

The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

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INTRODUCTION

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

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

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Partner, McNabb, Bragorgos & Burgess, PLLC.

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

1992; TN Bar No. 015265.

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, Bar No. 015265, licensed April 27, 1992.
Mississippi, Bar No. 100871, licensed on April 29, 2003.
Both are currently active.

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

No.

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

Shelby County Public Defender's Office, Assistant Public Defender, 1991 to 1995.
Nahon, Saharovich & Trotz, Associate, 1995 to 1998.
Spicer, Flynn & Rudstrom, Associate, 1998 to 2002.
The Adelman Firm, Member, 2002 to 2010.
McNabb, Bragorgos & Burgess, Partner, 2010 to present.

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.

3. Not applicable.

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

My practice is 100% litigation. The major areas of the law in which I practice are medical malpractice (now health care liability) defense and general insurance defense. I estimate that at present, 60% of my cases are health care liability defense cases. The remainder involve the defense of claims for damages in various tort settings. All of my cases require knowledge of the law of torts and damages, civil procedure and evidence.

My health care liability defense cases involve complicated issues requiring the development of admissible expert proof. My insurance defense cases involve areas of the law such as auto negligence, premises liability and agency. In the last year, I became involved in the defense of a class action lawsuit involving the duty a funeral home has to its customers. The majority of my practice is a motion practice involving motions to dismiss, discovery disputes, and for summary judgment. I regularly litigate motions to compel the enforcement of arbitration agreements, which involve issues related to advanced directives, powers of attorney, mental competence, contract and agency.

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.

Over the span of my practice, I have appeared as sole or lead counsel before every level of Court in Shelby County: General Sessions Civil and Criminal, Circuit Court, Chancery Court, Criminal Court, Probate Court, Juvenile Court, U.S. Bankruptcy Court, Federal District Court as well as in administrative proceedings with the State Department of Health and the Social Security Administration.

I began my professional career as an Assistant Public Defender in the Shelby County Public Defender's Office. I was an Assistant Public Defender from 1992 to 1995. I began in General Sessions defending indigents charged with misdemeanors and I advanced to permanent assignment in Division 5 of Shelby County Criminal Court, the "major violators" court. There, I was tasked with defending individuals with multiple prior convictions, most often charged with Class A or B felonies.

Next, I was an associate with Nahon, Saharovich & Trotz from 1995 to 1998 which, at that time was a general five lawyer practice. I handled criminal defense cases, plaintiff's personal injury claims, divorces, employment discrimination, bankruptcy (both creditor and debtor), and Social Security Disability.

I then began my civil defense practice with Spicer, Flynn & Rudstrom where I was an associate from 1998 to 2002. The bulk of my practice involved Workers' Compensation defense and I tried numerous of Worker's Comp cases in that time along with some auto accident and slip fall cases.

I next joined the Adelman Law Firm in 2002 and remained there until 2010. Over 95% of my case load involved the defense of nursing homes or other long term care providers in matters where the plaintiff sought both compensatory and punitive damages and asserted claims of medical malpractice, ordinary negligence, negligence *per se*, breach of contract, breach of fiduciary duty and fraud. My tenure at the Adelman Firm coincided with a period of much volatility in the nursing home industry. The plaintiff's bar had established a template to maximize the emotional value of these cases and began obtaining seven figure jury verdicts all over the country, including a case in Warren County, Tennessee where the jury awarded over \$4M in compensatory damages and over \$30M in punitive damages. My firm's representation of some of the largest nursing home operators in the Tennessee and Mississippi, allowed to participate in the development of the theories of defense used to thwart these massive judgments.

In nursing home cases, the stakes are very high. They involve intense litigation that begins with motions to dismiss, and also involve difficult questions on the scope of discovery as it relates to parent corporations not directly involved in the operation of the nursing home; the development of expert proof; the cross examination of the plaintiff's experts; motions to exclude experts; motions for summary judgment; and the defense of claims for punitive damages.

In 2010, I had the opportunity to practice law with my brother at McNabb, Bragorgos & Burgess, where I am currently a partner. My case load is more diverse. Approximately 60% of my case load involves the defense of nursing homes. But I have also defended a local hospital and other tort claims for personal injuries. I have appeared approximately 11 times before the Tennessee Court of Appeals or a Special Workers' Compensation Appeals Panel.

Since 1998, almost all of my cases have been in Tennessee Circuit Courts outside of Shelby County. Over that time I have handled cases in Fayette, Tipton, Lauderdale, Dyer, Obion, Weakley, Henry, Gibson, Carroll, Madison, Hardeman, McNairy, Harden, Haywood, Stewart,

Montgomery, Grainger, Robertson, Wilson, Davidson, Rutherford, Knox, Anderson, Roane, Loudon, Blount, Hamilton, Bradley and Franklin Counties. I have also appeared before each of the grand divisions of the Tennessee Court of Appeals. Presently, I have cases pending in Fayette, Davidson, Anderson, Grainger, Wilson, Rutherford, and Stewart Counties.

Practicing before Circuit Court Judges throughout the State allows me the opportunity to observe how dozens of Circuit Court Judges conduct the business of their Court. I have learned that being decisive is what works best in the administration of a Tennessee Circuit Court. I have learned the leading role a trial judge must take to ensure the efficient administration of justice. I have learned the importance of being considerate of an attorney's time in the administration a courtroom, and, even more so, the time of the litigants and jurors. I have experienced the difference it makes for a judge to render rulings quickly rather than delaying a decision for weeks or even months. I have learned that much can be accomplished in an early morning conference call between the lawyers and the Judge, which then frees up the courtroom for other business. Most importantly, the level of respect a Circuit Court Judge receives is in direct proportion to the level of respect the Judge shows the lawyers and litigants.

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

Not applicable.

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.

Not applicable.

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

During my third year of law school I was chosen for a legal externship with U.S. Bankruptcy Judge, Bernice B. Donald, which allowed me to serve as her law clerk for a semester. I was able to observe, first hand, her process of deciding a case. She shared with me her process of mapping out the critical issues, finding facts, coming to a conclusion and writing a decision. I was able to draft many Orders on her behalf. This experience working for Judge Donald first piqued my interest in one day serving on the bench.

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.

This is my first application.

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.

Indiana University, 1984-1988 B.S. in Public Affairs.

Cecil C. Humphreys Schools of Law, 1988 -1991, Juris Doctor.

PERSONAL INFORMATION

15. State your age and date of birth.

I am 50 years old. Born October 26, 1965.

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

My entire life (other than four years in college).

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

I have been a resident of Shelby County since 1975.

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.

Not applicable.

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.

Not applicable.

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.

I was the subject of one claim of Ineffective Assistance of Counsel by one of my clients during my time at the Public Defender's Office. The Motion was denied. I have also had one bar complaint. It was in the late 1990's and was summarily dismissed. I cannot remember the particulars.

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.

Foreclosure, 2011 associated with a divorce. After sitting empty for over a year and the denial of a short sale by my mortgage company, I instituted a strategic foreclosure in 2011. It involved a 2007 mortgage used to purchase the equity of the marital home I obtained in the 2006 divorce. The 2008 collapse of real estate values adversely affected the property's value. I was no longer living in the house at the time. The foreclosure concluded with the bank buying the house for an amount slightly more than the amount outstanding on the mortgage. There was no deficiency on the loan.

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.

In addition to the foreclosure discussed above, I am twice divorced, both in Shelby County Circuit Court. The first, CT-005613-06 was filed in 2006. That case involved the dissolution of a 15 year marriage with property and the custody of our two minor children. The second, CT-004610-11 was filed in 2011 and involved the dissolution of a brief marriage with no children and no claim for property. Each case was one of irreconcilable differences. I was able to amicably resolve both of these divorces through negotiation and without the necessity of any litigation activities whatsoever.

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.

Memphis Jewish Federation.

Bornblum Jewish Community School, Member of the Board of Directors.

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.

I have maintained membership in the Memphis Bar Association, the Tennessee Bar Association, The Mississippi Bar, the Defense Research Institute and the Tennessee Defense Lawyers Association.

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.

Not applicable.

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

Not applicable.

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.

I presented a CLE on advance directives and living wills about four or five years ago.

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.

Not applicable.

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

Not applicable.

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.

See attached

- 1) *Adkins v. Laurel Manor*, Brief of Appellee
- 2) *Hyde v. Diversicare*, Defendants' Supplemental Memorandum of Law in Support of Motion to Compel Arbitration and Stay Lawsuit

ESSAYS/PERSONAL STATEMENTS

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

I am seeking this position to serve the people of Shelby County by running an efficient courtroom which shows great respect for the litigants, lawyers and jurors who appear before me. I am well-suited for the position because I possess objectivity and compassion. I have often been complemented on my pragmatism. I believe my work ethic and temperament are well-suited to the demands of a Circuit Court Judge. I believe that any lawyer that I have worked with or against will attest to my professionalism, honesty and integrity. I am intellectually interested in the law. I find myself most fulfilled when researching and writing a legal memorandum on a particular question of procedural or substantive law. These are the traits necessary to becoming a productive and well-respected jurist.

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)*

The biggest commitment I made to the idea of equal justice under the law is the four years I spent in the Shelby County Public Defender's Office. It was an honor to ensure the constitutional and due process rights of the most vulnerable members of our community. My pro bono work has involved volunteering at the Saturday legal clinic run by Memphis Area Legal Services. I was also involved with the Memphis Bar Association's Law Rules committee which involved speaking to middle and high school students concerning the law's fundamental role in our society.

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 appointment to Division III of Shelby County Circuit Court. This is one of nine civil divisions in Shelby County. In Memphis there are separate Criminal Courts. The Shelby County Circuit Court can hear any type of civil litigation, but the majority of the cases that come before them involve family law, personal injury, and private business and property disputes. It is my hope to impact the court by increasing the knowledge and respect the citizens of Shelby County have for the courts. I plan on achieving this by working my hardest to ensure the swift and just adjudication of controversies and to meet the needs and reasonable expectations of lawyers and litigants.

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 have worked with Facing History and Ourselves and the Memphis Bar Association's Law Rules committee. My work for both of these organizations centered on speaking to middle or high school students on subjects such as equal protection under the law, due process, the nature of the legal system, the significance of South Africa's Truth and Reconciliation Commission, and how systematic changes in the law by Nazi Germany legitimized hate and prejudice. Each time I spoke before a classroom, the students would ultimately express more interest in the day to day operation of the courts, the practice of law and the role Courts play in the resolution of controversies between citizens. If appointed, my community involvement would focus on ways to improve the public school system in Shelby County, by arranging for judges and attorneys to speak to students on the role the law and courts play in maintaining a civil society, and to provide inspiration on the importance of education.

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)*

The most influential experience in my life was growing up in the restaurant business. Our success depended on satisfying our customers. I learned the important role empathy plays in satisfying a customer. I believe that focusing on the needs of others is the best way to insure the litigants who appear before me, while perhaps not satisfied with the result, will nonetheless be satisfied that they received a fair hearing in a timely and respectful manner

I believe the experience of my first divorce is a good example of my pragmatism, objectivity and temperament. I understood the unnecessary damage my children would suffer through a long, litigation over money and custody. It allowed me to resolve the case in a way that met the needs of all involved, not just myself. Even more so, my former spouse and I have never required Court intervention to address any of the reasons divorce litigants with children often find their way back to court.

My experience negotiating the resolution of numerous cases allowed me to learn how to view a

situation objectively, convey my client's position and drill down to the essential issues.

A Circuit Court Judge plays a fundamental role in our society. It requires the appropriate temperament, work ethic, intelligence, and objectivity. I have exhibited all of these traits in my practice and, therefore, believe that I am well-suited for the Bench.

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)*

I will uphold the law regardless of my personal feelings. It is not the place for a Circuit Court Judge to question the propriety of a certain law or rule. As a lawyer, it has been my job to establish the proof required under the law. The role of a Circuit Court Judge is to objectively apply the law to the facts presented. It is the role of the legislature and appellate courts to address changes to the substance of the law. It is not the role of a Circuit Court Judge to legislate from the bench.

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. Amy Weirich
Shelby County District Attorney

B. Rachel Shankman
Founding Director
Facing History and Ourselves, Memphis Region

C. Rabbi Micah D. Greenstein
Senior Rabbi, Temple Israel

D. Howard B Hayden
Wiseman Ashworth Law Group, PLLC

E. Mitchell D. Moskovitz
Shea, Moskovitz & McGhee

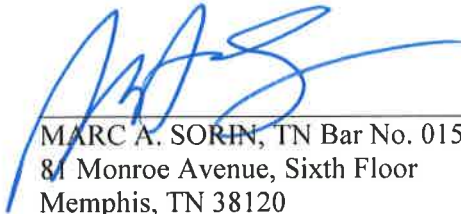
AFFIRMATION CONCERNING APPLICATION

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 Division III of the Thirtieth Judicial District at Memphis, Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended questionnaire with the Administrative Office of the Courts for distribution to the Council members.

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

Dated: November 30, 2015.



MARC A. SORIN, TN Bar No. 015265
81 Monroe Avenue, Sixth Floor
Memphis, TN 38120
Phone: (901) 624-0640
msorin@mbb-law.com

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.

Marc A. Sorin
Type or Print Name


Signature

11/30/15
Date

015265
BPR #

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

The Mississippi Bar, # 100871

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

66-5843

SHEILA DUNLAP, Individually and as
Personal Representative of the ESTATE OF
VICTORIA ADKINS,

Plaintiff/Appellant,

NO. E2012-02432-COA-R3-CV

VS

LAUREL MANOR HEALTH CARE, INC.,
a Tennessee Corporation,

Defendant/Appellee.

BRIEF OF APPELLEE, LAUREL MANOR HEALTH CARE

4/18/13
Fed Ex

McNABB, BRAGORGOS & BURGESS, PLLC

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ORAL ARGUMENT REQUESTED

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STATEMENT OF THE ISSUE

Whether the acts and omissions alleged in Plaintiff's Complaint bear a substantial relationship to the rendition of medical treatment by a medical professional, or concern medical art, science, training, or expertise; all of which would require expert testimony; thereby subjecting this action to dismissal with prejudice due to Plaintiff's failure to file a Certificate of Good Faith as required by Tennessee Code Annotated section 29-26-122.

STATEMENT OF THE CASE

This is a medical malpractice case. On June 1, 2012, Plaintiff filed her Complaint for Damages. (T.R. 1-15). Plaintiff alleges that her decedent, Victoria Adkins, suffered injuries and death as a result of the poor care Ms. Adkins received in April and May of 2010, while a resident of Defendant's nursing home. (T.R. Vol. I, pp. ¶¶ 6, 14-16, 24). Plaintiff did not attach to her Complaint or separately file a Certificate of Good Faith as required T.C.A. §29-26-122. (Note the absence of such anywhere in the Technical Record).

On July 25, 2012, Defendant filed a Motion to Dismiss pursuant to Rule 12.02(6) of the Tennessee Rules of Civil Procedure which asserted Plaintiff's failure to file the Certificate of Good Faith as grounds for dismissal. (T.R. Vol. I, pp. 18-22). Plaintiff responded to the Motion to Dismiss asserting that the Complaint was "entirely based on ordinary negligence, rather than medical malpractice...". (T.R. Vol. I, pp. 24-28). By order filed October 25, 2012, the Claiborne County Circuit Court dismissed this "Healthcare Liability action"¹ with prejudice, due to the "Plaintiff's failure to file a certificate of good faith pursuant to Tenn. Code Ann §29-26-122 ". (T.R. Vol. I, p. 37).

Plaintiff is now before this Honorable Court making the same argument the trial court rejected below. (See, Brief of Appellant).

¹ Defendant acknowledges that this is not a Healthcare Liability Action due to the fact that this cause of action accrued on May 4, 2010. (T. R. Vol. I, p. 3, ¶16). (See, SECTION 24, TENNESSEE CIVIL JUSTICE ACT OF 2011, 2011 Tennessee Laws Pub. Ch. 510 (H.B. 2008) (**This act shall take effect October 1, 2011, the public welfare requiring it and shall apply to all liability actions for injuries, deaths and losses covered by this act which accrue on or after such date.**) (emphasis added)). Therefore, the analysis outlined in *French* is dispositive, not *Tenn. Code Ann. §29-26-101(c)* (Any such civil action or claim is subject to this part regardless of any other claims, causes of action, or theories of liability alleged in the complaint...).

STATEMENT OF FACTS

This is a wrongful death action against Defendant's nursing home, which asserts that the death of Plaintiff's decedent, Victoria Adkins, was caused by certain acts and omissions of Defendant's nursing staff. (T. R. Vol I., pp. 1-15). As stated above, this case comes before this Honorable Court following the trial court's granting Defendant's 12.02(6) Motion to Dismiss. (T.R. Vol I., p. 35). Thus the only facts before this Court are those alleged in Plaintiff's Complaint. *Traw-Med of America, Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 696 (Tenn.2002). Plaintiff's Complaint asserts numerous theories of liability, all of which center on the failure of Defendant's employees to properly administer prescribed medications and their failure to properly use a prescribed medical device. (T.R. Vol. I, pp.1-13).

Victoria Adkins was a resident of a nursing home in New Tazewell, Tennessee, doing business as Laurel Manor Health Care, from April 16, 2010 until her death on May 4, 2010. (T. R. Vol. I, pp. 1-3, ¶¶2, 6 &16). Plaintiff's Complaint alleges the following: "While under the **care and treatment** of the defendant nursing home, [Ms. Adkins] suffered from Chronic obstructive Pulmonary Disease ("COPD"), as well as a fractured vertebra in her spine that rendered her bedridden and unable to care for herself without the assistance of a competent nursing staff." (T. R. Vol. I, p.3, ¶9) (Emphasis added). On several occasions during her residency, Ms. Adkins was transferred to The University of Tennessee Medical Center ("UTMC"). (T. R. Vol., p.3, ¶10.) On one of those occasions "[Ms. Adkins] was prescribed a Continuous Positive Airway Pressure Machine ("CPAP") to increase oxygen flow to her lungs, along with numerous other [sic] medications, including Coumadin to prevent blood clots." (T.R. Vol. I. p. 3, ¶12). Following her April 30th hospital admission, Ms. Adkins was re-admitted to Laurel Manor Health Care on May 3, 2010. (T. R. Vol. I, p. 3, ¶¶14, 15). She died at

approximately 2:00 a.m. on May 4, 2010. (T. R. Vol. I, p. 3, ¶16). **“Victoria Adkins’ death resulted from the Defendant’s improper care of Victoria Adkins, in not properly administering the prescribed medications, not properly using the required breathing device and not following proper and common patient care procedures...”** (T. R. Vol. I, p. 4, ¶23).

In the section of Plaintiff’s Complaint entitled “NEGLIGENCE”, Plaintiff alleges Defendant’s nursing staff “...failed to use the degree of care and caution in the care of Victoria Adkins that would be exercised by a competent nursing home facility in the same community by not following established practice and procedure...including failure to provide the prescribed medicine and failure to properly used [sic] the prescribed medical device; ...[and] failure to monitor the condition of the patient at all times.” (T. R. Vol. I, p. 5, ¶26 a.-c.). Plaintiff further alleges that “Defendant negligently or deliberately caused decedent to not be [sic] properly medicated with the prescribed blood thinners with knowledge that the effect of such medications were [sic] necessary.” (T. R. Vol. I, p. 5, ¶27 a.). Plaintiff also alleged that Defendant “[failed] to properly medicate, remediate, and use the prescribed equipment and standard of care..., including such equipment being the prescribed CPAP machine, proper and necessary medication, and established and proper nursing care.” (T. R. Vol. I, p. ¶31 b.).

The next section of the Complaint is entitled “PROFESSIONAL NEGLIGENCE” and clearly makes allegations that sound in medical malpractice. (T. R. Vol. I, pp. 7-8, ¶¶32-38). The remainder of the Complaint asserts claims for Gross Negligence, Intentional Infliction of Emotional Distress; Negligent Infliction of Emotional Distress; Breach of Fiduciary Duty; and Breach of Contract.² (T. R. Vol. I, pp. 8-12, ¶¶40-68). However, given Plaintiff’s position that “The Case At Bar Is One Of Ordinary Negligence”, although not dispositive, Plaintiff

² Plaintiff also alleges the derivate claims of wrongful death, vicarious liability and loss of consortium, but those claims are not germane to the analysis here.

acknowledges that these other theories of liability are moot. (Brief of Appellant, p. 11). It is important to note, however, that the only sufficient factual allegations in Plaintiff's Complaint which articulate any claim for relief are: 1) the failure of the nursing staff to administer the proper medication; and 2) the failure of the nursing staff to properly use the prescribed medical equipment. (T.R. Vol. I, p. 5, ¶26 b.; p. 5-6, ¶27 a.; p. 6, ¶31 b.; p. 7, ¶34; p. 8, ¶41; p. 11 ¶62).

It is also important to note what is NOT alleged in Plaintiff's Complaint. Nowhere in the Complaint do the terms "CNA", "orderlies", "unlicensed staff", "understaffing", "custodial services", "basic care", or "lack of training" appear. See, *Estate of French v. Stratford House*, 333 S.W.3d 546, 559 (Tenn. 2011) (citing, *Kujawski v. Arbor View Health Care Ctr.*, 407 N.W.2d 249, 252 (1987). (quoting *Cramer v. Thea Clark Mem. Hosp.*, 172 N.W.2d 427, 428 (1969)). Further, the Complaint fails to include any allegations describing "nonmedical, administrative, ministerial or routine care". *French*, 333 S.W.2d at 560 (citing, *Bennett v. Winthrop Cmty Hosp.*, 489 N.E.2d 1032, 1035 (1986).

Finally, it is essential to note that Plaintiff did not file a Certificate of Good Faith required T.C.A. §29-26-122. (T.R. Vol. I, pp.1-42).

STANDARD OF REVIEW

Appellate review of a trial court's granting of a Rule 12.02(6) motion to dismiss is *de novo*, with no presumption of correctness on the part of the trial court. *Trau-Med of Am., Inc.*, 71 S.W.3d at 697..

A Rule 12.02(6) motion to dismiss challenges only the legal sufficiency of the complaint itself, and not the strength of the plaintiff's proof. *Id.* at 696 (citations omitted). This Honorable Court must construe the complaint liberally, presuming all facts as alleged by Plaintiff to be true and affording Plaintiff the benefit of all reasonable inferences. *Id.* "Great specificity in the pleadings is ordinarily not required to survive a motion to dismiss; it is enough that the complaint set forth a short and plain statement of the claim showing that the pleader is entitled to relief." *Id.* (citations omitted). To be sufficient and survive a motion to dismiss, a complaint must not be entirely devoid of factual allegations. Tennessee Rule of Civil Procedure 8.01 requires a plaintiff to state " 'the facts upon which a claim for relief is founded.' " *Smith v. Lincoln Brass Works, Inc.*, 712 S.W.2d 470, 471 (Tenn.1986) (quoting *W & O Constr. Co. v. City of Smithville*, 557 S.W.2d 920, 922 (Tenn.1977)). A complaint "need not contain detailed allegations of all the facts giving rise to the claim, [but it] **must contain sufficient factual allegations to articulate a claim for relief.**" *Abshure v. Methodist Healthcare-Memphis Hospitals*, 325 S.W.3d 98, 103-04 (Tenn. 2010) (Emphasis added). "The facts pleaded, and the inferences reasonably drawn from these facts, must raise the pleader's right to relief beyond the speculative level." *Id.* at 104. As the Tennessee Supreme Court stated:

While a complaint in a tort action need not contain in minute detail the facts that give rise to the claim, *it must contain direct allegations on every material point* necessary to sustain a recovery on any legal theory, even though it may not be the theory suggested ... by the pleader, *or contain allegations from which an inference may fairly be drawn that evidence on these material points will be introduced at trial.*"

Leach v. Taylor, 124 S.W.3d 87, 92 (Tenn. 2004) (Emphasis in original). Courts are not required to accept as true assertions that are merely legal arguments or “legal conclusions” couched as facts. *Riggs v. Burson*, 941 S.W.2d 44, 47–48 (Tenn.1997).

ARGUMENT

I. THE FACTS ALLEGED IN PLAINTIFF'S COMPLAINT AND THE INFERENCES REASONABLY DRAWN FROM THOSE FACTS CLEARLY ASSERT A MEDICAL MALPRACTICE CLAIM AND NOT ONE FOR ORDINARY COMMON LAW NEGLIGENCE

In the seminal case of *Estate of French v. Stratford House*, the Tennessee Supreme Court acknowledged that a single complaint "can be founded upon both ordinary negligence principles and the medical malpractice statute". *Estate of French*, 333 S.W.3d at 557. The Court went on to state:

The TMMA applies only to those alleged acts that bear a substantial relationship to the rendition of medical treatment by a medical professional, or concern medical art or science, training, or expertise. If there are additional acts or omissions alleged that do not bear a substantial relationship to medical treatment, require no specialized skills, or could be assessed by the trier of fact based upon ordinary everyday experiences, then the claims may be made under an ordinary negligence theory.

Id.

The case at bar is an appeal of a dismissal pursuant to Rule 12.02(6) of the Tennessee Rules of Civil Procedure, its "resolution is determined by an examination of the pleadings alone". *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011) (citing, *Leggett v. Duke Energy Corp.*, 308 S.W.3d 843, 851 (Tenn.2010); *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 696 (Tenn.2002); *Cook ex rel. Uithoven v. Spinnaker's of Rivergate, Inc.*, 878 S.W.2d 934, 938 (Tenn.1994); *Cornpropst v. Sloan*, 528 S.W.2d 188, 190 (Tenn.1975) (overruled on other grounds by *McClung v. Delta Square Ltd. P'ship*, 937 S.W.2d 891, 899-900 (Tenn.1996)). Therefore this Court is bound by what is alleged in Plaintiff's Complaint (and any reasonable inferences that can be drawn from those allegations) and not the speculative inferences Plaintiff asserted at the trial court and now on appeal.

An objective review and analysis of the allegations contained in Plaintiff's Complaint can only lead to the conclusion that it states a claim for medical malpractice alone and not one for ordinary negligence. As stated above, boiled down to its essence, the Complaint is centered on two allegations that meet the requirements of Rule 8.01 of the Tennessee Rules of Civil Procedure: 1) the administration of prescription medications, and 2) the administration of a medically prescribed CPAP machine. . (T.R. Vol. I, p. 5, ¶26 b.; p. 5-6, ¶27 a.; p. 6, ¶31 b.; p. 7, ¶34; p. 8, ¶41; p. 11 ¶62). The remaining allegations fail to "give [Defendant] notice of the nature [any other] wrongs ... with reasonable certainty". *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 427 (Tenn. 2011) (citing, *Hammett v. Vogue, Inc.*, 179 Tenn. 284, 165 S.W.2d 577, 579 (1942)). In other words, any objective review of Plaintiff's Complaint can only lead to the conclusion that " the real issues to be tried" are whether the Defendant's nursing staff was appropriate in their administration of Ms. Adkins' medications and their administration of the use of the medically prescribed CPAP machine. *Id.*

Having now distilled the "real issues" alleged in Plaintiff's Complaint, this Court is next required to determine if those allegations "bear a substantial relationship to the rendition of medical treatment" or whether these alleged omissions "could be assessed by the trier of fact based upon ordinary everyday experiences." *French*, 333 S.W.3d at 557. This Honorable Court need look no further than Tennessee Code Annotated section §63-7-103, entitled "Professional Nursing", which states:

a)(1) "Practice of professional nursing" means the performance for compensation of any act requiring substantial specialized judgment and skill based on knowledge of the natural, behavioral and nursing sciences and the humanities as the basis for application of the nursing process in wellness and illness care; and

(2) "Professional nursing" includes:

- (A) Responsible supervision of a patient requiring skill and observation of symptoms and reactions and accurate recording of the facts;
- (B) Promotion, restoration and maintenance of health or prevention of illness of others;
- (C) Counseling, managing, supervising and teaching of others;
- (D) Administration of medications and treatments as prescribed by a licensed physician, dentist, podiatrist or nurse authorized to prescribe pursuant to § 63-7-123;
- (E) Application of such nursing procedures as involve understanding of cause and effect; and
- (F) Nursing management of illness, injury or infirmity including identification of patient problems.

Tenn. Code Ann. § 63-7-103 a) (1) and (2). Even without the benefit of this clear edict by the Tennessee Legislature, it is obvious that the administration of medication and the application of a CPAP machine “require specialized skills” and are not “ordinary, everyday experiences” that a jury could call upon to determine if the Defendant’s nursing staff breached its duty to Ms. Adkins. See, *French* 333 S.W.3d at 556. The Plaintiff’s Complaint fails to assert any acts or omissions that involve the “custodial services” the Court described in *French*. *Id* at 558 (citing, *Smartt v. NHC Healthcare/McMinnville*, 2009 WL 482475, at *9 (“...such as bathing, feeding, grooming, etc.; functions the plaintiffs could have provided themselves”).

Plaintiff in her Brief, citing paragraph 23 of her Complaint, argues “that the nursing home failed to ensure the staff, assistants and administrative personnel followed and complied with the plan of care instituted by outside physicians and perform services that were routine and nonmedical in nature.”³ (Brief of Appellant, p. 14). In fact, Paragraph 23 of Plaintiff’s Complaint alleges:

Upon information and belief, Victoria Adkins’ death resulted from Defendant’s improper care of Victoria Adkins, in not properly

³ Plaintiff/Appellant, in her Brief, failed to make any citation to the Technical Record in compliance with Rule 5(b) of the Rules of the Court of Appeals of Tennessee. Therefore, Defendant moves this Honorable Court to ignore any assertion of fact contained in the Brief of Appellant.

administering the prescribed medications, not properly using the required breathing device and not following proper and common patient care procedures required in Defendant's facility.

(T. R. Vol. I, p. 4, ¶23). Plaintiff, citing paragraph 34 of her Complaint, further argues that "the complaint states that this matter is based upon the failure of the nursing home personnel to administer the proper medication and failing to properly monitor the condition of decedent." (Brief of Appellant, p. 15). Paragraph 34 of the Complaint, which is contained in the section entitled "PROFESSIONAL NEGLIGENCE", alleges: "Defendant failed to use reasonable care to avoid the injury to Ms. Adkins by not administering proper medication, not using proper equipment and by not properly monitoring the condition of the decedent." (T. R. Vol. I, p. 7 ¶34).

Plaintiff's arguments are without any merit. It would be speculative and unreasonable to infer that assistants and administrative personnel were administering medication and a medical device or monitoring Ms. Adkins' condition. Only a licensed nurse can perform such tasks. See, Tennessee Code Annotated section §63-7-103 (a)(2)(A) and (D). In addition, Plaintiff fails to describe any other "proper and common patient care procedures" that are alleged to have caused Ms. Adkins' death. Looking at the Complaint in its entirety, there are no other "short and plain statements of fact" from which this Honorable Court can infer that these patient care procedures, whatever they were, involved the basic, custodial care discussed in *French*. Tenn. R. Civ. P. 8.01.

Given the analytical framework the Supreme Court provided in *French* and applying it to the allegations made by the Plaintiff here, one can only conclude that the Plaintiff's claim is one of medical malpractice.

II. PLAINTIFFS FAILURE TO FILE A CERTIFICATE OF GOOD FAITH IN THIS MEDICAL MALPRACTICE ACTION WAS A VIOLATION OF TENNESSEE CODE ANNOTATED SECTION 29-26-122.

As succinctly stated by the Tennessee Supreme Court; “Tennessee Code Annotated section 29-26-122 requires the filing of a certificate of good faith in all medical malpractice cases requiring expert testimony, confirming that an expert has signed a written statement that there is a good faith basis to maintain the action.” *Myers v. AMISUB (SFH), Inc.*, 382 S.W.3d 300, 305 (Tenn. 2012). In *Myers*, the Plaintiff filed a medical malpractice claim against St. Francis Hospital and other medical providers in January of 2007. *Id.* at 304. On May 15, 2008, the Tennessee Legislature enacted section 29-26-122 of the Tennessee Code and then later amended that section on June 11, 2009. *Id.* Mr. Myers voluntarily dismissed his medical malpractice claim on October 21, 2008 and, with the benefit of the Tennessee savings statute, re-filed the action on September 30, 2009, after the enactment of and subsequent amendments to Tennessee Code Annotated section 29-26-122. Thus the “statutory changes reflected in Tennessee Code Annotated section 122, as amended, were in effect when Mr. Myers re-filed his malpractice suit.” *Id.*

Mr. Myers failed to file a certificate of good faith when he re-filed his malpractice action. *Id.* at 306. In response to the re-filed complaint, the defendants filed a motion to dismiss, pursuant to Rule 12.02(6) of the Tennessee Rules of Civil Procedure, asserting Mr. Myers’ failure to file a certificate of good faith at the time he re-filed his lawsuit. *Id.* In opposition to the motion to dismiss, Mr. Myers argued that the expert disclosures filed in the original suit satisfied the certificate of good faith requirement.⁴ *Id.* The trial court denied the motion to

⁴ The Court was also confronted with questions concerning Mr. Myers’ compliance with notice provisions contained in Tennessee Code Annotated section 121, but the Supreme Court’s review and analysis of that section of the

dismiss on the grounds that Mr. Myers had substantially complied with the requirements of the statute⁵. *Id.* The Tennessee Court of Appeals then reversed and remanded the case for dismissal, holding that Mr. Myers “failed to demonstrate extraordinary cause that would excuse compliance”. *Id.* at 307. The Tennessee Supreme Court then granted application for permission to appeal “to address the effect of [Mr. Myers’] failure to comply with...the certificate of good faith requirement of Tennessee Code Annotated section 29-26-122”. *Id.*

The Supreme Court first noted that filing a Rule 12.02(6) motion to dismiss for failure to state a claim “was the proper way for a defendant to challenge the complaint’s compliance with...Tennessee Code Annotated section 29-26-122”. *Id.* In that analysis, the Court looked to the language of the statute and noted that it “expressly provides that ‘[i]n any medical malpractice action in which expert testimony is required by § 29-26-115, the plaintiff or plaintiff’s counsel *shall* file a certificate of good faith with the complaint’”. *Id.* at 308. (emphasis in original). The Court went on to state, “[t]he use of the word “shall” in [the statute] indicates that the legislature intended the requirement to be mandatory, not directory”. *Id.* Finding that the legislature intended the filing of a certificate of good faith to be mandatory, the Court found the “trial court’s denial of Defendant’s motion to dismiss on its finding of substantial compliance and extraordinary cause was error.”⁶ *Id.* at 311.

TMMA is irrelevant to the issues before this Court and therefore, in the interest of clarity, the *Myers* Court’s references to that statute are omitted in certain quotations contained in this Brief.

⁵ Tenn. Code Ann §29-26-122.

⁶ The Supreme Court refused to address the question of whether the **contents** of a certificate of good can be satisfied by substantial compliance. *Id.* Since this decision, the Tennessee Court of Appeals has addressed that question in *Caldwell v. Vanderbilt University*, M2012-00328-COA-R3CV, 2013 WL 655239 (Tenn. Ct. App. Feb. 20, 2013) and *Vaughn v. Mountain States Health Alliance*, E2012-01042-COA-R3CV, 2013 WL 817032 (Tenn. Ct. App. Mar. 5, 2013). In both instances the Court of Appeals affirmed the dismissal by the trial court due to the insufficiency of the contents of the certificates of good faith filed in each.

The Supreme Court then “address[ed] the consequences of Mr. Myers’s failure to comply with the statute.” *Id.* The Court stated:

The legislature expressly provided the consequence of a plaintiff’s failure to file the required certificate of good faith with the complaint in Tennessee Code Annotated section 29–26–122, stating that “*the complaint shall be dismissed, as provided in subsection (c), absent a showing that the failure was due to the failure of the provider to timely provide copies of the claimant’s records requested as provided in § 29–26–121 or demonstrated extraordinary cause.*” Tenn.Code Ann. § 29–26–122(a) (emphasis added). Subsection (c) of the statute provides that “[t]he failure of a plaintiff to file a certificate of good faith in compliance with this section shall, upon motion, make the action *subject to dismissal with prejudice.*” *Id.* at § 29–26–122(c) (emphasis added). Although the statutory scheme provides the trial court with discretion to, “upon motion, grant an extension within which to file a certificate of good faith if the court determines that a health care provider who has medical records relevant to the issues in the case has failed to timely produce medical records upon timely request, or for other good cause shown,” *id.*, Mr. Myers did not file a motion seeking such relief. Consequently, his complaint must be dismissed with prejudice.

Id. at 311-12. The Supreme Court then recognized that the notice provisions of the TMMA⁷ did not expressly provide for dismissal of a medical malpractice complaint with prejudice like the certificate of good faith requirement. *Id.* at 312. Therefore, the Court affirmed the holding of the Court of Appeals and dismissed the action solely on the grounds of Mr. Myers’s failure to file the certificate of good faith. *Id.*

The material facts in the case at bar are identical. It is undisputed that Plaintiff failed to file a certificate of good faith with her Complaint. Plaintiff has not alleged or made any motion asserting the failure of any medical provider to timely provide her with medical records relevant to this action. As a consequence of those failures, and given that Plaintiff’s Complaint clearly asserts a claim of medical malpractice, it must be dismissed with prejudice.

⁷ Tenn. Code Ann. §29-26-121.

CONCLUSION

Even the most liberal construction of the statements of fact contained in Plaintiff's Complaint establish that this cause of action is based upon two or three omissions: the failure to properly administer prescribed medication (Coumadin); and the failure to properly use a prescribed medical device (CPAP machine). It can be inferred from some of the other, conclusory allegations, that Plaintiff alleges the failure of the Defendant's nursing staff to properly monitor the affect these were having on Ms. Adkins. None of these functions are common everyday experience, rather they required the specialized skill and training licensed nurses receive and are tested on before they obtain a license to practice. Accordingly, Plaintiff's cause of action is one for medical malpractice. That being the case, Plaintiff's failure to file a certificate of good faith as required by Tennessee Code Annotated 29-26-122 is fatal and the dismissal by the trial court must be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This certifies that a copy of the foregoing has been served upon opposing counsel for all parties or all parties individually as follows,

Lyle Moe Esq.
101 W. Broadway Avenue
Suite 207
Maryville, Tennessee 37802

by placing a copy of same in the U.S. Mail, postage prepaid, on the April 18, 2013.


MARC A. SORIN

IN THE CIRCUIT COURT OF TENNESSEE
FOR THE SEVENTH JUDICIAL DISTRICT AT CLINTON
ANDERSON COUNTY

66.5303

**ROBERT HYDE as next friend of LOIS
HYDE an incapacitated person,**

Plaintiff,

VS

**DIVERSICARE BRIARCLIFF, LLC d/b/a
BRIARCLIFF HEALTH CARE CENTER;
DIVERSICARE MANAGEMENT
SERVICES CO.; DIVERSICARE
LEASING CORP.; and DIVERSICARE
HEALTH SERVICES, INC. f/k/a
ADVOCAT, INC.,**

NO. B4LA0061

2015 MAY 11 P 1:23
FILED

Defendants.

**DEFENDANTS SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO
COMPEL ARBITRATION AND STAY LAWSUIT**

COME NOW Defendants, by and through counsel of record and submit this Supplemental Memorandum in Support of Motion to Compel Arbitration and Stay Lawsuit.

INTRODUCTION

On November 2, 2012 the Plaintiff, Robert G. Hyde signed a Nursing Home Alternative Dispute Resolution Agreement on behalf of his mother, Lois Hyde, which clearly and conspicuously informed him that entering into an arbitration agreement was a waiver of the constitutional right to a jury trial. See, Exhibit 1, Section II F. More than seven (7) years prior, Ms. Lois. Hyde executed a *Durable Power of Attorney for Health, Business, and General*

Purposes which named Robert G. Hyde as her attorney-in-fact.¹ See, Exhibit 2, Section 1. The issue before this Court is whether Ms. Hyde's *Durable Power of Attorney for Health, Business, and General Purposes* cloaked Mr. Hyde with the authority to execute the arbitration agreement. Defendants assert that a reasonable interpretation of the document only leads to the conclusion that Mr. Hyde was, in fact, cloaked with such authority.

LAW AND ARGUMENT

Ms. Hyde's Durable Power of Attorney is much more than simply a Durable Power of Attorney for Health Care. From its title, *Durable Power of Attorney for Health, Businesses, and General Purposes*, it is evident that Lois Hyde intended for her Power of Attorney to apply to situations much more than just "health care decisions". As the Plaintiff pointed out in his Response to Defendant's Motion to Compel Arbitration and Stay Lawsuit,

Lois W. Hyde's April 19, 2015 Durable Power of Attorney granted to Robert Hyde and Billy Hyde, independently, specific authority over Ms. Hyde's monies, real and personal property, tax returns, borrowing, investments, continuing business matters, support, dues and contributions, safe deposit boxes, voting trust, employ agents, securities, gifts, and additions to revocable trusts.

See. Plaintiff's Response to Defendants' Motion to Compel Arbitration and Stay Lawsuit, filed December 17, 2014, p. 5 Because of this enormous difference in the scope of the power of attorney at issue in this case and the power of attorney at issue in *Wilkins*, Plaintiff's reliance upon that case is misplaced and therefore, irrelevant.

In *Wilkins*, the Court of Appeals was interpreting the extent of authority granted pursuant to a durable power of attorney for healthcare. *Wilkins v. GGHSC Springfield, LLC*, No. M2013-01536-COA-R3-CV, 2014 WL 819460 at *3. In *Wilkins*, as is the case in the matter before this

¹ The Power of Attorney also named Ms. Hyde's Son Billy M. Hyde as an attorney-in-fact. However the document clearly states that the two sons could act independently. See, Exhibit 2, Section 1.

Honorable Court, the principal's agent signed an alternative dispute resolution agreement, separate and apart from the admission contract. *Id.* at *4. The Court of Appeals relied upon language in the power of attorney which limited the attorney-in-fact's authority to "exercise powers relating to matters involving Principal's health and medical care." *Id.* at *4. The Court concluded that the extent of the authority granted by the durable power of attorney for health care was limited to decisions concerning medical treatment, alone. *Id.* at *4. Nothing could be further from the truth in the case at bar. The grant of authority in Ms. Hyde's *Durable Power of Attorney for Health, Business and General Purposes* is much more expansive than the durable power of attorney in *Wilkins*. Plaintiff argues:

...nowhere in the eleven (11) page power of attorney at issue in this case, where Lois Hyde specified in great detail, when and how she wanted Robert Hyde to act for her, does it authorize Mr. Hyde to enter into an optional arbitration agreement on Ms. Hyde's behalf or to otherwise waiver her constitutional rights, including her right to a jury trial.

See, Supplement to Plaintiff's Response to Defendants' Motion to Compel Arbitration and Stay Lawsuit, served April 22, 2015, p. 2. Therefore, from the Plaintiff's perspective, it appears that unless Ms. Hyde's durable power of attorney contained a specific provision granting her attorney-in-fact the authority to execute an arbitration agreement, Mr. Hyde exceeded his authority when he chose to sign this arbitration agreement.

The seminal case in Tennessee on the analysis a Court must go through to determine the extent of authority provided for in a durable power of attorney is *Tennessee Farmers Life Reassurance Co. v. Rose*, 239 S.W.3d 743(Tenn. 2007). Plaintiff ignores the more relevant legal proposition recognized therein:

Unless otherwise constrained by law or public policy, a person executing a power of attorney may empower his or her agent to do the same acts, to make the same contracts, and to **achieve the**

same legal consequences as the principal would be personally empowered to do. Restatement (Second) of Agency § 17 (1958); 12 Samuel Williston, *Treatise on the Law of Contracts* § 35:9, at 188 (Richard A. Lord ed., 4th ed.1999).

Tennessee Farmers Life Reassurance Co. v. Rose, 239 S.W.3d 743, 749 (Tenn. 2007) (emphasis added). At issue in *Tennessee Farmers* was whether the attorney-in-fact had the authority to change the beneficiary of her principal's life insurance policy. *Tennessee Farmers*, 239 S.W.3d at 746. The power of attorney at issue in *Tennessee Farmers* granted the attorney-in-fact the authority to "transact all insurance business on my behalf" and included the general provision:

Giving and granting unto the said [attorney-in-fact], my said attorney, full power and authority to do, execute and perform all and every other act and thing whatsoever,.... This power of attorney shall not be affected by any subsequent disability or incapacity of mine if such should occur. It is my express intent that the authority herein conferred upon my said attorney shall be exercisable in all events notwithstanding my subsequent disability or incapacity."

Id. at 746-47. The Supreme Court began its analysis by recognizing that the power of attorney at issue "...provided that it 'shall not be affected' by [the principal's] subsequent disability or incapacity, if any...." *Id.* at 748. Ms. Hyde's power of attorney contains similar language. *See*, Exhibit 2, Section 2. The Court concluded that since the durable power of attorney contained this language, it must be "...construed in light of the Uniform Durable Power of Attorney Act." ("The Act") *Id.* at 748 (*citing* Tennessee Code Annotated sections 34-6-101 to -110 (2001)).

The Court then examined sections 34-6-108 and 34-6-109 of The Act (Exhibits 3 and 4, respectively). The Court cited subsection (a) of 34-6-108 which states:

Upon the principal clearly expressing an intention to do so within the instrument creating a power of attorney, the language contained in § 34-6-109 may be incorporated into such power of attorney by appropriate reference. The provisions so incorporated shall apply to the attorney-in-fact with

the same effect and subject to the same judicial interpretation and control in appropriate cases, as though such language were set forth verbatim in such instrument. Tenn.Code Ann. § 34-6-108(a) (2001).

Id. (emphasis added). The Court then pointed out that subsection (c) of §34-6-108 specifically restricts a court from presuming a durable power of attorney grants the authority to change beneficiary designations in a life insurance policy. Tenn. Code Ann. §34-6-108(c) (5). The Court then concluded that The Act

...essentially provide[s] that, in cases in which the provisions of section 34-6-109 are incorporated by reference into the power of attorney, an attorney-in-fact is not authorized to change the beneficiary of the principal's life insurance policy unless the principal has expressly authorized the attorney-in-fact to do so within the power of attorney.

Id. at 748-49. Therefore, the Court in *Tennessee Farmers* was faced with a situation where the attorney-in-fact exercised authority not specifically provided for in the durable power of attorney. Further, pursuant to The Act, absent express authority, changing the beneficiary of an insurance policy is specifically prohibited by the Tennessee Uniform Durable Power of Attorney Act. Tenn. Code Ann. §34-6-108(c) (5).

The situation confronting this Honorable Court is in no way similar to the situation in *Tennessee Farmers*. In *Tennessee Farmers* the Court concluded the power of attorney **did not make appropriate reference to The Act**. *Id.* at 749. The Court then applied the principle that "...neither a 'strict' or 'liberal' interpretation of the instrument [is required], **but rather a fair construction that carries out the author's intent as expressed in the instrument.**" *Id.* The Court found that the general language within the power of attorney: "...to transact all insurance business...or take any other action necessary or proper in this regard'" was language sufficient to grant the attorney-in-fact the authority to change the beneficiary. Id.

Unlike the power of attorney in *Tennessee Farmers*, Ms. Hyde's *Durable Power of Attorney for Health, Business, and General Purposes* makes reference to the Tennessee Uniform Power of Attorney Act **and** the Tennessee Durable Power of Attorney for Health Care Act. (See Exhibit 1, Section 2). As a result, the powers listed in Tenn.Code Ann. §34-6-109 must be incorporated, verbatim, into Ms. Hyde's Durable Power of Attorney. Tenn.Code Ann §34-6-108(a) (2007), *Tennessee Farmers*, 239 S.W.3d at 748-49. Accordingly, this Court need look no further than the first subsection of Tenn.Code Ann. §34-6-109 to conclude that at the time Mr. Hyde executed the arbitration agreement, he had the authority to do so. Without any restricting language, it provides:

Without diminution or restriction of the powers vested in the attorney at law, by law or elsewhere in the instrument, and subject to all other provisions of the instrument, the attorney in fact, without the necessity of procuring any judicial authorization, or approval, **shall be vested with and in the application of the attorney in fact's best judgment and discretion on behalf of the principal** shall be authorized to exercise the powers specifically enumerated in this section:

(1) Generally do, sign or perform in the principal's name, place and stead any act, deed, matter or thing whatsoever, that ought to be done, signed or performed, **or that, in the opinion of the attorney in fact, ought to be done, signed or performed in and about the premises, of every nature and kind whatsoever, to all intents and purposes whatsoever**, as fully and effectually as the principal could do if personally present and acting. The enumeration of specific powers hereunder shall not in any way limit the general powers conferred here...

Tenn. Code Ann. § 34-6-109(1) (2007) (emphasis added). There is no specific restriction in Tenn. Code Ann. § 34-6-108 (c) which addresses arbitration agreements or the waiver of the right to a jury trial. See, Tenn.Code Ann. §34-6-108(c). (Attached as Exhibit XYZ). If the Tennessee Legislature believed that a principal must specifically grant an attorney-in-fact the

authority to sign an arbitration agreement, thereby waiving the principal's right to a jury trial, then such restriction would be included in sub-section (c) of Tenn. Code Ann. §34-6-108. Ms. Hyde's durable power of attorney clearly referenced the Tennessee Uniform Durable Power of Attorney Act. *Id.* As a result, it conferred Ms. Hyde with the authority to

Generally do, sign or perform in the principal's name, place and stead any act, deed, matter or thing whatsoever, that ought to be done, signed or performed, **or that, in the opinion of the attorney in fact, ought to be done, signed or performed...**

Tenn.Code Ann. § 34-6-109(1) (2007) (emphasis added).

Furthermore, the relevant provision in Ms. Hyde's *Durable Power of Attorney for Health, Business, and General Purposes* is even more expansive than the language of The Act. Contrary to Plaintiff's strained interpretation of the term "premises"², the "General Powers" section of the *Power of Attorney for Property* contained within the *Durable Power of Attorney for Health, Business, and General Purposes* is the section which granted Mr. Hyde the authority to sign the arbitration agreement. Since 1903, Tennessee Courts have held that recovery upon a right of action in a wrongful death case is considered property of the deceased that is distributed outside of the will. *Haynes v. Walker* 76 S.W. 902, 903 (Tenn., 1903), *Anderson v. Anderson*, 366 S.W.2d 755(Tenn. 1963), *Rickman v. Rickman*, 2013 WL 5656214 at *6. In the "General Powers" section of the *Power of Attorney for Property*, it specifically states that Mr. Hyde has the authority to

Generally, do, sign, or perform in my name, place, and stead any act, deed, matter, or thing whatsoever, that ought to be done, signed or performed, **or that in the opinion of the attorney-in-fact, ought to be done, signed, or performed in and about the premises**, of every nature

² See, Black's Law Dictionary which defines "Premises" as "Matters previously referred to in the same instrument". As used in this instrument, no reasonable interpretation of the "premises" would conclude that is limited only to Hyde's household.

and kind whatsoever, to all intents and purposes whatsoever, as fully and effectually as I could do if personally present and acting.

See, Exhibit 2, Section 3(a) (emphasis added). This Section of the instrument is almost the same language contained in Tenn. Code Ann. § 34-6-109(1). However, Ms. Hyde's *Durable Power of Attorney for Health, Business, and General Purposes* goes on to state, "[t]he enumeration of specific powers hereunder shall not in any way limit the general powers conferred herein." *See*, Exhibit 2, Section 3(a). This language makes clear that Ms. Hyde granted her attorney-in-fact with vast general powers to do whatever he saw fit when it came to handling her affairs. It is the opposite of the situation in *Wilkins*, where the power of attorney was restricted to health care decisions alone. Plaintiff wants this Court to interpret this instrument only from the perspective of a durable power of attorney for health care. When Mr. Hyde signed the arbitration agreement, doing so was his expression of something that "ought to be done" on Ms. Hyde's behalf. Taking all of this into consideration, as a matter of law, Mr. Hyde had the authority to execute the arbitration agreement. Therefore, this matter must be referred to Arbitration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This certifies that a copy of the foregoing has been served upon opposing counsel for all parties or all parties individually as follows,

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Via facsimile and by placing a copy of same in the U.S. Mail, postage prepaid, on the 6 day of May, 2015.



MARC A. SORIN