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

Name: Stephen D. Crawley

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(including county)

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INTRODUCTION

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

This document is available in word processing format from the Administrative Office of

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

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

I am presently retired, following twenty-nine years of law practice with the Memphis law firm of Burch, Porter & Johnson, PLLC.

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 1985, and my Board of Professional Responsibility number is 011454.

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 is the only state in which I have ever been licensed to practice law. My BPR number is 011454, and I became licensed on October 24, 1985. My license is currently active.

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

I have never been denied admission to, suspended, or placed on inactive status by the Bar of any state.

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).

1985 to 1992—Associate attorney at Burch, Porter & Johnson

1993 to 2014—Partner and, later, member at Burch, Porter & Johnson, after the firm became a professional limited liability company.

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.

Since my retirement in August of 2014, I have enjoyed spending time with my family members, reading, traveling and engaging in recreational activities, primarily golf. I have also given considerable thought to what professional or occupational endeavors I would like to pursue in the future.

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.

During the latter years of my practice, the major areas in which I practiced were as follows:

Defense of nursing homes in personal injury/wrongful death litigation—40%

Insurance Coverage (providing opinions as to coverage and litigating declaratory judgment and other actions involving coverage disputes and bad faith claims)—30%

Products liability litigation (defense)—18%

Commercial litigation—10%

Employment litigation/EEOC work (defense)—2%

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.

As an associate in a large law firm, I worked on a wide variety of legal matters, from representing plaintiffs in personal injury claims to corporations in large commercial disputes. This worked involved trials in general sessions and circuit court, which I handled by myself, as well as complex, multi-party litigation, which involved numerous issues and often lasted for years. I assisted a more senior lawyer on these larger cases, but even in those, I conducted the majority of the discovery and motion activities myself. Among these cases was a federal lawsuit arising out of a claim for property damage due to the alleged presence of asbestos at a large hospital complex in Memphis and a products liability claim raising out of the death of a janitorial worker who was killed in an elevator accident at a local shopping mall. Examples of other complex cases are:

Southern Tin Compress Corp. v. Plough, Inc., et al., Shelby County Circuit Court, docket number 23873-3 T.D. (defended manufacturer of product packaged in aerosol cans from claims for personal injury and property damage arising out of an explosion involving some cans at a scrap yard, which explosion occurred as cans and automobile gasoline tanks were being compressed into bales of scrap metal);

Wilbur-Ellis Company v. Buckman Laboratories, Inc., U.S. District Court, S.D. Iowa, docket number 3-91-CV-80167 (and several related Iowa state-court cases) (defended supplier of fungicide, which an agricultural chemical manufacturer used as the active ingredient for a seed treatment it developed, which treatment allegedly failed to work and thus allegedly led to lost yields for numerous corn farmers in the Mid-West);

Richard Jackson v. R. D. Werner Company, Inc., Shelby County Circuit Court, docket number 14539-7 T.D. (represented the plaintiff in a products liability action involving an aluminum extension ladder, from which the plaintiff fell because of what we believed was a design defect in the ladder; the jury, however, found in favor of the defendant manufacturer. The case was notable because I had the privilege of being co-counsel, along with Joel Porter, with Lucius Burch in what turned out to be Mr. Burch's last jury trial).

My work as an associate also included representing a husband and wife in a civil rights false arrest lawsuit against two sheriff's deputies, which was the first matter I tried to a jury as the lead attorney. (This case was in federal court before the Honorable Robert M. McRae, who was noted for running a very strict courtroom. I made sure to carry in my wallet a significant amount of cash every day of trial in case Judge McRae held me in contempt, which, fortunately, he did not do.).

As my practice progressed, I shifted to representing only defendants in personal injury/ products liability claims.

In my third year as an associate, I began working on insurance coverage matters for one of my firm's corporate clients. I found that I enjoyed the challenge of analyzing complicated insurance policies and advising clients, both insureds and insurers, regarding coverage issues. I continued to work in this area to the point where coverage work became the second largest area of my practice.

One of the commercial litigation cases on which I worked as an associate arose out of the

attempted rescission of the acquisition of a cotton merchandising business. This matter was very complicated, involving as it did cotton merchandising, futures and forward contracts, hedging strategies, and accounting issues. (*Neil A. Mearns v. ConAgra, Inc.*, U.S. District Court, W.D. Tenn., docket number 87-2621). This case was quite challenging, especially for a political science major, but it was very interesting work.

I continued to devote a significant amount of time to representing clients in commercial litigation. Although I have never had an interest in being a businessman myself, I very much enjoyed the opportunity that commercial litigation provided to see how businesses are run and how business decisions are made. Commercial litigation is often different from personal injury/property damage cases because, unlike that category of litigation, where the facts that led to the dispute are fixed in the past, commercial litigation often requires the lawyer to advise his client on an ongoing basis in an effort either to salvage the transaction or to better position the client for trial. Such advice will have consequences for the remainder of the case, and such decisions often must be made in a very short period of time. The dynamic nature of commercial litigation places additional pressure on the lawyer, but it can also make such matters very interesting to handle.

The majority of the cases I handled, both as an associate and later as a partner, involved defending manufacturers, designers or distributors of various products from claims that these products were defective or unreasonably dangerous. This is the type of work that I enjoyed the most, probably because of my interest in the engineering aspects of those cases and because I like to learn how things work. I represented manufacturers or distributors of products such as: Agricultural fungicides; asbestos-containing insulation products; elevators; kerosene heaters; drugs and medical devices; consumer electronic appliances; industrial wood-cutting machinery; personal computers; reinforced concrete water pipes; polyethylene water pipes; and tankless water heaters, among others. These matters included the following lawsuits:

James Bridges, et al. v. NuTone, Inc., Funai Electric Co, Ltd., et al., docket number 95-2284 (U.S. District Court, W.D. Tenn.) (defense of manufacturer of in-wall radio/intercom unit that allegedly caused house fire);

Grant Presgrove and Stephanie Presgrove v. Yamaha Motor Corp. of America, et al., Master File No. 3:09-MD-2016-JBC, U.S. District Court, W.D. of Kentucky (represented vehicle manufacturer in a products liability case involving a utility terrain vehicle roll-over claim, which was part of a federal multi-district litigation);

Todd Frohbieter v. David Sisk, M.D.; Campbell Clinic, HealthSouth Diagnostic Center of Memphis; Ron Carroll; Glen Dickson, M.D.; Mitek Surgical Products, Inc., Ethicon, Inc., and Johnson & Johnson, docket number 99-2146 GA (U.S. District Court, W.D. Tenn.) (defended manufacturer of a suture anchor that failed after being placed in the shoulder of an aspiring professional football player, who claimed that his career was ruined following an unsuccessful surgery to repair an injury to his shoulder. Of particular interest was the evaluation of the plaintiff's alleged damages, which required analysis of the NFL salary structure and the likelihood of a rookie player succeeding in the league.);

Other products liability cases on which I have worked have included an action in federal court in Minnesota to recover on behalf of a manufacturer of microwave ovens the cost of retrofitting certain ovens with replacement fan switches, because the original switches were manufactured by a third-party with the wrong type of grease, which had led to several fires (*Litton Microwave Cooking Products v. Leviton Mfg. Co., Inc.*, 15 F.3d 790 (8th Cir. 1994); an action to recover economic losses my client, a formulator of agricultural chemical chemicals, suffered when steel containers it had purchased from the defendant leaked, allegedly because the containers did not conform to contract specifications (*Drexel Chemical Co. v. Brockway Standard Co., et al.*, (U.S. District Court, W.D. Tenn.); and an action to recover economic losses my client sustained when a third-party manufacturer produced batches of product that allegedly failed to conform to specifications, which necessitated a recall of those products (*Schering-Plough Healthcare Products v. Prime Enterprises, Inc.*, docket number 04-2071, U.S. District Court, W.D. Tenn.). These and other cases have given me extensive experience with warranty and consumer protection law under the Uniform Commercial Code and the Tennessee Consumer Protection Act.

I have had considerable experience with contract issues, such as contract formation/meeting of the minds; fraudulent inducement; failure of consideration; contract interpretation, including application of the statute of frauds and the parol evidence rule; estoppel; rescission; waiver; and the damages recoverable for breach of contract. I have also litigated cases involving covenants not to compete and alleged misappropriation of trade secrets. (*DTEC, Inc. v. Don Carter,* Shelby County Circuit Court, docket number 46506-8 T.D.; *Black & Decker U.S., Inc. v. Techtronic Industries Co., Ltd.*, docket number 1:08-CV-01002, U.S. District Court, W.D. Tenn.).

In 1999 I began representing the operators of nursing homes in cases alleging personal injury or wrongful death. This work eventually became the predominant area of my practice. I have also defended doctors, nurses and other healthcare providers in medical malpractice/healthcare liability cases, which work grew out of my nursing home defense work.

I worked on one divorce case, early in my career, and I worked on a few administrative law matters, which were also early in my career. One of these latter cases involved the representation of a grocery store chain in a dispute over application of Tennessee's cigarette price control/anti-discount law. The other involved whether our client's business signage was "grandfathered" under a change to a municipality's sign ordinance.

My experience in probate court has been limited. On several occasions, however, I have represented the administrator or executrix in the administration of estates (one of which being my father's estate). I have also represented a wife in her becoming the conservator of her husband's person and estate, whose estate I also handled in probate upon the ward's death. I have from time to time drafted wills for family members and for family or personal friends.

During the last two years of my active practice, I began representing clients in employment matters before the U.S. Equal Employment Opportunity Commission. These matters involved race or age discrimination allegations and also retaliatory discharge and whistle-blower claims.

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

Among the more interesting cases on which I worked are the following:

Rose Fowler v. Belz Enterprises, Ronald H. McFarland Associates, Dover Elevator Co., and Guardsmark, Inc., Shelby County Circuit Court, appellate opinion at 1995 WL 81887 (Tenn. Ct. App. Feb. 27, 1995). This lawsuit involved a claim for wrongful death of a worker who died while cleaning the glass enclosure of the observation elevator at the Oak Court Mall in Memphis, shortly after the mall opened. I conducted most of the discovery in the case and assisted my partner, DeWitt M. Shy, Jr. in the five week trial, which received a considerable amount of attention in the local newspaper. We were gratified when the jury, which found in favor of the plaintiff and against two other defendants, found that our client, which had installed the elevator and its associated equipment, was not at fault in any way for the accident.

Kilgore Flares Company, LLC v. Globe Indemnity Co. and Royal & Sun Alliance Insurance, PLC, Hardeman County Chancery Court, docket number 14022. I was the lead lawyer in this case, which involved an insurance coverage claim for property damage and business interruption losses that my client, a manufacturer of military pyrotechnic devices, had sustained following an explosion at its manufacturing plant. The amount of the claim was substantial, and we were able to achieve a satisfactory settlement of this complex and highly contested dispute.

Baptist Memorial Hospital, et al. v. Argo Construction Corp., Hanson Pipe & Products South, Inc. and ETI Corp., Shelby County Circuit Court, docket number CT-004905-02. The plaintiffs in this lawsuit sought damages for deficiencies that allegedly existed in a storm water drainage system that had been constructed on the campus of a large hospital complex in Memphis. This was both a products liability claim, as plaintiff alleged deficiencies in the concrete pipe my client had manufactured, and also a construction defect claim, as plaintiff claimed that the contractor and the engineer who installed and designed the system were negligent in this work. I was the third—and final—partner at my firm to be in charge of this technically and legally complex case, which went on for more than ten years. I enjoyed the technical and legal aspects of this case very much. In the course of the litigation, I successfully opposed a co-defendant's attempt to assert a claim for indemnity, which I contended was barred as a matter of law. This is reported at *Baptist Mem. Hosp. v. Argo Const. Corp.*, 308 S.W.3d 337 (Tenn. Ct. App. 2009).

The Heil Company, et al. v. Evanston Insurance Co., No. 05-CV-284 (U.S. District Court, E.D. Tenn.). This insurance coverage claim arose out of a $4,000,000.00 default judgment that an Alabama state court had imposed against the insured as a sanction for the insured's lawyer's misconduct in defending the insured. The insurer I represented had issued a policy that included a "self-insured retention" endorsement, which conditioned coverage on the insured's providing a "proper defense" for the claim until the amount of the retention was satisfied. I won a summary judgment for my client, with the court finding that since the insured had not provided a proper defense, no coverage was available under the policy. This opinion is found at 2009 WL 596001, March 9, 2009.

Donna Edwards, Individually and for the Use and Benefit of the Statuary Wrongful Death Beneficiaries of Lillian Nichols, Deceased v. Wellington Healthcare Property, L.P. d/b/a

Millington Healthcare Center, Shelby County Circuit Court, docket number CT-005499-10, tried in arbitration proceeding on April 18-19, 2013 before Oscar C. Carr, III., Esq., who served as the arbitrator. I tried this arbitration matter and obtained a decision in favor of my client, the nursing home, which the plaintiff alleged had been negligent in not recognizing the development in the decedent of an infection, which the plaintiff claimed should have been detected weeks earlier than it was. The issues litigated included which of two possible types of infection the decedent had, the different symptoms of each and when they would have manifested themselves, and the conduct of the nurses and the decedent's family members during the last week of the decedent's life.

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.

Not applicable.

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.

I have served as a guardian ad litem in connection with the settlement of a personal injury claim brought on behalf of a minor.

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

I represented a distributor of a tankless water heater in a complex and long-litigated lawsuit that arose out of a fire that destroyed a brand new, million dollar home in Lebanon, Tennessee. There were numerous other defendants, including electricians, plumbing companies, property developers and contractors. The cause of the fire was never determined, but I proved to the satisfaction of the parties that no defect existed in my client's product and secured my client dismissal from the case on very favorable terms prior to trial. (*Charles and Kimberly Sterns v. Travis McAfee, et al.*, Wilson County Circuit Court, docket number 09CV-1878). It was a pleasure to work with excellent lawyers from Middle Tennessee on this matter, none of whom I had worked with before and all of whom got along well while, at the same time, providing good representation of their clients' respective interests.

One of the last cases I handled was a declaratory judgment that involved an insurance coverage question under liability policies that my client had issued to Lambuth University. A student had sued the school alleging that she became ill because mold was present in the athletic dormitory to which she had been assigned. I was successful in obtaining a summary judgment in favor of my client in reliance on a mold exclusion contained in the policies, which Chancellor James F. Butler found controlled the issue and which negated any duty on the part of my client either to defend or indemnify Lambeth from this claim. The plaintiff never appealed this ruling, which involved a number of issues regarding contract interpretation and the differences between the duty to defend and the duty to indemnify. (*Lambuth University v. Lexington Insurance Co., et al., Chancery Court of Madison County,* docket number 66629).

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 to the Governor's Commission for Judicial Appointment for a position on the Western Section of the Tennessee Court of Appeals. The commission interviewed the applicants on May 16, 2014, and I was not one of the applicants whose name was submitted to the Governor for consideration.

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.

Memphis State University—Fall semester 1978; I transferred from MSU in order to complete my undergraduate education at Baylor University. I did not apply to Baylor until the summer of 1978, so I was unable to start school at Baylor until the Spring 1979 semester, which is why I attended MSU in 1978. I also took foreign language courses at Memphis State University during summer session in both 1980 and 1981.

Baylor University—1979 to 1982, Bachelor of Arts degree; Major: political science; Minors: history and economics (*magna cum laude*; recipient: Omicron Delta Kappa Outstanding Senior Man Award; member of Alphi Chi, an honorary society limited to the top five percent of class).

University of Tennessee George C. Taylor School of Law—1982 to 1983; I received the American Jurisprudence Award in Torts II for the highest grade in that class. The University of Tennessee had and has an excellent law school, and I liked many of the professors who taught my classes during the second semester of my first year. Unfortunately, I had had a number of professors during my first semester whom I either disliked or felt were poor teachers, and I did not want to take other classes from them, particularly the constitutional law class, to which the worst of these professors had been assigned to teach my class section during my second year. I, therefore, decided to transfer to Baylor Law School.

Baylor University Law School—1983 to 1985; Juris Doctor degree; I was named to the Dean's List for several quarters, and I graduated in August of 1985 in the top twenty-five percent of my class.

PERSONAL INFORMATION

15. State your age and date of birth.

I am fifty-five years old, and I was born on February 23, 1960.

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

Fifty-five years, except for those years when I was in school in Texas.

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

Fifty-five years, except for those years when I was in school.

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 have never served in the military.

20. Have you ever pled guilty or been convicted or are now on diversion for violation of any law, regulation or ordinance other than minor traffic offenses? If so, state the approximate date, charge and disposition of the case.

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 identify the number of formal complaints you have responded to that were 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. Please provide any relevant details on any such complaint if the complaint was not dismissed by the court or board receiving the complaint.

None.

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.

No.

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.

Bellevue Baptist Church
Tournament Players Club at Southwind
Memphis Humane Society
Republican National Committee
Tennessee Republican Party
Shelby County Republican Party
National Rifle Association
Memphis Sports Shooting Association
Baylor Alumni Association
Baylor Law Alumni Association
American Air Museum in Great Britain
Pacific Aviation Museum
Commemorative Air Force

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.

American Bar Association (1986 to 2014) (Member—Sections of Litigation and Insurance Coverage)

Tennessee Bar Association (1999 to present)

Memphis Bar Association (1980s to present)(served on the Practice & Procedure Committee in approx. 1996-97)

Tennessee Defense Lawyers Association (2007 to 2014)

Defense Research Institute (1992 to 2014)

Christian Legal Society (1998 to present)

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.

AV Pre-eminent rating by Martindale-Hubbell since approximately 2007.

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

None.

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.

In approximately 2002, I applied for the position of United States Magistrate Judge for the Western District of Tennessee, which is an appointive position.

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

I have never been a registered lobbyist.

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.

Attached are:

(A) Application of South Parkway Associates, L.P. for Permission to Appeal to the Tennessee Supreme Court Pursuant to Tennessee Rule of Appellate Procedure 11, filed in November of 2013 in the Tennessee Supreme Court, case available at 2013 WL 5424653. This was entirely my work.

(B) Brief of Cross Defendant/Appellee Hanson Pipe & Products South, Inc., filed in October 2008 in the Tennessee Court of Appeals, case reported at 308 S.W.3d 337 (Tenn. Ct. App. 2009). This was ninety percent my work.

(C) Lexington Insurance Company's Reply to Bryant's Response to Motion for Summary Judgment and Response to Bryant's Motion for Partial Summary Judgment, filed on April 16, 2014, in the case of *Lambeth University v. Lexington Insurance Co., et al.*, in the Chancery Court for Madison County. This was entirely my work.

(D) Response of Standard Construction Company to Plaintiff's Motion for Partial Summary Judgment or, in the Alternative, Motion in Limine, served in February 2007 in an arbitration proceeding before G. Patrick Arnoult, Esq., which was being administered through the Probate Court of Shelby County. This was entirely my work.

ESSAYS/PERSONAL STATEMENTS

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

I am seeking this position because I want to put the legal knowledge and experience I acquired, and the good judgment I believe that I developed, during my twenty-nine year legal career to use serving the public and the legal profession. In my practice, I saw how difficult it can be for trial judges, who in Tennessee must perform their duties with far fewer resources than is the case in the federal trial courts, to learn and remain conversant with developments in various legal subjects. I believe that my years of experience and the knowledge of the law that I developed during my career have well-prepared me to be a Circuit Court judge. I also recognize that in addition to knowing the law, a good judge must apply the law fairly to all parties who appear in court. I believe that I am capable of doing so, and I would strive to ensure that I apply the law justly and dispassionately to all litigants, should I be privileged to be selected as a judge on the Tennessee Circuit Court.

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)***

I have represented indigent clients, both through the Memphis Area Legal Services pro bono program and otherwise. I have also prepared simple wills for free or for a greatly discounted fee for individuals who have been in need of those services but unable to pay for them. My pro bono work has included helping a homeowner whose insurer initially refused to pay the full cost of repairing storm damage to his house, because the insurer claimed that such repair would be impermissible "betterment." I have also assisted low income clients with landlord-tenant issues and debt relief problems. I represented, for a greatly discounted fee, an elderly client in handling the estate of her deceased son, and I later handled this client's estate on a similar basis.

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 am seeking the position of Circuit Court Judge for Division 3 of the Thirtieth Judicial District at Memphis, which is one of nine divisions of this Court. The Thirtieth Judicial District is co-extensive with Shelby County, so except for instances in which a circuit court judge might be called to sit as a special judge in another judicial district, all of the work for this position would be performed in Shelby County. The circuit court is Tennessee's general trial court of record and handles civil disputes involving a wide variety of issues, such as breach of contract, personal injury, business and corporate disputes, domestic relations and child custody matters, and various appeals from, for example, the General Sessions Court, the Credit Union Board of Appeals, and the Tennessee Human Rights Commission. The circuit court has co-extensive jurisdiction with the chancery court in those cases where the parties submit to have an equitable matter heard by the circuit court. In the Thirtieth Judicial District, the circuit court hears no criminal cases. I enjoy collegially discussing legal issues and would expect to be involved in such discussions with my fellow jurists. I would also seek to cooperate and share the workload of the other divisions by, for example, accepting transfers when necessary. I believe that I am temperamentally well-suited to working with other members of the Circuit Court.

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)***

I am a member of Bellevue Baptist Church, although in recent years I have attended Second Presbyterian Church. My involvement in church activities would not change, were I to be appointed to the circuit court. In that event, I would expect to speak on occasion regarding general topics relating to the administration of civil justice. Were I to be appointed as a judge on the circuit court, I would refrain from fund-raising activities for any private or public group and from participation in partisan political activities. I would adhere to the Code of Judicial Conduct regarding service on any board or leadership body of any organization.

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)***

My parents instilled in me the necessity of living by principles regarding right, wrong and how to treat others. They also imbued in me the importance of being a diligent worker in whatever endeavor I undertook. It is, therefore, not surprising that I approached the study and practice of law with a determination to do the very best job that I was capable of doing. In law, as in most other things, this requires an intense investment of time and effort. My inclination to work hard and to deliver the best representation possible for my clients was reinforced by professional mentors at my law firm, foremost among them being DeWitt Shy and Brook Lathram. Both of these men are perfectionists who taught me much about how to be a lawyer and to whom I am deeply indebted.

I have represented not only large corporations, but also individuals and owners of small businesses. I have seen first-hand how important, and even life-changing, lawsuits can be for the people involved. As a judge, I would be mindful of the effect my decisions would have on the lives of the litigants, and I would give each case the consideration it deserves.

I believe myself to be well-suited, both by personality and by experience, for the position I seek. Were I to be selected as a judge on the Circuit Court, I would, to the best of my ability, bring to that work the same dedication that I devoted to the practice of law.

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)***

Were I to be appointed as a circuit court judge, I would respect the will of the people, as expressed in the constitution and statutes that the people have enacted through the representative branches of the government, even though I may personally disagree with the wisdom of a particular law. I would not substitute my personal judgment with respect to the merits of an established rule of statutory or common law. I promise further that I would do what I believe the constitution and the law require, without regard to personal consequences.

One instance in which I followed a legal rule with which I disagreed arose in the middle of a products liability trial I was defending in federal court. The issue concerned the measure of damages to be used in determining the value of lost personal property, such as clothing or household furniture/items, which typically have little to no market value. I was uncertain if the attorney for the plaintiffs was aware of a line of cases in Tennessee holding that a loss of such property was to be evaluated according to a "personal value to the owner" standard, rather than the usual "market value" measure. The ethics rules require lawyers to bring adverse legal authority to the attention of opposing counsel and the court in the event that opposing counsel is unaware of such authority. Although I have never agreed with the premise underlying this rule, I told my client's insurance claims handler that I intended to bring these authorities to the attention of opposing counsel on the morning of the second day of trial. I was urged not to do so at that time. I, nevertheless, asked the plaintiff's attorney whether he was aware of those cases, which, as it turned out, he was.

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.	Mr. Cliff Hunt, President, Standard Construction Company, Inc.,
B.	Mrs. Natalie Berkley, Administrator, Parkway Health and Rehabilitation Center,
C.	Jef Feibelman, Esq., Member, Burch, Porter & Johnson, PLLC,
D.	J. Brook Lathram, Esq., Member, Bass, Berry & Sims PLC,

E. Todd A. Rose, 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 Circuit 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: November 24, 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.

Stephen D. Crawley

Type or Print Name

Stephen D. Crawley

Signature

November 24, 2015

Date

011454

BPR #

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

ATTACHMENT A

IN THE SUPREME COURT FOR THE STATE
OF TENNESSEE

JERALD FARMER, individually
and as surviving spouse for the
wrongful death beneficiaries
of MARIE FARMER, deceased,

Plaintiff-Appellee,

vs.

SOUTH PARKWAY ASSOCIATES, L.P.,
d/b/a Parkway Health and Rehabilitation
Center,

Defendant-Appellant.

Case No._____

Court of Appeals Case No.
W2012-02322-COA-R3-CV

Shelby County Circuit Court
Case No. CT-000593-11

**APPLICATION FOR PERMISSION TO APPEAL
TO THE TENNESSEE SUPREME COURT PURSUANT
TO TENNESSEE RULE OF APPELATE PROCEDURE 11**

Stephen D. Crawley (No. 11454)
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Memphis, Tennessee 38103
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Attorney for Defendant-Appellant

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Defendant-Appellant, South Parkway Associates, L.P. ("Parkway"), pursuant to Rule 11 of the Tennessee Rules of Appellate Procedure, hereby applies to the Tennessee Supreme Court for appeal by permission from the final decision of the Court of Appeals for the Western Section of Tennessee. In support of this application, Parkway states as follows:

DATE OF JUDGMENT

On September 25, 2013, the Court of Appeals for the Western Section of Tennessee entered its opinion and judgment in this action. Parkway served a Petition for Rehearing or, in the Alternative, Motion for Clarification, on October 4, 2013. The sole purpose of said Petition was to modify a sentence on page 2 of the opinion by adding the word "allegedly." The Court of Appeals entered its modified opinion and order on November 8, 2013.

QUESTIONS PRESENTED FOR REVIEW

This application presents the following questions for review:

1. Is implied actual authority insufficient, as a matter of law, to enable an agent to execute an arbitration agreement in connection with healthcare services?
2. Is an agent who has implied actual authority to make healthcare decisions on behalf of her principal able to validly execute an optional arbitration agreement that will bind the principal?
3. Did the Court of Appeals err in holding that the arbitration agreement that Marie Farmer's sister executed on Farmer's behalf was unenforceable because Farmer was unaware that her sister would be executing an arbitration agreement?
4. With respect to apparent authority, is the type of conduct required of the principal that leads a third party to believe that the agent is authorized to act for the principal

qualitatively different when the subject of the agency concerns healthcare issues than is the case where the agency concerns other subjects?

5. Did the Court of Appeals err in holding as a matter of law that a principal's acts of omission with respect to a third party are insufficient to create an agency based on apparent authority with respect to the execution of a nursing home arbitration agreement?

6. Did the Court of Appeals err in holding that Farmer's leaving the meeting with her sister and Parkway's admissions coordinator after learning that admissions documents would be signed at that meeting, and permitting her sister to complete the meeting and sign the documents, was insufficient to create a reasonable belief in the admissions coordinator that Farmer intended for her sister to act on her behalf in executing the admissions documents?

STANDARD OF REVIEW

The standard of review of all issues, both legal and factual, is de novo with no presumption of correctness attaching to either. Review of a decision regarding enforcement of an arbitration agreement is de novo. *Rosenberg v. BlueCross BlueShield of Tenn., Inc.*, 219 S.W.3d 892, 903 (Tenn. Ct. App. 2006). Legal conclusions are reviewed de novo without a presumption of correctness. *Parks Props. v. Maury Cnty.*, 70 S.W.3d 735, 741 (Tenn. Ct. App. 2001), as are conclusions applying the law to the facts. *Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn. 2000).

Whether an agency relationship exists is a question of fact under the circumstances of the particular case. *McCay v. Mitchell*, 62 Tenn. App. 424, 463 S.W.2d 710, 715 (1970). Where the trial court heard no live testimony and, instead, based its findings on depositions or other documentary proof, an appellate court need not afford any deference to the trial court's

assessment of witness credibility and may make its own independent assessment of the credibility of the documentary proof, since it is in just as good a position as the trial court to judge the credibility of the witnesses who provided the proof. *Wells v. Tenn. Bd. of Regents*, 9 S.W.3d 779, 783-84 (Tenn. 1999); *Mid-Century Ins. Co. v. Williams*, 174 S.W.3d 230, 236 (Tenn. Ct. App. 2005).

STATEMENT OF RELEVANT FACTS

Parkway submits that the facts set forth in the opinion of the Court of Appeals are accurately stated. For the Court's convenience, Parkway reproduces below the testimony of Angelica Massey, who is the sister of Marie Farmer, regarding Massey's actions on Farmer's behalf regarding admissions to hospitals and to Parkway. Consistent with prior practice at other facilities, Massey signed paperwork in order to have her sister admitted to Parkway. Massey testified regarding one of these documents, the Admission Agreement Acknowledgement form, as follows:

> Q. And why did you sign her name there on that line?
>
> A. Because I was, like I said, before—prior to then I was always signing her paperwork for her. She was never in the office. She was never consulted for anything. I mean, it was always I. She never signed anything. She was never asked anything, so it was always me.
>
> Q. You are saying it was always you?
>
> A. It was always I, I meant to say.
>
> Q. You are not talking about just at Parkway. You are talking about other hospitals, health care facilities?
>
> A. Yes. Nine times out of ten I did the signing.

(*Id.*, p. 68:10-24; R. Vol. 9, Ex. 4 to Massey Dep.)

Massey also testified as follows:

Q. Do you recall Ms. Kuykindall saying anything to you about your signing Marie Farmer's name to this document?

A. As far as?

Q. Just anything about, you know, why are you signing her name; or no, you don't need to sign her name or anything like that?

A. I don't recall anything. I just, like I said, I was just always just signing her name to everything, you know. I can't recall if she said anything to the fact or not. She might have. She might have not. I can't say that she – I can't recall it.

Q. Did you tell Ms. Kuykindall anything about you were authorized to act on behalf of your sister?

A. The only thing that I could have told her is that I just signed her paperwork; and if anything was to do with her as far as her admissions or anything like that, that I was the person to call to go, to see.

Q. You believe that you would have told her that?

A. Yes, sir.

Q. And is that what you have told, in substance, other people at other health care facilities when you are signing documents?

A. I would tell them that I would be the person that they would have to go to see.

Q. All right. And did you ever tell your sister that you were signing documents on her behalf?

A. No, sir, I didn't. No, sir. I'm pretty sure she knew. But as far as me conversating it or voicing it, I signed these papers, I signed this or arbitration or something like that is concerned, I signed your admission papers or something never was voiced.

It was never something that I brought up to her because, like I said, she was in a state of – her health was extremely bad, and anything that I – I didn't bring up as far as her health was concerned, as far as finances were concerned, as far as paperwork was concerned, I never discussed with her. And nor did she ever ask me anything about did you sign anything or never, never.

Q. Okay. I understand.

A moment ago you said that you were pretty sure that she knew that you were signing documents for her.

Do you recall that?

MR. GEE: Object to form.

A. Yes.

MR. GEE: Go ahead.

BY MR. CRAWLEY:

Q. Do you recall your testimony from a moment ago that you were pretty sure that Ms. Farmer knew that you were signing documents for her?

A. Yes. And the reason being is that you would have to sign papers. You know, there are [sic] certain paperwork that you would have to do for you to be admitted to anyplace or anything like that. So I would say that I'm pretty sure that she knew. Anything that was dealing with her, she knew that my sister had it, you know.

Q. That you were taking care of it?

A. Exactly.

Q. And she never voiced any objections to you as far as doing that; correct?

A. No, sir. She never has.

MR. GEE: Object to the form.

"Her" being Kuykindall, or "her" being Ms. Farmer?

MR. CRAWLEY: Ms. Kuykindall.

THE WITNESS: That is what I understood.

BY MR. CRAWLEY:

Q. Your sister never voiced any objections to you handling her affairs.

A. No, sir.

MR. GEE: Object to the form.

BY MR. CRAWLEY:

Q. And Ms. Farmer, your sister, never voiced any objections to you signing papers on her behalf; correct?

MR. GEE: Object to the form.

A. No, nor did she ever agree. It was nothing we ever conversated.

BY MR. CRAWLEY:

Q. I understand it never came up.

A. It never came up.

Q. But you believe she would have known you were signing papers for her to get her admitted to the hospitals?

A. As far as anything is concerned—as far as anything, I mean papers, anything—she would know that I would take care of it.

Q. And Ms. Farmer never voiced any objection to that to you?

MR. GEE: Object to the form.

A. No, sir.

(R. Vol. 5, pp. 69:7-73:5.)

The trial court conducted an evidentiary hearing on May 31, 2012, during which it heard arguments of counsel, the trial court having previously read the depositions of Kuykindall and Massey. (R. Vol. 4, pp. 91:13-24.)[1] At the conclusion of the hearing, the trial court ruled that Parkway had not carried its burden of proving that a valid and enforceable arbitration agreement existed between Parkway and Mrs. Farmer. The trial court reserved ruling on the issue of whether the terms of the Arbitration Agreement were sufficient to bind Mrs. Farmer. (*Id.*, pp. 92:9-12, 100:11-102:7.) The trial court entered an order on September 10, 2012 setting forth its ruling on all issues. (R. Vol. 3, pp. 269-71.) The trial court ruled that Marie Farmer was not a party to the Resident and Healthcare Center Arbitration Agreement, which was signed by Angelica Massey and Rose Kuykindall, the admissions coordinator for Parkway. (Id.)

The Court of Appeals affirmed the trial court's finding that Massey lacked either implied actual authority or apparent authority to sign the arbitration agreement on Farmer's behalf. (Appendix A at 9-10, 12.) Because of this ruling, the Court of Appeals did not decide the issue of whether the terms of the arbitration agreement applied to Farmer. (Appendix A at 12.)

[1] Rather than presenting testimony from witnesses in person in open court, the parties subsequently agreed to submit the testimony of these witnesses to the trial court via their depositions. (R. Vol. 3, p. 265, p. 265.)

REASONS SUPPORTING REVIEW

I. THIS CASE PRESENTS THE NEED TO SECURE UNIFORMITY OF DECISION, TO SECURE SETTLEMENT OF IMPORTANT QUESTIONS OF LAW, AND TO SECURE SETTLEMENT OF QUESTIONS OF PUBLIC INTEREST.

Parkway submits that this Court should grant permission to appeal in this case in order to clarify whether implied actual authority is a sufficient basis on which an agent can make healthcare decisions for a principal. If so, then is such an agent also authorized to execute an arbitration agreement in the course of making those healthcare decisions? Finally, this Court should clarify whether an agency based on apparent authority is subject to a different test for its creation when the subject of the agency concerns healthcare decisions, as opposed to any other type of subject.

A. The Court Should Grant Review to Determine Whether Implied Actual Authority is Insufficient, as a Matter of Law, to Create an Agency in the Nursing Home Context.

The Court of Appeals may have ruled as it did, at least in part, because of the Court's belief that at least one court in Tennessee had held as a matter of law that an agent who has only implied actual authority to act for his principal cannot validly execute a nursing home arbitration agreement. At the beginning of its discussion of the implied actual authority issue, the Court of Appeals stated:

> At the outset, we note we have found no Tennessee court that has applied the implied actual authority principle in the context of agreements to arbitrate in the nursing home setting and the parties have not directed us to one. In fact, in the recent case, ***Blackmon v. LP Pigeon Forge, LLC***, this Court notably excluded implied authority as a basis for authority in this context, stating that "[a]n arbitration agreement signed by a family member, even a next of kin, without the express or apparent authority of the nursing home resident, is invalid." ***Blackmon***, 2011 WL 9031313, at *14 (citing ***Raiteri v. NHC Healthcare/Knoxville, Inc.***, No. E2003-00068-COA-R9-CV, 2003 WL 23094413 (Tenn. Ct. App. Dec. 30, 2003)).

(Appendix A at 9, quoting *Blackmon v. L P Pigeon Forge, LLC,* No. E2010-01359-COA-R3-CV, 2011 WL 9031313 Tenn. Ct. App. Aug. 25, 2011).

Parkway submits that the *Blackmon* court did not intend, by the above-quoted statement, to exclude implied actual authority as a sufficient basis by which an agent could execute of an arbitration agreement for a nursing home resident. To the extent the Court of Appeals in the instant case so interpreted *Blackmon*, Parkway submits that the Court of Appeals read *Blackmon* too broadly, as will be demonstrated below.

Blackmon involved a 78 year old woman who was admitted to a nursing home following a hospitalization. Before her hospitalization, the woman had been living at home by herself and had been handling her own affairs without assistance, including managing her financial matters, providing her own transportation and preparing her own meals. Id. at *1. The details of how the admissions documents were signed were conflicting in some respects, but the court found that the nursing home had asked the woman's son to sign the admissions documents, which included an arbitration agreement, even though the son had made no representations about his authority to act for his mother. Id. at *1-2. While the mother had executed a power of attorney in 1991, giving her son the authority to act on her behalf in connection with the distribution of estate properties, the trial court held that the power of attorney had lapsed because its purpose had long since been fulfilled and because the power of attorney had not been used for over a decade. Id. at **6-7.

The issue on appeal was whether the trial court erred in finding that the son lacked express actual authority to sign the arbitration agreement as his mother's attorney-in-fact. Id. at *11. The court of appeals affirmed the trial court, holding that the 1991 power of attorney had lapsed. Id. at *16. The court also found, in a section of the opinion entitled "Actions of

Mother," that the mother had taken no actions to clothe her son with authority to act as her agent with respect to her admission to the nursing home, the court stating that there was no evidence that the mother took any action "that cloaked Son with either express or apparent authority to act on her behalf in executing the admission documents, including the arbitration agreement." Id. at *17. The court then, in a section of the opinion entitled "Actual or Apparent Authority of Son," noted that the son never held himself out as his mother's attorney-in-fact, never indicated that he held a power of attorney authorizing him to act on her behalf, never exercised any of the powers granted under the 1991 power of attorney document, and never handled any of his mother's personal or financial affairs. The court then affirmed the trial court's denial of defendants' motion to compel. Id. at *19.

Blackmon thus discussed only express actual authority and apparent authority, and never discussed the concept of implied actual authority, in reaching its conclusion. Courts frequently use the term "express authority" synonymously with "actual authority" and that is what the *Blackmon* court, which elsewhere in its opinion also used the term "actual authority," did here. *Blackmon*'s statement, which the Court of Appeals in the instant case quoted, to the effect that express authority or apparent authority must exist before an agent will be capable of executing an arbitration agreement regarding a nursing home resident, cannot reasonably be understood to mean that the *Blackmon* court intended thereby to exclude implied authority, which is a type of actual authority, as a basis on which an agent could validly execute a nursing home arbitration agreement. If that is what the *Blackmon* court intended, it would surely have said so, especially since it had otherwise failed to mention implied authority. This is especially so given the authority that *Blackmon* cites in support of its assertion, *Raiteri v. NHC Healthcare/Knoxville,*

Inc., No. E2003-00068-COA-R9-CV, 2003 WL 23094413 (Tenn. Ct. App. Dec. 30, 2003). *See Blackmon* at *14.

Raiteri involved a husband who had signed his competent wife into a nursing home without any express authority from her to do so. Implied authority was never discussed in the opinion, and there was no evidence before the court of the husband having had a history of making or signing documents for his wife. Accordingly, the *Raiteri* court found there was neither express nor apparent authority for the husband's agency for his wife. *Raiteri* at *13. The court did not, either explicitly or by implication, disapprove implied actual authority as a basis for an agency concerned with nursing home admissions. The subject of implied actual authority simply was not addressed. *Raiteri* thus does not stand for the proposition for which the Court of Appeals below cited *Blackmon.*

Furthermore, it would be incongruous for the *Blackmon* court to have accepted apparent authority – which applies only in the absence of actual authority—as a basis for an agency concerned with healthcare decisions, but to have rejected a form of actual authority – implied authority – as a basis for such an agency. *Thomas v. Pointer,* No. W2011-01595- COA-R3, 2012 WL 2499590 at *7 (Tenn. Ct. App. June 29, 2012)(apparent authority becomes an issue only in absence of actual authority).

B. The Court Should Grant Review to Decide Whether an Agent, who has Implied Actual Authority to Make Healthcare Decisions on Behalf of a Principal, May Also Execute an Arbitration Agreement when that Principal is Unaware that the Agent May so Act.

Tennessee has already decided that an agent who is authorized to make healthcare decisions for his principal is authorized to execute arbitration agreements in connection with those healthcare decisions. This is so even though there is no evidence that the principal, at the

time he granted the authority, contemplated that the agent would execute an arbitration agreement or that the principal even knew what arbitration was. Parkway submits that the Court of Appeals erred in not extending this principle to the facts of this case.

In *Owens v. Nat'l Health Corp.*, 263 S.W.3d 876, 884-85 (Tenn. 2007), this Court held that an agent, who had express actual authority to make healthcare decisions for a principal, also had the authority to execute an arbitration agreement applicable to disputes that may arise between the principal and her healthcare providers. In *Owens*, the principal executed a durable power of attorney for healthcare appointing a Ms. Daniel as her attorney-in-fact. Three weeks later, Ms. Daniel admitted the principal to a nursing facility and executed the facility's admission contract, which included an arbitration agreement. *Owens*, 263 S.W.3d at 879-881. Thereafter, the conservator for the principal filed a lawsuit on the principal's behalf against the entities associated with the nursing home, seeking damages for personal injuries the principal allegedly sustained while a resident at the nursing home. Id. at 881. The conservator argued, in opposing the defendants' motion to compel arbitration, that the attorney-in-fact lacked authority to bind the principal to an arbitration agreement because such was a "legal decision" and was thus outside the scope of the durable power of attorney, which authorized the attorney-in-fact to make only "health care decisions" for the principal. Id. at 883-84.

After analyzing both the wording of the power of attorney and the provisions of Tenn. Code Ann. § 34-6-201 et seq., this Court held that because the statute authorized an attorney-in-fact to make healthcare decisions for the principal to the same extent as the principal could have done herself, the attorney-in-fact was authorized to execute the arbitration agreement on behalf of the principal. Id. at 884. This Court also noted its disagreement with the distinction that the conservator made between a legal decision and a healthcare decision, stating:

> The plaintiff's argument on this issue is faulty in at least one other respect. Her purported distinction between making a legal decision and a health care decision fails to appreciate that signing a contract for health care services, even one without an arbitration provision, is itself a "legal decision." The implication of the plaintiff's argument is that the attorney-in-fact may make one "legal decision," contracting for health care services for the principal, but not another, agreeing in the contract to binding arbitration. That result would be untenable. Each provision of a contract signed by an attorney-in-fact could be subject to question as to whether the provision constitutes an authorized "health care decision" or an unauthorized "legal decision." Holding that an attorney-in-fact can make some "legal decisions" but not others would introduce an element of uncertainty into health care contracts signed by an attorney-in-fact that likely would have negative effects on their principals. Such a holding could make it more difficult to obtain health care services for the principal. And in some cases, an attorney-in-fact's apparent lack of authority to sign an arbitration agreement on behalf of the principal presumably could result in the principal being unable to obtain needed health care services. For example, a mentally incapacitated principal could be caught in "legal limbo." The principal would not have the capacity to enter into a contract, and the attorney-in-fact would not be authorized to do so. Such a result would defeat the very purpose of a durable power of attorney for health care.

Id. at 884-85.

The Court of Appeals for the Eastern Section, in *Necessary v. Life Care Ctrs. of Am., Inc.*, No. E2006-00453-COA-R3-CV, 2007 WL 3446636 (Tenn. Ct. App. Nov. 16, 2007), followed *Owens* when it held that a wife, who had oral express authority to sign admissions documents and to make healthcare decisions for her husband, also had the authority to sign a voluntary arbitration agreement in connection with her husband's admission to a nursing home. Id. at *5. In that case the husband, who was mentally competent and was able to read and write, had given his wife authority to sign admitting documents so that he could get treatment at a nursing home. Id. at *3. The wife never asked for, nor received, her husband's authority to waive his right to a jury trial or to submit his claims to arbitration. Id. Furthermore, the nursing

home personnel never asked the husband to sign the arbitration agreement himself and never asked the wife to explain the document to her husband. Id. The wife never told her husband about the arbitration agreement, and the husband never saw the agreement. Id. Additionally, the nursing home's representative had a sufficient understanding to have been able to have asked the wife about her authority and whether a power of attorney or a guardianship existed. Id.

The court, while noting that no written power of attorney was involved, nevertheless applied the rationale of *Owens* to hold that the wife had the authority to execute the voluntary arbitration agreement. The court stated:

> Plaintiff essentially argues that she had express authority from Decedent, who was competent to give her that authority, to sign all of the admission documents and make all of the decisions regarding his admission to Life Care's facility – except one: she did not have his authority to sign an arbitration agreement, even though he did not withhold such authority. Such a conclusion would result in the type of "untenable" situation described in *Owens, supra.* Therefore, we hold that Plaintiff, who had the Decedent's express authority to sign the admission documents at the healthcare facility, also had the authority to sign the arbitration agreement on the Decedent's behalf as one of those admission documents.

Id. at *5.

This was so even though there nothing to indicate that the principal had any familiarity whatsoever with the concept of arbitration, let alone knew that his wife might execute an arbitration agreement that would waive his right to a jury trial. Nevertheless, and even though the arbitration agreement *was not a requirement for entry into the nursing home*, the court of appeals upheld the authority of the agent to bind her principal to the arbitration agreement.

The Court of Appeals in the instant case stated that it need not address whether the principles set forth in *Owens* and *Necessary* could be applied to the situation before it, which involves an optional arbitration agreement where the principal did not give the agent an express declaration of authority. (Appendix A at 9, footnote 2.) The Court of Appeals, however,

effectively *did decide* this issue when the Court declined to extend the reasoning of *Necessary* to the facts of the present case. (Id., p. 10, footnote 4.) The Court of Appeals did so by holding that Farmer could not have objected to an optional arbitration agreement that she knew nothing about. The Court of Appeals stated:

> After carefully examining the record, we must find the fact that Farmer never challenged Massey's pattern of routinely signing admission documents on her behalf is not controlling as to the arbitration agreement in question because Farmer could not object to an optional arbitration document she knew nothing about. Farmer may have suspected that Massey would sign the necessary admission documents at Parkway, but the optional arbitration agreement was not a necessary admission document. Even if we were to credit Kuykindall's version of events, Kuykindall clearly testified that nothing about the arbitration agreement was ever discussed in Farmer's presence, Farmer was not in the room when the arbitration agreement was actually explained or signed, and the record does not reflect that Farmer had any knowledge about an arbitration agreement whatsoever either before or after its execution. Parkway has not demonstrated that Farmer impliedly gave authority to Massey to sign a document that she knew nothing about; especially one that her admission to the facility was not dependent upon and was clearly an optional waiver of Farmer's constitutional rights.

Appendix A at 9, 10.

Parkway submits that the Court of Appeals, by focusing on whether Farmer knew of and intended to authorize her sister to execute an *arbitration agreement*, erred by framing the issue too narrowly. Under *Owens* and *Necessary*, the proper characterization of the issue should have been whether Farmer intended to authorize her sister to make *healthcare decisions*, including executing admissions documents to healthcare facilities, on her behalf. If so, then there exists no reason under Tennessee law why that authorization should not extend to the execution of an arbitration agreement for one of those healthcare facilities.

The type of authority an agent possesses has no effect on the powers of an agent. An agent whose authority is derived from either implied actual authority or apparent authority is just as able to bind his principal to an agreement as an agent whose authority was expressly granted,

so long as the agent acts within the scope of his authority. *Miliken Group, Inc. v. Hays Nissan*, Inc., 86 S.W.3d 564, 567 (Tenn. Ct. App. 2001); *Corbitt v. Federal Kemper Ins. Co.*, 594 S.W.2d 728, (Tenn. Ct. App. 1980) (apparent authority equal to real authority when third-party unaware of limitation on agent's authority); *Estate of Mooring v. Kindred Nursing Ctrs.*, et al., No.W2007-02875-COA-R3-CV, 2009 WL 130184 at *fn. 4 (Tenn. Ct. App. Jan. 20, 2009)(implied authority recognized as aspect of actual authority, citing Restatement (Third) of Agency § 2.01 cmt. b (2004)).

There is testimony in the record from Massey, Farmer's sister, to support a finding that Farmer had impliedly authorized her sister to act on her behalf with respect to healthcare decisions and hospital admissions, and the Court of Appeals did not find otherwise. In light of Massey's past actions on behalf of Farmer, to which Farmer never objected, the question becomes whether this implied authorization included the authority to execute an optional arbitration agreement.

While at first glance the Court of Appeals' rationale for its decision-- that Farmer could not have impliedly authorized her sister to execute a document that Farmer knew nothing about-- may seem to be supported by the notion of fairness, upon further examination of *Owens* and *Necessary*, it becomes apparent that this is not the case. The same issue of fairness was present in those cases, in neither of which was there any indication that the principal, at the time he created the agency, had any idea that the agent would waive the principal's right to a jury trial and obligate the principal to arbitrate any disputes that might arise with the nursing home. There was not even any evidence that the principal knew what arbitration was. Yet, the courts in each case held that the agent was empowered to execute the arbitration agreement at issue.

Parkway submits that there is no reason to limit the principles announced in *Owens* and *Necessary* only to those instances where the agency rests on express authority. An agent is an agent, whether the principal created the agency expressly, by oral or written words, or impliedly, by a course of conduct. *Bells Banking Co. v. Jackson Centre, Inc.*, 938 S.W.2d 421, 424 (Tenn. App. 1996); *Milliken Group* at 569-70. There should, therefore, be no difference in effect where the principal orally tells his relative to have her admitted to a healthcare facility and where the principal impliedly makes the same request by repeatedly allowing her sister to have her admitted into various healthcare facilities and to execute the paperwork associated with those admissions. Accordingly, Parkway asks this Court to grant permission to appeal the ruling of the Court of Appeals so that this area of the law may be clarified.

C. The Court Should Grant Review to Decide Whether the Principal's Conduct Towards a Third Party, which is Required to Create an Agency Based on Apparent Authority, is Qualitatively Different in the Context of Medical Services.

The Court of Appeals held that the fact that Famer met with Kuykindall for five minutes, and who then left Massey to sign what Farmer knew to be only admissions documents, was insufficient to show that Farmer "clothed Massey with the authority to sign an arbitration agreement." (Appendix A at 11). Again, the Court of Appeals defined the issue narrowly by speaking of the signing of an arbitration agreement, rather than the signing of admissions paperwork. The Court of Appeals cited *Wilson v. Americare Sys.*, No. M2008-00419-COA-R3-CV, 2009 WL 890870 (Tenn. Ct. App. Mar. 31, 2009) for its purported rule that there must be some "overt affirmation of agency" in order to prove apparent authority in the context of medical services. The Court of Appeals, therefore, did not believe that Farmer's leaving a meeting where she knew admissions paperwork—but not specifically an arbitration agreement--would be signed

"constitutes an overt affirmation to a third party that she authorized Massey to sign the arbitration agreement." (Appendix A at 11.)

Parkway submits that the Court of Appeals erred in holding that Parkway's admissions coordinator was not justified in believing that Farmer wanted her sister to act on her behalf in executing the Parkway admissions documents. All of the elements for an agency based on apparent authority are present, and the Court of Appeals should have found that such an agency existed, assuming that it believed the admissions coordinator's account of this meeting.

The Court of Appeals also erred in relying on *Wilson* and its supposed creation of an additional requirement—not heretofore recognized in Tennessee--for the creation of an apparent agency when the agency concerns medical services. *Wilson*, in so holding, misconstrued two other cases, *Raiteri* and *Thornton v. Allenbrooke Nursing & Rehab. Ctr.*, No. W2007-00950-COA-R3-CV, 2009 WL 890870 (Tenn. Ct. App. July 3, 2008).

It is the acts of the principal, not of the agent, that are necessary to create apparent authority. *Milliken Group,* 86 S.W.3d at 569. To create an agency based on apparent authority, the principal must have given a third-party some reason to believe that another person was authorized to act for the principal. Id. This belief may arise either by the principal's affirmative or passive conduct. *Dexter Ridge Shopping Ctr., LLC v. Little,* 358 S.W.3d 597, 609 (Tenn. Ct. App. 2010) (apparent authority created when person "by words or conduct represents or permits it to be represented" that another person is his agent); *Milliken Group,* 86 S.W.3d at 571 (by failing to communicate any limitations to either agent or third party with whom agent dealt and by acquiescing in agent's continued conduct, principal cloaked agent with apparent authority). This Court long ago stated:

> 'Apparent authority in an agent is such authority as the principal knowingly **permits** the agent to assume or which he holds the agent out as possessing; such

> authority as he appears to have by reason of the actual authority which he has; such authority as a reasonably prudent man, using diligence and discretion, in view of the principal's conduct, would naturally suppose the agent to possess. Ostensible authority is such authority as a principal intentionally **or by want of ordinary care** causes or **allows** a third person to believe the agent to possess, and in some jurisdictions it is so defined by statute. Ostensible authority to act as agent may be conferred if the principal affirmatively or intentionally, **or by lack of ordinary care**, causes or **allows** third persons to act on an apparent agency. It is essential to the application of the above general rule that two important facts be clearly established: (1) That the principal held the agent out to the public as possessing sufficient authority to embrace the particular act in question, **or knowingly permitted him** to act as having such authority; and (2) that the person dealing with the agent knew of the facts, and, acting in good faith, had reason to believe, and did believe, that the agent possessed the necessary authority.'

Southern Ry. Co. v. Pickle, 138 Tenn. 238, 245-6, 197 S.W. 675, 677 (1917), quoting 2 Corpus Juris pp. 574-75 (emphasis supplied).

That these acts may be either acts of commission or acts of omission was explicitly stated in *D.M. Rose & Co. v. Dysart*, 8 Tenn. App. 325, 1928 WL 2119 at *7 (1928). In that case, the court quoted with approval from a treatise that said:

> The authority of an agent of the assurer must depend, in a large measure, upon the authority which those dealing with him are justified from the acts or omissions of the principal in believing him to possess. The question is not so much, what powers did the agent actually possess—it is the agent's ostensible or apparent authority, which is the test of his actual powers in the absence of knowledge of limitations thereon on the part of persons dealing with such agent. . . .

Dysart, 1028 WL 2119 at *7.

The Court of Appeals, nevertheless, accepted at face value *Wilson's* characterization of *Raiteri* and *Thornton* as holding that apparent authority is inapplicable to authorize medical services absent "an overt affirmation of agency." This sounds as though *Wilson* requires conduct by the principal akin to his telling the third-party, "A is my agent." Neither *Raiteri* nor *Thornton* says this, and such a requirement would, in any event, have been inconsistent with Tennessee law, as Parkway has demonstrated.

Examination of *Raiteri* and *Thornton* shows that in neither case was the requirement satisfied that the principal, by some words or conduct towards a third party, led the third party to believe that the agent was authorized to act for the principal. In *Raiteri*, there simply was no evidence that the resident had ever done anything to lead the nursing home to think that her husband was authorized to act for her. The court there noted the absence of any exigent circumstances that might have given rise to an apparent agency; the resident was sharper mentally than her husband; and the resident would have been able to indicate whether she assented to the terms of the admission agreement. *Raitieri*, 2003 WL 23094413 at * 9.

In *Thornton*, the court discussed actual authority and apparent authority in the same paragraph and concluded:

> Regardless of the extent of the daughter's involvement in her mother's personal affairs, the nursing home simply cites no single action by the decedent where she indicated to the nursing home or to her daughter that her daughter was her agent for the purposes in question.

Thornton, 2008 WL 2687697 at *8.

This passage was merely the court's way of briefly dealing with the issue before it, i.e. the absence of any conduct by the principal toward a third party that would have led the third party to believe that the principal intended for her daughter to act as her agent. It was not intended to lay down a new rule of agency law, applicable only to medical services, imposing a higher standard of conduct by the principal in order to create an apparent agency. *Wilson* thus misconstrued the holdings of *Raiteri* and *Thornton*, and the Court of Appeals in the instant case perpetuated this error by taking *Wilson's* statement at face value.

The Court of Appeals also erred when it attempted to bolster this supposed "overt affirmation" requirement by distinguishing two out-of-state cases, *Perry v. Meredith*, 381 So.2d 649 (Ala. Civ. App. 1980) and *Broughsville v. OHECC, LLC* No. 05CA008672, 2005 WL

3483777 (Ohio Ct. App. Dec. 21, 2005), which held that apparent authority may be established by the agent's acts of omission as well as commission, by saying that *Barbee* "expressly . . . rejected this position." (See Appendix A at 12, footnote 5.) The Court of Appeals, however, was mistaken in its reading of *Barbee*. While *Barbee v. Kindred Healthcare Operating, Inc.*, No. W2007-00517-COA-R3-CV, 2008 WL 4615858 (Tenn. Ct. App. Oct. 20, 2008), did discuss both *Perry* and *Broughsville*, *Barbee* held that no apparent authority was present, not because of the "acts of commission vs. acts of omission" distinction, but because the resident/principal was non compos mentis at the time the acts occurred and therefore lacked the capacity to appoint anyone as her agent. *Barbee*, 2008 WL 4615858 at *9.

This Court should, therefore, grant permission to appeal so that the error in *Wilson*, which the Court of Appeals below perpetuated, and the Court of Appeals' own mistaken reading of *Barbee*, can be corrected and the law on these points clarified.

CONCLUSION

WHEREFORE, Parkway respectfully requests that this Court grant an appeal by permission from the final decision of the Court of Appeals for the Western Section of Tennessee in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 25th day of November 2013, served via U. S. Mail, postage prepaid, a true and correct copy of the above and foregoing on W. Bryan Smith, Esq., Morgan & Morgan, One Commerce Square, 40 S. Main Street, Suite 2600, Memphis, Tennessee 38103.

Stephen D. Crawley

ATTACHMENT B

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TABLE OF AUTHORITIES

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PREFACE

The cross defendant/appellee Hanson Pipe & Products South, Inc. respectfully submits this Brief in response to the Brief of the cross plaintiff/appellant Argo Construction Corporation. In this Brief, the cross plaintiff/appellant will be referred to as "Argo" and the cross defendant/appellee will be referred to as "Hanson."

As noted in Footnote 1 of Argo's Appellate Brief, the reverse sides of Hanson's bid and delivery tickets, which were attached as Exhibits A and B, respectively, to Hanson's Answer to Argo's Cross-Claim, were not copied by the trial court clerk and sent up with the record on appeal. The record has now been supplemented, and Volume 8 contains copies of the front and reverse sides of both the bid and the delivery tickets, which have been numbered for the Court's convenience.

ISSUES PRESENTED FOR REVIEW

1. Whether the Trial Court correctly held that the exclusive remedy provision in the Sales Contract Terms and Conditions precludes Argo's claim for indemnity against Hanson; or, alternatively,

2. Whether the Trial Court correctly held that the one-year limitations period set forth in the Sales Contract Terms and Conditions bars this action.

STATEMENT OF FACTS

Argo was the general contractor on a storm water drainage system project at the Baptist Memorial Hospital East Campus. (R. Vol. 1, p. 2). Hanson sold concrete arch pipe to Argo pursuant to a bid that Hanson submitted to Argo on August 12, 1998. (R. Vol. 2, p. 296). Argo orally accepted Hanson's bid. (R. Vol. 2, p. 296). The front page of the August 12, 1998 bid states, "THIS OFFER OF SALE IS CONDITIONED UPON BUYER'S ACCEPTANCE OF THE SALES CONTRACT TERMS AND CONDITIONS CONTAINED ON THE REVERSE SIDE HEREOF." (R. Vol. 8, p. 8a). The Sales Contract Terms and Conditions are found on the reverse side of the bid Hanson submitted to Argo. (R. Vol. 8, p. 8b).

Hanson thereafter performed under the contract by delivering concrete arch pipe to Argo, at the Baptist East job site, beginning on June 17, 1999 and ending August 4, 1999. (R. Vol. 2, pp. 298-99). Argo's representatives signed a Delivery Ticket for each load of pipe, the front of which stated "THIS CONTRACT IS SUBJECT TO THE SALES CONTRACT TERMS AND CONDITIONS CONTAINED ON BOTH SIDES OF THIS DELIVERY TICKET" and the back of which re-stated the identical Sales Contract Terms and Conditions that were on the reverse side of the bid documents. (R. Vol. 8, pp. 12b-48b). Argo paid Hanson in full for each of the thirty-eight loads of pipe that Hanson delivered. (R. Vol. 2, p. 299).

The Sales Contract Terms and Conditions included the following provisions regarding Argo's exclusive remedy and the period in which Argo could assert a claim against Hanson:

> **LIMITED ONE YEAR EXPRESS WARRANTY; DISCLAIMER OF OTHER WARRANTIES.** Seller warrants that the products will conform to any specifications expressly set forth in this Contract and otherwise will be free of defects in material and workmanship for a period of one (1) year after delivery. SELLER DISCLAIMS ALL OTHER EXPRESS, IMPLIED, OR STATUTORY WARRANTIES, INCLUDING WARRANTIES OF MERCHANTABILITY AND OF FITNESS FOR A PARTICULAR PURPOSE. Any promotional materials, technical brochures, designs, descriptions of products and their use, or

other documents provided by Seller, and any statements by Seller's salespersons and representatives, are for general information only, and shall not be considered warranties or part of this Contract. BUYER ACKNOWLEDGES THAT IT HAS NOT RELIED UPON SUCH INFORMATION BUT HAS SATISFIED ITSELF INDEPENDENTLY AS TO THE PRODUCTS' MERCHANTABILITY AND FITNESS FOR BUYER'S PARTICULAR PURPOSE.

. . . .

ONE YEAR TIME LIMIT ON CLAIMS; Venue; Attorney's Fees. Any claim or defense regarding this Contract shall be barred unless asserted by the commencement of any action or the raising of a defense within one year from the date the act or omission to which such claim or defense relates first occurs or arises. The parties consent to venue in the federal and state courts located in the COUNTY OF SHELBY, STATE OF TENNESSEE. If Seller must act to enforce this Contract, Seller shall be entitled to recover from Buyer all expenses (including attorney's fees) incurred.

(R. Vol. 8, p. 8b).

The buyer's duty to inspect goods is set forth in the following provision of the Sales Contract Terms and Conditions:

Buyer's Duty to Inspect. Buyer shall inspect the products immediately upon delivery and notify Seller of any defect in writing on the delivery receipt, or (where delivery is unattended) through written communication to Seller within five (5) business days following delivery, and in all events prior to use or installation of the products. Otherwise, the products shall be deemed to be in good order and condition, accepted by Buyer, and in conformity with this Contract.

(R. Vol. 8, p. 8b).

The Sales Contract Terms and Conditions also included an express provision requiring Argo to indemnify Hanson, but its terms did not impose the same obligation on Hanson in favor of Argo:

Indemnity. Buyer shall comply with applicable law and customary industry procedures, and shall hold harmless and indemnify Seller for defense costs (including attorney's fees) and liability incurred by Seller regarding claims for personal injuries (including death) and property damage arising from Buyer's storage, use, and handling of the products. Buyer shall indemnify Seller for

defense costs and liability incurred by Seller regarding any claims made concerning the specifications.

(R. Vol. 8, p. 8b).

The Sales Contract Terms and Conditions set forth the exclusive remedy for Argo, the buyer:

> **EXCLUSIVE REMEDY.** If any product sold fails to conform to Seller's limited warranty within one (1) year after delivery, upon prompt notice by Buyer and Seller's determination that the products have been stored, installed, and maintained in accordance with Seller's recommendations and standard industry practice, Seller shall remedy such nonconformity at Seller's option and expense either by returning a repaired product, delivering a replacement, or providing a full refund of the purchase price by credit or payment. THIS REMEDY HAS BEEN TAKEN INTO ACCOUNT IN ESTABLISHING THE PRICE UNDER THIS CONTRACT, AND IS INTENDED AS A MUTUALLY ACCEPTABLE ALLOCATION OF RISK BETWEEN BUYER AND SELLER. IT IS BUYER'S SOLE AND EXCLUSIVE REMEDY AGAINST SELLER FOR BREACH OF WARRANTY OR FOR OTHER CLAIMS REGARDING THE PRODUCTS, WHETHER ARISING IN CONTRACT, WARRANTY, TORT, STRICT LIABILITY, OR OTHERWISE.

(R. Vol. 8, p. 8b).

The Sales Contract Terms and Conditions also included a provision limiting Hanson's liability, which, consistent with the Exclusive Remedy provision, explicitly limited Hanson's liability to the purchase price paid by Argo:

> **LIMITATIONS OF LIABILITY.** SELLER, ITS OWNERS, DIRECTORS, OFFICERS, EMPLOYEES, AGENTS, SUCCESSORS, NOMINEES OR ASSIGNS SHALL NOT BE LIABLE FOR PUNITIVE DAMAGES, OR FOR INCIDENTAL, SPECIAL OR CONSEQUENTIAL DAMAGES (INCLUDING BUT NOT LIMITED TO LOSS OF PROFITS, LOSS OF USE, OR BUYER'S REMOVAL, RETURN/DISPOSAL, AND REINSTALLATION COSTS), REGARDLESS OF WHETHER SELLER IS AWARE OF THEIR POSSIBLE OCCURRENCE. IN NO EVENT SHALL THEIR LIABILITY EXCEED THE PURCHASE PRICE PAID.

(R. Vol. 8, p. 8b).

Also contained within the Sales Contract Terms and Conditions was a choice of law clause, which stated:

> **Governing Law.** The validity, interpretation, performance, and resolution of any dispute related to this Contract shall be governed by the law of the State of Tennessee (without regading [sic] to Conflicts of Laws provisions).

(R. Vol. 8, p. 8b).

Argo completed the storm water drainage system project in July of 2000. (R. Vol. 2, p. 299). Baptist began experiencing problems with the work in late August of 2001. (R. Vol. 2, p. 299). On August 27, 2002, over three years after Hanson delivered its last load of pipe to Argo, Baptist filed a complaint against both Argo and Hanson, as well as others, claiming that all were responsible for the settling problems, and resulting sinkholes, that Baptist was experiencing. (R. Vol. 1, p. 1).

Specifically, Baptist claimed that Agro was negligent in:

(a) providing and installing pipe which was not appropriate or adequate and which did not meet specifications provided by the defendant ETI;

(b) failing to adequately and properly inspect, test and install the pipe on the Project;

(c) failing to use proper and adequate quantity and quality of the bedding for the installation of the pipe on the Project;

(d) failing to properly position and seal the pipe joints;

(e) failing to exercise due care and skill in the performance of its duties as general contractor on the Project;

(f) misrepresenting that the pipe in question met the applicable requirements and specifications and that the pipe bedding used was adequate and appropriate for the project;

(g) failing to perform its duties as general contractor in accordance with applicable standards.

(R. Vol. 1, pp. 5-6).

Argo filed its cross-complaint seeking indemnity from Hanson on October 2, 2007, over eight years after Hanson delivered its last load of pipe to Argo. (R. Vol. 2, p. 223). In its cross-complaint, Argo sought indemnity from Hanson for whatever amounts may be awarded against Argo in Baptist's action against Argo and for the attorney's fees that Argo has incurred in defending against Baptist's claims. (R. Vol. 2, p. 230).

Argo is not claiming that the exclusive remedy found in the Sales Contract Terms and Conditions was unconscionable. (R. Vol. 5, p.20).

ARGUMENT

I. The Trial Court Correctly Held That the Exclusive Remedy Provision in the Sales Contract Terms and Conditions Precludes Argo's Claim for Indemnity Against Hanson.

A. The parties have agreed that Tennessee law governs Argo's putative claim against Hanson.

Hanson's sale to Argo of the pipe at issue, out of which sale Argo's indemnity claim arises, is a transaction in goods and is, therefore, governed by the Uniform Commercial Code. Trinity Industries, Inc. v. McKinnon Industries Bridge Co., 77 S.W.3d 159, 172-74 (Tenn. Ct. App. 2001). The Uniform Commercial Code permits parties to a transaction to choose the law of the state that is to govern the contract in question. Tenn. Code Ann. § 47-1-105(1) (2001). Argo and Hanson exercised this right and agreed that Tennessee substantive law would govern the resolution of any dispute that relates to the Sales Contract, which provides:

> **Governing Law**. The validity, interpretation, performance, and resolution of any dispute related to this Contract shall be governed by the law of the State of Tennessee (without regard to conflicts of laws provisions).

(R. Vol. 8, p. 8b). Therefore, however instructive the law of other jurisdictions may be on the various issues Argo raises in this appeal, where the courts of Tennessee have addressed a particular issue, this Court is bound to apply Tennessee law to resolve that issue.

B. Tennessee law permits parties to a contract to allocate risks among themselves as they see fit, and courts are to interpret those contracts as written.

In Tennessee, the parties to a contract for the sale of goods are free to allocate the risks between themselves. Trinity Industries, Inc., 77 S.W.3d at 174. Contracting parties' rights and obligations should be governed by their written contract. Marshall v. Jackson & Jones Oils, Inc., 20 S.W.3d 678, 681 (Tenn. Ct. App. 1999). Courts must construe contracts as written, Bob Pearsall Motors, Inc. v. Regal Chrysler-Plymouth, Inc., 521 S.W.2d 578, 580 (Tenn. 1975), and are not at liberty to make a new contract for parties who have spoken for themselves. Petty v.

Sloan, 197 Tenn. 630, 640 (1955). Courts therefore are not to concern themselves with the wisdom or folly of a contract, Brooks v. Networks of Chattanooga, Inc., 946 S.W.2d 321, 324 (Tenn. Ct. App. 1996), and will not relieve parties from contractual obligations simply because they later prove to be burdensome or unwise, Atkins v. Kirkpatrick, 823 S.W.2d 547, 553 (Tenn. Ct. App. 1991).

C. Argo and Hanson agreed that the Sales Contract Terms and Conditions would govern any claim regarding the concrete arch pipe in question, including the claim for implied indemnity that Argo is attempting to assert.

Under Tenn. Code Ann. § 47-2-719, parties to a contract for the sale of goods are free to allocate the risks between themselves by modifying or limiting the available remedies. Trinity Inds., Inc., 77 S.W.3d at 174. That statute provides:

> **47-2-719. Contractual modification or limitation of remedy. -(1)** Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages:
>
> (a) the agreement may provide for remedies in addition to or in substitution for those provided in this chapter and may limit or alter the measure of damages recoverable under this chapter, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts; and
>
> (b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.
>
> (2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in chapters 1-9 of this title.
>
> (3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

Tenn. Code Ann. § 47-2-719.

Argo and Hanson agreed to limit the buyer's remedy to repair, replacement, or full refund of the purchase price of the pipe, and they expressly agreed that this would be Argo's exclusive remedy for any claim relating to the pipe, regardless of the legal theory upon which such a claim might be based. The pertinent language of the exclusive remedy states that it: ". . . IS

BUYER'S SOLE AND EXCLUSIVE REMEDY AGAINST SELLER FOR BREACH OF WARRANTY OR FOR OTHER CLAIMS REGARDING THE PRODUCTS, WHETHER ARISING IN CONTRACT, WARRANTY, TORT, STRICT LIABILITY, OR OTHERWISE." (R. Vol. 8, p.8b). This "OTHER CLAIMS/OR OTHERWISE" language thus covers all claims that may arise regarding the pipe, including Argo's purported claim for implied indemnity.

Argo, however, now asks this Court to ignore the limitation of remedies language in the Sales Contract to which Argo agreed, claiming that "Argo is entitled to indemnity despite the limitation of remedies language in the Sales Contract drafted by Hanson."[1] (Appellant's Brief at 21). Argo never addresses the effect of the "OTHER CLAMS/OR OTHERWISE" language of the limited remedy. Instead, Argo essentially contends that the parties to a contract for the purchase of goods cannot agree, i.e. that they are legally incapable of agreeing, that the buyer may give up his right to seek indemnity should the goods he bought be defective. Argo does not make this argument explicitly, but this is the position that Argo is ultimately asking this Court to embrace. Argo cites no authority for the argument that an implied right to indemnity cannot be disclaimed, for there is none. Tennessee law, as shown by the authorities cited supra, provides that parties are free to contract as they see fit.

The case of Northland Ins. Co. v. State of Tennessee, 33 S.W.3d 727 (Tenn. 2000), on which Argo places so much reliance, does not support Argo's argument that an action for indemnity arising out of a breach of warranty is not governed by the terms of the contract out of which the warranty arose. Northland involved an attempt by an insurer, who had settled a

[1] Argo is correct that the Sales Contract Terms and Conditions were drafted by Hanson. Argo fails to mention, however, that Hanson provided these Sales Contract Terms and Conditions to Argo when Hanson presented its bid to Argo on August 12, 1998 and each time Hanson delivered the thirty-eight loads of pipe between June 17, 1999 and August 4, 1999. (R. Vol. 2, p. 233). The front page of the August 12, 1998 bid states, "THIS OFFER OF SALE IS CONDITIONED UPON BUYER'S ACCEPTANCE OF THE SALES CONTRACT TERMS AND CONDITIONS CONTAINED ON THE REVERSE SIDE HEREOF." (R. Vol. 8, p. 8a). Argo paid Hanson in full for the pipe and other materials that Hanson supplied to Argo for the Baptist project. (R. Vol. 2, p. 233). Argo does not dispute that Argo agreed to these terms, nor does Argo claim that it ever objected to these terms.

wrongful death lawsuit against its insured, to obtain contribution or indemnity from the state, whose employee's actions allegedly contributed to the traffic accident that resulted in the death. The supreme court held that the action could not be maintained because there was no statutory waiver of sovereign immunity for indemnity or contribution claims. The court held that such claims were distinct from actions for monetary claims due to acts or omissions of state employees that create a dangerous condition on state-maintained highways, for which immunity had been waived. No contract for the sale of goods or for breach of warranty was involved in Northland, and the court, therefore, never addressed whether parties to a contract could agree on the remedies that would be available for breach of that contract.

A right to implied indemnity, as with any other right, may be disclaimed or waived. Argo did exactly that when it accepted the Terms and Conditions, including the "OTHER CLAIMS/OR OTHERWISE" language contained therein.

Additionally, Argo's argument that a claim for indemnity is outside of the terms of the parties' contract, and thus is not affected by the terms of the contract, would be incorrect even if the Terms and Conditions governing this transaction did not contain the "OTHER CLAIMS/OR OTHERWISE" language, as a Tennessee court of appeals has made clear. So long as the given remedy states that it is the exclusive remedy, all other remedies are excluded.

The trial court below held, in reliance upon Hardimon v. Cullum & Maxey Camping Centers, Inc., 591 S.W.2d 771 (Tenn. Ct. App. 1979), that because Hanson and Argo did not include a right to indemnity among the remedies available to Argo, Argo is precluded from bringing a claim against Hanson for implied indemnity. (R. Vol. 4, p. 498). In Hardimon, a manufacturer of a defective motor home sold it to a distributor subject to a sales agreement that set forth the sole remedy that the distributor would have against the manufacturer in the event the

motor home contained any manufacturing defects. The distributor later sold the motor home to a third-party, who successfully sued the distributor for rescission of the sale due to the distributor's inability to correct manufacturing defects in the motor home. After refunding the sales price to its customer, the distributor proceeded with a claim for implied indemnity against the manufacturer.

The trial court in Hardimon, in ruling against the distributor, noted that the "central issue" in the litigation was whether the loss caused by the sale of the defective motor home should fall on the distributor, who sold the motor home to the plaintiff, or on the manufacturer. Id. at 774. In deciding that the manufacturer bore no liability for the loss, the trial court reviewed the "dealer agreement," which the trial court held governed the relationship between the parties. Id. The agreement stated that the only warranty the manufacturer gave to the dealer was an express written warranty that set forth the manufacturer's duty in the event it manufactured and sold a defective motor home, which duty was to reimburse the distributor for the cost the distributor incurred in performing warranty work. Id.

The appellant/distributor argued on appeal that the trial court erred in dismissing the distributor's indemnity claim against the manufacturer for the manufacturing defects that existed in the motor home. Id. at 776. The court of appeals, however, affirmed the trial court stating:

> As previously discussed, appellant's rights against [the manufacturer] were completely spelled out in their contract (i.e. appellant repair at [the manufacturer's] expense). Therefore, there can be no other remedy under the contract. T.C.A. Sec. 47-2-719(1)(a).

Id.

In discussing the indemnity issue, the court of appeals distinguished the case of Houseboating Corp. of America v. Marshall, 553 S.W.2d 588 (Tenn. 1977), which had recognized that a seller of a defective product had an implied right of indemnity against the

manufacturer who was responsible for the defects in the product. The Hardimon court noted, however, that: "that case did not involve the contractual agreement between the manufacturer and dealer, which is involved in this case. In the present case, the form and the extent of indemnity was agreed upon, i.e., reimbursement of expenses of repair." Hardimon, 591 S.W.2d at 777.

Argo attempts to distinguish the Hardimon case by claiming that it did not deal with a claim for implied indemnity, such as Argo is attempting to assert here. (Appellant's Brief at 23). Argo is mistaken. The Hardimon opinion never mentions any express indemnity agreement and, in fact, makes clear that the agreement between the distributor and the manufacturer was silent on the subject of indemnity. Therefore, the only type of indemnity the court could have been considering would have been implied indemnity. Further evidence that the distributor in Hardimon was making a claim for implied, rather than express, indemnity is that the distributor relied on the Houseboating Corp. of America case, in which the Tennessee Supreme Court discussed principles of implied indemnity, such as that the right to indemnity is based on the principle that everyone is responsible for the consequences of his own wrong and that one is liable to indemnify another who has been compelled to pay damages that the former should have paid. Houseboating Corp. of America, 553 S.W.2d at 589. The supreme court also observed that indemnity obligations may be express or may arise by implication from the relationship of the parties. Id. The supreme court, without any mention of any contractual terms that may have existed between the dealer and the manufacturer, held that the dealer's claim could be sustained as a claim for indemnity and thus affirmed the judgment in the dealer's favor against the

manufacturer. Id. at 590.[2] Houseboating Corp. of America thus involved a claim for implied indemnity.

The Hardimon court's analysis of the Houseboating Corp. of America case shows that the Hardimon court was fully aware of the principles concerning implied indemnity. The Hardimon court nevertheless concluded that the distributor in the case before it had no such claim because its rights as against the manufacturer were governed by the terms of the written agreement. Hardimon, 591 S.W.2d at 777.

The instant case, by virtue of the written Sales Contract between Argo and Hanson, is closer factually to Hardimon than it is to Houseboating Corp. of America. The Sales Contract at issue here spells out the rights Argo and Hanson have as to each other and provides the exclusive remedy available to Argo. Since the remedy of indemnity is not mentioned in the contract, it is not available to Argo.

The cases from foreign jurisdictions that Argo cites do not help it on this point. The fact that cases from Arizona, Arkansas, Alabama, and Texas may hold that a limitation of remedies clause does not preclude an indemnity claim does not change the fact that the Tennessee Court of Appeals reached a contrary result in Hardimon when it held that an exclusive remedy provision necessarily excludes any remedy not mentioned therein, including an indemnity claim. Hardimon, 591 S.W.2d at 776. Because Tennessee law governs this dispute, it is the Hardimon case that supplies the rule of decision on this point.

The holding in Hardimon also disposes of Argo's argument that the remedy of implied indemnity cannot be disclaimed unless it is specifically set forth by name. Although Argo cites a case from Texas that seems to so hold (Appellant's Brief at 22), this is not the law in Tennessee.

[2] These same general principles concerning the doctrine of implied indemnity are found in the case of Winter v. Smith, 914 S.W.2d 527 (Tenn. Ct. App. 1995), a case upon which Argo relies to explicate the nature of implied indemnity. (Appellant's Brief at 11, 12, 21).

D. Argo is bound by the terms of its contract.

Argo claims that to deny it an opportunity to pursue its indemnity claim would be inequitable because without indemnity from Hanson, Argo may be forced to pay damages for which Hanson is solely responsible. By this argument, Argo is just asking to rewrite the contract so as to relieve Argo of a provision it now finds to be unfavorable. There is nothing unfair or inequitable about holding a business entity to the terms of a contract to which it willingly agreed. What would be unfair is to ask a court to ignore those terms years later, after it becomes apparent to one party that those terms are inconvenient to it.

E. Hanson's exclusive remedy of repair, replacement, or refund of the purchase price of the pipe cannot, as a matter of Tennessee law, fail of its essential purpose.

For any product that Hanson sold that failed to conform to Hanson's limited warranty, Argo's exclusive remedy was for Hanson to remedy such nonconformity at Hanson's option and expense "either by returning a repaired product, delivering a replacement, or providing a full refund of the purchase price by credit or payment." (R. Vol. 8, p. 8b). Argo claims that a genuine issue of material fact exists as to whether this exclusive remedy provision in the Sales Contract failed of its essential purpose. (Appellant's Brf. at 26). This argument is without merit because Tennessee law states that a remedy that is limited to repair, replacement, or refund of the product's purchase price cannot, as a matter of law, fail of its essential purpose.

In Arcata Graphics Co. v. Heidelberg Harris, Inc., 874 S.W.2d 15, 29 (Tenn. Ct. App. 1993), Hawkins, the purchaser of printing presses, had agreed to certain limitations on its remedy against the seller, which limitations, the court noted, are permissible under Tenn. Code Ann. § 47-2-719. The court stated the following concerning Hawkins' claim that the limited remedy should be disregarded because it failed of its essential purpose:

> Here, Hawkins has argued a failure of essential purpose. However, we are of the opinion that this argument is without merit in view of the adequate remedy provided in the contract, and offered by Harris, which allowed Hawkins to receive at no cost the type of dampening system it desired or to return the presses and receive a refund of the purchase price. These are fair and adequate remedies and were never invoked by Hawkins. The contractual remedy did not fail as a matter of law. U.C.C. § 2-719, per comment 1, requires only a "minimum adequate remed[y]." Section 2-719(2) is concerned with the essential purpose of the remedy chosen by the parties, not with the essential purpose of the code or of contract law, or of justice and/or equity. 1 White and Summers, Uniform Commercial Code § 12-10 (3d ed. 1988). U.C.C. § 2-719(2) is concerned only with novel circumstances not contemplated by the parties and does not contemplate agreements arguably oppressive at their inception. Id.

Id. at 29. The court went on to note that, "[u]nder Tennessee law, the availability of a refund remedy will prevent a repair remedy from failing of its essential purpose." Id. (citing Int'l Talent Group v. Copyright Mgmt., 769 S.W.2d 217 (Tenn. Ct. App. 1988)). Concluding that "a warranty providing for repair, replacement or refund provides a minimum adequate remedy that cannot fail of its essential purpose," the court dismissed Hawkins' contract and/or warranty claims for monetary damages. Id. Because Hanson's warranty was for repair, replacement or refund, it cannot fail of its essential purpose as a matter of Tennessee law.

Argo does not address the holding of Arcata Graphics on this point. Instead, Argo asserts that the exclusive remedy fails of its essential purpose because Argo had an insufficient amount of time within which to exercise its rights under the exclusive remedy due to the latency of the defect in the pipe. (Appellant's Brf. at 28). In making this argument, Argo confuses the concept of failure of essential purpose with the concept of unconscionability and relies on cases that have also confused these concepts. As Hanson will now demonstrate, the better-reasoned cases, as well as legal commentators, recognize that these are two distinct concepts to which different standards are applied. Before Hanson does so, however, Hanson will address Argo's claim that

"novel circumstances" exist and that they cause the limited remedy to fail of its essential purpose.

1. The circumstances were within the contemplation of the parties at the time the Sales Contract was made.

In a transparent attempt to avoid the holding of Arcata Graphics that a "repair, replace or refund" remedy cannot, as a matter of law, fail of its essential purpose, Argo cites language from that opinion to the effect that UCC § 2-719(2) is "concerned 'with novel circumstances not contemplated by the parties.'" (Appellant's Brf. at 27). Argo relies on self-serving statements from its president, John Bryant, that, in his 34 years in the construction industry, he was unaware of any situation where the steel reinforcement in concrete pipe had been improperly positioned by the manufacturer and the pipe failed as a result and that he, therefore, never contemplated that this would occur. (Id. at 5-7; 26-27).

Essentially, then, Argo is taking the position that it never contemplated that there could be any defect in concrete pipe that would not be detectable upon visual inspection and that Argo did not expect the pipe that Hanson supplied to fail after it was installed. This seems to be an unreasonable position for someone with 34 years construction experience to take. The engineering expert for Argo, Richard Gibbs, on whose affidavit Argo relies, is quite knowledgeable about the amount of time that it might take for concrete pipe to fail. (Appellant's Brf. at 5-7). It would seem reasonable to assume that Mr. Bryant, with his 34 years of experience in the construction industry, would or at least should have been aware of the possibility that concrete pipe could be imperfectly made and that it could take some period of time for the alleged results of such imperfections to manifest themselves.

This is not a "novel circumstance not contemplated by the parties", as contemplated by UCC § 2-719(2). That section deals with situations such as where the seller is either unable or

unwilling to repair or replace the defective product in a reasonable time. Trinity Industries, Inc. v. McKinnon Bridge Co., Inc., 77 S.W.3d 159, 169 (Tenn. Ct. App. 2001). It does not encompass a buyer's disappointment over the fact that a product failed unexpectedly.

2. *UCC section 2-719(2) regarding failure of essential purpose deals with the adequacy of a remedy during the time it was offered, not with the adequacy of the period of time in which the remedy was available.*

Hanson provided Argo with a limited one year express warranty, which warranty had expired by the time Argo brought suit against Hanson. (R. Vol. 8, p. 8b). Although no Tennessee state court has discussed the issue of whether Tenn. Code Ann. § 47-2-719(2) applies to claims based on an expired warranty, several courts outside Tennessee support the conclusion that this UCC provision does not apply to such claims.

In Boston Helicopter Charter, Inc. v. Agusta Aviation Corp., 767 F. Supp. 363 (D. Mass. 1991), the purchaser of a helicopter claimed that the seller's warranty failed of its essential purpose under § 2-719. Id. at 374. The helicopter had crashed and the warranty had already expired at the time of the crash. Initially noting that a few courts have held that a warranty may fail of its essential purpose under § 2-719 due to the latency of a defect, the court nonetheless concluded that "[t]he better reasoned approach, however, is that § 2-719(2) is inapplicable once the warranty has expired." Id. (citing 2 R. Anderson, Uniform Commercial Code § 2-302:86 (1982) ("time limitation not a question of failure of remedy, but of whether unconscionable")).

The Boston Helicopter court explained:

> This is certainly not a case in which an exclusive or limited remedy failed of its essential purpose. To the contrary, the warranty provisions here operated just as intended, allocating the risk of loss between the parties both before and after the warranty expired. The transformer operated satisfactorily long after the warranty period had run. A purchaser cannot claim that a warranty provision has failed of its essential purpose merely because a potential claim does not arise until after the warranty period has expired. Put another way, to apply 2-719(2) to an expired warranty is to confuse limitation of remedy with limitation of liability.

> Thus, as 2-719(2) concern remedies, it is inapplicable to AAC's warranty provision limiting the duration of liability.

Id. (citations omitted). The court went on to address, and reject, the argument that the "durational limitation was unconscionable." Id. Argo has conceded that it is not claiming that the Sales Contract is unconscionable. (R. Vol. 5, p. 20).

In Regents of the University of Colorado v. Harbert Constr. Co., 51 P.3d 1037 (Colo. Ct. App. 2001), the plaintiffs sued the contractor that built their cogeneration facility after an explosion had damaged the facility. The trial court granted summary judgment to the contractor, finding that the parties' contract precluded plaintiffs' recovery for claims of negligence, breach of contract, strict liability, and indemnification. On appeal, the plaintiffs noted that the contract at issue included a warranty that was subject to a twelve-month period, which was triggered by the plaintiffs' acceptance of the facility. The plaintiffs argued that the length of the limited warranty deprived them of the substantial value of the contract under Colorado's U.C.C, Colo. Rev. Stat. § 4-2-719(2) because the defect was latent. Regents of the University of Colorado, 51 P.3d at 1041. The court, though hesitantly accepting the premise that the U.C.C. applied to the contract, nonetheless concluded that the warranty did not fail of its essential purpose, explaining: "The warranty provision did not provide an inadequate remedy to plaintiffs during the warranty period; it merely limited the duration of the contractor's liability. Therefore, § 4-2-719(2) is inapplicable here." Id.

Other cases have likewise rejected the argument that a warranty failed of its essential purpose merely because a potential claim did not arise until after the warranty period had expired. See Arkwright-Boston Mfrs. Mut. Ins. Co. v. Westinghouse Elec. Corp., 844 F.2d 1174, 1179 (5th Cir. 1988) ("In a contract between two sophisticated corporations, a time limitation on an express warranty is simply a matter of allocating risks."); Wisconsin Power &

Light Co. v. Westinghouse Electric Corp., 830 F.2d 1405, 1412-13 (7th Cir. 1987); Hart Engineering Co. v. FMC Corp., 593 F. Supp. 1471, 1479 (D.R.I. 1984) ("Section 2-719 is concerned with the circumscription or modification of remedies, not with language purporting to define the scope of a seller's liability. It is, therefore, plainly inapposite to the one year time warranty contained in the purchase agreement.").

These cases are consistent with the trial court's decision below. Tenn. Code Ann. § 47-2-719(2) has no application to an expired warranty because, as demonstrated by the courts in Regents of the University of Colorado and Boston Helicopter, that UCC provision addresses the adequacy of the remedy during the time it was offered, not the adequacy of the duration of the warranty.

3. *Section 2-719(2) does not support Argo's argument that a limitation of remedies provision fails of its essential purpose if the alleged defect is latent.*

No Tennessee court has squarely addressed the issue of whether a limitation of remedies provision fails of its essential purpose due to the latency of the alleged defect. Argo cites McCullough v. General Motors Corp., 577 F. Supp. 41 (W.D. Tenn. 1982), to support its argument that the latent defect in Hanson's pipe caused the exclusive remedy provision to fail of its essential purpose. The McCullough court dealt with a personal injury claim by a consumer against an automobile manufacturer. Id. at 43. The defendant, General Motors, had moved for summary judgment, arguing that the plaintiff's claims were barred by a twelve-month, 12,000 mile warranty. Id. at 44. In denying this motion, the court concluded that a genuine issue of material fact existed either as to (1) whether the time limitation in McCullough was manifestly unreasonable or (2) whether the remedy deprived either party of the substantial value of the bargain. Id. at 47.

In reaching its result, the McCullough court cited to two cases, Neville Chemical Co. v. Union Carbide Corp., 422 F.2d 1205 (3d Cir. 1970) and Wilson Trading Corp. v. David Ferguson, Ltd., 244 N.E.2d 685 (N.Y. 1968), neither of which supports the position that Argo advances, i.e. that the latency of a defect causes a limited remedy to fail of its essential purpose because the warranty was limited to one year.

The Neville court based its ruling on section 1-204 of the UCC,[3] not on 2-719(2), and held that the time limitation was manifestly unreasonable. Neville, 422 F.2d at 1217. Moreover, the extremely brief time period at issue in Neville, fifteen days following receipt of the product, is incomparable to the one year period in which Argo had to bring any claim against Hanson. Id. at 1208.

The Wilson Trading case is likewise distinguishable from the instant case. There, the court found that a contract for the sale of yarn that contained a provision barring claims not brought within ten days, even if the defect could not have been discovered during the time before the yarn was processed, caused the remedy to fail of its essential purpose. Wilson Trading, 244 N.E.2d at 688. Wilson Trading has been criticized by White and Summers for applying 2-719(2) when the real issue appeared to be whether the time limitation, ten days after receipt of the shipment of yarn, was "oppressive at its inception." James J. White & Robert S. Summers, Uniform Commercial Code § 12-10 (2d ed. 1980) ("It was not circumstances that left the buyer remediless but rather his own agreement to assume the risk for defects that could not have been discovered within ten days."). As noted by White and Summers, "[t]he stipulated remedy may have been unreasonable or unconscionable (and unenforceable for that reason) but it did not fail

[3] Section 1-204 of the UCC states: "Whenever this Act requires any action to be taken within a reasonable time, any time which is not manifestly unreasonable may be fixed by agreement." Neville, 422 F.2d at 1217.

to achieve its essential purpose—to indemnify the buyer against latent defects that could have been discovered within ten days." White and Summers, §12-10, p. 468.

Other cases that Argo cites likewise rely primarily on an unconscionability analysis, not a failure of essential purpose analysis, to support their holdings. In Cox v. Lewiston Grain Growers, Inc., 936 P.2d 1191 (Wash. App. Ct. 1997), a farmer sued a seed company after the seed he purchased failed to produce a crop. Id. at 1195. In an extensive analysis, the court found that the clause limiting the seed company's damages to the price of the seed was unconscionable. Id. at 1197-98. Subsequently, in a brief paragraph which could be considered dicta, the court noted that if the defect is latent and non-discoverable upon inspection, the exclusive remedy could fail of its essential purpose. Id. at 1198. Because unconscionability was the main holding, Cox does not support Argo's argument. Furthermore, Cox's holding was distinguished in Adcock v. Ramtreat Metal Technology, Inc., 2001 WL 410658 (Wash. Ct. App. 2001) (copy attached), a case that more closely resembles the facts at issue in Argo's appeal. In Adcock, a drilling company sued a metal tempering company after the drilling company and its customers experienced problems with the metal tempering company's work. *Id.* at *5. The plaintiff relied on Cox in arguing on the potential "failure of essential purpose'" of the exclusionary clause. Id. The Adcock court of appeals recognized that the basis of the Cox ruling was unconscionability, not failure of essential purpose. The Adcock court thus held that under 2-719(2), there is no failure of essential purpose if there is a minimum adequate remedy. Id. As noted above, Argo's exclusive remedy of repair, replacement, or refund is adequate as a matter of law. See Arcata Graphics Co., 874 S.W.2d at 29.

In another case cited by Argo, Latimer v. William Mueller & Son, Inc., 386 N.W.2d 618 (Mich. Ct. App. 1986), the court reasoned that the remedy provided in the limitation of liability

clause failed of its essential purpose and that the clause was unconscionable. Id. at 636-37. The court did not separate its analysis of these two concepts and held that the clause was unconscionable. Id. at 637. Due to its reliance on an unconscionability analysis and its ultimate holding of unconscionability, Latimer does not offer strong support for Argo's claim that its exclusive remedy failed of its essential purpose. In Majors v. Kalo Laboratories, Inc., 407 F. Supp. 20 (M.D. Ala. 1975), the court cites to § 2-719(2) and held that an "illusory" remedy "can be said to 'fail of its essential purpose.'" Id. at 23. Similar to Cox, this one sentence is the only mention of § 2-719(2) in the entire opinion, and the ultimate holding in Majors was that the exclusion clause was unconscionable. Id. at 23, 25 ("This is, therefore, a proper case for a determination that the attempted exclusion is unconscionable.").

Argo also relies on Comind Companhia De Seguros v. Sikorsky Aircraft Division of United Technologies Corp., 116 F.R.D. 397 (D. Conn. 1987), but that case offers no support because no "remedial conflict" exists in the Sales Contract Terms and Conditions. In Comind, a buyer of a helicopter sued the seller and manufacturer for breach of warranty. Id. at 401. The terms of the contract warranted that the helicopter was free of defects and that the warranty was limited to repair or replacement if the buyer notified the seller of the defect within 90 days. Id. at 409. The court held that if "Comind's claims are correct, if the defect was latent and not reasonably discoverable within the 90 day period, then the sole remedy provided for in the sales contract could be claimed to be wholly inadequate to support the obligation of the seller to deliver a defect-free product." Id. at 413. The Comind court noted that a "remedial conflict" existed between the express obligation to deliver products free of defects and the provision that provided for repair or replacement of defects complained of within 90 days. Id. at 413. This second clause, "in effect revokes this warranty [(that the helicopter would be free from defects)]

for latent defects not discovered or reasonably discoverable within 90 days." Id. In Argo's case, no such remedial conflict exists: The Sales Contract warrants that the pipe would be free from defects for a period of one year after delivery, and the limitations provision provides that Argo had one year in which to bring any claim regarding the contract.

The trial court properly relied upon Contour Medical Technology, Inc. v. Flexcon Company, Inc., No. 01A01-9707-CH-00315, 1998 WL 242609 (Tenn. Ct. App. May 6, 1998) (copy attached) to dispose of Argo's argument that the one-year time period deprived Argo of the substantial value of its bargain with Hanson. Contour Medical involved a buyer's claim that sheets of adhesive material, out of which the buyer fabricated patches that were to be used in securing electronic wires to patients who were undergoing medical examinations, were defective because they failed to adhere either to the electrode or to the patient's skin. The defendant manufacturer had obtained a partial summary judgment on the plaintiff's warranty claim. On appeal the plaintiff claimed that the limited remedy was unconscionable because the defect with the goods was latent. The court of appeals noted:

> The plaintiff also contends that the limited remedy is unconscionable because the defect was latent and could not have been discovered until the harm occurred. See § 47-2-719(3). While there are holdings to that effect *see Latimer v. Williams Mueller & Son, Inc.*, 149 Mich.App. 620, 386 N.W.2d 618 (1986) *Nevill Chem. Co. v. Union Carbide, Corp.*, 422 F.2d 1205 (3rd Cir. 1968) *Frank's Maintenance & Eng'g, Inc. vs. C.A. Roberts Co.*, 86 Ill. App.3d 980, 42 Ill. Dec. 25, 408 N.E.2d 403 (Ill. App. 1980), the cases seem to be about evenly split. *Cf. Fleming Farm v. Dixie Agric. Supply, Inc.*, 631 So.2d 922 (Ala.1994) *Kleven v. Geigy Agric Chem.* 303 Minn. 320, 227 N.W.2d 566 (Minn.1975) *Estate of Arena v. Abbott & Cobb, Inc.* 158 A.D.2d 926, 551 N.Y.S.2d 864 (N.Y.App.Div. 1990). We would hesitate to adopt either rule in this case; we think that unconscionability depends more on the circumstances surrounding the transaction than on the latency of the defect. Indeed, a latent defect that cannot be discovered (even by the seller), may be a good reason for the seller to bargain for a limitation on the buyer's remedies.

Contour Medical, 1998 WL 242609 at *6. Although the court of appeals went on to conclude that the defect in question was not latent, the court of appeals' discussion of the latent defect issue is noteworthy because it recognizes that a seller may have valid and acceptable reasons for limiting a buyer's remedies when the defects are, in fact, latent. Argo claims that Contour Medical is distinguishable because that court dealt with an unconscionability argument. (Appellant's Brief at 30.) Regardless of how Argo characterizes its argument, Contour Medical is significant because it shows that a Seller may have a valid and acceptable reason for binding its remedy when a potential defect would be difficult or impossible to detect.

The argument that Argo is making might be relevant if Hanson had relied on its requirement that Argo give notice of any defects in the pipe within five days of delivery. (R. Vol. 8, p. 8b). Hanson, however, made no such argument in the trial court. Therefore, the authorities Argo cites are inapposite to this case.

II. The Trial Court Correctly Determined That Argo's Cross-Claim Is Barred by the One Year Contractual Limitation Period Contained in the Sales Contract Terms and Conditions.

A. Argo and Hanson agreed to a specified period of time in which Argo could bring any claim against Hanson.

Argo and Hanson were entitled to contractually agree upon terms limiting the time in which Argo could assert claims arising out of the sale of the pipe, and their rights should be governed by their written agreement. See Trinity Industries, Inc. v. McKinnon Bridge Co., Inc., 77 S.W.3d 159, 174 (Tenn. Ct. App. 2001); Marshall v. Jackson & Jones Oils, Inc., 20 S.W.3d 678, 681 (Tenn. Ct. App. 1999). The parties agreed that Argo would have one year within which to assert any claim relating to the sale of the pipe.

The broad language in the Sales Contract Terms and Conditions referring to "[a]ny claim... regarding this Contract" necessarily includes a purported claim for indemnity:

> **ONE YEAR TIME LIMIT ON CLAIMS; VENUE; ATTORNEY FEES.** Any claim... regarding this Contract shall be barred unless asserted by the commencement of any action... within one year from the date the act or omission to which such claim... relates first occurs or arises....

(R. Vol. 8, p. 8b). Furthermore, under the Exclusive Remedy Provision of the Sales Contract Terms and Conditions, Argo agreed that these terms and conditions would govern any claim regarding the pipe sold by Hanson to Argo. This provision states:

> **EXCLUSIVE REMEDY.** If any product sold fails to conform to Seller's limited warranty within one (1) year after delivery, upon prompt notice by Buyer and Seller's determination that the products have been stored, installed, and maintained in accordance with Seller's recommendations and standard industry practice, Seller shall remedy such nonconformity at Seller's option and expense either by returning a repaired product, delivering a replacement, or providing a full refund of the purchase price by credit or payment. THIS REMEDY HAS BEEN TAKEN INTO ACCOUNT IN ESTABLISHING THE PRICE UNDER THIS CONTRACT, AND IS INTENDED AS A MUTUALLY ACCEPTABLE ALLOCATION OF RISK BETWEEN BUYER AND SELLER. IT IS BUYER'S SOLE AND EXCLUSIVE REMEDY AGAINST SELLER FOR BREACH OF WARRANTY OR FOR OTHER CLAIMS REGARDING THE PRODUCTS, WHETHER ARISING IN CONTRACT, WARRANTY, TORT, STRICT LIABILITY, OR OTHERWISE.

(R. Vol. 8, p. 8b). Argo agreed that it would have one year to assert *any action* for *any claim*, whether arising in contract, warranty, tort, strict liability or *otherwise*, regarding the Contract from the date the act or omission first occurs or arises. This "or otherwise" language includes Argo's claim for indemnity.

Hanson delivered its last load of pipe on August 4, 1999. Argo thus had until August 4, 2000 in which to bring any claim regarding the Contract against Hanson. Argo, however, waited until October 2, 2007 to file its cross-claim against Hanson for indemnity, which is years beyond the period the parties had agreed upon for filing any claims regarding the contract.

Argo's claim that its "indemnity claim against Hanson does not begin to run until such time as Argo pays a judgment or settles the claims of Baptist Hospital for which Hanson should

bear responsibility" (Appellant's Brief at 13) ignores the plain language of the Sales Contract Terms and Conditions. Argo cites no authority that parties are prohibited from agreeing to a different period of time within which a claim for indemnity must be asserted from that that would ordinarily be provided by the general rule as to when claims for indemnity must be made. Indeed, the authority that Hanson has found on this point supports Hanson's position. See 41 Am. Jur. 2d Indemnity § 38 (2008) ("A statute of limitations governing indemnity actions will not apply to an indemnity claim where the parties have agreed in the contract to a specified period in which to bring indemnity claims." (citing Black Mountain Ranch v. Black Mountain Dev. Co., 627 P.2d 1006 (Wash. Ct. App. 1981)).

The trial court, in noting that the parties had agreed to a one year period in which to assert claims, recognized the well-established principle of freedom of contract. (R. Vol. 5, p. 26). Hanson submits that this Court should affirm the trial court's decision.

B. Argo and Hanson's agreement that Argo had one year in which to bring any claim against Hanson distinguishes this case from the cases cited by Argo that hold that the U.C.C. limitations period does not apply to indemnity actions.

Argo states that the "statute of limitations for indemnity is separate and distinct from the UCC statute of limitations applicable to breach of contract claims brought under T.C.A. § 47-2-725." (Appellant's Brief at 10). This statute provides, in part: "(1) An action for breach of any contract for sale must be commenced within four (4) years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one (1) year but may not extend it." Tenn. Code. Ann. § 47-2-725(1). The statute permits the parties to reduce the four year limitations period to a one year limitations period, which, as set forth in the Sales Contract Terms and Conditions, is exactly what Argo and Hanson did. (R. Vol. 8, p. 8b).

Argo cites to state and federal courts in foreign jurisdictions that have held that the U.C.C. four year from tender of delivery limitations period does not apply to indemnity claims. (Appellant's Brief at 15). Not one of the cases cited by Argo, however, discussed the situation in which a purchaser and a seller contractually selected a shorter period of limitations for bringing any claim, regardless of the theory on which the claim is based against the seller. Because these cases are devoid of any discussion of language similar to that of the language in the Sales Contract Terms and Conditions, they provide no guidance in resolving the contract interpretation issue before this Court. The issue before this Court is not whether Argo's indemnity claim is barred by the four year U.C.C. limitations period, which was the issue discussed in the cases cited by Argo, but whether Argo's indemnity claim is barred by the one year limitations period set forth in the Sales Contract Terms and Conditions to which the parties agreed would govern the filing of *any* claim regarding the Contract.

Although other jurisdictions disagree with the cases cited by Argo and hold that the UCC period of limitations does apply to claims for indemnity,[4] this Court need not decide whether an indemnity claim exists independent of a breach of contract claim under Tenn. Code. Ann. § 47-2-725 in order to resolve this appeal. Based on the language of the Sales Contract, any alleged claim for implied indemnity that Argo had against Hanson is time-barred because Argo failed to bring it within the agreed-upon time period set forth in the Sales Contract. Argo has cited to no case law or statute that prohibits parties from contracting for limitations periods for indemnity claims.

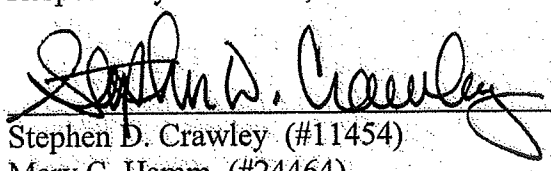
[4] Raymond-Dravo-Langenfelder v. Microdot, Inc., 425 F. Supp. 614, 619-20 (D. Del. 1977); PPG Indus., Inc. v. Genson, 217 S.E.2d 479, 480 (Ga. Ct. App. 1975); Farmers Nat'l Bank v. Wickham Pipeline Constr., 759 P.2d 71, 76-77 (Idaho 1988); R.N. Thompson & Assocs., Inc. v. Wickes Lumber Co., 687 N.E.2d 617, 621 (Ind. Ct. App. 1997); Iowa Mfg. Co. v. Joy Mfg. Co., 669 P.2d 1057, 1060 (Mont. 1983); Sheehan v. Morris Irrigation, Inc., 460 N.W.2d 413, 417 (S.D. 1990); Perry v. Pioneer Wholesale- Supply Co., 681 P.2d 214, 219 (Utah 1984).

In its brief, Argo includes an extensive discussion of how these thirteen courts have concluded that the U.C.C. limitations period does not apply to an implied indemnity claim, but Argo never squarely addresses the actual language in the Sales Contract. (Appellant's Brief at 15-18). The trial court correctly disregarded Argo's efforts to shift the focus away from the pertinent language in the Sales Contract: "I see no basis for allowing an indemnification when the contract states to the contrary. The parties' contract is at arm's length, apparently. And they contracted for a shorter period of time, and that was one year." (R. Vol. 5, p. 26). In its *de novo* review of the trial court's interpretation of the terms of the Contract, Hanson submits that this Court should come to the same conclusion.

CONCLUSION

For the foregoing reasons, Hanson was entitled to a summary judgment in its favor, and the ruling of the trial court should, therefore, be affirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has been via U.S. Mail, postage prepaid, on James B. Summers, Esq. and Heather W. Fletcher, Esq., Allen, Summers, Simpson, Lillie & Gresham, PLLC, 80 Monroe Ave., Suite 650, Memphis, TN, 38103, William Jeter, Esq., 35 Union Avenue, Suite 300, Memphis, Tennessee 38103, Brett Hughes, Esq., One Commerce Square, Suite 2700, Memphis, Tennessee and Scott Campbell, Esq., 6750 Union Avenue, Memphis, Tennessee 38138 on this 20th day of October, 2008.

Stephen D. Crawley

ATTACHMENT C

4-16-14

IN THE CHANCERY COURT FOR MADISON COUNTY, TENNESSEE

LAMBUTH UNIVERSITY,

Plaintiff,

Docket No. 66629

vs.

LEXINGTON INSURANCE COMPANY, EDUCATIONAL & INSTITUTIONAL INSURANCE ADMINISTRATORS, INC., and KASI JEAN BRYANT,

Defendants.

LEXINGTON INSURANCE COMPANY'S REPLY TO BRYANT'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO BRYANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Bryant has raised a number of arguments in response to Lexington's motion for summary judgment and has repeated many of them in her motion for partial summary judgment on her cross-claim against Lexington. None of Bryant's arguments has any merit, as Lexington will demonstrate below.

A. Because the Duty to Defend is Determined Solely by Reference to the Allegations of the Complaint, the Actual Cause of Bryant's Alleged Injury is Irrelevant.

Bryant claims that if mold is found not to be the cause of Kasi Bryant's alleged illness, then the Fungus/Mold Exclusion, on which Lexington relied to deny coverage, "becomes irrelevant and cannot provide the basis for Lexington's or EIIA's refusal to provide Lambuth a defense." (Bryant's Response at 9). Bryant points to the fact that Lambuth hired an expert in the

underlying case who, according to Lambuth's former counsel, is expected to say that mold did not cause Bryant's alleged illness. *(Id.)*

Bryant's argument fails because, as Bryant herself acknowledges later in her Response, the duty to defend is determined solely by reference to the allegations of the underlying complaint. (Bryant's Response at 16). Furthermore, this determination is to be made as of the time the underlying complaint was filed. *Kern v. Transit Cas. Co.*, 207 F. Supp. 437 (E.D. Tenn. 1962) (insurer's duty to defend determined when action is brought, not by outcome of action).

The Amended Complaint here alleges that mold/fungus caused Bryant to become ill. (Lexington's Statement of Undisputed Material Facts ("SUMF"), ¶¶ 16, 20, 21, 23, 25). That allegation frames the analysis regarding whether Lexington's duty to defend Lambuth arose. The actual cause of Bryant's alleged injury has no relevance in determining whether Lexington's duty to defend Lambuth was triggered.[1] As Lexington explained in its Memorandum and in this Reply, there is no allegation in Bryant's Amended Complaint against Lambuth that is not excluded by the Fungus/Mold Exclusion. That being the case, no duty to defend ever arose.

B. It is Not Premature to Determine that Lexington Has No Duty to Indemnify Lambuth.

Bryant argues that is premature for this Court to determine whether or not Lexington will have a duty to indemnify Lambuth from Bryant's lawsuit. Bryant claims that this is because "[t]he duty to indemnify must be determined after and based upon the findings of fact made by the jury in the underlying tort case." (Bryant's Response at 9). The rule on which Bryant relies, however, applies only where the insurer has a duty to defend the insured and factual disputes exist that must be resolved before the duty to indemnify can be decided.

[1] As Lexington pointed out in its original memorandum in support of its motion for summary judgment, any such duty to defend would not, in any event, arise unless and until Lambuth satisfies the $500,000 Retained Limit contained within the Self-Insured Retention Endorsement of the policies. (Lexington's Memorandum at 11, fn. 4).

Where, however, there is no duty to defend, there is no duty to indemnify. Numerous cases from Tennessee have recognized that rule (Lexington's Memorandum at 10-11), and Bryant has not addressed those cases in her Response. Courts in other cases that Lexington cited, which Bryant likewise ignored, had no trouble declaring that an insurer had no duty to indemnify its insured where no duty to defend the insured existed. *See eg., Insura Property and Casualty Co. v. Ashe*, No. M202-00374-COA-R3-CV, 2003 WL 253255 (Tenn. Ct. App. Feb. 6, 2003) (Lexington's Memorandum at Tab 9) (summary judgment granted in favor of insurer who sought declaration as to coverage under CGL policy against defendants who had sought defense and indemnity coverage from insurer); *Certain Underwriters v. Patel*, No. 3:10-cv-00958, 2011 WL 2182445 (M. D. Tenn. June 3, 2011) (Lexington's Memorandum at Tab 5) (same).

Since Lexington owes no duty to defend Lambuth, Lexington would have no duty to indemnify Lambuth from any judgment that Bryant may obtain against Lambuth. There is, in other words, no coverage available to Lambuth for Bryant's lawsuit, and it is not premature for this Court to make this determination.

C. The Amended Complaint's Allegations that Lambuth Neglected to Maintain the Dorm Room in a Clean Condition are Within the Scope of the Mold/Fungus Exclusion.

Bryant argues that the Amended Complaint alleges acts of Lambuth's negligence, apart from the presence of mold or fungus in Bryant's dorm room, which allegedly caused Bryant's illness. (Bryant's Response at 26-27). Bryant claims that since these alleged acts and omissions are not subject to the Mold/Fungus Exclusion, the Amended Complaint alleges a non-excluded claim.

Lexington anticipated that Bryant would make this argument and Lexington dealt with it in its Memorandum. (Lexington's Memorandum at 11-15). Bryant's Response simply ignores

Lexington's argument, and the two cases Lexington cited in its Memorandum, and proceeds to list eleven duties that Lambuth allegedly violated and that Bryant claims fall outside the scope of the Mold/Fungus Exclusion. None of these allegations, however, has any meaning apart from the alleged presence of mold or fungus in Kasi Bryant's dorm room. The allegations all relate to Lambuth's alleged failure to maintain Kasi Bryant's dorm room in a clean condition, and the only reason given in the Amended Complaint for why these alleged failures were harmful is because of the alleged presence of mold or fungus. Thus, like the allegations of negligence against the hotel owner in *Certain Underwriters v. Patel*, Bryant's allegations do not take her claim outside the scope of the exclusion to coverage

D. The Concurrent Cause Doctrine Does Not Save Lambuth's or Bryant's Claim for Coverage.

In making the above argument, Bryant also tries to invoke the concurrent cause doctrine by claiming:

> Bryant's injuries are alleged to have been caused by any insured peril, even if occurring with the contribution of a potentially excluded peril (as argued by Lexington). Thus, there is coverage under Tennessee law since the non-excluded cause(s) is/are substantial factors in producing Kasi Jean Bryant's injuries, even if the claimed excluded cause contributed to the ultimate result and even if the excluded cause, standing alone, might allow Lexington to properly invoke the policy exclusion. *Capitol Indemnity Corp. v. Braxton,* 24 Fed. Appx. 434 (6th Cir. 2011); *Clark v. Sputniks, LLC,* 368 S.W.3d 431 (Tenn. 2012).

(Bryant's Response at 27).

Bryant may not rely on the concurrent cause doctrine. As summarized in *St. Paul Reinsurance Co., Ltd v. Williams*, No. W2003-00473-COA-R3-CV, 2004 WL 1908808 (Tenn. Ct. App. Aug. 25, 2004) (copy attached), the concurrent cause doctrine:

> provides that coverage under a liability policy is equally available to an insured whenever an insured risk constitutes a concurrent proximate cause of the injury. *Almany,* 1987 Tenn.App. LEXIS, at *24. Concurrent causation was recognized and approved by the Tennessee Supreme Court in *Allstate Insurance Company v.*

> *Watts,* 811 S.W.2d 883, 887 (Tenn.1991) (holding "there should be coverage in a situation ... where a non-excluded cause is a substantial factor in producing damage or injury, even though an excluded cause may have contributed in some form to the ultimate result and, standing alone, would have properly invoked the exclusion contained in the policy.").

Id. at *2.

Bryant's reliance on the concurrent cause doctrine is misplaced for two reasons. First, as Lexington has explained in the preceding section, there is no "concurrent cause" alleged in the Amended Complaint – the sole cause of Bryant's purported injury is alleged to be mold or fungus; how that mold or fungus came to be present in Bryant's room, and how Bryant came to be exposed to the mold or fungus, are not concurrent causes of Bryant's alleged injury – the alleged cause of the injury is mold or fungus.

The second reason why the concurrent cause doctrine does not apply here is because the wording of the Mold/Fungus Exclusion precludes it. The exclusion provides that the exclusion will apply "regardless of any other cause, event, material, product and/or building component that contributed concurrently or in any sequence" to any alleged bodily injury. (SOMF No. 8). Therefore, even if something else may have been a contributing cause to a Bryant's alleged bodily injury, no coverage would exist under the policy.

Tennessee law permits an insurer to contract around the concurrent cause doctrine. In *Atlantic Casualty Ins. Co. v. Cheyenne Country,* 515 Fed. Appx. 398, 2013 WL539436 (6th Cir. Feb. 13, 2013) (copy attached), an insurer filed a declaratory judgment action against a nightclub and the personal representative of the survivor of a man who died, following an altercation with the nightclub's security personnel, in order to determine whether the insurer had a duty to defend the nightclub from the survivor's lawsuit for wrongful death. That lawsuit alleged that the nightclub was negligent: In failing to care for the decedent while he was in its custody; in failing

to assess and treat his medical condition; in failing to monitor whether the decedent was breathing; in failing to request timely medical aid; in failing to exercise due care and caution; in failing to train its employees with respect to handling persons like the decedent; in failing to train its employees with respect to the handling of dangerous instrumentalities; in failing to act reasonably in hiring, training and retaining its staff; and in failing to promote and enforce rules and regulations that would keep employees and customers safe. *Id.* at *1.

The insurer relied upon several exclusions to coverage, one of which excluded coverage for "any actual or alleged injury [that] arises out of assault and/or battery regardless of whether the assault and/or battery is the proximate cause of the injury." *Id.* at **4.

The district court held that there was no coverage, owing to the exclusions, and that the insured had no duty to defend the nightclub. The court of appeals affirmed. In addressing the nightclub's concurrent cause agreement, the court noted that the parties had contracted around the concurrent cause doctrine with language that "could not be clearer." *Id.* The court noted that similar language was not present in the policies involved in other Tennessee cases, which had applied the concurrent cause doctrine. *Id.* The court stated, "[t]he policy explicitly excludes any injury that arises from battery, regardless of the existence of concurrent causes. The underlying allegations include a battery. Therefore, Atlantic does not have a duty to defend Cheyenne Country." *Id.*

The court went on to note that it was not against public policy to contract around the concurrent cause doctrine and that the majority of states that had considered the matter have permitted it. *Id.* The court also observed that, while the Tennessee Supreme Court had yet to address the question, at least two federal district court judges in Tennessee had held that insurance companies are free to contract around the concurrent cause doctrine. *Id.* The court

concluded: "Such language has almost nationwide support and we have no reason to conclude that the Tennessee Supreme Court would find that it violates public policy." *Id.*

Based on the foregoing, the concurrent cause doctrine does not apply to the allegations Bryant has made against Lambuth. Even if it did apply, the Mold/Fungus Exclusion expressly contracts around that doctrine. Since mold is alleged to be a cause of Bryant's illness, the exclusion precludes any coverage to Lambuth for Bryant's claim.

E. Declaratory Relief is Proper Here as to Lexington's Contractual Obligations.

Lexington is not seeking to "remove Bryant as a party" to this declaratory judgment action, as Bryant claims. (Bryant's Response at 33). Bryant is an indispensable party to this declaratory judgment action (*Vale Chemical Co. v. Hartfoed Acc. and Indemn. Co.*, 516 A.2d 684 (1986), which is why Lambuth and later, Lexington, sued her. Lexington merely pointed out in its Memorandum that Bryant has no right to assert that Lexington is estopped from providing a conditional defense to Lambuth under a reservation of rights, since Bryant is, by her own admission, neither a party to, a third-party beneficiary of, or an assignee of Lambuth's insurance policies with Lexington, nor is she a judgment creditor of Lambuth.

Lexington is not seeking an "advisory opinion" from the Court as to its duty to indemnify Lambuth for any judgment that Bryant might obtain as to Lambuth, as Bryant claims. (Bryant's Response at 15; Bryant's Separate Motion for Partial Summary Judgment as to Her Cross-Claim Against Lexington Insurance Company at 2). Declaratory relief is appropriate in order to determine whether coverage is available under an insurance policy (*Standard Fire Ins. Co. v. Chester O'Donley & Associates, Inc.*, 972 S.W.2d 1, 5-6 (Tenn. Ct. App. 1998). Bryant herself has admitted in her Answer to Lexington's cross-claim that:

> . . . Bryant admits that it is proper for this Court to declare the rights of the parties as to insurance coverage and requests that the Court declare such rights and issue

> an order finding that there is, in fact, insurance coverage under the policies issued by Lexington Insurance Company, Inc. . . . .

(Bryant's Answer to Cross-Claim of Defendant Lexington Insurance Company, Inc. at 3, ¶ 9).

While Bryant undoubtedly would have preferred to have obtained a default judgment against an unrepresented Lambuth, which judgment she could then have used as a basis for suing Lexington directly, Lexington's efforts to protect its interests is not improper, and Bryant's displeasure over this is not a basis for dismissing Lexington's declaratory judgment action against Bryant. Bryant's request that this Court enter a partial summary judgment ordering the dismissal of Lexington's claims (Bryant's Motion for Partial Summary Judgment at 3) is, therefore, without merit.

To the extent that Bryant's partial summary judgment motion raises other issues, these are simply a repetition of arguments that Bryant has made in her Response to Lexington's motion, and Lexington adopts its arguments as to those arguments in response to Bryant's motion.

CONCLUSION

Based on the foregoing, Lexington submits that its motion for summary judgment should be granted and that Bryant's motion for partial summary judgment on her cross-claim should be denied.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing has been served upon J. Houston Gordon, Esq., 114 W. Liberty Ave., P.O. Box 846, Covington, Tennessee 38019, H. Frederick Humbracht, Esq., Bradley Arant Boult Cummings LLP, 1600 Division Street, P.O. Box 340025, Nashville, Tennessee, 37203, and Kathleen Pasulka-Brown, Esq., Pugh, Jones & Johnson, P.C., 180 North LaSalle Street, Suite 3400, Chicago, IL 60601, via United States mail, postage prepaid, this 16th day of April, 2014.

Stephen D. Crawley

ATTACHMENT D

IN THE PROBATE COURT OF SHELBY COUNTY, TENNESSEE

IN RE:

CONSERVATORSHIP FOR CASSELLA LOVE B-25064

RESPONSE OF STANDARD CONSTRUCTION COMPANY TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, MOTION IN LIMINE

COMES NOW the defendant, Standard Construction Company, Inc. ("Standard"), and submits for the arbitrator's consideration this Response to the Plaintiff's Motion for Partial Summary Judgment or, in the Alternative, Motion in Limine.

FACTS

1. At the April 14, 2001 mediation of the underlying case, there was no discussion of either Ronald S. Terry Construction Company, Inc. ("Terry") or Standard adding fill to any portion of Mrs. Love's property other than that on which Terry had placed the original fill, which was the subject of the underlying suit. Accordingly, neither Terry nor Standard agreed to any such obligation. (*See* Standard's Answers to Plaintiff's Interrogatories Nos. 6 and 15).

2. Paul Billings drafted the Mutual Release and Settlement Agreement at issue here with input from plaintiff's counsel. (*See* Plaintiff's Motion at 26-50).

3. Mr. Billings expressed his understanding of the agreement concerning fill work that the parties had reached by his handwritten notes, which he faxed to plaintiff's counsel on May 2, 2001 at 6:14 p.m., and in his handwritten notes that appear in the margins of Rex Brasher's letter of May 2, 2001, which letter Mr. Billings sent to plaintiff's counsel by fax at 6:23 p.m. on May 2, 2001. (*See* Plaintiff's Motion at 36-38).

4. In the course of negotiating with the plaintiff's counsel over the wording of the Settlement Agreement, plaintiff's counsel, on April 23, 2001, supplied to Mr. Billings a letter from EnSafe, one of plaintiff's experts, which letter transmitted specifications. A copy of these specifications, and the transmittal letters, is attached hereto as Exhibit A. These specifications became Exhibit E to the Settlement Agreement.

5. The term "surface vegetation," which is found in the final version of the Settlement Agreement, was selected by plaintiff's counsel and was included in his draft of a proposed settlement agreement that he forwarded to Mr. Billings. Mr. Billings incorporated the term "surface vegetation" into the final version of the Settlement Agreement. (*See* Plaintiff's Motion at 31).

LAW AND ARGUMENT

The plaintiff's motion is predicated on the proposition that the parol evidence rule precludes any testimony from the defendants to the effect that they did not intend to, nor did they agree to, add fill to any part of Mrs. Love's property other than that on which the original fill was to be removed. Plaintiff thus reasons that, without such evidence, the Settlement Agreement must stand as written and that plaintiff should, therefore, be awarded a summary judgment in its favor.

The parol evidence rule, however, does not apply to an action for reformation, for which the defendants have prayed. Factual disputes exist concerning the basis for reformation, and these disputes preclude the grant of summary judgment.

Standard will now set forth the standards applicable to a summary judgment motion. Standard will then address specific areas raised by the plaintiff's motion.

I. The Summary Judgment Standard.

Summary judgment provides a means where an issue or a case can be disposed of when there are no genuine issues of fact. *Ferguson v. Tomerlin*, 656 S.W.2d 378 (Tenn. App. 1983). The primary question to be determined upon a motion for summary judgment is whether there are any material factual questions which exist before the legal issues can be ruled upon. *Hamrick v. Spring City Motor Co.*, 708 S.W.2d 383, 389 (Tenn. 1986). The movant carries the burden of proving that no genuine issues of material fact exist and that the uncontradicted evidence entitles the movant to a judgment as a matter of law. *Gann v. Key*, 758 S.W.2d 538 (Tenn. App.1988).

The opponent of the motion need only to demonstrate that there are disputed or contradicted material factual issues. *Belsky v. Payne*, 560 S.W.2d 78 (Tenn. App. 1977). In responding to a motion for summary judgment, the opponent is not required to prove the merits of the case. The opponent must, however, submit evidence by affidavit or otherwise, showing that a material factual issue exists. T.R.C.P. 56.05; *Moman v. Walden*, 719 S.W.2d 531, 533 (Tenn. App. 1986).

Summary judgment should be granted at the trial court level only when undisputed facts, and the inferences reasonably drawn from the undisputed facts, support but one conclusion, which is that the party seeking the summary judgment is entitled to a judgment as a matter of law. *Pero's Steak & Spaghetti House v. Lee*, 90 S.W.3d 614, 620 (Tenn. 2002); *Webber v. State Farm Mutual Automobile Ins. Co.*, 49 S.W.3d 265, 269 (Tenn. 2001). The court must take the strongest legitimate view of the evidence in favor of the non-moving party, allow all reasonable inferences in favor of that party, discard all countervailing evidence, and, if there is a dispute as to any material fact or if there is any doubt as to the existence of a material fact, the court must

deny the motion. *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993); *Evco Corp. v. Ross*, 528 S.W.2d 20 (Tenn. 1975).

II. Standard's Prayer for Reformation of the Settlement Agreement Takes this Case Outside of the Parol Evidence Rule.

The circumstances in which parol evidence will be admissible to contradict the written words of a contract are set forth in The Restatement (Second) of Contracts, which provides:

> **§ 214. Evidence of Prior or Contemporaneous Agreements and Negotiations**
>
> Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish
>
> (a) that the writing is or is not an integrated agreement;
> (b) that the integrated agreement, if any, is completely or partially integrated;
> (c) the meaning of the writing, whether or not integrated;
> (d) illegality, fraud, duress, mistake, lack of consideration , or other invalidating cause;
> (e) ground for granting or denying rescission, reformation, specific performance, or other remedy.

Restatement (Second) Contracts § 214 (1981).

Subsections (d) and (e) of the Restatement thus specifically recognize that the parol evidence rule does not apply where a writing is to be reformed due to a mistake. Tennessee recognizes this exception to the parol evidence rule. *See Clayton v. Haury*, 224 Tenn. 222, 452 S.W.2d 865, 867-8 (1970) (parol evidence cannot be admitted to contradict or vary the terms or to enlarge or diminish the obligations of a written instrument or deed, except on grounds of fraud, accident or mistake); *see also Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1295 (6th Cir., 1991) (parol evidence admissible where a party seeks to reform a writing on the grounds that it does not embody the agreement of the parties because of mistake); *Rentenbach Engineering Co., Construction Div. vs. General Realty, Ltd.*, 707 S.W.2d 524, 526 (Tenn. App. 1985) (parol evidence rule does not apply to actions for reformation).

The court of appeals, in the case of *GRW Enterprises, Inc. v. Davis*, 797 S.W.2d 606 (Tenn. App. 1990), in discussing exceptions to the parol evidence rule, explained that:

> The [parol evidence] rule appears to be quite all-encompassing. However, the courts have been reluctant to apply it mechanically and have now recognized that it has numerous exceptions and limitations. Thus, the rule does not prevent using extraneous evidence to prove the existence of an agreement made after an earlier written agreement, *Brunson v. Gladish*, 174 Tenn. at 316, 125 S.W.2d at 147; *Bryan v. Hunt*, 36 Tenn. (4 Sneed) 543, 547-48 (1857); *Tryce v. Hewgley*, 53 Tenn.App. 259, 267-68, 381 S.W.2d 589, 593 (1964), or to prove the existence of an independent or collateral agreement not in conflict with a written contract. *McGannon v. Farrell*, 141 Tenn. 631, 637, 214 S.W. 432, 433 (1919); *Isabell v. Aetna Ins. Co.*, 495 S.W.2d 821, 824 (Tenn.Ct.App. 1971). In each of these circumstances, the courts have conceived that the parol evidence is not being used to vary the written contract but rather to prove the existence of another, separate contract.
>
> The courts have also recognized certain circumstances that permit contracting parties to vary or to circumvent the plain terms of their written contract. Thus, the parol evidence rule does not prevent using extraneous evidence to prove that a written contract does not correctly embody the parties' agreement, *Davidson v. Greer*, 35 Tenn. (3 Sneed) 384, 384 (1855); *Rentenbach Eng'g Co., Constr. Div. v. General Realty, Ltd.*, 707 S.W.2d 524, 526-27 (Tenn.Ct.App. 1985); *Gibson County v. Fourth & First Nat'l Bank*, 20 Tenn.App. 168, 178-79, 96 S.W.2d 184, 190 (1936); 3 A Corbin, *Corbin on Contracts* § 592 (1960), or to prove estoppel or waiver. *Woods v. Forrest Hills Cemetery*, 183 Tenn. 413, 421, 192 S.W.2d 987, 990 (1946); *Freeze v. Home Fed. Savs. & Loan Ass'n*, 623 S.W.2d 109, 112 (Tenn.Ct.App. 1981); *Bailey v. Life & Casualty Ins. Co.*, 35 Tenn.App. 574, 582, 250 S.W.2d 99, 102 (1952).

GRW Enterprises, 797 SW2d at 610-11.

Under Tennessee law, a "mistake" is: "[A]n act which would have been done, or an omission which would not have occurred, but from ignorance, forgetfulness, inadvertence, mental incompetence, surprise, misplaced confidence, or imposition...." *See Williams v. Botts*, 3 S.W.3d 508, 509 (Tenn. App. 1999). The act of drafting the Settlement Agreement in such a way that it could be interpreted to require defendants to fill portions of Mrs. Love's property on which defendants had never placed original fill was a mistake.

Since defendants here are seeking reformation of the Settlement Agreement to express the parties' true intentions, the parol evidence rule does not apply to bar evidence of the

intentions of the parties in executing that agreement. Thus, while plaintiff's discussion of the parol evidence rule is generally an accurate statement of the law, it is inapplicable to the case before the arbitrator. Plaintiff's motion for partial summary judgment, to the extent it is based on defendants' inability to present parol evidence, and plaintiff's alternative motion in limine, should, therefore, be denied.

III. There is Evidence from which the Arbitrator Could Find that the Requirements for Reformation Have Been Met, which Precludes Summary Judgment.

Plaintiff claims that Standard and Terry cannot reform the Settlement Agreement because the requirements for reformation have not been met. Plaintiff claims that: (1) Standard has mis-stated the law's requirements for reformation based on a unilateral mistake; (2) defendants' alleged fault precludes an action for reformation; and (3) defendants cannot prove that they are entitled to reformation by clear and convincing evidence. Standard will now demonstrate that plaintiff is simply mis-informed about the law, which eliminates plaintiff's first objection, and that plaintiff's second and third objections depend on the resolution of factual disputes, which defeat plaintiff's summary judgment motion.

A. Reformation for a unilateral mistake is available where the non-mistaken party "knew or should have known" of the other party's mistake.

Standard does not dispute the legal proposition from Section 47 of Tennessee Jurisprudence, cited at page 23 of plaintiff's motion, to the effect that the two grounds for the equitable remedy of reformation are mutual mistake or unilateral mistake induced by fraud or inequitable conduct. Standard, however, does dispute plaintiff's assertion that:

> It is not sufficient that the other party 'knew or should have known' of the other's mistake. Rather, as set forth above, it must be shown that the other party was guilty of 'fraud or inequitable conduct.' A correct statement of the law is that unilateral mistake may warrant reformation where one party has made a mistake 'and the other knows it and

fails to inform him of the mistake or conceals the truth from him.' Thus, in Tn Jur, Recission, Cancellation and Reformation, at §47, it is said:

> Thus to protect an innocent party, a written instrument may be reformed, especially where there is ignorance or a mistake on one side and fraud or inequitable conduct on the other, as where one party to an instrument has made a mistake and the other knows it and fails to inform him of the mistake or conceals the truth from him. (citing Tennessee cases).

(Plaintiff's Motion at 23-24).

Plaintiff, while correctly quoting the passage from Tennessee Jurisprudence, errs by reading it too broadly. The quoted section does not say that the non-mistaken party *must* know of the other's mistake, but merely states that such actual knowledge would be an example of inequitable conduct that would justify reformation. In fact, Tennessee law permits a writing to be reformed because of a unilateral mistake if the non-mistaken party *should have been* aware of the other party's mistake.

In *Confrancesco Construction Co. v. Superior Components, Inc.*, 52 Tenn. App. 88, 371 S.W.2d 821 (1963), a building material supplier submitted to a contractor an erroneous bid for lumber in the amount of $1,310.00, when the bid amount should have been $5,310.00. The contractor accepted the erroneous bid, and the supplier delivered the lumber to the job site. The supplier discovered the mistake and notified the contractor before the contractor had used the lumber. The contractor, however, refused either to pay the difference in price or to return the lumber, and the contractor proceeded to use the lumber in the construction project. The supplier then filed a material lien, and the contractor sued to enjoin enforcement of the lien.

The chancellor denied the supplier recovery of the $4,000.00 it was claiming. The appellate court reversed, noting that "[r]elief from the effect of a unilateral mistake is consistently allowed where one party knows or has reason to know of the other's error and the requirements for rescission are fulfilled." 371 S.W.2d at 823 (emphasis supplied). The court

listed the requirements for rescission as being: (1) The mistake was material to the contract; (2) the mistake was not the result of neglect of a legal duty; (3) the enforcement of the contract would be unconscionable; and (4) the other party could be placed in statu quo. *Id.* at 823-24.

The court of appeals held that the case before it was the classic situation where relief should be granted from the effect of a unilateral contract and reformed the contract by modifying the chancellor's decree to allow the supplier to recover the $4,000.00 error in the original bid. In reaching this result, the court noted that a $4,000.00 error in a total bid of $9,000.00 was a material mistake and that the contractor "though [it] did not participate in or cause [the supplier's] mistake, had good reason to believe, in our opinion, that [the supplier] had made a mistake in its bid quotation . . . ." *Id.* at 824. These reasons included: (1) A competing bid from another supplier for the wood was more than three times the price that the defendant had mistakenly quoted, even though the defendant supplier's quote concerned a more expensive type of wood; (2) the contractor itself had calculated what the cost of the wood should have been; and (3) the quoted price was so out of proportion to its actual costs that an experienced contractor should have realized that "something was wrong." *Id.*

The court of appeals also held that the fact that the building materials had been put to their intended use did not prevent the reformation of the contract. The court wrote:

> But whether or not [the contractor] knew or should have known of [the supplier's] mistake at the time it entered into the contract, [the contractor] was notified of the mistake before it changed its position in any way and the parties could be placed in statu quo without any prejudice to [the contractor] other than the loss of an unconscionable bargain.

Id. at 824-25.

In the instant case, plaintiff knew or should have known of defendants' mistake as to the scope of the fill work. Not only had plaintiff gotten a $900,000.00 cash payment as part of the settlement, but plaintiff also was to receive, under plaintiff's current interpretation of the Agreement, work that plaintiff's own expert had valued as being in excess of $1.8 million at a cost to plaintiff that would have been no more than $650,000.00.[1] Defendants contend that plaintiff knew or should have known that Ron Terry, who was seeking to recover his costs for the fill work he was to perform, could not have done so for the amounts agreed upon if the contractor knew that he was obligated to perform fill work on the entire tract of property.

Additionally, defendants' understanding of the scope of the fill work they had agreed to perform was communicated to plaintiff's counsel by two faxes, which Standard's counsel sent to plaintiff's counsel late on the afternoon of May 2, 2001. (*See* Plaintiff's Motion at 35-38). Plaintiff thus had actual knowledge of what the defendants understood the agreement to have been and had this knowledge before the settlement was finalized and approved by the Probate Court. Yet, plaintiff's counsel said nothing at that time regarding their disagreement with defendants' understanding of the scope of the fill work.

Tennessee law requires only that one have reason to know that the other party to a contract has made a mistake in order for the mistaken party to be eligible to seek reformation of the contract. The factual record before the arbitrator contains evidence that would support not only a finding that plaintiff should have known of defendants' mistake, but also that plaintiff actually knew of this mistake. In any event, genuine disputes remain over these facts, and the inferences to be drawn therefrom, and these genuine issues of material fact preclude a summary judgment.

[1] This was the upper limit agreed upon at the time of the settlement. The parties later reduced this upper limit to a flat $525,000.00.

B. Whether defendants' fault precludes reformation depends on the resolution of genuine issues of material fact.

Plaintiff's second argument against reformation of the Settlement Agreement is the claim that defendants must have been "free of any fault" in creating the circumstances that led to the mistake. Plaintiff argues that "plaintiff had no reason to know of any mistake on the part of the Defendants" and that "if there was a mistake on the part of the Defendants as to the meaning of the contract, it was one which clearly could have been avoided by their attorneys, one of whom drafted it, by inserting language therein evidencing what they say was their subjective intention." (Plaintiff's Motion at 24).

First of all, plaintiff has again overstated the law regarding the degree of fault that must exist in order to bar a claim for reformation. The court of appeals dealt with this issue in the case of *Rentenbach Engineering Co., Construction Division v. General Realty, Ltd.*, 707 S.W.2d 524 (Tenn. App. 1985) and, relying on precedent from the supreme court, held that only gross negligence by the party seeking relief is sufficient to bar a claim for reformation.

The *Rentenbach* case involved a hotel owner who took bids from a contractor to renovate the hotel. The contractor submitted an initial bid of $4,439,000, which bid included a five percent contingency amount that would cover any unforeseen costs that might arise during construction.

The owner rejected the contractor's original bid because it was too high. Further negotiations ensued. At a meeting between the owner, his architects and the contractor's representatives, the parties agreed to delete the five percent contingency, according to the testimony of the contractor's principal. The contractor then drew up a written document memorializing the agreement that indicated that the five percent contingency was to be deleted.

The owners did not accept this written document, but the parties continued negotiations the next day. At a three hour meeting held at the offices of the owner's attorney, at which the owner's attorney, the owner's architect, and several representatives of the contractor were present, the parties reached an agreement. However, the contract they signed did not delete the contingency clause.

Shortly thereafter, the representative of the contractor realized that the contingency had not been deleted, as he claimed the owner had agreed would be done. The contractor so advised the owner's attorney of this alleged oversight and told the attorney that the owner had agreed to its deletion. The attorney, who was unable to reach his client, then signed a document in which he purported to delete the contingency on behalf of the owner. Thereafter, a change order deleting the contingency was presented to the owner, who declined to sign it.

The contractor sued to reform the written contract to delete the contingency. The chancery court reformed the contract and awarded judgment to the contractor in the amount of $503,000.

On appeal, the defendant owner argued that the contractor was not without fault, which the defendant claimed was a prerequisite for reformation. In rejecting this contention, the court of appeals relied on the case of *Alston v. Porter*, 31 Tenn. App. 628, 219 S.W.2d 745 (1949), for the following quotation, which the *Alston* court took from the 1875 supreme court case of *Hicks v. Gooch*, 3 Shan. 447, 451:

> It is stated to be the well-defined and well-established rule upon this subject, that when the mistake is of so fundamental a character that the minds of the parties have never, in fact, met; or where an unconscionable advantage has been gained by mistake or misapprehension, and there was no gross negligence on the part of the plaintiff, either in falling into the error, or in not sooner claiming redress, and no intervening rights have

> accrued, and the parties may still be placed in status quo, equity will interpose in its discretion to prevent intolerable injustice.

Rentenbach, 707 S.W.2d at 527. Based on this authority, the *Rentenbach* court held:

> We believe under the facts in the present case, [the contractor] was not guilty of gross negligence which would bar its recovery. In this regard, it would appear that if mere negligence precludes relief, very few if any instruments could be reformed on the ground of mutual mistake, because if a party uses due care in reading an instrument he would never sign one which did not contain the parties' agreement.

Rentenbach, 707 S.Ws.2d at 527-28.

There are disputed facts in the instant case concerning whether plaintiff should have recognized that defendants were mistaken in their understanding of their obligation as to the scope of the fill work they were to perform. A fact question likewise exists concerning whether defendants were negligent in this regard and, if so, whether this negligence amounts to the kind of gross negligence that would bar reformation. Questions of negligence and gross negligence are generally not amenable to summary disposition. *Wolfe v. Hart*, 679 S.W.2d 455, 457 (Tenn. App. 1984); *Martin v. Town of McMinnville*, 51 Tenn. App. 503, 369 S.W.2d 902, 905 (1962). Accordingly, plaintiff's argument that defendants were guilty of such neglect so as to preclude, as a matter of law, their action for reformation must fail.

C. Whether defendants will be able to prove that they are entitled to reformation with the requisite degree of proof is a question of fact.

Summary judgment is not available unless the undisputed facts and the inferences reasonably drawn from such facts support only one conclusion-- that the moving party is entitled to judgment as a matter of law. *Peros Steak & Spaghetti House v. Lee*, 90 S.W.3d 614, 620 (Tenn. 2002). The facts regarding the circumstances leading to the execution of the written Settlement Agreement, including but not limited to whether defendants agreed at the mediation to add fill to hitherto undisturbed areas of Mrs. Love's property, are in dispute. It is premature to

ask the arbitrator to rule, in a summary judgment motion, that the strength of the proof defendants will put on at trial cannot, as a matter of law, rise to the level of clear and convincing evidence. Nevertheless, defendant will make the following observations about its burden of proof.

Clear and convincing proof is that degree of proof that is traditionally required in suits in equity. *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1295 (6th Cir. 1991).

As the *Rentenbach* case shows, merely because there is contradictory testimony does not preclude a trier of fact from concluding that the testimony presented by one side is clear and convincing. In that case, the owner testified that he had not agreed to delete the contingency provision from the contract, while a representative of the contractor gave contrary testimony.

The court of appeals noted that the "clear and convincing" standard is a safeguard that prevents the parol evidence rule from being emasculated merely by a litigant's praying for reformation. 707 S.W.2d at 527. The court of appeals observed that the trial court, while not addressing the issue expressly, felt that the contractor had met this higher burden of proof, as the chancellor considered "the credibility and interest of the witnesses" in reaching his decision. The record also contained documentary evidence that supported the conclusion that the owner had agreed to delete the contingency. Accordingly, the court of appeals concluded that the contractor had produced the requisite degree of proof to entitle it to reform the contract.

It is improper to determine the credibility of witnesses, or to weigh evidence, in deciding a motion for summary judgment. *Byrd v. Hall*, 847 S.W.2d 208, 211-12 (Tenn. 1993). Defendants submit that plaintiff's motion should be denied and that the arbitrator should make his determinations on the strength of the parties' evidence and the credibility of their witnesses based on the proof presented at the arbitration hearing.

IV. The Rules Concerning the Construction of Contracts and Industry Custom Show that Defendants Were Not Required to Remove Trees from Mrs. Love's Property.

Plaintiff has misconstrued Standard's position regarding the removal of surface vegetation. Plaintiff claims defendants contend that: "[T]hey did not intend to remove surface vegetation from any area other than that area from which the illegal solid waste was removed." (Plaintiff's Motion, p. 20). This statement is incorrect insofar as Standard is concerned, as Standard has always taken the position that the Settlement Agreement obligated the defendants to "remove all surface vegetation from the entire 7.96 acres."[2] The question that Standard has raised is whether the term "surface vegetation" includes trees. There are two reasons why Standard contends that it does not: (1) The term "surface vegetation" in the dirt moving industry has a specific meaning, which meaning does not include the removal of trees; and (2) the Settlement Agreement itself, in Exhibit E, paragraph 1.06, obligates defendants to protect trees, shrubs, lawns and other features that were to remain on the property. Obviously, the term "remove all surface vegetation" could not require the removal of all trees if the Agreement contemplated that some trees were to remain on the property.

Standard will now address the rules regarding the construction of contracts and will show that there is no contradiction in terms that would justify the arbitrator's reading paragraph 1.06 of Exhibit E out of the contract. Standard will then show that evidence of industry custom and usage concerning the term "surface vegetation" is admissible.

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[2] On page 3 of Standard's April 26, 2005 Statement of Factual and Legal Issues, Standard stated:

> Paragraph 1(C)(1) of the Agreement requires Terry/Standard to "remove all surface vegetation from the entire 7.96 acres" of Mrs. Love's property. The legal issue is whether this language also requires removal of trees and shrubs that are on the northern edge of Mr. Love's property. In other words, does the term "surface vegetation" include trees and shrubs such that they should have been removed from the entire 7.96 acres, especially in view of paragraph 1.06 of Exhibit E to the Agreement, which obligates Terry/Standard to protect trees, shrubs, lawns and other features remaining on the property and thus implies that Terry/Standard were not required to remove trees and shrubs.

Before Standard does so, however, Standard would like to correct plaintiff's claim that Terry's attorney, during the drafting of the Settlement Agreement, sought to insert language in the Agreement that would have required Terry to remove surface vegetation from "only that portion of the property from which the illegal solid waste was removed." (Plaintiff's Motion at 26).[3] Standard assumes that plaintiff is referring to Rex Brasher's May 2, 2001 letter to Paul Billings. Mr. Brasher did not state in his letter that Terry intended to remove vegetation only from the area in which the original fill had been placed. In fact, Mr. Brasher stated the exact opposite; the letter says that, "Terry will agree to slope the fill, but he will not agree to fill or compact any area not covered by the 'fill' area shown on the map. He will grade or smooth off or remove vegetation from the non-fill area, except for large growth trees on the edge(s) of the property." (Plaintiff's Motion at 38, emphasis supplied). Thus, Terry specifically agreed to remove "vegetation", but not large trees, from areas that never contained any fill.

The question before the arbitrator is what does the term "vegetation" mean. A review of contract construction principles will be instructive in answering this question.

A. Evidence of trade custom is admissible to show that the word "vegetation" did not require defendants to remove the trees from Mrs. Love's property.

The cardinal rule in interpreting contracts is to ascertain the intention of the parties and to give effect to that intention. *Frizzell Const. Co., Inc. v. Gatlinburg, LLC*, 9 S.W.3d 79, 85 (Tenn. 1999). Courts may determine the intention of the parties, "by fair consideration of the terms and provisions of the contract, by the subject matter to which it has reference, by the circumstances of the particular transaction giving rise to the question, and by the construction placed on the agreement by the parties in carrying out its terms." *Id.* (citing *Penske Truck Leasing Co. v. Huddleston*, 795 S.W.2d 669, 671 (Tenn. 1990)). A contractual construction that is fair and

[3]Plaintiff repeats this assertion on pages 43 and 56 of the Motion.

reasonable will prevail. *Keller v. West-Morr Investors, Ltd.*, 770 S.W.2d 543, 549 (Tenn. App. 1988).

The Tennessee Supreme Court has held that, "it is the universal rule that a contract must be viewed from beginning to end and all its terms must pass in review, for one clause may modify, limit or illuminate another." *Cocke County Bd. of Highway Comm'rs v. Newport Utilities Bd.*, 690 S.W.2d 231, 237 (Tenn. 1985). Courts are to interpret a contract in a way that will give effect to all of its provisions and will avoid a construction that would render any of its provisions illusory or meaningless. *Hilton Hotels Corp. v. Dunnet*, 275 F.Supp. 2d 954, 964 (W.D. Tenn. 2002); *Burress v. Sanders*, 31 S.W.3d 259, 265 (Tenn. App. 2000). All provisions of a contract should be construed as in harmony with each other, if reasonably possible, so as to avoid repugnancy between provisions. *Rainey v. Stansell*, 836 S.W.2d 117, 119 (Tenn. App. 1992).

The Tennessee Supreme Court has recognized that "words used in contracts may have different meanings attached to them in different places by law or usage," and if they are ambiguous, "custom or usage in a particular place may give them an exact and appropriate meaning." *Williamson v. Smith*, 41 Tenn. 1, 4 (1860). Thus, "if the full and entire intention of the parties does not appear from the words of the contract, and if it can be interpreted by any custom of usage of the place where it is made, that course is to be adopted." *Id.*; *see also* 29A Am. Jur. 2d Evidence § 1143 (2004) ("Parol evidence is always admissible to define and explain the meaning of words or phrases in a written instrument which are technical and not commonly known, or which have two meanings—the one common and universal and the other technical. Similarly, where a word or phrase is used in a peculiar sense as applicable to a particular trade ..., extrinsic evidence is admissible to explain or illustrate the meaning of that word or phrase.").

Plaintiff was the party who introduced the term "surface vegetation" into the Settlement Agreement. During the litigation to which that Agreement applied, plaintiff had retained the services of an experienced engineer, Marshall Colvin, to assist plaintiff.

Anyone familiar with the dirt industry, such as Mr. Colvin, was on notice of the custom in that industry that terms such as "clearing" or "clearing and grubbing" are used when the parties intend to require that trees be removed, as this usage is widespread in that industry. A term referencing only surface vegetation is not sufficient to impose this duty. It is axiomatic that the knowledge of an agent, such as Mr. Colvin, is imputed to his principal. *Griffith Motors, Inc. v. Parker*, 633 S.W.2d 319, 322 (Tenn. App. 1982). Plaintiff is thus bound to have known what Mr. Colvin was on notice of, and this knowledge justifies applying the industry custom concerning the terms to be used in the industry when trees are to be removed.

Plaintiff now seeks to avoid the consequences of the language plaintiff selected by having plaintiff's attorney submit an affidavit concerning what knowledge Mr. Colvin did or did not have in his mind regarding this custom. This proffered testimony is impermissible speculation and hearsay and should be disregarded. Defendants will be able to prove, by testimony from Ron Terry and from the professional engineer, Charles Furlow, the existence of the industry custom regarding the language necessary to require the removal of trees.

B. The most reasonable construction of the Settlement Agreement supports the conclusion that defendants were not obligated to remove trees from Mrs. Love's property.

As pointed out in the previous section, contracts are to be construed as a whole, every provision is to be construed in a way that is consistent with the other provisions in the same contract, and every provision in a contract is to be given some effect, if at all possible.

The provision in Section 1(C)(1) of the Settlement Agreement regarding removal of "all

surface vegetation from the entire 7.96 acres" can be read consistently with paragraph 1.06 of Exhibit E, which requires defendants, ". . . to protect trees, shrubs, lawns and other features remaining as portion of the final landscape," by holding that the term "surface vegetation" does not encompass trees. Such a construction would give effect to both of the provisions of the contract, as the rules of contract construction require be done, and would be consistent with the practice in the dirt moving industry regarding the language to be used when trees are to be removed.

The construction plaintiff would have the arbitrator adopt, however, would require the arbitrator to read paragraph 1.06 of Exhibit E out of the contract altogether. Such a reading would be unreasonable because it would fail to give effect to a contract provision that is capable of being harmonized with other provisions.

Furthermore, plaintiff's suggestion that the arbitrator follow the preference for typewritten terms over printed terms is inapplicable to the Settlement Agreement. This rule of construction applies where the parties modify a printed form to suit a particular fact situation. This is not what happened here. In the instant case, plaintiff's counsel supplied the specifications that became Exhibit E to the Settlement Agreement. Included in these specifications was section 1.06. There was never any type-written or hand-written modification to the Settlement Agreement. The rule of construction plaintiff has suggested the arbitrator use does not, therefore, apply to the written agreement that is the subject of this arbitration.

CONCLUSION

Based on the foregoing, Standard submits that plaintiff's motion for summary judgment or, in the alternative, motion in limine should be denied.

Respectfully submitted,

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Certificate of Service

I hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing to Rex L. Brasher, Jr., Esq., Brown, Brasher & Smith, 5100 Poplar Avenue, Suite 2515, Memphis, Tennessee 38137; and William H. Fisher, III, Attorney for Conservator, 5830 Mt. Moriah, #7, Memphis, Tennessee 38115.

This 9th day of February, 2007.

Stephen D. Crawley

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