Tennessee Judicial Nominating Commission

Application for Nomination to Judicial Office

Rev. 25 August 2011

Name: John D. Stevens

Office Address: (including county) 161 Court Square,
Huntingdon, Carroll County, Tennessee 38344

Office Phone: (731) 986-9742 Facsimile: (731) 986-0616

Email Address: [redacted]

Home Address: (including county) [redacted]

Home Phone: [redacted] Cellular Phone: [redacted]

INTRODUCTION

Tennessee Code Annotated section 17-4-101 charges the Judicial Nominating Commission with assisting the Governor and the People of Tennessee in finding and appointing the best qualified candidates for judicial offices in this State. Please consider the Commission'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 Commission 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 http://www.tncourts.gov). The Commission 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 word processing document.) Please read the separate instruction sheet prior to completing this document. Please submit the completed form to the Administrative Office of the Courts in paper format (with ink signature) ***and*** electronic format (either as an image or a word processing file and with electronic or scanned signature). Please submit seventeen (17) paper copies to the Administrative Office of the Courts. Please e-mail a digital copy to debra.hayes@tncourts.gov.

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Law Office of John D. Stevens, 161 Court Square, Huntingdon, Tennessee 38344

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

I was licensed in 2003 and my BPR number is 022574.

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.

I was admitted to practice in Tennessee on May 19, 2003. My bar number of 022574. My license is currently active.

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

No.

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

1. LAW OFFICE OF JOHN D. STEVENS. March 2007-Present. Huntingdon, Tennessee. General practice of law
2. SPRAGINS BARNETT & COBB, PLC. October 2005-February 2007. Jackson Tennessee; Practice areas were workers' compensation; personal injury, and civil litigation.
3. RAINEY, KIZER, REVIERE & BELL, PLC. May 2003–October 2005. Jackson Tennessee; Practice areas: workers' compensation, insurance defense, employment law, and personal injury insurance defense.

4. LAW CLERK - 16TH JUDICIAL DISTRICT. August 2002-May 2003. Murfreesboro, Tennessee; Hon. Don R. Ash, Circuit Court. Majority of cases before the court were criminal; assisted court researching evidentiary issues; assisted court draft opinions when judge sat as Special Judge on Tennessee Court of Appeals.

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

I have been continuously employed since completing my legal education.

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.

As with most law practices in rural areas, I have a general legal practice. The following is my best estimate of my practice:

Elder law/estate planning/probate – 50%

Family law – 20%

Criminal law – 15%

Civil litigation – 10%

Real estate transactions – 4%

Business formation/commercial law/contracts – 1%

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 Commission 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 Commission. Please provide detailed information that will allow the Commission 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. Also separately describe any matters of

special note in trial courts, appellate courts, and administrative bodies.

My legal practice has been very diverse. My work experience has touched all areas of the law, as most broadly defined, in all three branches of government but some of it was prior to becoming a licensed attorney. My pre-law school experience is explained in a subsequent response.

I began private practice in the spring of 2003 for a large, highly respected Jackson, Tennessee firm. My practice experience was similar to that of many young lawyers as an associate. I was in the employment law group which handled workers compensation and employment discrimination cases. Of note, I injured myself running and was limited in my ability to get around. Because I had limited mobility, I prepared several appellate briefs. As I gained experience, I tried cases in General Sessions Court and argued motions in other courts of record.

In 2005, I changed firms where I developed my own cases with my own clients. As an associate, I nevertheless continued assisting partners with their files. On several occasions, I prepared appellate briefs and argued before the workers' compensation panel. I gained additional experience in motion practice but none of the matters I was handling progressed to trial during my tenure with Spragins Barnett & Cobb, PLC.

When working in Jackson for the two previously mentioned firms, I lived in Huntingdon and commuted to Jackson, a forty-five minute drive. During this time, my wife and I were blessed with our first child. The combination of work hours and driving were not in line with my personal commitment to my growing family. I approached Charles Trotter about renting an open office and in early 2007, I hung out my shingle on the Court Square in Huntingdon.

Being a solo practitioner is challenging and rewarding. Professionally, I represented clients in trial courts throughout West Tennessee, including Shelby County, and on occasion in Middle Tennessee. I represented clients in general sessions, juvenile, chancery and circuit courts. None of my clients had matters that were pursued beyond the trial level and, consequently, I have not practiced before the appellate courts in recent years. I have represented rich individuals, poor individuals, insurance companies, "mom and pop" businesses, large corporations, banks, and governmental entities. I have won cases I should, lost cases I should not, and settled cases that needed to be settled. I have represented clients before administrative bodies, such as the Department of Human Services and the Department of Labor and Workforce Development. My daily time commitment has not necessarily lessened but I gained the flexibility to attend my children's daytime school activities and participate in civic endeavors and, I hope, elevated the esteem of the legal profession through the manner in which I handle clients, opposing counsel and the community at large.

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

While clerking for Judge Don R. Ash, the prosecution of David Kyle Gilley was progressing toward trial. Mr. Gilley was charged in 2001 with the premeditated first degree murder of his high school sweetheart Laura Salmon, which occurred in 1984. The defense filed a motion based

upon Rule 404(b) to exclude the prior bad acts testimony of numerous witnesses proffered by the State. A two-day hearing was held on the issue. I reviewed the witness testimony and did the research and assisted Judge Ash with the analysis which informed his rulings on the admissibility of the statements. The ruling when up to the Court of Criminal Appeals on interlocutory appeal. The Court of Appeals upheld "nearly all of the trial court's rulings admitting and excluding the testimony" and held the Court erred concluding some testimony was cumulative prior to trial being conducted. State v. Gilley, 173 S.W.3d 1, 5 (Tenn. 2005). The case is important because it provides trial courts with substantive guidance on granting interlocutory appeals in criminal cases.

Also, while clerking for Judge Ash, I was privileged to prepare three opinions for the Court of Appeals, namely, Hilman v. Hilman, 2003 WL 21766254 (Tenn. Ct. App. July 31, 2003), In re Eden, 2003 WL 22002644 (Tenn. Ct. App. Aug. 25, 2003) and Ward v. Ward, 2002 WL 31845229 (Tenn. Ct. App. Dec. 19, 2002). Of course, I am not suggesting I get full credit for the work-product. Nevertheless, I do not believe it is any secret that law clerks prepare the written decisions for the Court under the Court's watchful eye.

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.

None

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 Court-appointed guardian ad litem and have been named by a few clients as co-trustee over their trust estates.

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

Prior to entering law school, I represented the executive branch as a Legislative Liaison in the creation and amendment of the codified law. From December 1996 to July of 1997, I was a liaison in the Governor's Office and I covered the House and Senate Judiciary Committees, the House Government Operations Committee and the House Agriculture Committee. As part of my job, I monitored all Senate Floor activity. In July 1997, I moved over to the Department of Human Services as the Department Legislative Liaison. I remained in that position until September 1998 when I moved to the Department of Health, Bureau of TennCare. In all three

positions, I drafted amendments to proposed legislation. I occasionally testified before legislative committees. When the legislature was not in session, I worked with the various divisions within the departments formulating the department's legislative priorities. Throughout my public sector service, I worked closely with many dedicated and knowledgeable professionals in the legal departments of the previously named departments, in the legislative branch, and with the various stakeholders impacted by amendments to the existing law.

While in law school, I worked part-time in the Shelby County Attorney's Office and did some legal research and writing for the Federal Express legal department. In the County Attorney's Office, I did legal research and writing assignments and occasionally went along with attorneys when they went to court. I prepared legal memoranda and assisted in the preparation of pleadings. My first legal "victory" came working for the County Attorney's office. I prepared (largely) a Rule 56 motion and memorandum of law that was granted by the District Court in a case where the plaintiff, an inmate in the county jail, made § 1983 claims alleging he was discriminated against by the medical contractor hired by the county to provide medical intake to the county jail. I also researched and prepared a Rule 56 motion and memorandum of law for Federal Express in a case where the plaintiff claimed discrimination under Title VII of the Americans with Disabilities Act. The motion was granted (although that dismissal was more likely based on the strength of the *pro se* plaintiff's case than my contribution).

During the summers while I was in law school, I was fortunate to find employment with several outstanding law firms. Before transferring to Memphis from Cumberland, I worked all summer for Riley and Jackson, P.C., a small two lawyer firm in Birmingham, Alabama. Despite being a small firm (and because the two lawyers are outstanding), this firm handled very complex litigation. For the bulk of the summer, while the lawyers prepared for a trial involving their Australian client's fraud claims against a pharmaceutical company, I monitored their cases. I interviewed witnesses, prepared pleadings, answered discovery, prepared discovery, reviewed discovery responses, did research and so forth. I assisted them with their jury trial involving that Australian client. A summer later, I was a summer associate for Ford & Harrison, LLP and prepared legal memoranda, including a fascinating research project regarding Chinese employment law in the Xiamen Province.

Upon graduation, I was privileged to work as a law clerk/court officer for Judge Don R. Ash. At that time, his docket was mainly criminal matters. I was normally in court with the judge, swearing witnesses, passing documents, keeping the courtroom in order. Although essentially an audience-member, I also had the equivalent of a backstage pass. There were two death penalty cases pending and I assisted the Court in its rulings on several evidentiary issues. Because Judge Ash sat as Special Judge on the Court of Appeals, I assisted the Court drafting its opinions. I read the trial transcripts, appellate briefs, appellate argument, and other documents in the appellate record and assisted in drafting the opinions.

13. List all prior occasions on which you have submitted an application for judgeship to the Judicial Nominating Commission 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.

None.

EDUCATION

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

University of Tennessee at Martin. (1992-1996)

B.S. (*Cum Laude*) in Political Science with a Minor in English.

Dean's List; Order of Omega Honor Fraternity; Undergraduate Alumni Council. Alpha Tau Omega social fraternity (Officer); Interfraternity Council (President - 1995; Vice President - 1994); Special Olympics Volunteer, Peer Enabling Program (PEP) Leader (1993-1996);

Cumberland School of Law, Samford University. (1999-2000)

(Transferred to the University of Memphis)

Cecil C. Humphreys School of Law, University of Memphis. (2000-2002)

Juris Doctor.

Dean's Award for Academic Excellence – Trial Advocacy;

Dean's Award for Academic Excellence – Legislative Drafting

PERSONAL INFORMATION

15. State your age and date of birth.

I will be 38 years old on October 18. I was born in 1973.

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

My wife and I returned to Tennessee in August of 2000.

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

I have lived in Carroll County since 2003.

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

Carroll

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.

None.

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

In May of 1993, I was cited for underage drinking in Weakley County, Tennessee. I did not contest the citation and it was eventually dismissed by the General Sessions Court.

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. If you have been disciplined or cited for breach of ethics or unprofessional conduct by any court, administrative agency, bar association, disciplinary committee, or other professional group, give details.

No.

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 which you have held in such organizations.

I am a member of the First Baptist Church – Huntingdon. I am currently the Professional and Finance Chair for the Carroll County United Way. I coach my six year old daughter's soccer team which operates under the umbrella of the American Youth Soccer Organization (AYSO). I currently am a representative of the State of Tennessee in the Delta Leadership Institute Executive Academy. I was a member of the Carroll County Chamber of Commerce in 2007-2008.

27. Have you ever belonged to any organization, association, club or society which 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 which you have held in such groups. List memberships and responsibilities on any committee of professional associations which you consider significant.

I have been a member of the Tennessee Bar Association since 1999. I joined the Madison

County Bar Association in 2003 and remained a member until 2007. I have been a member of the Carroll County Bar Association since 2007.

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

None.

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.

None.

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

No.

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

Attached is a Tennessee Court of Appeals opinion delivered by Don R. Ash sitting as Special Judge. As his law clerk, I prepared the opinion under his direction and guidance. The writing style, recitation of fact and expression of law are my own. The decision and analysis are the Court's. I was merely the scrivener.

Also attached is an appellate brief prepared by me in the appeal of a workers' compensation

matter before the workers' compensation panel of the Supreme Court.

ESSAYS/PERSONAL STATEMENTS

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

I seek this position to serve. An appellate judge is a position of service to the law and, if appointed, I commit to make impartial decisions within the scope of the judicial office. I humbly recognize the position is clothed with power, but the exercise of that power is not why I am applying. I have no personal agenda and am open to consider the deliberate views of the other members of the Court. Through life's challenges, I have begun to understand humility. True humility, to my understanding, is awareness of one's talents, skills and gifts but it is also awareness of one's limitations. Service is putting to use those talents, skills and gifts for a purpose beyond one's self while contemporaneously not attempting to exceed one's limitations. Judicial humility is the appreciation of the limited nature of the judicial branch. I commit to exercise judicial humility.

36. State any achievements or activities in which you have been involved which 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)***

As a human being practicing law in rural West Tennessee, pro bono service is not an abstraction nor is it a rhetorical platitude. It is a common practice among the bar because it is the right thing to do. Irrespective of any other standard, I provide services without charge or at a reduced fee because an "individual who considers himself injured, has a right to resort to the laws of his country for a remedy." Marbury v. Madison, 5 U.S. 137, 167 (1803). With that context, my services provided pro bono are neither exemplary nor worthy of merit.

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)***

Article VI of the Tennessee Constitution delegates the creation of "other inferior Courts" to the legislative branch, which exercised that power in 1967 by creating the Court of Criminal Appeals. The legislature empowered the Court to hear and decide trial court appeals in criminal cases and post-conviction petitions. Court membership increased from nine to twelve in 1996 with equal apportionment among the three grand divisions.

I did not personally know Judge McLin. It is my humble aspiration, if appointed, to be recognized as he was by his colleagues on the bench. He was described as "even-handed," "a kind man," "a dedicated jurist," "a joy to work with" and "a valuable servant of the people." I would strive to prepare clearly-worded and pragmatic opinions that promote consistency, reliance and predictability to law enforcement, lawyers, judges and citizens so that the Court's

decisions are less necessary.

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)***

In John 15:13, Jesus commanded his followers to love each other which requires action. He entreated His followers to serve others and service is important to me. It is my intent, if appointed, to continue to serve others where such service is not barred by ethical and/or time restrictions of the position.

I facilitate a Wednesday night Bible study comprised of mainly married couples with school-age children. If appointed, I intend to continue in that activity subject to the Court's calendar and caseload.

I am currently lending my lack of embarrassment for asking people for money to the United Way of West Tennessee. If selected, I recognize that I could not continue in that role but I would like to continue to assist that organization and other charitable community organizations in some capacity in conformity with Code of Judicial Conduct.

Finally, I am more and more intrigued by our nation's founding. I perceive the desire and need for the education of historical context in society as a whole. I enjoy public speaking and seem to have a knack for making the complex sound simple. I would enjoy the opportunity to participate in extra-judicial activities such as speaking, writing, lecturing and teaching on legal history, the legal system and the administration of justice.

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

We all make decisions but I submit decisions differ from judgments. As advocates, facts are presented and must be woven through the filter of law into an argument. The ultimate outcome, however, is not within the advocate's control. My judgments, as a father, a husband and an employer, have been relatively inconsequential compared to the decisions I will make if appointed. Through my brief time clerking for Judge Don Ash, I witnessed true judgment and its consequential burdens. Advocacy's burden is lightened by judgments' responsibility falling upon another. A judge must find another to lessen the weight of decisions – decisions of freedom or confinement; of life and death.

Judgment's awesome responsibility must be approached with generous amounts of humility, which I define as knowing one's strengths and weaknesses. I am a fair person - determined and hard-working. My natural decision making process is to aggressively seek information, examine other judgments, process that information, think critically, consider potential contingencies, and decide. My decisions tend to not be arbitrary but neither are they set in concrete due to my

pragmatism and desire for getting it right. I would echo Justice Clarence Thomas who was recently quoted as stating, "I am a follower of get-it-rightism."

Being a judge is ultimately a position of service. I purpose to serve, if appointed, with my time, my intellect, my talents, my respect and my written words. Parties and their counsel (if any) deserve the best I can give and that is my utmost desire to provide.

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)***

Upon much deliberation, I respectfully decline responding to this question beyond stating that if appointed, I will base my decisions upon the record of the case and the application of law to the record on appeal or the petition, if it is a post-conviction matter.

I base my response in the thought that, if appointed, it is possible that any response I provide could be interpreted as pre-judgment, even if I cite a civil rule or statute. As I read the question, I must reveal a personal disagreement with the substance of a specific statute or rule. It is my measured belief that my personal opinion regarding the substance of a particular statute or rule is unimportant.

Chief Justice John Roberts stated the reasons why he declined to provide statements of personal belief in the process of confirmation hearings as clearly as I have ever heard and it was as follows:

"It's because if these questions come before me, either on the court on which I now sit or, if I am confirmed, on the Supreme Court, I need to decide those questions with an open mind on the basis of the arguments presented, on the basis of the record presented in the case, and on the basis of the rule of law, including the precedents of the Court, and not on the basis of any commitments during the confirmation process. The litigants have a right to expect that of the judges or Justices before whom they appear."

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 Commission or someone on its behalf may contact these persons regarding your application.

	Charles L. Trotter, Jr. Trotter Law Firm, PLLC 161 Court Square, Huntingdon, Tennessee 38344 (731) 986-2207
	Steven W. Maroney Teel & Maroney, PLC 425 E. Baltimore Street Jackson, Tennessee 38301 (731) 424-3315
	Michelle Blaylock-Howser Reed & Howser 121 East Main Street Murfreesboro, Tennessee 37130 (615) 890-9040
	Fred J. Ward Pastor, First Baptist Church – Huntingdon 108 Church Street Huntingdon, Tennessee 38344 (731) 986-5000
	Dale Kelley Mayor of Huntingdon, Tennessee 12740 Lexington Street Huntingdon, Tennessee 38344 (731) 986-2902

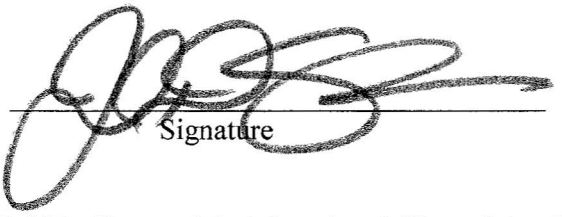
AFFIRMATION CONCERNING APPLICATION

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

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the Court of Criminal Appeals of Tennessee, and if appointed by the Governor, 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 Commission 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 Commission may publicize the names of persons who apply for nomination and the names of those persons the Commission nominates to the Governor for the judicial vacancy in question.

Dated: October 3, 2011



Signature

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

TENNESSEE JUDICIAL NOMINATING COMMISSION

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

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information which concerns me, including 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, and I hereby authorize a representative of the Tennessee Judicial Nominating Commission to request and receive any such information.

John D. Stevens
Type or Printed Name

Signature

10/3/2011
Date

022574
BPR #

THE UNIVERSITY OF
MEMPHIS.

Cecil C. Humphreys School of Law

1 N. Front Street
Memphis, Tennessee 38103-2189

Office: 901.678.2421
Fax: 901.678.5210

www.memphis.edu/law

September 26, 2011

Judicial Nominating Committee
c/o Debra Hayes
Executive Administrative Assistant
Administrative Office of the Courts
511 Union Street, Suite 600
Nashville, Tennessee 37219

RE: John D. Stevens

Dear Judicial Nominating Committee:

I am very pleased to recommend John D. Stevens for nomination to the Court of Criminal Appeals. While he was a third year student here at the University of Memphis School of Law, he participated in my seminar on Tennessee Constitutional Law. During the course of that seminar, I became familiar with a number of his personal attributes which, I believe, would serve him well on that court.

In the seminar, Mr. Stevens selected the issue of the constitutionality of a Tennessee income tax as the topic of his research. I remember his work well because the issue was then very timely. Mr. Stevens was able and conscientious in his approach to that question, and was very effective in describing his research to his colleagues. His work was well-organized, and he was a good listener. I believe that he would be a very valuable member of a deliberative body.

Mr. Stevens was certainly industrious in his efforts, and I believe that he would be similarly conscientious in staying abreast of the substantial workload of the Court of Criminal Appeals. I recommend him for your consideration without reservation.

Please do not hesitate to contact me if you wish any additional information.

Very truly yours,

Eugene L. Shapiro
Professor of Law

O'BRYANT
& ASSOCIATES
235 Veterans Drive North • Huntingdon, TN 38344 •731-986-3445
231B Oil Well Rd • Jackson, TN 38305 • 731-215-0562
Fax 731-986-3415

9/23/2011

Judicial Nominating Committee
c/o Debra Hayes
Executive Administrative Assistant
Administrative Office of the Courts
511 Union Street, Suite 600
Nashville, TN 37219

Dear Ms. Hayes,

It gives me immense pleasure to write in recommendation of John Stevens for court of Criminal Appeals Judge. I have known Mr. Stevens for 5 years, and have worked with him on many different types of estate plans. I have also had the privilege of being a co-speaker with Mr. Stevens to various groups on many occasions over that period of time.

I have always found Mr. Stevens to be of the highest moral and ethical standards when dealing with my clients, and in his personal recreational time. I have also found Mr. Stevens' knowledge and legal ability to be far superior to other attorneys that I have worked with in the past, even on very specialized estate plans. His interaction with my clients has always been professional and considerate, placing their goals above his own even if it meant referring them to another professional.

I have seen Mr. Stevens "stand up" for what he believes in our community through his involvement in local organizations and also in his leadership with a local church. I can truly say that he has provided a positive impact on our community through his leadership and involvement.

I have no doubt that Mr. Stevens will make deliberate and fair decisions as judge and I highly recommend him for the appointment.

Respectfully yours,

Nathan O'Bryant
Registered Investment Advisor
O'Bryant & Associates, Inc.

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
March 5, 2002 Session

JAMES O. WARD v. SUSAN AMPFERER WARD

Appeal from the Chancery Court for Shelby County
No. 29766-1 Walter L. Evans, Chancellor

No. W2001-01078-COA-R3-CV - Filed December 19, 2002

Mr. James Ward filed a Compliant for divorce on July 31, 1998. Mrs. Ward filed a Counter-Complaint for Absolute Divorce on November 30, 2000. The trial was held February 19, 2001 through February 22, 2001 and continued March 1, 2001 to March 2, 2001. On March 2, the Chancellor issued findings of fact and divided the marital property. Mrs. Ward asked the court to find Mr. Ward dissipated approximately $107,355 in marital assets, and requested the court award her attorney's fees as well as litigation expenses because the search for hidden funds resulted in a large portion of her attorney's fees. The Chancellor determined Mr. Ward did not dissipate marital assets, and denied the request for attorney's fees. The chancellor entered the final decree of divorce on April 6, 2001. This appeal followed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed in Part, Affirmed in Part, and Remanded

DON R. ASH, S.J., delivered the opinion of the court, in which DAVID R. FARMER, J. and, ALAN E. HIGHERS, J. joined.

Daniel Loyd Taylor, Memphis, Tennessee, for the appellant, Susan Ampferer Ward.

Larry Rice, Memphis, Tennessee, and Laura D. Rogers, Memphis, Tennessee, for the appellee, James O. Ward.

OPINION

I. Facts

Appellant Susan Ampferer Ward and Appellee James O. Ward married August 26, 1966. During the marriage, the parties divided responsibilities. Mr. Ward provided income from his job with Federal Express, maintained the home's exterior and surrounding property, as well as handling their investments. Ms. Ward maintained the household, cooked meals, cared for the children, and paid monthly bills.

Mr. Ward's salary was divided and separately maintained in different accounts. First, Mr. Ward deposited his paycheck in the Federal Express Credit Union. From this account, Mr. Ward covered expenses related to his responsibilities to the exterior of the home, including the mortgages, and the property improvements. He also maintained a separate account at Boatman's Bank. Next, Mr. Ward drew a check to the order of Ms. Ward to cover household expenses from the Credit Union. Ms. Ward controlled a jointly held family checking account from which she paid the family bills. Any money left over was considered by the parties as Ms. Ward's money. In the late 1980's the marriage soured for various reasons.

In early 1994, Mr. Ward came into a substantial amount of money through one of his investments. Rather than depositing this money in his Boatman's Bank account or the Credit Union account, Mr. Ward entered into an arrangement with an acquaintance Leigh Blanchard. Under their arrangement, Mr. Ward gave Ms. Blanchard money and then she deposited it in an Enterprise Bank account in Mr. Ward's name. When he needed cash, she withdrew it for him. At times, Ms. Blanchard would simply tender cash from a safe she maintained as a loan against the Enterprise account. Due to the complexity of their financial dealings, Mr. Ward and Ms. Blanchard kept a ledger of their transactions. Mr. Ward and Ms. Blanchard's relationship turned intimate later in 1994 and continued through 2000.

The parties separated in June 1997. Mr. Ward filed a Complaint for Divorce on July 31, 1998. Ms. Ward filed a Counter-Complaint for Absolute Divorce on November 30, 2000, and the trial was held four months later. February 19, 2001 through February 22, 2001 and on March 1 through March 2, 2001. On March 2, the Chancellor issued his findings and divided the marital property. Mrs. Ward argued Mr. Ward dissipated approximately $107,000 through his relationship with Ms. Blanchard. Additionally, she sought an award of attorney's fees for costs incurred while tracing the financial transactions with Ms. Blanchard. The Chancellor determined Mr. Ward did not dissipate marital assets and denied the request for attorney's fees. The chancellor entered the final divorce decree on April 6, 2001. Mrs. Ward filed a notice of appeal on May 3, 2001.

II. Standard of Review

We review the findings of fact and conclusions of law by the trial court in this non-jury trial *de novo* upon the trial court record. T.R.A P. 13(d). We presume the correctness of the trial court's factual findings, unless the preponderance of the evidence is otherwise. Id. "In a de novo review, the parties are entitled to a reexamination of the

whole matter of law and fact and this court should render the judgment warranted by the law and evidence." Bookout v. Bookout, 954 S.W.2d 730, 731 (Tenn. Ct. App. 1997) citing Thornburg v. Chase, 606 S.W.2d 672 (Tenn. Ct. App. 1980); American Buildings Co. v. White, 640 S.W.2d 569 (Tenn. Ct. App. 1982); Tennessee Rules of Appellate Procedure, Rule 36. The trial court's conclusions of law have no presumption of correctness. Adams v. Dean Roofing Co., 715 S.W.2d 341, 343 (Tenn. Ct. App. 1986). Furthermore, we defer to a trial court's division of marital property unless the trial court's decision is inconsistent with the statutory factors or is unsupported by the preponderance of the evidence. Manis v. Manis, 49 S.W.3d 295, 306 (Tenn. Ct. App. 2001).

III. Dissipation of Assets

In an action for divorce or legal separation, the trial court may equitably divide marital property without regard to fault, upon the request of either party. Tenn. Code Ann. §36-4-121 (a)(1)(2001). This statute sets out the General Assembly's basic premise regardingthe division of marital property, namely, it should be equitably based upon what "may be just and reasonable under the facts and circumstances of the case." Fisher v. Fisher, 648 S.W.2d 244, 246 (Tenn. 1983) quoting Langford v. Langford, 421 S.W.2d 632, 634 (Tenn. 1967).

Trial courts first classify property as marital or separate, according to the definitions set forth in T.C.A. § 36-4-121(b)(1)(A) and (B). Upon classifying the property, the trial court divides marital property weighing the evidence presented at trial as it relates to the factors listed in T.C.A. § 36-4-121(c). "[T] he trial judge's goal is to divide the marital property in an essentially equitable manner." Kinard v. Kinard, 986 S.W.2d 220, 230 (Tenn. Ct. App. 1998). An equitable division is not necessarily an equal one. Barnhill v. Barnhill, 826 S.W.2d 443, 449 (Tenn. Ct. App. 1991). One factor to be considered is a party's dissipation of marital property. Tenn. Code Ann. § 36-4-121(c)(5)(2001).

At trial, Ms. Ward argued Mr. Ward dissipated $107,000 in marital assets by transferring approximately $132,000 of marital funds to Ms. Blanchard[1]. In early 1994, Mr. Ward liquidated an investment property worth approximately $53,000. According to Mr. Ward, he did not want to put this money in the family checking account managed by Ms. Ward because of her gambling.[2] Instead, Mr. Ward and Ms. Blanchard allegedly established a financial management relationship where Mr. Ward entrusted marital funds to Ms. Blanchard.[3] Apparently, Mr. Ward gave Ms. Blanchard the money and she would

[1] Mr. Ward put $25,000 of this amount toward the repayment of an equity loan on the parties' property. Thus, the alleged dissipated amount is reduced to approximately $107,000.

[2] The record clearly reflects Ms. Ward's gambling activities between 1994 and 1997.

[3] Ms. Blanchard is employed by an asset management company in the stock-trading department. Regarding the details of the financial management relationship between Mr. Ward and Ms. Blanchard, this court makes no factual determination based upon the trial court's finding that both witnesses testimony was

deposit it into an Enterprise Bank account in Mr. Ward's name. When Mr. Ward needed money, he let Ms. Blanchard know and she would get it either from the Enterprise account or from her personal safe. Mr. Ward and Ms. Blanchard allegedly maintained a ledger recording each transaction.[4] When all was said and done, Mr. Ward alleges he spent the estimated $107,000 on himself because of his increased daily expenses due to the marital problems between himself and Ms. Ward.

The Chancellor found Mr. Ward did not dissipate marital property through his alleged transactions with Ms. Blanchard. In reaching this conclusion, the Chancellor stated

> in order for this court to conclude that there had been a dissipation of assets this court has to find that, number one, there had been some sort of fraud that exists and that there was nothing that...to counterbalance this alleged discretionary expenditure by Mr. Ward on the other hand.[5]...[t]he court is not satisfied with the proof to the point that the court has to conclude that Mr. Ward used $107,000 in a fraudulent manner that the court should take into consideration in making a disproportionate allocation of the marital assets.

We do not find the dicta cited in Walker to be persuasive. Under Tennessee law, a finding of fraud is not a prerequisite to a court finding a party dissipated marital assets.

The court notes dissipation is not defined in the statute. In such circumstances, courts must look to the plain language of the statute and apply the ordinary meaning of the words. Cohen v. Cohen, 937 S.W.2d 823, 827 (Tenn. Ct. App. 1996). "Dissipate" is defined "[t]o destroy or waste, as to expend funds foolishly." Black's Law Dictionary 473 (6th ed. 1990). This Court finds instructive an article by Lee R. Russ examining how courts around the country have dealt with the difficult task of making the fine-line distinction between dissipation and discretionary spending. See Lee R. Russ, Annotation, Spouse's Dissipation of Marital Assets Prior to Divorce as a Factor in Divorce Court's Determination of Property Division, 41 A.L.R. 4th 416 (1985). Trial courts must distinguish between what marital expenditures are wasteful and self-serving and those which may be ill-advised but not so far removed from "normal" expenditures occurring previously within the marital relationship to render them destructive.

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credible. Curiously, Mr. Ward had no explanation for why he did not just deposit the $53,000 in the Boatman's account, which Ms. Ward did not know existed.

[4] Unfortunately, the ledger was destroyed following the end of Mr. Ward and Ms. Blanchard's financial relationship. Because Mr Ward could not account for the money deposited, withdrawn and spent, he created a sheet estimating expenses [Exhibit 7] which is discussed later in this opinion.

[5] Apparently the Chancellor relied upon an unreported case, Walker v. Walker, No 01-A-01-9001-CH-00029, 1990 Tenn. App. LEXIS 440 (Tenn. Ct. App. June 27, 1990), when deciding the dissipation issue. In Walker, an issue was whether funds expended on the children during marriage could be considered in awarding an unequal property division. Id. at *9. In deciding this issue, the court said "[a]bsent fraud, a divorce court may not order a reimbursement or compensatory inequality of division of property for dissipation of marital property during the marriage." Id. at *11.

In determining whether dissipation occurred, we find trial courts should consider the following: (1) whether the evidence presented at trial supports the alleged purpose of the various expenditures, and if so, (2) whether the alleged purpose equates to dissipation under the circumstances. Id. at 420-421. The first prong is an objective test. To satisfy this test, the dissipating spouse can bring forward evidence, such as receipts, vouchers, claims, or other similar evidence that independently support the purpose as alleged. The second prong requires the court to make an equitable determination based upon a number of factors. Those factors include: (1) the typicality of the expenditure to this marriage; (2) the benefactor of the expenditure, namely, whether it primarily benefited the marriage or primarily benefited the sole dissipating spouse; (3) the proximity of the expenditure to the breakdown of the marital relationship; (4) the amount of the expenditure. Id. at 421.

We believe the above-announced analysis will be helpful in guiding trial courts when making this distinction. We reverse and remand back to the trial court to decide whether the facts support Ms. Ward's allegation that Mr. Ward dissipated approximately $107,000 of marital assets in his dealings with Ms. Blanchard applying the factors previously enumerated above.

IV. Admission of Estimated Expenditures into Evidence

To rebut Ms. Ward's allegation regarding Mr. Ward's dissipation of $107,000 in marital assets, Mr. Ward sought to present evidence of his yearly expenditures. Over Ms. Ward's objections the Chancellor allowed Mr. Ward to testify from a document marked Exhibit 7 estimating Mr. Ward's expenditures between 1990 and 1997 and admitted the document into evidence. Ms. Ward makes two arguments regarding the exhibit's admission: (1) Exhibit 7 violates Rule 1006 of the Tennessee Rules of Evidence as a summary of documents without supporting information and (2) Mr. Ward's counsel failed to lay the proper foundation under Rule 612 of the Rules of Evidence for a prior recollection refreshed.

(1) Rule 1006 summary of documents

Rule 1006 operates as an exception to the best evidence rule by allowing a party to admit a summary of originals rather than the burdensome production of "voluminous writings, recordings or photographs which cannot conveniently be examined in court." Tenn. R. Evid. 1006. For the summary to be admissible, the party seeking admission must lay the proper foundation, consisting of testimony that "(1) the original evidence is voluminous, and (2) the summary is sufficiently accurate in representing the original evidence." Neil P. Cohen et al., Tennessee Law of Evidence, § 10.06(3) at 10-21 (4th ed. 2000). At trial, Mr. Ward admitted he no longer possessed the receipts, vouchers, and other similar evidence to support his estimated expenses in Exhibit 7. He failed to meet the first prong because the original evidence is not voluminous - it is nonexistent.

Mr. Ward argues Exhibit 7 was not a summary of documents and therefore, Rule 1006 does not apply. He maintains Exhibit 7 is admissible under Rule 106 as a writing of a party. Rule 106 deals with the situation where one party offers only a portion of a

writing or recording and the other party seeks out of fairness to place that portion into context by requesting the entire writing or recording be presented into evidence. State v. Keough, 18 S.W.3d 175,182 (Tenn. 2000). We fail to see how Rule 106 is applicable.

(2) Foundation necessary to refresh prior recollection

Ms. Ward asserts the proper foundation was not laid by Mr. Ward to establish he needed his memory refreshed. Rule 612 requires a minimal foundation be laid when a witness on the stand cannot remember certain facts. On direct examination, the witness must: (1) be unable to recall requested information, (2) counsel approaches and allows the witness to inspect the writing, which refreshes the witness's memory, (3) the writing is taken back by counsel, (4) the witness then testifies from his refreshed memory. Tenn. R. Evid. 612 Advisory Committee's Comments. Clearly, Mr. Ward estimated his expenses because he could not recall exactly on what he had spent his money between 1990 and 1997. However, he was allowed to testify directly from Exhibit 7 over Ms. Ward's objections.

Regarding both the Rule 1006 issue and Rule 612 issue, we find the trial court erred in admitting Exhibit 7 into evidence. Mr. Ward failed to establish the required prerequisites under both rules. However, the trial court stated it would not consider Exhibit 7 as substantive evidence. The record clearly establishes the Chancellor relied solely upon witness testimony to establish the credibility of the estimated amounts. Therefore, we hold the Chancellor erred under Rule 1006 and Rule 612 regarding the introduction into evidence of Exhibit 7. However, we hold the admission was harmless error and did not prejudice Ms. Ward's rights. T.R.A.P. 36(b).

Attorney's Fees

Mrs. Ward seeks attorney's fees for costs incurred in searching, finding and tracing the approximately $107,000 Mr. Ward diverted to Ms. Blanchard. "The decision to award attorney's fees to a party in a divorce proceeding, and the amount thereof, are largely within the trial court's discretion and will not be disturbed upon appeal unless the evidence preponderates against such a decision." Houghland v. Houghland, 844 S.W.2d 619, 623 (Tenn. App. 1992). We find no evidence to reverse the trial court's denial of attorney's fees.

Conclusion

We conclude it was reversible error to require fraud to be shown as a prerequisite to finding marital assets were dissipated. For the foregoing reasons, the judgment of the

trial court is reversed in part, remanded in part, and affirmed in part, as consistent with this opinion. Costs of this appeal are taxed to Mr. Ward.

Don R. Ash
Special Judge

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON

EVA D. BROWN	)	
	)	
Plaintiff/Appellant	)	
	)	
v.	)	
	)	**Case No.: W2003-01181-WC-R3-CV**
PURODENSO COMPANY,	)	
	)	**From the Circuit Court of**
Defendant/Appellee	)	**Madison County, TN**
	)	**Case No. C-00-359**
	)	
	)	
	)	
	)	
	)	

BRIEF OF APPELLEE

JOHN D. BURLESON (BPR #10400)
JOHN D. STEVENS (BPR# 22574)
RAINEY, KIZER, REVIERE & BELL, P.L.C.
105 South Highland Avenue
Post Office Box 1147
Jackson, TN 38302-1147
(731) 423-2414

Attorneys for Purodenso Company

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II. WHETHER THE TRIAL COURT CORRECTLY DENIED A PERMANENT IMPAIRMENT AWARD?

STATEMENT OF THE CASE[1]

Purodenso Company employed Eva D. Brown as a panel pleater when she injured herself at work on January 4, 1999. (T.R., Vol. I, pg. 1, Original Complaint). She immediately reported her injury to her supervisor and was seen that same day by Dr. Gilbert Woodall. (T.R., Vol. I, pg. 1). Dr. Woodall diagnosed a contusion to her right knee. (T.R., Vol. I, pg. 2). He referred Ms. Brown to see an orthopedic specialist Dr. Michael Cobb. (T.R., Vol. I, pg. 2). Dr. Cobb concurred with Dr. Woodall's diagnosis. (T.R. Vol. III, Trial Transcript, Trial Exhibit 3, Cobb Deposition [hereinafter "Cobb Dep."]. After two additional visits with Dr. Cobb, Appellant was discharged without restriction or permanent impairment. (Cobb Dep. pg. 11-12).

Ms. Brown filed a Complaint seeking workers' compensation benefits and uncovered medical expenses on October 16, 2000 in the Circuit Court of Madison County. (T.R., Vol. I, pg. 1-3, Complaint). Appellee Purodenso filed its Answer on November 9, 2000. (T.R., Vol. I, pg. 4-6, Answer). A Notice of Wage Statement was filed by Purodenso on November 17, 2000. (T.R., Vol. I, pg. 7-9).

A Benefit Review Conference was conducted before Ms. Brenda Salley, Workers' Compensation Specialist for the Tennessee Department of Labor and Workforce Development, on September 13, 2002. (T.R., Vol. I, pg. 13). Trial was set for October 21, 2002 before the Honorable Donald H. Allen, Circuit Court Judge for Division II of Madison

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[1] Ms. Eva D. Brown will be referred to as "Appellant" or "Ms. Brown." Purodenso Company will be referred to as "Purodenso" or "Appellee." References to the technical record will be abbreviated "T.R." with page designations, and references to the trial transcript will be abbreviated "Trs." with page designations. References to exhibits will be abbreviated "Ex." with page designations.

County. (T.R., Vol. I, pg. 10). Trial was continued by agreement to November 21, 2002. (T.R., Vol. I, pg. 12). The Benefit Review Conference Report was submitted to Judge Allen on December 2, 2002 and indicated the parties had reached an impasse. (T.R., Vol. I, pg. 13).

Ultimately, trial was held February 19, 2003 before the Honorable Donald H. Allen. (T.R., Vol. III, Trs.). Judge Allen took the case under advisement and, on March 5, 2003, he notified the parties of his findings of fact and conclusions of law. (T.R., Vol. I, pg. 14-19). Judge Allen found the Appellant failed to meet her burden of proof by a preponderance of the evidence. (T.R., Vol. I, pg. 14, 19). The Order of Judgment was filed with the trial court clerk on April 1, 2003. (T.R., Vol. I, pg. 20-21). Ms. Brown filed her Notice of Appeal on April 30, 2003. (T.R., Vol. I, pg. 28). Pursuant to Supreme Court Rule 37, the parties mediated this matter June 25, 2003, but could not come to a resolution.

STATEMENT OF THE FACTS

Ms. Brown was injured in a work-related accident on January 4, 1999. (T.R., Vol. I, pgs. 1, 14; Vol. III, Trs. pgs. 26-27). At the time of trial, she was forty-five years old. (Trs. pg. 26). Ms. Brown is a high school graduate with some additional vocational technical school. (Trs. pg. 17). Since graduating from high school, she has done factory work for a number of different employers. (Trs. pgs. 19-22). Ms. Brown began with Purodenso in 1996. (Trs. pg. 22). Purodenso manufactures air filters for automobiles. (Trs. pgs. 22, 134).

At Purodenso, Ms. Brown works as a panel pleater. (Trs. pg. 14). Her job requires operating a machine that folds the paper product, called "media," to form the filter of the air filter. (Trs. pg. 141). On January 4, 1999, she was working her regular shift when he tripped and fell, landing on her hands and knees. (T.R., Vol. I, pg. 14; Trs. pgs. 27-28). She immediately reported the accident to her supervisor, Jeff Franks. (T.R., Vol. I, pg. 14; Trs. pg. 30). Mr. Franks took Ms. Brown to the Human Resources department, where she completed an incident report and was presented with a panel of three physicians from which she could choose to evaluate her. (Trs. pgs. 77-78).

Ms. Brown was seen by Dr. Gilbert Woodall, the company doctor, the same day. (T.R., Vol. I, pg. 15; Trs. pg. 31). She complained of pain and swelling in both knees to Dr. Woodall. (T.R., Vol. I, pg. 15; Trs. pg. 32). Dr. Woodall evaluated her injuries, wrote her a prescription, and put a knee brace on her right knee. (T.R., Vol. I., pg. 15; Trs. pg. 33). She returned to work and finished her shift. (T.R., Vol. I, pg. 15; Trs. pg. 34). The next day Appellant worked a regular shift doing light duty work. (T.R., Vol. I, pg. 15; Trs. pgs. 36-37).

Later, after continued complaints of knee pain in her right knee, Dr. Woodall referred her to Dr. Michael Cobb, a Board Certified orthopedic surgeon. (T.R., Vol. I, pg. 15; Trs. pg. 38; Cobb Dep. pg. 4). Appellant saw Dr. Cobb on February 3, 1999 complaining primarily of right knee pain. (T.R., Vol. I, pg. 15; Cobb Dep. pg. 4). Dr. Cobb noted "diffuse, not localized" complaints of pain during his examination. (T.R., Vol. I, pg. 15; Cobb Dep. pg. 5, line 14). Dr. Cobb defined diffuse as "widespread, not a certain part of the knee," (T.R., Vol. I, pg. 15; Cobb Dep. pg. 5, line 18), and that "[s]he is tender everywhere." (Cobb Dep. pg. 5, line 25). He noted the absence of "effusion or swelling." (T.R., Vol. I, pg. 15; Cobb Dep. pg. 6, line 3). Dr. Cobb diagnosed Ms. Brown as having a bruise of her right knee. (T.R., Vol. I, pg. 15; Cobb Dep. pg. 7). Dr. Cobb had a physical therapist show Ms. Brown some exercise to keep strength in her thigh and released her. (Cobb Dep. pg. 7).

Ms. Brown was seen by Dr. Cobb a second time on February 24, 1999. (T.R., Vol. I, pg. 15; Cobb Dep. pg. 8). Again, she complained of right knee pain and was examined. (T.R., Vol. I, pg. 15; Cobb Dep. pg. 8). He found signs of "fine crepitance," (T.R., Vol. I, pg. 15; Cobb Dep. pg. 9, line 18), which is a "roughness feeling in [the] kneecap joint" (Cobb Dep. pg. 9, line 19), that he described as a "developmental" (Cobb Dep. pg. 9, line 25), and "common condition." (T.R., Vol. I, pg. 15; Cobb Dep. pg. 9, line 24). Ms. Brown was given a cortisone injection, (T.R., Vol. I, pg. 15; Cobb Dep. pgs. 10, 25), and told she had a bruised knee with kneecap pain. (T.R. Vol. I, pg. 15; Cobb Dep. pg. 10).

Before returning to Dr. Cobb, Ms. Brown was seen by her personal physician Dr. Jennifer Johnson. (Trs. pg. 45). Dr. Johnson referred Ms. Brown to Dr. James T. Craig, Jr., a Board Certified orthopedic surgeon practicing with the Jackson Clinic. (Trs. pg. 4).

Ms. Brown was seen by Dr. Craig March 10, 1999, with complaints of pain in both knees, but more severe pain in her right knee. (T.R., Vol. I, pg. 16; Craig Dep. pg. 5) Dr. Craig noted "she did not have any swelling or any fluid in either one of her knees." (Craig Dep. pg. 6, lines 7-8). Both knees had crepitation but were stable. (T.R., Vol. I, pg. 16, Vol. III, Craig Dep. pg. 6). X-rays revealed some early degenerative arthritis, (T.R., Vol. I, pg. 16; Craig Dep. pg. 6), and chondromalacia of the patella, which is wearing of the cartilage behind the kneecap. (T.R., Vol. I, pg. 16; Craig Dep. pg. 8). He gave her a cortisone injection and released her. (T.R., Vol. I, pg. 16; Craig Dep. pg. 9).

Ms. Brown returned to Dr. Craig's office March 18, 1999, still complaining of pain in her right knee. (T.R., Vol. I, pg. 15; Craig Dep. pgs. 10-11). Upon examination he found the following:

> [n]o sign whatsoever of any fluid on the knee. She again was tender wherever I touched, not more so at the joint lines or other important landmarks. She had full range of motion. All ligaments again were stable. I again noted the kneecap crepitance."

(Craig Dep. pg. 10, line 25, pg. 11, lines 1-6). Dr. Craig discharged Ms. Brown from his care. (Craig Dep. pg. 11). After continued complaints of pain, she was offered another panel of physicians and chose Dr. James Varner.[2] (Trs. 81).

Appellant returned to Dr. Craig seventeen months later on August 21, 2000. (T.R., Vol. I, pg. 16; Craig Dep. pg. 10). Again, he noted no swelling, effusion, or fluid in the joint but did note crepitation in the right knee. (T.R., Vol. I, pg. 16; Craig Dep. pg. 10). He reviewed a radiologist's report from a prior MRI which failed to reveal any cartilage tears,

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1 Originally, Ms. Brown mistakenly gave the name Dr. Vernon Smith on page 43 when meaning to say Dr. James Varner. Her mistake was clarified on cross-examination on page 81.

(T.R., Vol. I, pg. 16; Craig Dep. pg. 10), ligament injury or meniscal injury. (T.R., Vol. I, pg. 16; Craig Dep. pg. 11). Because she continued complaining of pain and the objective evidence was negative, Dr. Craig recommended arthroscopic surgery to look inside the knee. (Craig Dep. pg. 12). Ms. Brown returned to Dr. Craig October 2, 2000, where surgery was discussed. (Craig Dep. pgs. 12-13). She agreed and an arthroscopy was performed by Dr. Craig on October 12, 2000. (T.R., Vol. I, pg. 16; Craig Dep. pg. 13). Dr. Craig found the "wearing" behind her patella and smoothed it down. (Craig Dep. pg. 13, line 24). Dr. Craig saw her post-arthroscopy on October 24, 2000, when he decided she had reached maximum medical improvement. (Craig Dep. pgs. 15-16).

Dr. Craig saw her again on December 27, 2000, due to injuries she suffered from a fall on some ice. (T.R., Vol. I, pg. 16; Craig Dep. pg. 17). Although it was not a direct strike on the ice, she did twist her right knee. (Craig Dep. pg. 16). She had significant pain and swelling and difficulty walking. (Craig Dep. pg. 16). Some fluid was removed and she was given an injection. (Craig Dep. pg.16).

Finally, Dr. Craig saw Ms. Brown two more times on September 12, 2001 and October 21, 2001. (Craig Dep. pg. 17). On September 21, 2001, she had the same right knee pain but she also now had left knee pain. (Craig Dep. pg. 17). Ms. Brown was seen for the last time by Dr. Craig on October 24, 2001, where no fluid was found but she now complained of tenderness on her kneecaps. (Craig Dep. pg. 18). Dr. Craig's final diagnosis was "chondromalacia of the patella, wearing out of the cartilage behind the kneecaps." (T.R., Vol. I, pg. 16; Craig Dep. pg. 19, lines 3-4). He released her without restriction, (T.R., Vol. I, pg. 17; Craig Dep. pg. 21), or permanent impairment. (T.R., Vol. I, pg. 17; Craig Dep. pg. 20).

Standard of Review

Appellate review of a Workers Compensation case is de novo upon the record accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50- 6-225(e)(2), Tucker v. Foamex, L.P., 31 S.W.3d 241, 242 (Tenn. 2000). This court is not bound by the trial court's findings, but may conduct its own independent examination of the record to determine where the preponderance lies. Vinson v. United Parcel Service, 92 S.W.3d 380, 383-4 (2002). When the trial judge has seen and heard a witness's testimony, considerable deference must be accorded on review to the trial court's findings of credibility and the weight given to that testimony. Conner Bros. Excavating Co. v. Long, 98 S.W.3d 656, 660 (Tenn. 2003) (citing Townsend v. State, 826 S.W.2d 434, 437 (Tenn.1992). The medical proof was presented by deposition and, therefore, this Court may draw its own conclusions about the weight and credibility of the expert testimony since it is in the same position as the trial judge. Houser v. Bi-Lo, Inc., 36 S.W.3d 68, 71 (Tenn. 2001).

ARGUMENT

The trial court correctly found the Appellant failed to prove her fall at work resulted in some permanent physical impairment or that the fall at work aggravated a prior existing physical condition. The trial court based these findings upon competent expert medical testimony. Therefore, the trial court properly found Appellee substantially complied with the Workers' Compensation Laws of Tennessee.

1. WHETHER THE TRIAL COURT CORRECTLY FOUND APPELLANT FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT HER INJURY WAS CAUSED BY A WORK-RELATED ACCIDENT?

Under the Tennessee Workers' Compensation Law, injuries by accident arising out of and in the course of employment which cause either disablement or death of the employee are compensable. Tenn.Code Ann. § 50-6-102(a)(12). The phrase "arising out of" has been described by the Tennessee Supreme Court as pertaining to the "cause or origin" of the accident. Hill v. Eagle Bend Mfg., Inc., 942 S.W.2d 483, 487 (Tenn. 1997). An accidental injury arises out of one's employment when it is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Fink v. Caudle, 856 S.W.2d 952, 958 (Tenn.1993).

In all but the most obvious cases, causation may only be established through expert medical testimony. Thomas v. Aetna Life & Cas. Co., 812 S.W.2d 278, 283 (1991). An injured employee is competent to testify, however, as to his own assessment of his physical condition and such testimony should not be wholly disregarded. McIlvain v. Russell Stover Candies, Inc., 996 S.W.2d 179, 183 (Tenn.1999).

Ms. Brown failed to carry her burden of proof regarding causation. She failed to produce any credible evidence to link her degenerative condition, chondromalacia of the patella, to her fall at work on January 4, 1999. Both Dr. Cobb and Dr. Craig testified Ms. Brown did not incur any permanent impairment as a result of her fall at work. (Cobb Dep. pg. 11; Craig Dep. pg. 20). The trial court found Dr. John R. Janovich's testimony regarding causation "not credible." (T.R., Vol. I, pg. 18).

When faced with conflicting medical testimony, the trial judge must choose which view to believe. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn.1991). The trial court accorded greater weight to the treating physician's opinion over that of the

expert hired solely for evaluation purposes after litigation has commenced. See Crossno v. Publix Shirt Factory, 814 S.W.2d 730 (Tenn. 1991)(citing A.C. Lawrence Co. v. Loveday, 455 S.W.2d 141 (1970). When making such a decision, the trial court may consider, among other things, the qualifications of the experts, the circumstances of their examination, the information available to them, and the evaluation of the importance of that information by other experts. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn.1991). Moreover, it is within the discretion of the trial judge to conclude that the opinion of certain experts should be accepted over that of other experts and that it contains the more probable explanation. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 676-7 (Tenn.1983). The trial court took these considerations into account when he found Dr. Janovich's testimony incredible.

A. Expert Qualifications

Unquestionably, the trial court found Dr. Janovich's, lack of board certification significant. In the trial court's letter setting forth its factual findings, the trial court noted both treating physicians, Dr. Cobb and Dr. Craig, are Board Certified in Orthopedic Surgery. (T.R., Vol. I, pgs. 15, 16). The plaintiff's expert witness Dr. Janovich, hired for the purpose of conducting an independent medical examination, is not board certified in orthopedic surgery. (Janovich Dep. pg. 8).

B. Examination Circumstances

The circumstances and timeliness of when each expert examined Ms. Brown was significant to the trial court. Dr. Cobb and Dr. Craig evaluated Ms. Brown within two months of her accidental fall at work. (Cobb Dep. pg. 4; Craig Dep. pg. 5). Dr. Janovich first saw Ms. Brown March 16, 2000, about fourteen (14) months after tripping at work and

did not see her again until April 10, 2001, more than twenty-seven (27) months later. (Janovich Dep. pg. 32). A comparison of Dr. Cobb and Dr. Craig's examination reports and diagnoses with Dr. Janovich's displays how Dr. Cobb and Dr. Craig are consistent while Dr. Janovich is inconsistent with them and with himself. This inconsistency supports the trial court disregarding Dr. Janovich's testimony.

Dr. Cobb initially examined Ms. Brown on February 3, 1999 - less than a month after her fall. Dr. Cobb noted no objective findings, the lack of swelling or fluid, the diffuseness of her pain, the stability of the right knee, and diagnosed her with a contusion of her right knee. (Cobb Dep. pgs. 5-7). On her second visit February 24, 1999, he noted a "fine crepitance" in both knees. (Cobb Dep. pg. 9). Otherwise, her examination displayed no objective findings such as swelling or localized pain. "I did not find localized tenderness that would lead one to believe that there was an injury in that area [her kneecap]." (Cobb. Dep. pg. 34, lines 7-9). He did not diagnose her with chondromalacia. He explained he did not "[b]ecause I looked for that condition when I examined her. If that area of her body was aggravated by the fall, one would assume that that area would be tender. I specifically felt the kneecap joint for that problem. And...she was not more tender there." (Cobb Dep. pg. 33, lines 8-13).

Dr. Craig initially examined Ms. Brown on March 10, 1999 and noted the absence of swelling or effusion. He diagnosed "early degenerative arthritis" and "chondromalacia of the patella." (Craig Dep. pgs. 7-8). He saw her again in August 2000, due to her continued complaints of right knee pain. His objective findings were negative for any sign of damage to her knee beyond the chondromalacia, which he described as caused by normal wear and tear and common for a patient in her forties like the Appellant. (Craig

Dep. pg. 19-20).

Dr. Cobb and Dr. Craig's findings were similar in that they both diagnosed degenerative problems with Ms. Brown's knees rather than any traumatic injury. Both noted the absence of swelling on all of her examinations. Both noted her knees were stable as a sign of the absence of ligament or cartilage damage. Both were apparently concerned about the absence of objective indications of the source of Ms. Brown's continued subjective complaints of pain, even to the point that Dr. Cobb questioned her credibility. Dr. Craig suggested an arthroscopy in a further attempt to discover the source of her pain following negative x-rays and an MRI that failed to reveal anything significant beyond the degenerative condition. Dr. Janovich's medical records and deposition testimony are significant when compared to the two similar evaluations as noted above.

Dr. Janovich's initial evaluation on March 16, 2000, which indicated tenderness all over, was similar to Dr. Cobb's observation her pain was diffuse. (Janovich Dep. Ex. 3). Her complaints related only to her right knee. (Janovich Dep. pg. 32). He noted crepitance, just as Dr. Cobb and Dr. Craig. (Janovich Dep. Ex. 3). An x-ray indicated an "early degenerative change" but "otherwise the knee examination on x-ray is unremarkable," similar to Dr. Cobb and Dr. Craig. (Janovich Dep. Ex. 3). He apparently did not view an MRI or report. (Janovich Dep. Ex. 3). He did, however, diagnose a presumptive tear of her medial meniscus, which was ruled out by her MRI. (Craig Dep. pg. 11).

On December 27, 2000, three and a half months prior to her next visit to Dr. Janovich, Ms. Brown slipped on some ice and apparently twisted her right knee. (Craig Dep. pg. 16). There is no indication Dr. Janovich had any knowledge of this incident when

he evaluated Ms. Brown on April 10, 2001, and the trial court called this fact "very important." (T.R., Vol. I, pg. 17). For the first time, Ms. Brown told Dr. Janovich she had pain in her left leg. Dr. Janovich noted the "mild degenerative changes in [the] patellofemoral compartment." (Janovich Dep., Ex. 4). When her "loaded" range of motion was tested by having Ms. Brown squat, Dr. Janovich only noted pain on her right side. (Janovich Dep., Ex. 4). However, he found "arthrosis of the patellofemoral compartment bilateral knees" and gave her a five percent (5%) impairment rating to both lower extremities. (Janovich Dep., Ex. 4). The trial court called the equal impairment rating "totally incredible." (T.R., Vol. I, pg. 17).

Dr. Janovich's change of opinion must be taken for what it is worth. He was not evaluating Ms. Brown for treatment. His diagnosis is based on a non-work related traumatic event of which he was unaware.

C. Available Information

Dr. Janovich based his opinion on less than all the facts and for that reason, the trial court found his testimony not credible. As just discussed, Dr. Janovich did not have enough information to provide a credible opinion on causation. He did not get to evaluate the Appellant until more than a year following the original injury. He was apparently unaware of her December 27, 2000 accident on ice where she required being treated by Dr. Craig. Dr. Cobb examined Ms. Brown three times in close proximity to her accident at work. Dr. Craig had the benefit of eight visits, x-rays, an MRI and arthroscopy in formulating an opinion on causation. Clearly, Dr. Cobb and Dr. Craig had the best opportunity to assess whether her chondromalacia was caused by a work-related incident.

D. What Other Experts Evaluated As Important

The absence of objective indications of injury were significant to both Dr. Craig and Dr. Cobb. Although Ms. Brown consistently complained of swelling in her right knee, but neither Dr. Cobb nor Dr. Craig found any evidence of swelling until after the December 27, 2000 slip and fall on the ice. Each searched for objective indications for the cause of her diffuse complaints of pain. Only through Dr. Craig's arthroscopy was a clear diagnosis obtained.

E. Appellant's Credibility Was Questioned

Ms. Brown's conflicting statements caused the trial court and Dr. Cobb to doubt the genuineness of her complaints. As noted by the trial court's letter of March 5, 2003, her in court testimony regarding continuous pain and swelling was contradicted by objective medical evidence. All three medical experts observed the absence of swelling in their evaluations. When questioned about why Dr. Cobb testified he never examined her left knee and that her right knee never had any swelling, she claimed she told both Dr. Cobb and Dr. Woodall about problems with both her knees. (Trs. pg. 78). What reason would Dr. Cobb have to not note all her complaints? She clearly exaggerated the severity of her symptoms in her testimony. When questioned at trial about whether her pain in her right knee was as constant as it was prior to surgery, she stated "Yes, it is constant." (Trs. pg. 84, line 17). However, in her deposition she was asked regarding her pain following surgery:

Q: Do you have...Is it still constant?"

A: Not as constant as it was."

(Trs. pg. 85, line 16-18). Of course, the trial court relied heavily on the contradiction of her claims of pain and swelling when the proof showed she worked large amounts of overtime,

a significant portion of which was "voluntary."

Dr. Cobb, who examined her more closely to the time of the accident at work, questioned her truthfulness due to the absence of a localized epicenter of pain. He explained the relevance of his statement, "[o]n examination, she is tender everywhere[,]" by describing how he established "a baseline of tenderness." (Cobb Dep. pg. 22, line 15-16, 25). "You cannot find the source of any injury, unless there are some signs[.]" (Cobb. Dep. pg. 23, lines 8-9). "There's no reason to be tender everywhere. The entire lower leg, upper leg, knee was not injured." (Cobb Dep. pg. 23, lines 19-20). He continued on this line of thought by stating, "in light of the fact that everywhere I touched she complained of pain...when I made my way up to the kneecap joint or the joint lines where the cartilage is, she did not complain of any more tenderness in those areas[,]" as he would have expected. (Cobb Dep. pg. 24, lines 22-23, pg. 25, lines 1-4). The widespread nature of her pain was not what he expected with a striking injury such as falling and landing on one's knees. For that reason, he doubted her credibility.

Even with complaints of "constant pain," Ms. Brown never missed a day's work from January 4, 1999, through her arthroscopic procedure. In addition, she worked a lot overtime. The trial court stated it found it "very hard to reconcile" the constant pain and swelling and her ability to work every day plus significant hours of overtime. Also, the trial court pointed out that Ms. Brown declined short term and long term disability payments when they were made available and chose to continue working instead. (T.R., Vol. I., pg. 19).

The trial court's ruling should be affirmed because Ms. Brown failed to prove her fall on January 4, 1999, caused her diagnosed condition, condromalacia of the patella. In the

medical opinion of both of Ms. Brown's treating physicians, she suffered a bruised knee as a result of her fall. Her continued complaints of pain were not proven by a preponderance of the evidence to have been caused by her fall at work.

2. WHETHER THE TRIAL COURT PROPERLY DENIED A PERMANENT IMPAIRMENT AWARD?

The extent of disability is a question of fact to be determined from all of the evidence, including lay and expert testimony. Tenn. Code Ann. § 50-6-241(c); Cleek v. Wal-Mart Stores, Inc., 19 S.W.3d 770, 773 (Tenn. 2000). The trial court did not find Dr. Janovich to be a credible expert witness and the court did not find her chondromalacia to be a work-related condition. Thus, the lower court did not assign an impairment rating. Appellant argues the lay and expert testimony establishes she did not hurt before January 4, 1999, now she does hurt, and, thus, her employer must pay. For the reasons stated above, no credible expert testimony offered the opinion her condition was caused by her work. Because there was no correlation between her painful and swollen knees and her job, neither Dr. Cobb nor Dr. Craig felt any permanency rating was appropriate.

As for lay testimony, her ex-husband and her sons testified she did not have symptoms before her injury, but she does experience pain, swelling and the reduced ability to perform everyday household chores. However, lay testimony is only competent in determining the extent of disability once causation and permanency of injury are established by expert medical testimony. Kellwood Co. v. Gibson, 581 S.W.2d 645 (Tenn. 1979), overruled on other grounds by Lollar v. Wal-Mart Stores, Inc., 767 S.W.2d 143 (Tenn. 1989).

CONCLUSION

Based on the foregoing, the trial court's finds that Appellant failed to prover that her injury was caused by her fall at work and that she failed to prove she suffered a permanent injury should be affirmed.

Respectfully submitted,

RAINEY, KIZER, REVIERE & BELL, P.L.C.

BY:_____

JOHN D. BURLESON (BPR #10400)
JOHN D. STEVENS (BPR# 22574)
RAINEY, KIZER, REVIERE & BELL, P.L.C.
105 South Highland Avenue
Post Office Box 1147
Jackson, TN 38302-1147
(731) 423-2414

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this pleading or document was served upon counsel of record by mailing postage prepaid to such counsel:

Ruby R. Wharton
Attorney At Law
147 Jefferson Avenue
Suite 1205
Memphis, Tennessee 38103

This the _____ day of September, 2003.

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