attorney-Client Privilege);
USAA000546 (3rd Redaction) (Attorney-Client Privilege; Opinion Work Product);
USAA000547 (1st Redaction) (Attorney-Client Privilege; Opinion Work Product);
USAA000548 (2nd, 3rd, 5th and 6th Redaction) (Attorney-Client Privilege);
USAA000550 (1st Redaction) (Attorney-Client Privilege);
USAA000550 (2nd and 3rd Redaction) (Fact Work Product);
USAA000551 (1st Redaction) (Attorney-Client Privilege; Opinion Work Product; Fact Work Product);
USAA000551 (2nd Redaction) (Attorney-Client Privilege; Fact Work Product);
USAA000551 (3rd Redaction) (Attorney-Client Privilege; Opinion Work Product; Fact Work Product);
USAA000552 (1st Redaction) (Attorney-Client Privilege; Opinion Work Product; Fact Work Product);
USAA000552 (2nd and 4th Redaction) (Attorney-Client Privilege; Fact Work Product);
USAA000553 (Attorney-Client Privilege);
USAA000554 (Attorney-Client Privilege; Opinion Work Product; Fact Work Product);
USAA000555 (1st Redaction) (Attorney-Client Privilege);
USAA000555 (2nd Redaction) (Attorney-Client Privilege; Fact Work Product);
USAA000748 (Attorney-Client Privilege);
USAA000766 (Attorney-Client Privilege; Fact Work Product);
USAA000800 (Fact Work Product);
USAA000814-818 (Opinion Work Product; Fact Work Product);
USAA001191-1192 (Opinion Work Product; Fact Work Product);
USAA001193 (Attorney-Client Privilege; Opinion Work Product);
USAA001195 (Fact Work Product);
USAA001203 (1st Redaction) (Attorney-Client Privilege; Fact Work Product);
USAA001203 (2nd Redaction) (Attorney-Client Privilege);

USAA001204 (Attorney-Client Privilege; Opinion Work Product; Fact Work Product);
USAA001205 (1st Redaction) (Attorney-Client Privilege);
USAA001205 (2nd Redaction) (Attorney-Client Privilege; Fact Work Product);
USAA001206 (1st and 3rd Redaction) (Attorney-Client Privilege; Fact Work Product);
USAA001206 (2nd Redaction) (Attorney-Client Privilege; Opinion Work Product; Fact Work Product);
USAA001207 (1st Redaction) (Attorney-Client Privilege; Opinion Work Product; Fact Work Product);
USAA001207 (4th Redaction) (Fact Work Product);
USAA001208 (1st and 2nd Redactions) (Fact Work Product);
USAA001208 (3rd Redaction) (Attorney-Client Privilege);
USAA001209 (1st, 2nd and 4th Redactions) (Attorney-Client Privilege);
USAA001210 (1st Redaction) (Attorney-Client Privilege);
USAA001211 (2nd Redaction) (Attorney-Client Privilege; Opinion Work Product);
USAA001212 (3rd Redaction) (Attorney-Client Privilege);
USAA001213 (2nd and 3rd Redactions) (Attorney-Client Privilege);
USAA001213 (4th Redaction) (Fact Work Product);
USAA001214 (1st Redaction) (Attorney-Client Privilege; Fact Work Product);
USAA001214 (2nd Redaction) (Attorney-Client Privilege); and
USAA001282 (Fact Work Product).

2. Communications Involving Martin Tate and USAA

David Wade, Esq., Matthew P. Gabriel and other attorneys with Martin, Tate, Morrow & Marston, P.C. ("Martin Tate") represent USAA in this lawsuit on the bad faith issue. Parties' Report at p. 2. Utilizing the factors set forth above, it is found that the following matters are privileged communications by and/or between USAA and Martin Tate and should be protected from disclosure on the bases stated below:

USAA000558 (1st Redaction) (Attorney-Client Privilege);
USAA001529 (Fact Work Product);
USAA001530 (Fact Work Product);

USAA001568 (Fact Work Product); and
USAA001570-1574 (Fact Work Product).

3. Communications Involving Allen Summers and USAA

USAA provided a defense to Mr. and Ms. Coleman in the Wrongful Death Lawsuit. The Documents Not Produced include documents reflecting communications by and/or between USAA and Allen Summers. The relationship between USAA and Allen Summers is distinct from that between USAA and Mr. McWhirter and that between USAA and Martin Tate.

When an insurer retains an attorney to represent an insured, the insured is the attorney's client. Tenn. Formal Ethics Op. 85-F-100 (Sept. 30, 1985); *see also Blaylock and Brown Const. Inc. v. AIU Ins. Co.*, 796 S.W.2d 146, 155 (Tenn. Ct. App. 1990) ("In this case, the correspondence between the retained counsel for plaintiffs-appellants in the underlying action and AIU could be relevant and is not privileged insofar as AIU is concerned.") As a result, it is found that the communications between USAA and Allen Summers are not protected from disclosure herein as privileged confidential client information of USAA or work product of its counsel. *See, e.g.*, Restatement (Third) of the Law Governing Lawyers § 59 (American Law Institute 2001) cited in *The Tennessean v. Tennessee Dep't of Personnel*, No. M2005-02578-COA-R3-CV, 2007 WL 1241337 at *8 (Tenn. Ct. App., Apr. 27, 2007). This finding necessitates consideration of the second "threshold" issue under the *West* analysis as to the communications involving Allen Summers, that of relevance.

4. Communications Involving Counsel for Mr. and/or Ms. Coleman

Among the Documents Not Produced is correspondence from or to Mr. and/or Ms. Coleman and/or counsel retained by them. Counsel for USAA had previously redacted that correspondence in an abundance of caution so as not to violate Mr. and/or Ms. Coleman's privilege, which is theirs to assert or waive individually. (Hearing Transcript at p. 11.) At the February 26, 2015 hearing, Mr. Leffler, counsel for Ms. Coleman, stated on the record that Ms. Coleman waives her attorney-client privilege so as to permit the dissemination of the correspondence contained in the USAA Claims File that had been previously redacted by counsel for USAA. (Hearing Transcript at p. 50.) To the date of the filing of this Report and Recommendation, it has not been communicated to the Special Master that a similar waiver has been made in regard to correspondence in which Mr. Coleman or his personal counsel was a party.

Ms. Coleman having waived her privilege, the following documents should be produced to counsel for Ms. Coleman in unredacted form:

USAA001127-1128 Undated letter from Ms. Coleman to Lee Abraham, Jr.
USAA001404-1405 Letter dated March 20, 2012 from Mr. Gresham to
Stephen R. Leffler
USAA001561 Letter dated July 12, 2012 from Mr. Gresham to Ms. Coleman

The following documents should be withheld from production until or unless a similar waiver may be made by Mr. Coleman:

USAA000598-599 Letter dated March 24, 2009 from Mr. Gresham to Mr. and
Ms. Coleman

USAA000604 Letter dated March 24, 2009 from Mr. Gresham to Mr. and Ms. Coleman

USAA000791-599 Letter dated October 13, 2009 from Mr. Gresham to Mr. and Ms. Coleman

USAA000802-803 Letter dated June 30, 2010 from Mr. Shelton to Mr. Gresham

USAA000899-900 Letter dated March 17, 2011 from Mr. Shelton to Mr. Gresham

B. Relevance

It is axiomatic that a declaratory judgment proceeding provides an appropriate vehicle for deciding insurance coverage questions. *Standard Fire Ins. Co. v. Chester-O'Donley & Associates, Inc.*, 972 S.W.2d 1, 5 (Tenn. Ct. App. 1998). Issues involving an insurance policy's coverage require the interpretation of the insurance policy in light of claims asserted against the insured. *Sulphuric Acid Trading Co., Inc. v. Greenwich Ins. Co.*, 211 S.W.3d 243, 248 (Tenn. Ct. App. 2006). As discussed below, on this reference there are two potential areas of relevance in light of the issues before the Court: (1) those Documents Not Produced, if any, that are relevant to the interpretation of the Policy; and (2) those Documents Not Produced, if any, that are relevant to the "true facts" at issue in the Wrongful Death Lawsuit against Mr. and Ms. Coleman.

The rulings of the Court fix the parameters of relevance. *See* TENN. R. CIV. P. 26.02 ("Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows....") The Court's Order on Motion Hearing September 13, 2013 stayed discovery on the bad faith claims asserted against USAA, meaning that those

Documents Not Produced that might be relevant to Defendants' assertions of bad faith on the part of USAA are not to be disclosed at this time.

A. The Interpretation of the Policy

In Tennessee, courts interpret insurance policies using the principles that guide the construction of other contracts. *National Ins. Ass'n v. Simpson*, 155 S.W.3d 134, 137 (Tenn. Ct. App. 2004). The principal goal is to ascertain and to enforce the intent of the contracting parties. *Id.* The parties' intent, and therefore the meaning of the contract, should be derived from the provisions of the policy itself. *Gredig v. Tenn. Farmers Mut. Ins. Co.*, 801 S.W.2d 909, 912 (Tenn. Ct. App. 1994). That intent is to be derived from the four corners of the policy, giving effect to all parts. *Blue Diamond Coal Co. v. Holland-America Ins. Co.*, 671 S.W.2d 829, 833 (Tenn. 1984).

Because policies of insurance are drafted by the insurer, any ambiguity and doubt is to be resolved in favor of the insured. *NSA DBA Benefit Plan, Inc. v. Connecticut Gen. Life Ins. Co.*, 968 S.W.2d 791, 795 (Tenn. Ct. App. 1997). Where the policy is ambiguous, the intent of the parties may be derived from extrinsic evidence outside the policy. *Id.* *Blue Diamond Coal Co.*, 671 S.W.2d at 833. The question of what constitutes an ambiguous insurance contract is well-settled in Tennessee: "Where language in an insurance policy is susceptible of more than one reasonable interpretation, [] it is ambiguous." *Tata v. Nichols*, 848 S.W.2d 649, 650 (Tenn. 1993). In other words, "[a]mbiguity in a contract is doubt or uncertainty

arising from the possibility of the same language being fairly understood in more ways than one.” *NSA DBA Benefit Plan, Inc.*, 968 S.W.2d at 795.

According to *Williston on Contracts*:

[n]ot every dispute with respect to the proper interpretation of insurance policy language constitutes an ambiguity. An insurance policy is not ambiguous simply because the parties disagree about its meaning. Both the insured and the insurer are likely to take conflicting views of coverage, but neither conflicting expectations nor disputation is sufficient to create an ambiguity. Rather, an objective test is applied to determine whether an ambiguity exists in an insurance policy. Generally, an ambiguity in insurance policy language exists only if the language is fairly or reasonably susceptible to two or more different, but reasonable, interpretations or meanings. A genuine uncertainty or honest difference must exist as to which of two or more meanings is proper; a policy is not ambiguous simply because “creative possibilities” as to its meaning can be suggested by the parties.

A policy term will not be found to be ambiguous simply because it is not defined within the policy, or because it has more than one meaning, or a broad meaning. Additionally, the fact that an insurance policy is a complex instrument requiring analysis or the need to interrelate multiple and various policy provisions, will not alone create an ambiguity....

16 *Williston on Contracts* § 49:17 (4th ed.), quoted with approval in *Stonebridge Life Ins. Co. v. Horne*, No. W2012-00515-COA-R3-CV, 2012 WL 5870386, ** 4-5 (Tenn. Ct. App., Nov. 21, 2012).

It follows that for extrinsic evidence to be relevant to the interpretation of the Policy, the Court would be required to first determine that the Policy is ambiguous. USAA contends that the applicable language of the Policy is unambiguous. Defendants argue that the

applicable language of the Policy is ambiguous. It is for the Court to determine if the Policy is ambiguous in regard to coverage. It can be said, however, that the following provisions and definitions within the Policy would, of necessity, be the locus of that ambiguity, if any there is:

RENEWAL DECLARATIONS PAGE

Named Insured and Residence Premises

HARRY R COLEMAN JR
583 BUCK TRAIL CV
CORDOVA, SHELBY, TN 38018-7628

SECTION I E. Personal Liability – Each Occurrence \$500,000

Source: Policy Packet at Page 4.

AGREEMENT

In return for payment of premium and subject to all terms of this policy, we will provide the insurance described.

Source: Policy at Page 1 of 18.

Section II – LIABILITY COVERAGES

Coverage E – Personal Liability [appearing in the Policy at Page 13 of 18] is deleted and replaced by the following:

If a claim is made or a suit is brought against an **insured** for compensatory damages because of **bodily injury** or **property damage** caused by an **occurrence** to which this coverage applies, we will:

1. pay up to our limit of liability for the damages for which the **insured** is legally liable; and

2. provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent. We may investigate and settle any claim or suit that we decide is appropriate. Our duty to settle or defend ends when the amount we pay or tender for damages resulting from the occurrence equals our limit of liability. This coverage does not provide defense to any insured for criminal prosecution or proceedings.

Source: Policy, Tennessee Special Provisions at Page 3 of 4.

Section II – EXCLUSIONS

1. **Coverage E – Personal Liability and Coverage F – Medical Payments to Others do not apply to bodily injury or property damage:**

a. caused by the intentional or purposeful acts of any insured, including conduct that would reasonably be expected to result in **bodily injury** to any person or **property damage** to any property.

Source: Policy at Page 13 of 18.

The following exclusions are added to **Item 1. Coverage E – Personal Liability and Coverage F – Medical Payments to Others:**

4. arising out of the commission of, attempting to flee from, or avoiding apprehension for a criminal act for which intent is a necessary element.

Source: Policy, Tennessee Special Provisions at Page 3 of 4.

Section II – CONDITIONS

1. **Limit of Liability.** Our total liability under Coverage E for all damages resulting from any one **occurrence** will not be more than the limit of liability for Coverage E as shown in the Declarations. This limit is the same regardless of the number of **insureds**, claims made or persons injured. All **bodily injury** and **property damage** resulting from any one accident or from continuous or repeated exposure to substantially the same general harmful conditions shall be considered to be the result of one **occurrence**.

2. **Severability of Insurance.** This insurance applies separately to each insured. This condition will not increase or limit our liability for any one occurrence.

Source: Policy at Page 17 of 18.

1. “**bodily injury**” means bodily harm, sickness or disease, including required care, loss of services and death that results.

3. “**insured**” means you and residents of your household who are:
a. your relatives....

5. “**occurrence**” means an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in:

- a. bodily injury; or
- b. property damage.

Source: Policy at Page 1 of 18.

It is not necessary for this Report and Recommendation to speculate whether the Court may find one or more of the above-quoted provisions of the Policy to be ambiguous. This Report and Recommendation does find that none of the non-privileged Documents Not Produced contain relevant extrinsic evidence that would aid the Court in resolving any ambiguity that might arguably be present in the language of the Policy.

B. The “True Facts” at Issue

An insurer’s duty to indemnify is based upon the facts found by the trier of fact. *Clark v. Sputniks, LLC*, 368 S.W.3d 431, 439 (Tenn. 2012); *St. Paul Fire and Marine Ins. Co. v. Torpoco*, 879 S.W.2d 831, 835 (Tenn. 1994) (“the duty to indemnify, i.e., ultimate liability,

depends rather on the true facts....”). In other words, an insurer’s duty to indemnify is established after determining the “true facts” of the case, in contrast to those facts alleged in the complaint. *Standard Const. Co., Inc. v. Maryland Cas. Co.*, No. 01-cv-2006-V, 2002 WL 1477886 at *12 (W.D. Tenn., May 15, 2002). An insurer’s duty to indemnify thus generally cannot be ascertained until the completion of the underlying litigation when liability is determined. See 43 Am. Jur. 2d, *Insurance* § 676 (2015), citing *Estate of Bradley ex rel. Sample v. Royal Surplus Lines Ins. Co.*, 647 F.3d 524 (5th Cir. 2011) (applying Mississippi law).

The Wrongful Death Lawsuit did not go to trial. As stated above, Mr. Coleman was tried before a jury in the Criminal Court of Shelby County and convicted of the second degree murder of Mr. Schwerin. Second degree murder is the knowing killing of another. TENN. CODE ANN. § 39-13-210(a)(1), cited in *Coleman* at *12.

The criminal court jury reached its verdict beyond a reasonable doubt after hearing the trial testimony of witnesses who had been at the scene of the incident and others. The State’s witnesses who were at the scene either at the time (or immediately after) the fatal discharge of the firearm were Katie Johnson (*Coleman* at **1-2), Asia Smith (*Coleman* at **2-3), Joseph Sneed (*Coleman* at **3-4), Steven Pilgreen (*Coleman* at *4), Nicholas Turpin (*Coleman* at *4), Officer Jason Pynkala (*Coleman* at *4), Officer Erik Jensen (*Coleman* at *5), Robert “Colt” Schwerin, III (*Coleman* at **5-6), Dallas Schwerin (*Coleman* at **6-7) and Savannah Schwerin (*Coleman* at *7). Ms. Coleman (*Coleman* at **8-9) and Mr. Coleman (*Coleman* at **9-10) testified on Mr. Coleman’s behalf at the trial.

As the conduct, transactions and occurrences that were at issue in the criminal trial are identical to those at issue in the Wrongful Death Lawsuit, the criminal trial testimony of the above-referenced witnesses (the “Criminal Trial Testimony”) lies at the core of the “true facts” and “relevant evidence” in regard to the Wrongful Death Lawsuit. That is, the trial transcript of the criminal trial contains “evidence having [a] tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence” in relation to the Wrongful Death Lawsuit. *See* TENN. R. EVID. 401.

In addition to the Criminal Trial Testimony, the Schwerin Defendants conducted discovery in connection with the Wrongful Death Lawsuit. The Documents produced by USAA in unredacted form include the transcript of the deposition of Mr. Coleman, taken by the Schwerin Defendants on September 9, 2010. *See* USAA000931-1063. Again, such deposition testimony, together with other deposition testimony taken in the Wrongful Death Lawsuit, is another source of the “true facts” and is relevant herein to the extent that it is relevant to the conduct, transactions and occurrences at issue in the Wrongful Death Action. In distinction, such items, as for example, contemporaneous summaries of deposition testimony are inferior and derivative in setting forth the “true facts” in relation to the

deposition transcripts themselves, and are not be useful in leading to other matter that could bear on the “true facts,” more so than the transcripts themselves.⁵

Against this background, this Report and Recommendation must determine which of the Documents Not Produced could bear on, or reasonably could lead to other matter that could bear on the “true facts” and thus are relevant to the issue of coverage. *See Boyd, supra*, 88 S.W.3d at 220 n.25. Utilizing this standard, the Report and Recommendation makes the following assessment of the relevancy or lack thereof of the non-privileged Documents Not Produced:

1. Relevant Documents:

USAA000681-686 Handwritten notes re: accounts of witnesses to incident;
USAA000692-694 Investigation report re condition of Mr. Coleman’s vehicle scene of incident and interviews individuals with indirect knowledge of incident;
USAA000696-697 Report of interview of Patricia Hughes;
USAA000708-711 Report of interview of Clark Plunk;
USAA000717 Report of interview of Regions Bank officer; and
USAA000718-721 Investigation report re condition of Mr. Coleman’s vehicle scene of incident and interviews individuals with indirect knowledge of incident.

⁵ Gary K. Smith, Esq. and Karen Campbell, Esq. of Gary K. Smith Law, PLLC, counsel for the Schwerin Defendants herein, also represented the “Schwerin Group” in the Wrongful Death Lawsuit. Parties’ Report at p. 2. Stephen R. Leffler, Esq. of Stephen R. Leffler, P.C., counsel for Ms. Coleman herein, was Ms. Coleman’s independent counsel in the Wrongful Death Lawsuit. *Id.* It is assumed that the deposition transcripts from the Wrongful Death Action are either in the possession of, or available to, said counsel.

2. Documents Not Relevant:

A. USAA – Allen Summers Communications (Source: Claims File)

USAA000530 Summary of Mr. Gresham's comments to USAA file handler re: (1) perceived reputation of Messrs. Coleman and Schwerin, and (2) generalized characterization of Mr. Plunk's account of incident. Discussion of potential assignment to take witness interviews and defense theory and nonavailability of police report;⁶

USAA000531 (2nd Redaction) USAA to do items re: liability investigation;

USAA000534 To do notation re: transmittal of Policy and correspondence;

USAA000535 (1st Redaction) Notation re: Mr. Gresham's to do items;

USAA000535 (2nd Redaction) Notation re: receipt of Mr. Gresham's correspondence to Mr. and Ms. Coleman requesting meeting and advising Leslie Ballin of same;

USAA000536 Notations re: USAA requests to Mr. Gresham for status report;

USAA000537 (1st, 2nd and 3rd Redactions) Notations re USAA requests to Mr. Gresham for status report;

USAA000537 (4th Redaction) Notations summarizing Mr. Gresham communication re: discussions with Mr. Ballin re: potential for sharing information and issues re: possible civil claim;

USAA000538 (1st Redaction) Notation re: voice message to Mr. Gresham;

USAA000538 (2nd Redaction) Notation re: letter from Mr. Gresham discussing potential civil claims that might be asserted by Mr. Schwerin's surviving children, potential theories in wrongful death claim;

USAA000538 (3rd Redaction) Notation re: message from Mr. Gresham relating newspaper article reporting filing of civil wrongful death lawsuit and Mr. Coleman's indictment on criminal charge of second-degree murder;

USAA independent confirmation of same;

USAA000592 Transmittal re: policies, matters to be accomplished;

USAA000600-601 Request for cooperation and relating Mr. Gresham's prior acquaintance with Mr. Coleman and other patrons of restaurant;

USAA000607 Request for status report;

⁶ The description of the documents set forth herein are intended to facilitate the Court's review of the findings of this Report and Recommendation. The descriptions, together with the unredacted portions of the Documents Not Produced, set forth such detail as might be set forth in a privilege log. *See, e.g., Simmons Foods, Inc. v. Willis*, No. 97-4192 RDR, 2000 WL 204270, at *5 (D. Kan., Feb. 8, 2000).

USAA000608 Request for status report;
USAA000610 Confirmation of requests for witness statements, photographs and police report regarding incident;
USAA000613-617 Memorandum re: potential civil claims that might be asserted by Mr. Schwerin's surviving children, potential theories in wrongful death claim; addressing skill of adversary counsel;
USAA000618-620 Transmittal of Complaint in Wrongful Death Lawsuit, discussion re: TRO and request for expedited discovery, reporting receipt and initial review of witness statements;
USAA000639-641 Transmittal of Complaint in Wrongful Death Lawsuit, discussion re: TRO and request for expedited discovery, reporting receipt and initial review of witness statements;
USAA000658 Suit transmittal for defense under a reservation of rights;
USAA000663 Acknowledgement of assignment;
USAA000673 Transmittal of statements and investigative materials;
USAA000674-677 Report of interview of Robbie and Richard Hornsby;
USAA000678-680 Report of interviews of John Bell and Patricia Hughes (Hughes interview report duplicate of USAA000696-697);
USAA000698 Report of interview of John Bell;
USAA000700 To do notation;
USAA000768-769 Report re: argument on Circuit Court ruling on motion to quash, continuation of temporary injunction and adversary counsel's statements to media;
USAA000792 Statement re: offer to share Mr. Schwerin's employment records;
USAA000799 Status report re: criminal trial date and request for instruction, motion pending in bankruptcy court to lift automatic stay;
USAA000804 Status report re: criminal trial, anticipated witnesses and potential impact of trial outcome on defense of Wrongful Death Lawsuit, addressing potential summary judgment motion on behalf of Ms. Coleman in Wrongful Death Lawsuit;
USAA000805-809 Memorandum addressing superseding cause defense for Ms. Coleman in Wrongful Death Lawsuit;
USAA000829 Unspecified letter of transmittal;
USAA000881-886 Report summarizing Mr. Coleman's deposition testimony in Wrongful Death Action;
USAA000887-892 Report summarizing Ms. Coleman's deposition testimony in Wrongful Death Action;

USAA000901-903 Report re: settlement discussions regarding and exposure of Mr. and Ms. Coleman to liability in Wrongful Death Lawsuit with recommendation;

USAA000916-919 Report re: settlement of claims asserted against Mr. Coleman in Wrongful Death Action, status of claims asserted in Wrongful Death Action against Ms. Coleman, theories of recovery and defense; potential summary judgment motion and potential discovery in advance of trial;

USAA001135 Transmittal of correspondence from Ms. Coleman's counsel and Ms. Coleman and reporting that trial of Wrongful Death Lawsuit would be against Ms. Coleman only;

USAA001178-1190 Pre-Trial Report re: Wrongful Death Lawsuit;

USAA001218 (1st Redaction) Notation re: receipt of complaint in Wrongful Death Lawsuit from Mr. Gresham;

USAA001218 (2nd Redaction) Notation re: message from Mr. Gresham relating newspaper article reporting filing of civil wrongful death lawsuit and Mr. Coleman's indictment on criminal charge of second-degree murder; USAA independent confirmation of same;

USAA001220 (1st Redaction) Notation re: letter from Mr. Gresham discussing potential civil claims that might be asserted by Mr. Schwerin's surviving children, potential theories in wrongful death claim;

USAA001220 (2nd Redaction) Notation re: voice message to Mr. Gresham;

USAA001221 (1st Redaction) USAA internal notation re: question for Mr. Gresham and file update;

USAA001221 (2nd Redaction) Notations summarizing Mr. Gresham communication re: discussions with Mr. Ballin and re: potential for sharing information and issues re possible civil claim;

USAA001221 (3rd and 4th Redactions) Notations re USAA requests to Mr. Gresham for status report;

USAA001222 Notations re: USAA request to Mr. Gresham for status report;

USAA001223 (1st Redaction) Notation re: receipt of Mr. Gresham's correspondence to Mr. and Ms. Coleman requesting meeting and advising Leslie Ballin of same;

USAA001223 (2nd Redaction) Notation re: unspecified correspondence to Mr. Gresham;

USAA001223 (3rd Redaction) Notation re telephone call from Mr. Gresham with to do notations re: transmittal of Policy and correspondence and Mr. Gresham's to do items;

USAA001224 Notation re exchange of voice messages with Mr. Gresham;

USAA001225 USAA Action Plan re: retention of defense counsel

USAA001228 Summary of Mr. Gresham's comments to USAA file handler re: (1) perceived reputation of Messrs. Coleman and Schwerin, and (2) generalized characterization of Mr. Plunk's account of incident. Discussion of potential assignment to take witness interviews and defense theory and nonavailability of police report;

USAA001230 (1st Redaction) Notation re: message left for Mr. Gresham;

USAA001230 (2nd Redaction) Notation re: request for advice from Mr. Gresham re: duty to defend;

USAA001236 Internal notation re: initial to do items;

USAA001279-80 Letter of transmittal re: discovery responses in Wrongful Death Lawsuit, summarizing responses;

USAA001292-93 Message summarizing deposition testimony of Savannah Schwerin;

USAA001294 Message addressing infliction of emotional distress claims asserted in Wrongful Death Lawsuit and available defenses;

USAA001312 Message addressing trial strategy and prospects and remaining discovery to be taken in Wrongful Death Lawsuit;

USAA001313 (1st Redaction) Message addressing trial strategy and prospects in Wrongful Death Lawsuit;

USAA001313 (2nd Redaction) Request for status update;

USAA001313 (3rd Redaction) Message summarizing deposition testimony of Savannah Schwerin;

USAA001314-15 Message summarizing deposition testimony of Savannah Schwerin;

USAA001316 (1st Redaction) Message regarding trial strategy and settlement issues for Ms. Coleman subsequent to Mr. Coleman's settlement of claims in Wrongful Death Lawsuit;

USAA001316 (2nd Redaction) Summary of research re: apportionment of fault in Wrongful Death Lawsuit;

USAA001317-18 Summary of research re: apportionment of fault and joint and several (and vicarious) liability issues in Wrongful Death Lawsuit;

USAA001468 Comments on Ms. Coleman's independent intervening cause defense in Wrongful Death Lawsuit;

USAA001469-70 Comments on review of deposition and criminal trial testimony of Ms. Coleman and issue of settlement;

USAA001472 Comments on anticipated trial testimony of Asia Smith and issue of settlement;

USAA001473 Comments on review of deposition testimony of Clark Plunk and trial strategy in relation to Mr. Plunk;

USAA001474-75 Comments on review of deposition and criminal trial testimony of Dallas Schwerin;
USAA001477-78 Comments on review of criminal trial testimony of Katie Johnson and issue of settlement;
USAA001474-75 Comments on review of deposition and criminal trial testimony of Savannah Schwerin;
USAA001474-75 Comments on review of testimony of Steven Pilgreen and 911 tape;
USAA001481 Comments on review of testimony of Steven Pilgreen and 911 tape;
USAA001482 Comments on review of testimony of Nicholas Turpin;
USAA001483 Comments re: exposure of Ms. Coleman in Wrongful Death Lawsuit and issue of settlement; and
USAA001484-85 Comments on potential punitive damage phase of trial against Ms. Coleman in Wrongful Death Lawsuit.

B. Reserve Information
(Source: Claims File)

This Report and Recommendation finds that notations on the following pages within the Documents Not Produced detail reserve information, which are not relevant to the issue of coverage. All redactions on each page shown below relate to such reserve information unless otherwise noted.

USAA000522;
USAA000523;
USAA000523;
USAA000531 (1st and 3rd redactions);
USAA000532;
USAA000541;
USAA000542;
USAA001215;
USAA001226;
USAA001227; and
USAA001235.

C. Record of Payments by USAA
(Source: Claims File)

This Report and Recommendation finds that notations on the following pages within the Documents Not Produced detail payments to law firms (LF), court reporters (CR), litigation support services (LS), investigation services (IS), court clerk (CC) by USAA, which are not relevant to the issue of coverage. All redactions on each page shown below relate to such payments unless otherwise noted.

USAA000545 (LF) (3rd redaction);
USAA000546 (CR) (1st and 2nd redactions);
USAA000547 (LF) (2nd redaction);
USAA000548 (LF) (1st and 4th redactions);
USAA000550 (LF) (4th and 5th redactions);
USAA000552 (LF) (3rd redaction);
USAA000555 (LF, CR, LS) (3rd, 4th and 5th redactions);
USAA000555 (LF, CR);
USAA000557 (LF, CR);
USAA000558 (LF, CR) (2nd and 3rd redactions);
USAA000559 (LF, CR);
USAA000560 (LF, CR, IS);
USAA000561 (LF, CR);
USAA000562 (LF, CR);
USAA000563 (LF, CR);
USAA000564 (LF);
USAA000565 (LF);
USAA000566 (CC, LF);
USAA001200 (CR, LF);
USAA001201 (LF, CR);
USAA001202 (LF, CR, LS);
USAA001205 (LF) (3rd retraction);

USAA001207 (LF) (2nd and 3rd redactions);
USAA001209 (LF) (3rd redaction);
USAA001210 (LF) (2nd and 3rd redactions);
USAA001211 (LF) (1st and 3rd redactions); and
USAA001212 (CR, LF) (1st and 2nd redactions).

D. Appraisals of Personal Property for Insurance Purposes
(Source: Underwriting File)

USAA000001-02 (apparel) (3/4/96);
USAA000022-23 (watch) (6/2/97);
USAA000024-31 (jewelry) (6/18/02);
USAA000032-33 (jewelry) (9/8/06);
USAA000045-50 (jewelry) (1/21/09); and
USAA000051-58 (watches) (9/10/90).

E. General Correspondence from USAA and Underwriting Notes
(Source: Underwriting File)

USAA000003 (sinkhole coverage) (2/16/05);
USAA000034-37 (deductible options) (3/16/04);
USAA000038-44 (power of attorney) (10/31/08);
USAA000059-67 (periodic policy worksheet) (3/3/05);
USAA000068-71 (request for corrected address information) (12/14/03);
USAA000073-86 (Homeowners Policy Packets (2/11/09));
USAA000088-89 (Cancellation of Coverage – Hedgegrove) (12/27/05);
USAA000155-168 (Homeowners Policy Packet (effective 4/17/05));
USAA000169-178 (Homeowners Policy Packet (effective 4/17/06));
USAA000179-187 (Homeowners Policy Packet (effective 4/17/07));
USAA000188-199 (Homeowners Policy Packet (effective 4/17/03));
USAA000200-207 (Homeowners Policy Packet (effective 4/17/04));
USAA000208-224 (Homeowners Policy Packet (effective 4/17/02));
USAA000239-246 (Homeowners Policy Packet (effective 4/17/11));
USAA000247-291 (Homeowners Policy Packet (effective 4/17/10));
USAA000292-308 (Homeowners Policy Packet (effective 2/15/02));
USAA000309-320 (Homeowners Policy Packet (effective 2/15/03));

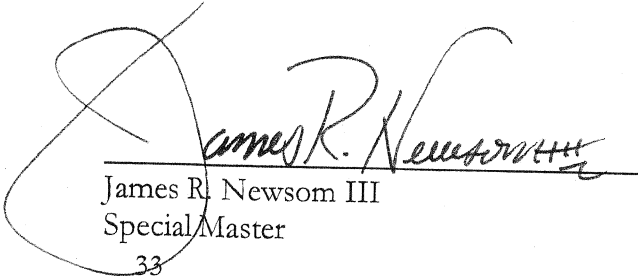
USAA000321-328 (Homeowners Policy Packet (effective 2/15/04));
USAA000329-341 (Homeowners Policy Packet (effective 2/15/05));
USAA000342-351 (Homeowners Policy Packet (effective 2/15/06));
USAA000352-373 Communications regarding appraisals and insured interests
of mortgagees in Buck Trail property (4/15/00 to 4/4/03);
USAA000374 USAA Homeowners Non-Automatic Renewal Worksheet
(process date 2/1/10);
USAA000375 USAA Homeowners Non-Automatic Renewal Worksheet
(process date 2/1/11);
USAA000376 USAA Homeowners Non-Automatic Renewal Worksheet
(process date 7/15/02);
USAA000377-380 USAA Underwriting notes on various topics (5/25/06 to
12/5/08);
USAA000385 USAA Underwriting notes relating to automobile coverage
(8/31/10);
USAA000389-391 USAA Policy premium documents (9/27/99);
USAA000392 Receipt notation (3/8/96);
USAA000393 USAA correspondence to Mr. Coleman re Changes to
Homeowners and Renters Policy Rating Factors (1/11/09);
USAA000399 USAA correspondence Receipt notation (3/8/96);
USAA000393 USAA correspondence to Mr. Coleman re Changes to
Homeowners and Renters Policy Rating Factors (1/11/09);
USAA000399 USAA correspondence to Mr. Coleman re revised Valuable
Personal Property Policy (7/13/06);
USAA000400-404 USAA Personal Property Floater Packet (effective
1/20/05);
USAA000405-409 USAA Personal Property Floater Packet (effective
6/19/02);
USAA000410-413 USAA Valuable Personal Property Packet (effective
11/11/06);
USAA000414-418 USAA Personal Property Floater Packet (effective
7/22/06);
USAA000419-423 USAA Personal Property Floater Packet (effective
9/11/04);

USAA000424-428 USAA Personal Property Floater Packet (effective 8/13/04);
USAA000429-432 USAA Valuable Personal Property Packet (effective 9/11/06);
USAA000433-442 USAA Personal Property Floater Packet (effective 9/11/04);
USAA000443-452 USAA Personal Articles Floater Packet (effective 9/11/05);
USAA000453-456 USAA Cover Correspondence to Mr. Coleman re “new Valuable Personal Property policy” and revisions from prior policy (effective 9/11/06);
USAA000457-468 USAA Valuable Personal Property Packet (effective 9/11/06);
USAA000469-479 USAA Valuable Personal Property Packet (effective 9/11/07);
USAA000480-485 USAA Valuable Personal Property Packet (effective 9/11/09);
USAA000486-490 USAA Valuable Personal Property Packet (effective 9/11/10);
USAA000491-500 USAA Personal Articles Floater Packet (effective 9/11/03);
USAA000501-505 USAA Valuable Personal Property Packet (effective 9/11/08); and
USAA000506-515 USAA Personal Articles Floater Packet (effective 9/11/02).

IV. CONCLUSION

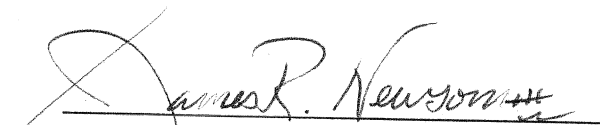
The foregoing are the findings of the Special Master.

Respectfully submitted,


James R. Newsom III
Special Master

TENN. R. CIV. P. 53.04 CERTIFICATE

I hereby certify pursuant to TENN. R. CIV. P. 53.04(1) that I have this day filed the Report and Recommendation with the Clerk of the Court and have filed with it a transcript of the proceedings dated February 26, 2015. Further, I have returned to the Court the materials delivered to me for *in camera* review. A copy of the Report and Recommendation has been delivered by electronic mail to Gary K. Smith, Esq. and Karen M. Campbell, Esq., 1770 Kirby Parkway, Suite 427, Memphis, Tennessee 38138; to Stephen R. Leffler, Esq., 707 Adams Avenue, Memphis, Tennessee 38105; to Warren D. McWhirter, Esq., 9032 Stone Walk Place, Germantown, Tennessee 38138; and to David Wade, Esq. and Matthew P. Gabriel, Esq., 6410 Poplar Avenue, Suite 1000, Memphis, Tennessee 38119, this 27th day of March, 2015.


James R. Newsom III
Special Master