TENNESSEE JUDICIAL NOMINATING COMMISSION
511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

APPLICATION OF STANLEY A. KWELLER FOR NOMINATION TO JUDICIAL OFFICE

October 28, 2011

Tennessee Judicial Nominating Commission

Application for Nomination to Judicial Office

Rev. 14 September 2011

Name: Stanley A. Kweller

Office Address: 214 Second Avenue North, Suite 103
(including county)

Nashville, TN 37201 (Davidson County)

Office Phone: 615-256-2602 Facsimile: 615-242-5967

Email Address: stan.kweller@jkmwh.com

Home Address: [redacted]
(including county)

[redacted] (Davidson County)

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.

I am an attorney in private practice with Jackson, Kweller, McKinney, Warden, Lewis & Hayes, a Professional Association of attorneys.

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

I was licensed to practice law in Tennessee in 1977. My Board of Professional Responsibility number is 005429.

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 am licensed to practice law in the State of Tennessee and have been since September 17, 1977, BPR # 005429. My license is currently active.

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

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

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

September 1977 to approximately February 1979, I was an associate attorney with Gore &

Hillman in Bristol, Tennessee.

February 1979 to August 1986, I was an Assistant District Attorney General for the State of Tennessee in Blountville, Tennessee, the Second Judicial District.

September 1986 to November 1991, I was an associate attorney with Flynn & Neenan, P.C. in Nashville, Tennessee.

November 1991 to date, I began in November, 1991 my own practice as an attorney with Robert L. Jackson & Associates. I am still with that firm currently known as Jackson, Kweller, McKinney, Warden, Lewis & Hayes, a Professional Association.

I worked a number of jobs during and after high school including working at my father's business, Hy's Car Wash, located in Chattanooga, Tennessee, at various times between 1963 and 1974.

I had various jobs during college, including working as a life guard at a club in Atlanta, Georgia then known as The Progressive Club, which has since gone out of business. I also worked in the construction industry after graduation from college and before attending graduate school.

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

I have been employed continuously as an attorney since the completion of 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.

Presently, my law practice consists of a general practice, primarily civil in nature. In terms of percentages, 65% to 70% of my practice is related to domestic relations law, including divorce, child custody, parenting time issues, child support, and issues related to the division of marital assets and liabilities. I also include in that designation, work in Juvenile Court that is related to issues of parentage and child support. In addition, I perform Appellate work in all of the aforementioned areas.

The balance of my practice consists of commercial and general litigation, employment discrimination and employee rights both for employers and employees, and a small general practice representing small businesses in the Nashville area.

Occasionally, I handle criminal cases as I have a background in criminal law based upon my time as an Assistant District Attorney and in private practice after leaving the District Attorney's Offic in Sullivan County.

I have had an active practice in many areas of the law. I do not limit my practice to any one area. I have certainly devoted more time in the past ten (10) years to the domestic relations portion of my practice than any other area. I still represent clients in all types of matters. I currently have cases pending for individuals and business in non-domestic relation matters in a number of different courts.

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.

Since starting my practice in 1977 with the firm of Gore & Hillman in Bristol, Tennessee, my practice has almost always been a litigation oriented practice. I tried my first jury trial in 1976 and have been trying cases of various types ever since. The first jury case I tried was defending a locally owned department store in Bristol, Tennessee in a tort claim where a patron of the store had fallen and been injured. My recollection is that I was able to obtain a Defendant's verdict in that case. During that same period and before going to the District Attorney General's Office in

Sullivan County, Tennessee, I defended a federal jury criminal matter and tort cases as a defense attorney. I tried a number of non-jury matters that were generally civil, as well as, representing defendants in criminal matters both on a paid and pro bono basis.

Beginning in 1979, I was employed by the office of the District Attorney General for Sullivan County, Tennessee, the Second Judicial District. From that time until I left that office to move to Nashville, Tennessee in September 1986, I represented the State of Tennessee in every type of possible criminal proceeding; from the lowest classification of misdemeanor criminal matters to cases involving the ultimate penalty. I tried cases in the General Sessions Court for Sullivan County in both sections of the county, (for those of you that do not know Sullivan County is divided in some ways like the State of Tennessee into three (3) separate parts). I also tried a significant number of jury trials in the Criminal Court for Sullivan County in front of a number of different Judges. On one occasion, I was asked to assist my co-worker, H. Greely Wells, who was appointed as the District Attorney Pro Tem for Knox County in a murder investigation and trial that was tried before the late Chief Justice Adolpho A. Birch sitting then by designation as trial judge in Knoxville.

My experience during that time included thousands of non-jury trials, hearings and jury trials in Criminal Court, which are too numerous to detail. As a prosecutor, I was involved in cases that specifically targeted prostitution in Sullivan County by closing down what were then called massage parlors, which were actually fronts for commercial prostitution rings. I was involved in the investigations, which were conducted by joint TBI and FBI operations relative to gambling and official corruption. I was able to use the civil law in order to assist our office in shutting down 12 massage parlors at one time severely hampering the ability of the purveyors of prostitution to continue their operations.

I left the District Attorney General's Office to pursue private practice in Nashville and to be closer to my family living in Nashville and parents who lived in Chattanooga at that time. My parents ultimately moved to Nashville upon their retirement.

I began work in Nashville in September of 1986 as an Associate Attorney with the firm of Flynn & Neenan, which is now known as Flynn & Radford. I was employed by the firm in a general civil practice, including work in trials in the area of personal injury cases, general business and corporate litigation and representing small businesses in this area. I also handled generally small criminal matters for clients of the firms or referrals that were made to me based upon my experience of a prosecutor.

I participated in a number of jury trials and multiple non-jury hearings during my tenure with Flynn & Neenan and there got my first real taste of domestic relations law. I had handled a couple small domestic relation cases in Bristol when I was in private practice but I did not pursue that line of work initially. One of the more interesting jury cases which I participated in trying involved a claim by a firefighter and police officer who were significantly injured as a result of an adult drunk driver. Our office, Flynn & Neenan, represented the police officer in the case. We were not only able to obtain a verdict against the adult drunk driver but also against the owner of the car, who happened to be his mother. Even though the car owner sought protection from the Bankruptcy court, we were ultimately able to obtain a significant recovery for our client.

In the Fall of 1991, after marrying my current wife, Virginia, I found that I needed to make a change and take more control over what I did as an attorney, both from a financial standpoint and from a practice standpoint. I met and became acquainted with Robert "Bobby" L. Jackson, Esquire through handling cases, primarily, against him in Nashville and when the opportunity to go to work with him in his association of attorneys, I could not pass it up.

I have been in practice with Bobby Jackson since the Fall of 1991. I have found the practice of law to be both challenging and fulfilling. My original intent was not to engage in practice primarily in the domestic relations field but as I have worked since 1991 I have found that more and more of my practice has been devoted to that area. However, a significant portion of my practice focuses on other matters. Specifically, I represent various local businesses in all types of commercial issues, including contract negotiations, lease negotiations, litigation involving employment matters, real property and other general types of civil practice.

I still receive referrals from other lawyers, friends and others involving criminal matters. While I do not practice in that area as much as I once did, I still feel very comfortable in the criminal arena. I have been involved for a number of years as an independent attorney with Corrections Corporation of America, assisting inmates in matters related to the protection of their rights while they are incarcerated. This is a paid position. It allows me to keep my finger in the criminal justice system. It also gives me a very different perspective from that of the typical civil litigation attorney.

During the course of my legal career, I have engaged in all types of civil litigation, including Medicare/Medicaid corporate fraud related issues that were litigated at some length in the Chancery Courts in Davidson County, and Appellate work of all types. In the last ten (10) years, I have primarily practiced in the area of domestic relations law. I also represent a number of small businesses in Nashville, with whom I have been involved for a number of years. I continue to actively engage in that practice.

I also have engaged in a practice of representing individuals and companies related to employment discrimination law and feel very comfortable in that arena as well. Along with the now deceased attorney from Atlanta, I tried a case involving sexual harassment where the defendant was the Department of the Army. We were successful in obtaining a substantial jury verdict for our client in Federal Court. I also participated in a case that was ultimately settled that involved a claim against the Department of the Army involving violations of the Americans with Disabilities Act. The case was settled in a very successful manner for our client.

I have tried cases in front of courts, boards and agencies all over the State of Tennessee. I have argued a number of different types of Appellate cases and I have represented both individuals and companies in litigation in Federal District Court in both the Eastern and Middle Districts of Tennessee and the Sixth Circuit Court of Appeals.

I have also represented clients in front of various boards and state agencies, including cases involving the Board of Psychologist and Psychological Examiners, the Board of Nursing and even the Board of Pardons and Paroles. I have appealed cases from those agencies and organizations to the Chancery Court of Davidson County and have appeared frequently in the

Chancery Court representing different types of individuals and businesses in matters that the Chancery Court routinely handles.

Since beginning my practice in Nashville, I have practiced in all of the Circuit and Chancery courts in Davidson County. I have also practiced in the Circuit and Chancery Courts for Cheatham County, Maury County, Robertson County, Sumner County, Williamson County and Wilson County, as well as, the entire Middle Tennessee area. In the last ten years, I have spent a significant amount of time practicing in the Fourth and Eighth Circuit Courts.

I find in my practice that the most intriguing and engaging cases are ones that involve complicated fact patterns or complicated legal issues. I have had the opportunity to handle both. Although they are taxing intellectually, they represent the most enjoyable types of cases in terms of a feeling of accomplishment when the case has been concluded. These cases include domestic cases, involving the U.C.C.J.E.A. (Uniform Child Custody Jurisdiction Enforcement Act), business cases involving complex financial transactions and governmental issues and civil litigation involving actions to pierce the corporate veil. I have had the opportunity to handle all of these types of cases and believe that those challenges have made me a better lawyer and put me in the best position possible to be an excellent Judge.

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

My practice has been a general one in nature covering all areas of the law. I feel quite comfortable representing individuals and companies in a number of different areas. I believe that I have an excellent reputation for being a careful, well prepared attorney. I believe that reputation includes the fact that I don't make wild crazy statements or accusations about either the facts or the law and that I have read and researched the law so that when I speak of it I do so with a solid foundation.

I have had an opportunity during my practice to handle more and more complicated and complex cases. The cases are complicated either because of fact patterns, which are outside of the general realm or because of complicated legal issues. These cases include matters involving the Uniform Child Custody Jurisdiction Enforcement Act, cases that have made multiple trips to the Court of Appeals on civil contractual issues, and criminal cases that involved complicated issues regarding double jeopardy.

As I stated before in response to question 8, I have been involved in a number of different types of cases that were certainly significant to my clients but more importantly helped establish what I believe to be a pattern for me of handling cases that were factually and legally challenging. The personal injury case involving the police officer who was injured as a result of a drunk driver involved significant issues relative to the responsibility of the owners of property being held liable for the action of others who use that property. In both of the employment law cases involving the Department of the Army, the motions for summary judgment were successfully challenged. In both of those cases, we were able to demonstrate to the Court that the Government was responsible for the acts of its employees in discriminating against other employees by virtue

of relatively novel legal theories.

I have been involved in cases of this type throughout my career and continue to do so. It is these types of cases that challenge me intellectually. Further, such cases increase my abilities in understanding the law and how it should be administered as a Judge.

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.

I have acted as a mediator in a number of different cases, none of which I would describe as noteworthy other than to the parties themselves. I have also had an opportunity to observe a number of different mediators, Judges, and Judicial Officers, who have influenced my practice and how I represent my clients.

The only judicial experience that I have had was acting as a Special Judge by appointment of the General Sessions Judges. I also recall one occasion acting for Judge Muriel Robinson of the Fourth Circuit Court for Davidson County.

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.

Other than as an attorney representing clients, I have not acted as a guardian ad litem, conservator, or trustee.

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

My answers to the questions number 8 and 9 are a good representation of my legal experience.

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.

I have made two (2) previous applications for judgeship. One in 1994 shortly after Judge Shriver

passed away. I applied for the position of Criminal Court Judge in Davidson County, Tennessee. Second, in 2003. I applied for the position of Chancellor when there were two (2) Chancery positions open in Davidson County, Tennessee. My name was not submitted to the Governor on either occasion.

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.

I graduated from Emory University in 1972 with a Bachelor of Arts Degree. I also graduated from Emory University in 1974 with a Master of Arts Degree. I graduated from the University of Tennessee College of Law with a Juris Doctorate in 1977. I have never attended a school after high school where I did not receive a degree.

PERSONAL INFORMATION

15. State your age and date of birth.

I am 61 years of age. My date of birth is September 28, 1950.

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

Other than living in Atlanta, Georgia during college and graduate school, I have not lived outside the State of Tennessee since the Spring of 1951 when my parents moved back to Tennessee from Pittsburgh, Pennsylvania where I was born.

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

I have lived in Davidson County since September of 1986.

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

I am registered to vote in Davidson County.

19. Describe your military Service, if applicable, including branch of service, dates of active

duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

I have no military service background.

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.

I have not ever pled guilty or been convicted or have been in violation of any law, regulation or ordinance. During my life I have received four (4) or five (5) speeding tickets for which I paid a fine or attended a traffic school.

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.

I have not ever been under any type of investigation for possible violation of a criminal statute. I am not under any investigation for violation of any disciplinary rule.

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.

I have never been disciplined or cited for breach of ethics or unprofessional conduct by any court, administrative agency, bar association, disciplinary committee or professional group.

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)?

I have never filed bankruptcy.

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.

Yes, in 1984 I was involved in a divorce action in Chancery Court for Sullivan County, Tennessee, docket number 82-15-4334. The divorce was granted. The opposing party was my then wife, Susan Kweller.

In 1993, my wife, Virginia Kweller, and I sued CNA on a claim regarding our homeowner's insurance policy. Initially the claim was filed in General Sessions Court under docket number 93GC17125. That case was appealed and/or transferred to the Circuit Court under case number 94C71 and was resolved by settlement.

In 2003, I was involved in a law suit with a former client. In that matter, I had represented a lady by the name of Beverley Martindale in a personal injury matter. I missed the statute of limitations. When I realized what had happened, I contacted my client immediately both by phone and by mail and advised her of what happened and advised her that she should seek other counsel and may wish to consider a lawsuit against me. Ultimately, that suit was filed under docket number 03C666, in the Circuit Court for Davidson County, Tennessee and that case was settled.

In 2003, an attorney with whom I continue to practice, Larry Hayes, Esquire and I were involved in a law suit in Chancery Court under case number 03-2440-I, styled Hayes and Kweller versus International Credit Corporation, LLC. That matter was a fee dispute and was also settled.

In 2007, I filed a General Sessions Court action against a former client under docket number 078GC21084 regarding fees and that matter was also settled.

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 Congregation, Ohabai Sholom, The Temple, in Nashville, Tennessee and have been for a number of years. I am also a member of the Jewish Community Center in Nashville, Tennessee and have been since 1986.

I am a member of the National Ski Patrol and have been a member for over 27-years and work through the Beech Mountain Ski Patrol.

I have served as a board member of the Jewish Family Services in Nashville, Tennessee. It does not technically have a membership. I have also served on the Community Relations Committee and the Allocations Committee for the Jewish Federation of Nashville.

I am a fellow of the Nashville Bar Foundation.

I have worked as a supervisor on site (SOS) with Habitat for Humanity in the past. I have not been active with that organization in the last two years. I have also participated in a number of builds for organizations acting with Habitat. I found that work to be most fulfilling and enjoyable.

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 am currently a member of the Nashville and Tennessee Bar Associations. I have been a member off and on in both of these organizations since moving to Nashville. I recently learned that my Nashville Bar Association membership had lapsed and reinstituted it upon learning of that lapse. At various times in the past I have acted as a committee member in the Nashville Bar Association both for the Legislative Affairs Committee and also on at least one occasion in the past on the Ethics and Professionalism Committee.

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.

I have been chosen by my peers to be included in the *Super Lawyers of the Middle South*® since 2008. This selection process for this honor is a multiphase process including the creation of a candidate roll, research by the *Super Lawyers* staff and a peer review of the candidates by other

attorneys. Each candidate is evaluated on 12 indicators of peer recognition and professional achievement. Selections are made on an annual state by state basis.

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.

In the past five (5) years I have been involved in CLE seminars for the Stewart Title Guarantee Company, TIPS Program in 2007. I have spoken to the Tennessee Association of Criminal Defense Lawyers Annual Review Seminar in 2010 and also the Tennessee Paralegal Association Seminar in 2010. I prepared for and was scheduled to speak at a seminar for Sterling Educational Services again in 2010, that seminar unfortunately was cancelled. I have also spoken and conducted an all day seminar for the Tennessee Bureau Of Investigation for their training of new agents in 2010 and I am scheduled to speak at a divorce related seminar in December of 2011.

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.

I am attaching to this question, two (2) Briefs which I was the principal or sole author. The first chronologically is a Brief that I prepared and filed on behalf of my client, Toni Price, in 1999, which was a domestic relations matter. Opposing counsel consisted of Jim Martin, Esquire and Greg Smith, Esquire. (Appendix "A")

The second example that I am submitting is a Brief of which I was the author in a civil, non-domestic relations case. In that case, there was an attempt to pierce the corporate veil and impose liabilities for the debts of a corporation on the principal shareholder and an attorney for the corporation. I was successful in that matter in initially obtaining a summary judgment on behalf of my client. The case was appealed and the summary judgment was upheld except to one issue. After the case was remanded to the Chancery Court, we were successful in the trial on the merits and successful on the second appeal which challenged that trial. (Appendix "B")

In both of these examples, I was the principal researcher and author of the materials and these examples reflect my personal work and effort. I am not including with this questionnaire the Appendixes to the Briefs, which consisted primarily of unreported Appellate decisions.

ESSAYS/PERSONAL STATEMENTS

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

After practicing law for 34 years, I have had an opportunity to see Judges across this State most of whom were good and some who were not as good. I believe that I have something to offer as a Judge, honesty, integrity, patience and a respect for the law. My background and experiences, my personal sense of a commitment to justice and a desire to give back to the community are the reasons that I am seeking this position. I know that I can serve the citizens of Nashville, Davidson County in the State of Tennessee as a Judge with honesty, integrity and excellence.

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)***

My achievements and activities are not awards or designations or public acknowledgements but rather they are the satisfaction of working hard for clients, doing what is necessary to present their matters to courts and tribunals and doing so with integrity between myself and my clients, as well as, myself and the tribunal. It is critical for the adversarial system that we, as lawyers, be honest with ourselves and with the courts. Honesty and that type of presentation is the basis the Court must rely on in order to make appropriate decisions.

I have had the opportunity to represent people of all walks of life in my practice. From those to whom money was not really an object of any concern to those whom a few dollars represents the difference between living and starving. I routinely take *pro bono* cases when asked by organizations in Nashville, including the Nashville Lawyer Referral Service and the Nashville Bar Association Pro Bono Program, Inc. referral service. Further, I perform *pro bono* work without a referral and without recognition because that is ultimately the essence of what a lawyer should do. As a prosecutor in Bristol, Tennessee, I worked on the first Domestic Violence

Shelter Board in that area to help them establish their tax exempt status. I continued that activity in Nashville in 1993 as the co-chair of an organization that helped raised money for the YWCA Domestic Violence Program.

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

I am seeking the position of Third Circuit Court Judge for Nashville, Davidson County, Tennessee. This Court is one of eight (8) Circuit Court positions in Nashville, Davidson County.

According to T.C.A. § 16-10-101, the Circuit Court is a court of general jurisdiction. In Davidson County the Circuit Court hear all matters that are filed in that Court, including, but not limited to, cases of domestic relations, personal injury, business and commercial ligation, cases involving violations of state or federal rights and responsibilities including Constitutional Rights, domestic relations, Order of Protections and cases of a general civil nature.

Because of my experience and background, I have the ability and feel comfortable in hearing any and all of these types of cases filed in the Circuit Court.

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

I have been active at various times during my career in areas related to domestic violence. As a young prosecutor, I was proud to help the Bristol Women's Shelter in its beginning stages to provide a safe place for victims of domestic violence.

After moving to Nashville, I continued to assist in that area to help those victims, and worked with the YWCA Domestic Violence Shelter in their fundraising activities.

I also participated as a member of the Jewish Federation of Nashville Community Relations Committee and in the past been a member of the Board of Directors of Jewish Family Services of Nashville, which provides all types of social services to members of any religion or race, including adoption services and other types of assistance. I have represented people at the request of that agency who could not otherwise afford counsel.

As a Judge, I see my role in acting in the community as governed in part by my own interest but also governed by the Code of Judicial Conduct. My role must be that of education. I intend to continue to contribute and participate as allowed by the Code of Judicial Conduct in organizations that I have supported in the past including Habitat for Humanity and the National Ski Patrol.

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)***

My parents, who have both passed away, provided me with the foundation which taught me how to act and work. People must act with integrity and decency towards others. That is the most important thing that a person can do in conducting their life. My mother's family immigrated to this country from Poland and my father's mother was an immigrant. Both families taught me that it is how you treat people regardless of the color of their skin, regardless of their gender, regardless of their political or religious affiliation but that determines whether or not you are a good, productive member of society.

Going to my grandfather's store in a predominately African-American section of Chattanooga, taught me that the color of someone's skin may be different but people are not different. Working for my father at his car wash in Chattanooga, Tennessee during summers and vacations, watching him treat everybody who walked through the door the same, taught me that if you treat people with dignity and respect you will earn their respect and friendship. They all taught me that there is no substitute for hard work. Each day you must get up, go to work and give everything you have to that job or profession to do it right.

If appointed to this position, that is what I will do. To get up each day, go to work, treat people with dignity and respect and administer the law fairly and honestly.

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)***

The simple answer is yes. When I look at the job of a Trial Judge, it is to make decisions based upon the facts that are presented and the law that exist. Trial Judges do not make law; they are governed by the statutes adopted by the legislature and by the decisions of the Appellate Courts that interpret the law.

Certainly, Trial Judges are called upon to interpret the law, in some cases to make decisions regarding novel or ingenious legal arguments made by counsel. However, the job of a Trial Judge is to make those decisions within the confines of the statutes that have been adopted by the legislature and the interpretation of those statutes as dictated by the Appellate Court decisions both Court of Appeals for a civil case or the Court of Criminal Appeals in a criminal matter and the Tennessee Supreme Court.

It is not the position of a Trial Judge to make a decision as to whether or not the law is good or bad. The Trial Court's authority is to be used to apply the law to the facts that are presented to the Court so that the Court can make a decision.

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.

A. Robert L. Jackson, Esquire Jackson, Kweller, McKinney, Warden, Lewis & Hayes 214 2nd Ave North, Ste. 103 Nashville, TN 37201 615-256-2602 (office) Attorney
B. Lew Connor, Esquire Waller, Lansden, Dortch & Davis 511 Union Street, Ste. 2700 P.O. Box 198966 Nashville, TN 37219 615-850-8495 (office) Attorney
C. R. Eddie Wayland, Esquire King & Ballow 1100 Union Street Plaza 315 Union Street Nashville, TN 37201 615-726-5430 (office) Attorney

D. Lindsey Cooper, D.D.S.

Cooper Oral and Maxillofacial Surgeon, P.C.

207 23rd Avenue North

Nashville, TN 37203

615-320-1392 (office)

Oral Surgeon

E. Ms. Dana Moore

E.N.A. (Education Network of America)

1101 McGavock Street

Nashville, TN 37203

615-312-6010 (office)

Director of Community & Government Relations

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] Third Circuit Court of the State 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 28, 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.

Stanley A. Kweller
Type or Printed Name

Signature

10/29/11
Date

#005429
BPR #

APPENDIX "A"
Question # 34

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

NEIL PRICE,	)	
	)	
Plaintiff/Appellant,	)	
	)	**Appeal No. 01A01-9807-CV-00345**
vs.	)	
	)	**Davidson County Circuit Court**
TONI PRICE,	)	**Case No. 94D-3333**
	)	**Judge Marietta Shipley**
Defendant/Appellee.	)	

BRIEF OF APPELLEE TONI PRICE

Robert L. Jackson
Stanley A. Kweller

Jackson, Kweller, McKinney, & Badger
One Washington Square, Suite 103
214 Second Avenue North
Nashville, Tennessee 37201
(615) 256-2602

Attorneys for Toni Price

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

X. Appendix

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF ISSUES ON APPEAL

Appellee's statements of issues on appeal are as follows:

I. The Trial Court did not abuse its discretion in its award of rehabilitative and permanent alimony to Ms. Price.

II. If the Trial Court did exceed its authority in setting Dr. Price's child support based on a percentage of his bonus income then the Trial Court should average Dr. Price's variable income. The Trial Court did not err in paying the remainder of the educational trust to the child at age twenty-four.

III. The Trial Court did not fail to abide by the parties' Partial Marital Dissolution Agreement previously entered into by the parties.

IV. The Trial Court did err in failing to award additional attorneys fees to the Wife at trial.

V. Wife is entitled to reasonable attorneys fees for the defense of this appeal.

INTRODUCTION

This case is before the Court on the appeal of Dr. Neil Price from a Final Decree of Divorce (a copy of the Final Decree is attached as Appendix J) entered by the Second Circuit Court for Nashville, Davidson County, Tennessee on June 4, 1998. (T.R. p. 294). Dr. Price's appeal attempts to focus on the award of alimony and certain awards regarding child support and division of property, but in reality is merely an attack on the findings of the Court which are, however, supported by the record. It is Ms. Price's contention that the Trial Court's Memorandum Opinion, with the exception of those orders related to the award of attorney's fees, makes certain findings of fact which are clearly and overwhelmingly supported by the record and which should not be overturned. Ms. Price does agree that there are no disputes with regard to division of marital property and therefore the Court of Appeals Rule 15 table has not been included herewith.

The parties in this appeal shall be referred to as Dr. Price or Husband and Ms. Price or Wife.

References to the technical record shall be referred to as (T.R. p. __). References to the trial transcripts shall be referred to as (T.r. 1996 at p.__) for the portions of the trial heard in 1996 and (T.r. 1998 at p. ___) for the portion of the trial heard in 1998.

Exhibits introduced at the trial are referred to by the year of the trial, either (Trial 1996 Ex. ___or Trial 1998 Ex. ___). References to the Court's Memorandum Opinion are in the form of (M.O. at p. __).

The Memorandum Opinion of the Trial Court is attached to Ms. Price's brief as Appendix A.

STATEMENT OF FACTS

Ms. Price, pursuant to Rule 27(b) of the Tennessee Rules of Appellate Procedure, hereby submits the following as the additional and corrected Statement of Facts to supplement and correct the misstatements made by Dr. Price in his Statement of Facts.

The parties in this case were married not on May 7, 1981, but on May 2, 1981, according to (T.R. p. 1) the sworn Complaint for Divorce filed on behalf of Dr. Price.

The Trial Court found, and the testimony supports, that this was a seventeen-year marriage (M.O. p. 4) and that Dr. Price as a medical doctor specializing in gastroenterolgy, has earned upwards of $500,000 per year during his career (T.r. 1996 p. 231). At the time the divorce was granted he was earning approximately $230,000 per year. (M.O. p. 4). The Trial Court found that Ms. Price had been unemployed for over five years, had graduated from law school, and that although she expects to be re-employed after passing the bar exam, she was not employed at the time the divorce was granted and had not yet taken the Texas bar examination. (M.O. p. 4). The testimony supports the fact that Dr. Price encouraged Ms. Price to attend law school even after the divorce was filed. (T.r. 1998 p. 402). When the parties last resided together in Nashville, Tennessee, they lived in a $830,000 home on Golf Club Lane in the Green Hills vicinity of Nashville. (T.r. 1998 p. 456).

During the course of the parties' marriage while Dr. Price was in medical training for internship, residency, and additional sub-specialty training, Ms. Price worked to assist and support the family. (T.r. 1996 p. 227, 234, 235, 249). (Trial 1996 Ex. 20). (A copy of

said Trial Exhibit is attached as Appendix B). However, since the birth of the parties' minor child, Ms. Price did not work outside the home although she later attended the University of Tennessee College of Law. (M.O. p. 4).

Dr. Price engaged in an adulterous relationship with Sharon Gellin which began during the first year of Ms. Price's legal education at the University of Tennessee College of Law. (T.r. 1998 p. 187). Ms. Gellin's mother, Alma Litton, was the babysitter for the minor child of the Prices during the time that Ms. Price was attending the University of Tennessee College of Law. (T.r. 1998 p. 187 and T.r. 1996 p. 79). In fact, Ms. Gellin and the Prices were close personal friends. (T.r. 1998 p. 186).

Dr. Price's extramarital sexual relationship with a friend of the parties caused the breakup of these parties' marriage. (T.r. 1996 at p.405). Because of the minor child, the Trial Court declined to grant the divorce upon the grounds of adultery. (M.O. p. 2). The testimony reflects that Ms. Price did not learn of the adulterous relationship until such time as the Husband's answers to Interrogatories were transmitted to her counsel. (T.r. 1998 p. 398). Dr. Price's meager attempts at reconciliation only began the day before the first trial scheduled in this matter. (T.r. 1998 p. 413). Without question, Ms. Price advised Dr. Price at the beginning of the attempted reconciliation that she would not move back to Nashville. Ms. Price explained during her testimony that as a result of Dr. Price's adulterous conduct and its effect on their circle of friends she could not live in Nashville. (T.r. 1998 p. 494-495). The only reason Dr. Price suggested reconciliation in the first place

was because of their daughter-not because of any desire to reconstitute his relationship with Ms. Price (T.r. 1998 p. 436).

During the course of the parties' marriage, they enjoyed a lifestyle commensurate with Dr. Price's earnings approaching $500,000 per year. (T.r. 1996 p. 231-233). The parties lived in a home which sold in 1997 for almost $900,000. (T.r. 1998 p. 112).

The Trial Court's determination of alimony in this marriage is based upon a very thorough review of the parties' prior situation, their lifestyle, and their abilities to earn income. The Trial Court made a specific factual finding that Ms. Price will never approach Dr. Price's earning capabilities. (M.O. p.5). The Trial Court awarded alimony, in part based on the lifestyle that the parties had enjoyed, the misconduct of Dr. Price, and the needs of Ms. Price, at $4,500 per month for the period of June 5, 1998, until January 5, 1999, and $3,500 per month until May 5, 2003. (M.O. p. 6). From June 5, 2003, to June 5, 2008, Ms. Price shall receive periodic permanent alimony in the amount of $2,000 per month. (M.O. p. 6). Dr. Price, in his Brief on page 16, misstates what occurred regarding certain assets of the parties. Dr. Price says that Ms. Price received one-half (½) of an approximately $60,000 payment to reconcile the Frist-Scoville Capital accounts and refers to Trial 1996 Ex. 10 from the 1996 hearing. (A copy of said Exhibit is attached as Appendix C)A review of that exhibit does not indicate any division of a $60,000 Frist-Scoville Capital account. The record does not support that Ms. Price received that money.

Dr. Price's characterization of Ms. Price's efforts to provide for herself and obtain a law degree are simply not borne out by the facts and certainly were not findings made

by the Trial Court in its Memorandum Opinion. What Dr. Price's factual statement does not include or acknowledge is that in addition to being a law student, Ms. Price, for two thirds of her career at University of Tennessee College of Law, was a full-time mother. (T.r. 1998 p. 404).

Ms. Price did testify that at the request of her husband she attempted a reconciliation in August of 1996. (T.r. 1998 p. 413). She testified that she would be happy to start over but that she would not move back to Nashville because she was not satisfied with the conduct of her husband while he lived here and with the conduct of their former friends which led to his ultimate misconduct. (T.r. 1998 p. 414). She agreed to put off the trial to attempt the reconciliation. (T.r. 1998 p. 415). She made this attempt even though she understood that Dr. Price was not really in love with her. (T.r. 1998 p. 436).

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ITS AWARD OF REHABILITATIVE AND PERMANENT ALIMONY TO MS. PRICE

The basic tenet of the Appellate Courts in reviewing decisions on the award of alimony is that the award of alimony, type, duration and amount, are well within the sound discretion of the Trial Court and will not be modified or changed absent a clear showing that the Trial Court's discretion has been manifestly abused. **Rains v. Rains, 58 Tenn. App. 214, 428 S.W.2d 650 (1968).** The award of alimony is within the sound discretion of the Trial Court. **Houghland v. Houghland, 844 S.W.2d 619 (Tenn. App. 1992). (Citing Rains v. Rains, supra).**

When coupled with the well-reasoned rule that the decisions of the Trial Court on factual matters carry with them a presumption of correctness, unless the preponderance of the evidence suggests otherwise, an extremely high burden is placed on the Appellant, in this case Dr. Price, to overturn the decision of the Trial Court. The Tennessee Rules of Appellate Procedure provide:

> Unless otherwise required by statute, review of findings of fact by the Trial Court in civil actions shall be de novo upon the record of the Trial Court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise.

Rule 13, T.R.A.P.

The granting of alimony or spousal support is governed both by statute and interpretation of that statute by the case law and is codified at T.C.A. §36-5-101. Section (d)(1) of that provision sets forth a non-exhaustive list of those factors to be considered by

the Court in determining the amount, type and duration of alimony or spousal support.

Those statutory factors include:

(A) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;

(B) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earning capacity to a reasonable level;

(C) The duration of the marriage;

(D) The age and mental condition of each party;

(E) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;

(F) The extent to which it would be undesirable for a party to seek employment outside the home because such party will be custodian of a minor child of the marriage;

(G) The separate assets of each party, both real and personal, tangible and intangible;

(H) The provisions made with regard to the marital property as defined in § 36-4-121;

(I) The standard of living of the parties established during the marriage;

(J) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party;

(K) The relative fault of the parties in cases where the court, in its discretion, deems it appropriate to do so; and

(L) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

T.C.A. §36-5-101(d)(1).

The Appellate Courts of this State have consistently held in interpreting that section of the Code that:

> Moreover, the Court must determine the amount of alimony such that 'the party obtaining a divorce [is not] left in a worse financial situation then he or she had before the opposite party's misconduct brought about the divorce.' (Citing cases).

Long v. Long, 968 S.W.2d 292 (Tenn. App. 1997).

This Court in Long recognized, as had the Tennessee Supreme Court previously in **Aaron v. Aaron, 909 S.W.2d 408 (Tenn. 1995)**, that the amount of alimony to be awarded in any case is a matter left to the sound discretion of the Trial Court in view of all the particular facts and circumstances of each case. **(Long at p. 249; Aaron at p. 410).**

In citing previous decisions, the Supreme Court in **Aaron** and this Court in **Long** held that:

> While alimony is not intended to provide a former spouse with relative financial ease, we stress that alimony should be awarded in such a way that the spouses approach equity.

Aaron at p. 411, Long at p. 294. (Emphasis added),

Although each of the cases referenced above, **Aaron** and **Long**, have been cited by Dr. Price as supporting his position, Ms. Price asserts that these cases instead support a confirmation and affirmation of the Trial Court's decision in this case. As did Judge Shipley when she referred to **Aaron** (T.r. 1998 p. 224). A review of the findings of the Trial

Court set out in the Memorandum Opinion filed by the Trial Court and attached hereto as Appendix A shows that Judge Marietta Shipley was well aware of the considerations and requirements regarding the award of alimony. Judge Shipley found as follows:

> The Court is well aware of all of the factors to determine alimony, including fault. As stated to the parties, fault is only one issue. The primary issues are need and ability to pay as well as an attempt to achieve some semblance of the parties' prior standard of living.

(M.O. p. 4).

Judge Shipley went on to hold "As adjusted the Court finds that Dr. Price's rock bottom expenses are $7,658, including child support and educational fund deposits. The Court finds that Ms. Price's rock bottom expenses are $6,633 with private school, no income taxes and no legal expense." (Emphasis added). (M.O. p. 5). The Trial Court went on to discuss how those figures were reached, including slashing Dr. Price's expenses for telephone, lawn care, newspaper, and visitation and charitable expenses, also reducing his clothing, travel, and cash expenses. (M.O. p. 5). The Court included in Ms. Price's expenses a housing expense of $2,500 to $3,000 per month, yet reduced certain other of her expenses. (M.O. p. 5). In terms of both Ms. Price's need and her ability to earn income in the future, the Trial Court make a specific factual finding supported by the record and not seriously challenged by the Husband, that (speaking of Ms. Price) ". . . she will never approach Dr. Price's earning capacity barring some entrepreneurial expertise." (M.O. p. 5). The Court then went on to set a sliding scale for a five-year term of rehabilitative alimony until June 1, 2003. Beginning on June 5, 2003, and continuing for five years, the

Court then determined that Ms. Price shall receive "Periodic permanent alimony in the amount of $2,000 per month subject to either party's death or remarriage." (M.O. p. 6).

It is apparent from a review of the Court's Memorandum Opinion and the record as a whole, that the Court gave painstaking consideration to the award of alimony and the award should stand. The Trial Court strictly followed the holdings of both **Aaron** and **Long**, as well as the requirements of T.C.A. §36-5-101. The Court considered the needs of Ms. Price, the ability of Dr. Price to pay the alimony in question, the requirement to restore the parties to an equitable position by the use of alimony payments, and the relative fault of the parties in the breakup of the marriage. (M.O. p. 5 and 6). This decision by the Trial Court is entitled to great weight at the Appellate Court level and should not be overturned absent a clear showing that the Trial Court abused its discretion. **Wallace v. Wallace, 733 S.W. 2d 102 (Tenn. App. 1987)**. Furthermore, the findings of fact made by the Trial Court shall be *de novo* upon the record of the Trial Court accompanied by a presumption of correctness of the findings unless the preponderance of the evidence is otherwise. **Luna v. Luna, 718 S.W.2d 673 (Tenn. App. 1986).**

The argument Dr. Price makes is disingenuous at best. The proof from the record clearly supports the position that Ms. Price has not yet begun practicing law and that, in fact, she has no income at the present time. Due to circumstances beyond her control, including the length and cost of this divorce action, Ms. Price has not yet taken the Texas bar examination. However, she is scheduled to do so in February of 1999. (A Motion to

supplement the record regarding her taking of the Texas bar examination is currently pending before this Court. Reference is made to that Motion and the attached Affidavit).

More importantly, in determining the proper amount of alimony in this case, the Trial Court made an assumption that Ms. Price would soon have income. The Trial Court found, and based its decision to set the amount of alimony with the expectation that Ms. Price would have initial income of $30,000 per year by the end of 1998, with an immediate increase to at least $55,000, and during the next five years, that income would increase with time. (M.O. p. 5). It is apparent that the Trial Court understood Ms. Price's need and her ability to earn her own income in setting the amount of alimony. Therefore, the alimony award should not be modified as the Trial Court's finding was not an abuse of discretion and the factual findings made are solidly supported by the record.

While not questioning the definition of rehabilitative alimony, it is evident from a review of the Husband's brief that he dismisses Ms. Price's needs as found by the Trial Court, refutes his ability to pay alimony, discounts the relative lifestyle of the parties while they were married, and disregards the well-recognized legal obligation for the spouses to approximate equity.

Dr. Price also fails to acknowledge that his misconduct brought about this divorce and that the Trial Court recognized, as did this Court and the Tennessee Supreme Court in **Long** and **Aaron** in quoting from a 1980 Tennessee Court of Appeals case, **Shackelford v. Shackelford 611 S.W.2d 598 (Tenn. App. 1980)**, that the party obtaining a divorce

should not be left in a worse financial position than he or she had been before the opposite party's misconduct brought about the divorce.

It is obvious Dr. Price is solely at fault from a review of the Trial Judge's decision and her specific finding on page 2 of the Memorandum Opinion granting the Wife a divorce on the grounds of inappropriate marital conduct, that although Dr. Price had admitted adultery, the Trial Court stated it will not grant a divorce on the grounds of adultery when minor children are involved. (M.O. p. 2). The Trial Court discussed at great length Ms. Price's earning capabilities and capacities as well as when she might be receiving such earnings. Although Ms. Price is not yet employed, the Trial Court's decision clearly envisioned her having appropriate income in addition to the alimony to be paid by Dr. Price, and therefore any job which she may hold should not affect the alimony awarded.

A review of the factors set out in T.C.A. §36-5-101, unlike the biased review conducted by Dr. Price, indicates that the amount of alimony awarded by the Trial Court was proper. Using the headings set by Dr. Price, Ms. Price suggests to the Court that Dr. Price's arguments are factually incorrect and misleading.

A review of the statutory factors is set out below.

EARNING CAPACITIES

A. Dr. Price undoubtedly possesses a greater earning capacity than Ms. Price, yet he does not pay a "generous" amount of child support. He does not pay private school tuition payments as set forth in page 37 of the Appellant's Brief. Rather, Dr. Price pays the

exact amount of child support ordered by the Trial Court and pays only $2,100 in direct cash payments to Ms. Price, not the $2,500 stated in Dr. Price's argument. Furthermore, the Trial Court specifically found that Dr. Price's income levels are such that Ms. Price will never be able to approach them. (M.O. p. 5).

EDUCATION AND TRAINING

B. It is conceded that both parties have advanced degrees. However, Dr. Price's education and experience guarantees him an income at or near what he has earned in the past, in the range of approximately $500,000 per year. Ms. Price's delay in taking the bar exam has been driven in large measure by the acrimony and vindictiveness of this divorce action and subsequent appeal, which has reduced her ability to earn, thereby increasing her need.

DURATION OF THE MARRIAGE

C. The marriage was a seventeen-year marriage. Regardless of the arguments propounded by Dr. Price, this was a long-term marriage during much of which Ms. Price was not required to work due to Dr. Price's ability to earn a substantial income.

AGE, MENTAL AND PHYSICAL CONDITION OF THE PARTIES

D. and E. Plaintiff concedes that she is healthy and her mental and physical conditions are good.

WORK OUTSIDE THE HOME

F. Nowhere does Ms. Price argue that she should not be required to work outside the home. In fact the Trial Court envisioned Ms. Price receiving an income of at

least $55,000 per year in its determination of the amount of alimony to be awarded. (M.O. p. 5).

SEPARATE ASSETS AND DIVISION OF MARITAL PROPERTY

G. and H. The marital property was divided equally and the balance remaining will be used by Ms. Price as she deems appropriate. However, it does not provide a significant level of income calculated to give her a total income equivalent to or near that of Dr. Price, or to achieve a semblance of the standard-of-living she enjoyed before Dr. Price's adulterous conduct. (M.O. p. 4).

STANDARD OF LIVING ESTABLISHED DURING MARRIAGE

I. Without question, the parties enjoyed a relatively lavish standard of living- contrary to the assertions of Dr. Price. They lived in a home which sold in 1997 for almost $900,000. They did enjoy an appropriate lifestyle commensurate with Dr. Price's earning upwards of $500,000 per year.

TANGIBLE AND INTANGIBLE CONTRIBUTIONS TO THE MARRIAGE

J. Contrary to Dr. Price's assertions, there is no evidence that either party weighed more heavily in this area and it is clear that Ms. Price has been the primary caretaker of the minor child, providing emotional support for her since her birth.

RELATIVE FAULT OF THE PARTIES

K. Dr. Price's argument provides a curiously short comment on the issue of fault, yet it is without question a significant factor in the determination of alimony. Dr. Price admitted an adulterous relationship. He failed to advise either the Trial Court or this

Court that the adultery took place with a close friend of the parties during a tine in the marriage when Ms. Price was in Knoxville attending law school. (T.R. 1998 p. 189). For Dr. Price to state in his argument that there was no finding by the Court that Dr. Price was responsible for the breakup of this marriage is ludicrous. The Trial Court recognized how painful Dr. Price's misconduct was in having an adulterous relationship with a close friend of the parties. (T.r. 1998 p. 225). Dr. Price was not awarded this divorce. Ms. Price was awarded the divorce. (M.O. p. 2). She was awarded this divorce because Dr. Price had committed acts of inappropriate marital conduct (i.e., adultery). He admitted adultery and the only reason that the Court did not make that specific finding was set out by the Trial Court on page 2 of its Memorandum Opinion, "Whenever there are minor children in a divorce, it is the Court's position that inappropriate marital conduct encompasses all fault and the determination of the nomenclature of the fault is left to the sound discretion of the Trial Court." (M.O. p. 2).

Dr. Price cannot so easily escape his misconduct. His failure to abide by his marital vows led to the divorce of these parties and ultimately prevented the parties' reconciliation (T.r. 1998 p. 435). The Trial Court, in contemplating the amount of alimony to be awarded, took that factor, along with all the others, into consideration. The Trial Court's decision should stand.

II. IF THE TRIAL COURT DID EXCEED ITS AUTHORITY IN SETTING DR. PRICE'S CHILD SUPPORT BASED ON A PERCENTAGE OF HIS BONUS INCOME THEN THE TRIAL COURT SHOULD AVERAGE DR. PRICE'S VARIABLE INCOME. THE TRIAL COURT DID NOT ERR IN

PAYING THE REMAINDER OF THE EDUCATIONAL TRUST OVER TO THE CHILD AT AGE TWENTY FOUR

Ms. Price concedes that cases from this Court have in the past held that it is inappropriate for a Trial Court to order an automatic adjustment in child support based upon a percentage of the Husband's future income. **Lovan v. Lovan, Appeal No. 01A-01-9607-CV-0037371, 1997 W.L. 15223 (Tenn. App. at Nashville, January 17, 1997)** (A copy of said case is attached as Appendix L)., **Smith v. Smith, Appeal No. 01A-01-9705-CH-00216, 1997 W.L. 2646 (Tenn. App. at Nashville, October 29, 1997).** (A copy of said case is attached as Appendix M). In each case, the Court, in commenting on the Trial Court's lack of authority to order automatic adjustments in child support, did determine that the correct method for dealing with fluctuating income was for the Trial Court to average the income over a period of time and set child support accordingly.

It is obvious why Dr. Price did not refer to the **Smith** case in his Brief. References to this case would cause his child support obligation to increase significantly. A review of the exhibits regarding Dr. Price's income during the period of the trial indicates that in July, 1996, his base pay, was $27,376.67 per month, plus a $500 stipend for serving on the executive committee. (Trial 1996 Ex. 1). (A copy of said Exhibit is attached as Appendix C). Trial Exhibit 2 from the 1996 hearings (a copy of said Exhibit is attached as Appendix E) provides that as of July 2, 1996, Dr. Price should have been paying $3,938.12 per month in child support payments to Ms. Price. (Trial 1996 Ex. 2). Dr. Price's average monthly net income in 1996, determined by the child support guidelines, was $18,752.91. (Trial 1996 Ex. 2).

In 1997, Dr. Price's average monthly gross income was $27,521.03. (Trial 1998 Ex. 53). (A copy of said Exhibit is attached as Appendix G). His average gross monthly income from January, 1996, through February, 1998, was $29,183.92. (Trial 1998 Ex. 53). Based upon those calculations, and including the amounts of deductions allowed pursuant to the guidelines - - that is the F.I.C.A., Medicare and Federal income tax deductions -- Husband's average monthly income for the periods from 1996 through the trial of this cause was $16,646.91 net income for child support purposes.[1]

Therefore, the Trial Court should have set child support at the total amount of $3,495.85 per month. Ms. Price respectfully requests that the child support be set at that amount, that she continue to receive in direct child support payments at least $2,100 per month, and that the balance be paid into the educational trust fund for the benefit of the parties' minor child with the monies to be paid to the minor child at the conclusion of that trust, the appropriateness of which will be discussed below.

Dr. Price is correct that the Trial Court cannot impose automatic adjustments on child support. However, in his argument, Dr. Price neglected to show the Court the correct and appropriate method of dealing with variable income levels. Based upon the decision of this Court in **Smith v. Smith**, an average of his income for that time period would be appropriate to set the correct amount of child support to be paid.

---

[1] The calculation to determine the amount of income for child support purposes was made as follows: An average was taken from the net income figures provided by Dr. Price in Trial 1996 Ex. 2 of $18,752.9; Trial 1996 Ex. 11 (a copy of said Exhibit is attached as Appendix F) of $18,829.69; and Trial 1998 Ex. 42 (a copy of said Exhibit is attached as Appendix H) of $12,258.14. Those figures were added together and divided by three to show the average net income figure for child support purposes at $16,646.91.

Dr. Price is not correct in his assertion that turning over the remainder of any trust fund to the parties' child when she reaches age twenty four is inappropriate. The purpose of child support is not simply to provide for support and maintenance of children during their minority. As the Tennessee Supreme Court found in **Nash v. Mulle, 846 S.W. 2d 803 (Tenn. 1993)** while child support payments may not extend beyond a child's minority, the benefits from such payments can extend beyond the minority of a child. **Nash at p. 806.**

There does not appear to be any Tennessee case directly on point regarding the disposition of any remaining funds at the time the child either reaches majority or ends formal education, as set out in the instant matter. The logic of the two foreign cases cited by Dr. Price apply equally well in reverse, that is, awarding the monies set aside for the child's benefit during minority when she reaches her majority accomplishes the goals defined by the Tennessee Supreme Court in Nash: that responsible parents with high incomes set aside money for their children's future benefit. **Nash at p. 806.** It stands to reason then, that payment to the child of any remainder funds when she reaches age twenty four, is logical.

III. THE TRIAL COURT DID NOT FAIL TO ABIDE BY THE PARTIES' PARTIAL MARITAL DISSOLUTION AGREEMENT PREVIOUSLY ENTERED INTO BY THE PARTIES.

Dr. Price fails to point out in his Brief that after the partial Marital Dissolution Agreement was entered into between the parties, the parties entered an Order of Reconciliation on September 16, 1996. (T.R. p. 102). (A copy of said Order of Reconciliation is attached as Appendix I). The Order of Reconciliation remained in effect

until June 4, 1997. (T.R. p. 143). The case was then reinstated on the trial docket. Without question, whatever meetings of the mind occurring between the parties in July of 1996 were not necessarily the same as one year later. The delay in the trial of this matter was referenced by the Trial Court in its Memorandum Opinion when the Trial Court specifically discussed modifying the partial Marital Dissolution Agreement. (M.O. p. 7). The modification is therefore reasonable and in keeping with the understanding entered into between the parties.

In 1992, this Court held, in discussing a modification of a Marital Dissolution Agreement or decree of divorce, that the Court must determine the apparent purposes in the minds of the draftsman and the Trial Court. **Barzizza v. Barzizza, Appeal No. 02A01-9110-CV-00246, 1992 W.L. 1398262 (Court of Appeals W.S. June 23, 1992).** (A copy of said case is attached as Appendix N). In **Barzizza** which discussed the admissibility of parole evidence as in this case, the intent of the parties at the time of the entry of the 1996 partial Marital Dissolution Agreement did not contemplate the reconciliation of the parties for almost one year and the subsequent delay in the trial of this matter for another year. It was therefore appropriate for the Trial Court to make decisions regarding those intervening matters which were not considered in the partial Marital Dissolution Agreement.

The Court's requirement for Dr. Price to pay certain expenses incurred by Ms. Price after July 2, 1996, is appropriate. Dr. Price complains that Ms. Price was awarded $12,000 in repayment of certain debts that he claims are not pursuant to the partial Marital Dissolution Agreement. Ms. Price's posits that Dr. Price misreads the terms of that

agreement. The Agreement set out in the Appendix to this brief which includes the Final Decree of Absolute Divorce states:

> 26. Except as otherwise expressly provided in this Agreement, all property and interest in property of a party shall remain the property of that party and neither party shall have any claim to the income, assets or estate of the other party and each party shall be responsible for paying debts incurred by that party except for attorneys fees and expenses that may be awarded by the Court.

(T.R. p. 305).

The partial Marital Dissolution Agreement does not limit the term expenses to legal expenses incurred as a part of the trial. Rather, it is a general term and is part of an agreement that was negotiated between the parties. The Courts will enforce contracts as written and will not, as in this case, construe the contract against either party when the words are clear and unambiguous. (**Barzizza, Id.**). In this case, the parties negotiated this Agreement at arms length, it was not a contract imposed on either one of them. Rather, the contractual provisions allow the Court to award expenses that incur after the date of the Agreement. Indeed, after carefully reviewing the expense documents submitted, it was clear to the Trial Court that Ms. Price's basic living expenses exceeded her income, and in order to rectify the discrepancy, the Trial Court awarded the balance, as it was authorized to do. Therefore, Ms. Price is entitled to those expenses which she has incurred, including debts and the minor child's tuition.

Given the lifestyle of the parties, and the level of income they enjoyed during the marriage, it is appropriate that Dr. Price pay these expenses as they were incurred at a time that Ms. Price was not working and was, in fact, for all practical purposes, unable to work.

It is fair and reasonable under the circumstances of this case to award these monies to Ms. Price. Dr. Price's argument that there is no record of these debts or evidence of the same is simply not supported by the record. The trial exhibits introduced by the parties and specifically Trial 1998 55 (a copy of said Exhibit is attached as Appendix K) provides a record of these expenses and the Trial Court relied upon this record to make its determination that reimbursement would be proper. (M.O. p. 6).

Dr. Price also misconstrues the requirement the Court imposed on him to pay private school tuition in the Memorandum Opinion page 6. What the Court actually did was require Dr. Price to repay Ms. Price for the tuition that had been incurred by joint decision of the parties. (T.r. 1998 p. 406-410). Ms. Price is not demanding Dr. Price pay for private school or private school tuition. However, given the income level of the parties, it was likely the child would have attended private school had the parties remained married. The Trial Court was well within its authority to order Dr. Price to reimburse Ms. Price the tuition for the private school. The expense of private school is now being partially borne by the educational trust fund established by the Trial Court, the balance of the private school expense is paid by Ms. Price.

Dr. Price was aware of the child's enrollment in the private school and consented thereto as he made the initial payment for the private school tuition. (T.r. 1998 p. 407). Dr. Price agreed to repay Ms. Price for the tuition she had advanced to the school. (T.r. 1998 p. 409). The agreement for Dr. Price to reimburse Ms. Price was for the school year beginning September 1997, an agreement which was reached while the parties were

attempting their so-called reconciliation. (T.r. 1998 p. 408). The record supports Ms. Price's contention that this agreement was made jointly by the parties and therefore within the purview of the Trial Court to require Dr. Price to make those payments, as that situation was not envisioned by the partial Marital Dissolution Agreement and could not be a part of the meeting of the minds on that agreement.

The discussion regarding the filing of a joint 1997 Federal Income tax return is moot as the parties did file a joint 1997 Federal Income tax return and that refund has been equally divided between the parties. The burden is upon Dr. Price to show how the Trial Court's order prejudiced him or in what fashion this would have harmed him financially, yet he offered no evidence or proof of the same. Therefore, he should not be awarded any money as a result of this alleged error.

Moreover, there was evidence in the record that the parties had always filed a joint income tax return previously, (T.r. p. 423) and since the partial Marital Dissolution Agreement was silent on this issue, its failure to be included can be assumed to mean that it was a determination to be made by the Trial Court.

As the 1996 partial Marital Dissolution Agreement did not envision that the parties would continue to be married into 1998, it was appropriate for the Trial Court, in making its decision, to equitably divide those items of marital property which were not contemplated in the 1996 partial Marital Dissolution Agreement. There was no modification of the partial Marital Dissolution Agreement as to the issues discussed above based on the Memorandum Opinion filed in May of 1998 because the Agreement could not

have addressed those assets or liabilities. Therefore, the Trial Court had the authority to equitably divide marital assets that did not exist at the time of the execution of the partial Marital Dissolution Agreement. The decision of the Trial Court regarding the division of retirement accounts and the payment of medical insurance should remain as ordered by that Court. As the partial Marital Dissolution Agreement did not envision a yearlong attempt at reconciliation or an additional two-year delay between the date of the partial Marital Dissolution Agreement and the ultimate end of the marriage, it does not fairly or equitably deal with certain marital assets or liabilities incurred or developed after the date of the Agreement.

A review of the cases cited by Dr. Price shows that they do not factually fit the pattern in this case. The authority of the Trial Court to divide marital assets is statutory and when an asset or liability could not be envisioned by a Marital Dissolution Agreement because of other events, it is within the Trial Court's authority pursuant to T.C.A. §36-4-121 to divide those assets or liabilities.

IV. THE TRIAL COURT DID ERR IN FAILING TO AWARD ADDITIONAL ATTORNEYS FEES TO THE WIFE AT TRIAL

Without question, the award of attorney's fees in a divorce action by the Trial Court is left to the sound discretion of that Court and generally will not be disturbed on appeal absent an abuse of that discretion. (**Gilliam v. Gilliam, 776 S.W. 2d 81 (Tenn. App. 1988).** It is also axiomatic that the award of attorney's fees in a divorce action is a part of the decision on alimony and is subject to the same considerations and factors as is the general award of alimony. (**Aaron at p. 411**).

Respectfully, Ms. Price suggests that the Trial Court should have ordered Dr. Price to pay her attorneys' fees. A review of the Trial Court's Memorandum Opinion at pages 8, 9 and 10 indicates that the Trial Court was upset by what it considered to be excessive fees. During the course of this trial, Dr. Price took the position that the child support guidelines were unconstitutional. There were literally reams of papers filed regarding that issue.

Those documents were not made part of the record on appeal in part due to the volume of paper and since the issue was waived by Dr. Price. That issue was ultimately abandoned by Dr. Price, yet the attorney's fees incurred by Ms. Price to defend that action along with the Attorney General's office participation was significant.

As late as the hearing on July 2, 1996, the Attorney General's office was present in Court for the purpose of defending the constitutionality of the child support guidelines. (T.r. 1996 p. 5). The following excerpts demonstrate the discussions and contentiousness regarding this issue:

> General Sheldon: ...We have also filed a fairly substantial brief on the issues.
>
> The Court: What is happening with the - I don't know how we differentiated that, between the validity part an the constitutionality part.
>
> General Sheldon: As to the validity, Your Honor, as I understood that, Dr. Price's challenges essentially went to the authority of the Department of Human Services to promulgate the 1994 amendment. This Court, I think, has properly dismissed those, ruling that those questions need to go first before the Agency. Dr. Price has chosen not to file a petition for declaratory order before the Agency and I think has waived the issue at this time.
>
> The Court: He has waived the issue by doing what?

General Sheldon: By failing to go ahead and file a petition for declaratory order as was his remedy insofar as his challenges to the validity of promulgation of the guidelines were concerned.

The Court: Is there a timeline?

General Sheldon: No, your Honor. But that order went down in the middle of April. I think the fact that he has not filed a petition clearly speaks for itself.

The Court: Okay. Let me hear from Mr. Martin just on this issue so I know kind of how we're bifurcating this.

Mr. Martin: Your Honor, the order that went down in April held that this Court did not have subject matter jurisdiction to determine the validity of the 1994 amendment to the child support guidelines. Although we respectfully disagree with your ruling, Your Honor has ruled that you simply do not have subject matter jurisdiction to decide that question. You have reserved in that order, Your Honor, the constitutional issues regarding validity of the guidelines. And at the pre-trial conferences that we had in early June, you indicated that the constitutional validity would not be determined today.

Now, General Sheldon has filed on behalf of the State of Tennessee, a brief, as she indicated. Dr. Price has also filed a brief addressing the issues to the extent that we can address those issues. Dr. Price has also filed a motion to compel in connection with a request for admission. That motion was just filed and has not been heard yet and will need to be heard at some point by Your Honor. Obviously you ruled on some discovery issues in this case, and that is an additional discovery issue that would have to be decided.

So, as I see it right now, Your Honor, Dr. Price has raised affirmative defenses and Your Honor has held that you do not have subject matter jurisdiction to determine the validity of the child support guidelines, and reserved the constitutional question and --...

(T.r. 1996 p. 6-8).

Mr. Davis: Mrs. Price's position is that the guidelines, that the guidelines are constitutional and that they are valid and that they should be enforced. And that's our position. And we think Your Honor, as I understood what you said, that that would not be an issue today. And we have another issue

> later which will be—there will be a subsequent hearing, as I understand it, Your Honor told us yesterday you would sign an order having a second hearing later on the questions of grounds for divorce and fault grounds. So, we still have two more issues to be involved in the case after today.

(T.r. 1996 p. 10).

Mr. Martin, Dr. Price's attorney, during that hearing, continued to assert the position that he had not waived his right to challenge the guidelines as he stated "Just so the record is clear, Dr. Price respectfully disagrees with General Sheldon, and we do not believe that we have waived anything at this point in time. We believe that we have raised valid objections and your Honor has ruled and an Order has been entered regarding the subject matter jurisdiction of the Court. And that's simply an issue that will have to be decided some other day - - ." (T.r. 1996 p. 13). A review of the brief filed on behalf of Dr. Price indicates unconditionally that he has now waived any challenge to the constitutionality of the guidelines now. Yet, large amounts of time at the Trial Court were spent in defending that now disregarded issue.

Although the Trial Court was upset at the overall amount of the fees, given the fact that one of the purposes of alimony is to prevent a party from being financially harmed as a result of the other's party misconduct (**Wallace v. Wallace, 733 S.W. 2d at 109; Duncan v. Duncan, 686 S.W. 2d 568 (Tenn. App. 1984))** it would be appropriate in this case to award Ms. Price the attorney's fees of $43,739.02. This will allow Ms. Price to keep from dissipating the relatively few assets the parties had to divide. (M.O. p. 9).

V. WIFE IS ENTITLED TO REASONABLE ATTORNEYS FEES FOR THE DEFENSE OF THIS APPEAL

It has long been the law in Tennessee that a party in a divorce action can be awarded attorney's fees on appeal if justified. Long, 968 S.W. 2d at 298 (Tenn. App. 1997). A successful party on an appeal in a divorce is entitled to an award of attorney's fees when the actions of the Appellant simply serve to delay and show a pattern of litigiousness. As T.C.A. §36-5-101(i) provides, the Court may, in its discretion, "At any time pending the suit, . . . compel a spouse to pay any sums necessary for the support and maintenance of the other spouse and to enable such spouse to prosecute or defend the suit . . . " T.C.A. §36-5-101(i).

This appeal was begun by Dr. Price. Ms. Price's position is that Dr. Price's issues on appeal are not well justified and she should therefore be awarded a reasonable fee for defending this appeal.

CONCLUSION AND RELIEF SOUGHT

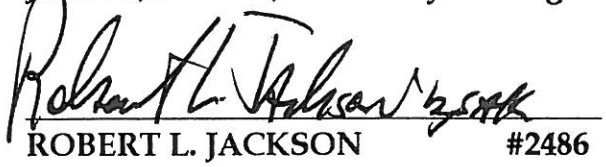
Ms. Price asserts that the Trial Court was correct in its decisions and determinations regarding the amount, frequency and duration of alimony payments and that the judgment should stand. Ms. Price also asserts that if, in fact, the Trial Court erred in setting child support, it was too low. The Trial Court should be required to recalculate Dr. Price's child support payments based on the average of his income over the past several years, so as to more accurately reflect the true amount of income which he has earned in the past and will likely earn in the future.

Thirdly, Ms. Price asserts that the Trial Court was correct when it made the award of certain properties and required Dr. Price to pay certain expenses jointly incurred by the parties or not contemplated by the partial Marital Dissolution Agreement which was signed two years before the divorce was granted.

Additionally, Ms. Price would respectfully request the Court award her attorneys fees at the Trial Court level that were denied by the Trial Court. Lastly, Ms. Price would ask that the Court award her a reasonable attorneys fee for the defense of this appeal.

Respectfully submitted,

Jackson, Kweller, McKinney & Badger



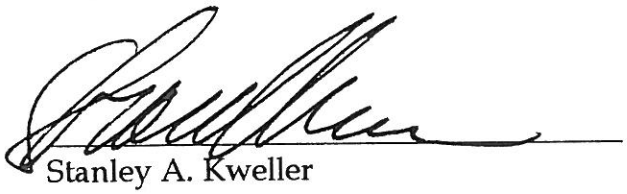
ROBERT L. JACKSON #2486

STANLEY A. KWELLER **#5429**

Attorneys for Toni Price
One Washington Square, Suite 103
214 Second Avenue North
Nashville, Tennessee 37201
(615) 256-2602

Certificate of Service

I do hereby certify on the 20th day of January, 1999 that a true and correct copy of the foregoing document was sent via United States Postal Service, first class, postage prepaid to the following: James G. Martin, Esq. and Gregory D. Smith, Esq., Attorneys for Neil Price, 424 Church Street, Suite 1900, Nashville, Tennessee 37219-2327.



Stanley A. Kweller

APPENDIX "B"
Question # 34

IN THE COURT OF APPEALS FOR THE STATE OF TENNESSEE AT NASHVILLE, MIDDLE SECTION

CHRISTINA ALTICE,	)	
	)	
Plaintiff/Appellant,	)	
	)	
vs.	)	**Docket No. M2007-00212**
	)	**Davidson County**
NATS, INC., MARY FRIDDELL, and ESTATE OF ROSA MARY HUMPHREYS,	)	**Chancery Court #04-678-III**
	)	
	)	
Defendants/Appellees.	)	

REPLY BRIEF OF APPELLEES: NATS, INC., MARY FRIDDELL, and ESTATE OF ROSA MARY HUMPHREYS

Stanley A. Kweller #5429
Jackson, Kweller, McKinney,
Warden & Hayes
214 Second Avenue North, Ste. 103
Nashville, TN 37201
(615) 256-2602

Attorney for Defendants/Appellees

ORAL ARGUMENT REQUESTED

I. TABLE OF CONTENTS

INTRODUCTION

The following Reply Brief is on behalf of the Appellees in this cause NATS, Inc. (herein after referred to as "NATS"), Mary Friddell and the Estate of Rosa Mary Humphreys. References shall be made to matters of the papers filed in the Trial Court, TR p ____, and/or specific pages of depositions, which will be referred to by those specific depositions.

There is no transcript or statement of evidence as this matter was decided on a Motion for Summary Judgment in favor of the Defendants.

II. TABLE OF AUTHORITIES

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. The Trial Court was correct in finding that there were no indications of badges of fraud, deception or malice by these Appellees that would give rise to the Court piercing the corporate veil of the corporation known as Nursing Assistance Training Specialist, Inc. and/or imposing any liability on the three Appellees for any action taken by them.

II. The Trial Court was correct in finding that the transactions conducted by certain Appellees as fiduciaries of the corporation were under the close scrutiny of the Internal Revenue Service and that there were no indications that the actions were taken fraudulently, deceptively or with malice.

III. The Trial Court was correct in determining that there were no genuine issues of material fact subject to dispute, therefore Summary Judgment was appropriate.

STATEMENT OF THE CASE

This action began with the Complaint filed by the Plaintiff/Appellant against the Defendant, NATS, Inc. (herein after referred to "NATS") on March 5, 2004. (TR p.1) The Complaint alleged in essence that NATS was the alter ego of another corporation known a Nursing Assistance Training Specialists, Inc. (herein after referred to as "Nursing, Inc.") against whom the Appellant had a previous default judgment. An Answer was filed by NATS on April 12, 2004 to the original Complaint. (TR p. 14)

On April 21, 2004 a Motion was filed by the Plaintiff to add three additional Defendants (TR p. 17) with a proposed Amended Complaint attached as an exhibit. (TR p.18) On May 10, 2004 the Trial Court, the Honorable Chancellor Claudia C. Bonnyman, found that the Motion to Amend should be granted in part and the Plaintiff was permitted to amend her Complaint to add as additional parties: Mary Friddell and the Estate of Rosa Mary Humphreys. (TR p. 35) An Answer to the first Amend Complaint was filed on June 9, 2004. (TR p. 41)

On July 1, 2004 a second Motion for Leave to Amend the Complaint was filed by the Plaintiff. (TR p. 45) and the Response thereto was filed by the Defendants on July 9, 2004. (TR p. 55) On July 22, 2004 the Trial Court, the Honorable Claudia C. Bonnyman, Chancellor denied the second of the Plaintiff's Motion to Amend the Complaint. (TR p. 58)

On May 12, 2006 the Trial Court entered a scheduling Order setting various dates for the parties regarding discovery and setting a trial date of October 30, 2006. (ORDER of Ellen Hobbs Lyle, Chancellor. (TR p. 75))

On August 23, 2006, well in advance of the scheduled trial date, the Defendants filed a Motion for Summary Judgment (TR p.76). Along with the Motion and Memorandum (TR p. 78) Plaintiffs filed a Statement of Undisputed Material Facts accompanying the Motion as required by Rule 56. 03 the Tennessee Rules of Civil Procedure. (TR p. 90) The Plaintiffs also filed along with their Motion, Memorandum and Statement of Undisputed Material Facts, three depositions: two of Charles J. Friddell and one of Mary Carol Friddell, which are a part of this record (and shall be referred to herein after as the deposition of the individual party by the date and page number.)

On September 15, 2006 the Plaintiff filed a Renewed Motion to Add a Defendant (TR p. 103) and the Defendants responded to that Motion on September 22, 2006. (TR p. 105) (That Motion was not ruled upon as a result of the Trial Courts granting the Defendants Motion for Summary Judgment.) Plaintiff filed a Response in Opposition to the Defendants Motion for Summary Judgment and Response to the Statement of Undisputed Material Fact on September 25, 2006 (TR p. 107 and 109). Additional Affidavits of Charles J. Friddell and Mary Carol Friddell were filed by the Defendants on September 27, 2006 (TR p. 176 and 179)

On October 10, 2006, the Trial Court, the Honorable Ellen Hobbs Lyle, Chancellor, ruled that the Defendants Motion for Summary Judgment was well taken and dismissed the case against the Defendants. (TR p. 181)

On November 9, 2006, the Plaintiff filed a Motion to Alter or Amend (TR p. 184). A Response was made to said Motion by the Defendants along with a Supplemental Affidavit of Charles J. Friddell on December 4, 2006 (TR p. 190 and 193).

On December 20, 2006, the Trial Court entered an Order confirming its original Order granting of Summary Judgment in this matter and dismissing the Motion to Alter or Amend. (TR p. 209) Notice of Appeal was filed in this on January 18, 2007. (TR p. 212)

STATEMENT OF FACTS

Nursing Inc. was a Tennessee not for profit corporation, which had no shareholders. (Deposition of Charles J. Friddell, June 15, 2006 at p. 6) During the calendar year 1999 a suit in Federal Court was pending against Nursing, Inc., filed by the Appellant in this case. (Deposition Charles J. Friddell, June 15, 2005 at p. 8) At the time that suit was pending the corporation was in dire financial straits. (Deposition of Charles J. Friddell, June 15, 2006 at p. 8, 9) In addition to losing money it also owed substantial money to the Internal Revenue Service for payroll tax liabilities. (Deposition of Charles J. Friddell, June 15, 2006 at p. 9) Mary Friddell (the wife of Charles J. Friddell) had been acting as the President of the not-for-profit corporation during its existence. (Deposition of Charles J. Friddell, December 18, 2003 at p. 6) Mary Friddell was not a member of the Board of Directors. (Deposition of Charles J. Friddell, December 2003 at p. 6) Mary Friddell was also not a member of that not for profit corporation. (Deposition of Mary Carol Friddell at p. 10)

The only assets of the corporation known as Nursing, Inc. were a few desks, chairs and some training materials. (Defendants Statement of Undisputed Material Facts p. 3)

The assets of the not-for-profit corporation known as Nursing, Inc. were sold to Rosa Mary Humphreys and the corporation known as NATS, Inc. Said sale took place as a result of a certain Sale Agreement (a copy of which is attached to the original Complaint in this matter as Exhibit "B") (TR p. 7) The Defendant, Mary Friddell also known as Mary Carol Friddell, was required to pay the trust fund portion of the past due

payroll taxes on the behalf of Nursing, Inc. because she had signed checks on behalf of that corporation during its existence. (Defendant's Statement of Undisputed Material Facts p. 10; Deposition of Charles J. Friddell, June 15, 2006 p. 13 – 15) Charles J. Friddell went on to testify in that deposition that had the IRS believed that transfer was inappropriate or not done for an appropriate amount of money they would have tried to collect the employer's portion of the payroll taxes along with penalty and interest, which they did not do. (Deposition of Charles J. Friddell, June 15, 2006 p. 15 and 16) This fact is not disputed by the Appellant.

At the time the sale took place of the assets of Nursing, Inc. to Rosa Mary Humphreys and NATS , Inc. the requirements for Tennessee Not for Profit Corporation Act were completed by Charles J. Friddell sending a notification to the Attorney General for the State (a copy of which letter is attached to the original Complaint as Exhibit "D".) (TR p. 12) Mr. Friddell also testified that he sent a copy of that letter to the then attorney for Ms. Altice, David Briley, Esquire. (Deposition of Charles J. Friddell, June 15, 2006 p. 19.) Mr. Friddell also testified that he believes he sent financial statements and perhaps even the Sale Agreement to David Briley, Esquire at that time. (Deposition of Charles J. Friddell Id.) Additionally, Mr. Friddell testified, without contradiction, that he had previously given to Mr. Briley copies of the notices on the Federal tax liens and told him that Nursing, Inc. was not going to defend the Federal Court suit any further because they simply had no money. (Deposition of Charles J. Friddell, June 15, 2006 at p. 19)

In fact, according to the Deposition of Charles J. Friddell, which testimony is un-contradicted in the record, the reason that the case was not defended further was simply because there were no assets available to pay attorney fees let alone any judgment; nor

did it make any financial sense given the few assets that existed. (Deposition of Charles J. Friddell, June 15, 2006, p. 19, L. 1).

Rosa Mary Humphreys, now deceased, was initially the sole shareholder and president of NATS. (Deposition of Charles J. Friddell, June 15, 2006, p. 21) In 2002, Ms. Humphreys during her lifetime transferred the stock of that corporation to her daughter, Mary Carol Friddell. (Deposition of Charles J. Friddell, June 15, 2006, p. 22, L. 9) She did that because of all the monies, which Ms. Friddell had put into the corporation and had not been paid back, particularly the $22,000 in IRS Trust Fund requirements. (Deposition of Charles J. Friddell, June 15, 2006, p. 22, L. 22) That all occurred while Ms. Humphreys' husband was quite ill. (Deposition of Charles J. Friddell Id) Shortly thereafter, Ms. Humphreys, while caring for her ill husband, suffered a stroke and ultimately died. (Deposition of Charles J. Friddell, June 15, 2006, p. 23, L. 1)

When the corporation known as NATS needed working capital Ms. Humphreys and Ms. Friddell both co-signed loans for the corporation which were ultimately paid back by the corporation. Those loans were made by banking institutions. (Deposition of Charles J. Friddell, June 15, 2006, p. 25, L. 5)

Other than the receipt of the stock Ms. Friddell was never compensated by NATS for the payment to the Internal Revenue Service for the trust fund portion of the payroll taxes. (Deposition of Charles J. Friddell, June 15, 2006, p. 26, L. 6) Charles J. Friddell was never repaid for the loan which he repaid to Mr. Tommy Eves. (Deposition of Charles J. Friddell Id)

Each corporation had its own taxpayer ID number; that is Nursing, Inc and NATS; each had a separate taxpayer identification number. (Deposition of Charles J.

Friddell, June 15, 2006 p. 30, L. 19) There was a stock certificate issued first to Rosa Mary Humphreys when the corporation known as NATS was formed. Three years later a new certificate was issued to Mary Carol Friddell when the stock was transferred to her. (Deposition of Charles J. Friddell, June 15, 2006, p. 32, L. 17)

Mr. Friddell also testified that all of the monies paid by Rosa Mary Humphreys to purchase the assets of Nursing, Inc. were used to pay to either payroll or payroll taxes. (Deposition of Charles J. Friddell, June 15, 2006, p. 27, L. 16)

Mary Carol Friddell never received any salary or income from Nursing, Inc. (Deposition of Charles J. Friddell, June 15, 2006, p. 66, L. 5) NATS moved their location from the location of Nursing, Inc. shortly after they acquired the assets of Nursing, Inc. (Deposition of Charles J. Friddell, June 15, 2006, p. 70, L. 10)

ARGUMENT

I. The Trial Court was correct in finding that there were no indications of badges of fraud, deception or malice by these Appellees that would give rise to the Court piercing the corporate veil of the corporation known as Nursing Assistance Training Specialist, Inc. and/or imposing any liability on the three Appellees for any action taken by them.

A review of all the cases that discuss the piercing of a corporate veil or requiring other parties to be responsible for liability of a corporation as an alter ego or any other theory all involve the basic premise that in order to disregard the corporate form and impose liability on another corporation or another individual there must be indication that debt was incurred due to some misconduct on behalf of those persons. *Muroll Gesellschaft, M.B.H. vs. Tennessee Tape, Inc.*, 809 S.W.2d 1211 (Tenn. Ct. App. 1995) The Court in that case held:

> Corporate veils are pierced-that is-the legal entity is disregarded and the true owners of the entity are held liable when the corporation is liable for a debt but is without funds due to some misconduct on the part of officers and directors.

Tennessee Tape, Inc. at p. 213.

Other courts have used even stronger language to discuss the piercing of the corporate veil and the reasons for doing so in disregarding a corporate entity must be based upon something more than mere speculation. This Court has previously held:

> The principle of the piercing the fiction of the corporate veil is to be applied with great caution and not precipitately, since there is a presumption of corporate regularity. (Emphasize added)

Schlater vs. Haynie, 833 S.W. 2d 919, 925 (Tenn. Ct. App. 1992).

The Court, in *Schlater*, went on to quote with the approval from the various commentators:

> While generally, a corporation be looked on as a legal entity, as discussed Supra § 8, the corporate fiction will be disregarded and the corporate veil pierced in appropriate, special, unusual, or compelling circumstances, as where sufficient reason to the contrary appears where the corporation is created or used for an improper purpose, or where the corporate form has been abused, as when used to an end subversive of the corporation's policy.

Schlater Id.

In discussing the burden of proof, the *Schlater* Court went on to hold:

> There is a presumption that a corporation is a distinct entity, separate from its shareholders, officers, directors or affiliated corporations, and the party wishing to negate the existence of such separate entity has the burden of proving facts sufficient to justify piercing the corporate veil.

(Citing other materials *Schlater* Id.)

In a recent opinion by the Middle Section Court of Appeals authored by Judge Frank Clement, he undertook to discuss at length the reasoning and purpose behind piercing the corporate veil as well as the factual circumstances necessary to do so in a very complicated factual matter. *Boles vs. National Development Company, Inc.*, 175 S.W. 3d 226 (Tenn. App. Ct. 2005) In that case the Court even referred in its Appendix to a flow court of various corporations which the Court ultimately find were used to shield or hide fraud and false dealing. This case does not begin to reflect the complexity of the *Boles* matter. There are not hundreds of corporations with interlocking directors and agreements. Rather this is a simple case with straight forward facts not readily subject to dispute. The most important factor considered by Judge Clement in *Boles* is whether or not the corporation is a sham or dummy designed to protect a wrongdoer from liabilities. *Boles* at p. 244.

There is no question but that in *Boles*, the Trial Court's decision and that of this Court were greatly impacted by the sanctions imposed upon the principal defendants in that matter and the manner in which they handled certain issues at the Trial Court. *Boles* at p. 238. No such sanction exists here.

Boles and other cases also emphasize that whether or not to disregard the corporate fiction depends particularly on the circumstances in each case and is a matter particularly within the province of the Trial Court. (*Boles* at p. 245.) Emphasizing as the Appellant here seeks to do that all of the factors must be considered not simply one or two. *Boles* Id.

In this case the Trial Court, examined at great length all of the information provided to it by each party. (TR p. 181 & 209) In both Orders, that is the Order granting Motion for Summary Judgment and the Order denying the Motion to Alter or Amend, the Court found that there were no indications of badges of fraud, deception or malice by these Defendants that would give rise to the Court piercing the corporate veil. (TR p. 181 & 209) The Court also went on to find specifically that these Defendants were not the alter ego of Nursing Assistance Training Specialist, Inc. and that they undertook no actions to harm or defraud the creditors of the same. (TR p. 182) In her second Order, the Trial Court found that the Plaintiffs could not show any material breach of any fiduciary duty by any of the Defendants and that there was no zone of insolvency caused by any acts of the Defendants. (TR p. 209) The Trial Court specifically found that all actions of the Defendants regarding their relationship with the corporations in making and repaying loans were justified, above board, and conducted in good faith with fair dealing. (TR p. 210)

There are a number of cases in Tennessee which discuss these issues, in addition to cases cited previously, including *Oceanic School, Inc. vs. Barber*, 112 S.W. 3d 135 (Tenn.Ct.App.2003); *Electric Power Board of Chattanooga vs. St. Joseph's Valley Structural Steel Corporation*, 691 S.W. 2d 522, (Tenn. 1985); *VP Buildings, Inc. vs. Polygon Group* (an unreported decision of the Court of Appeals) 2002 WL 15 634 (Tenn. Ct. App. 2002) (a copy of which is attached hereto in Appendix "A"); *Money and Tax Help, Inc. vs. Moody*, 205 WL 263872 (Tenn.Ct.App.205) (an unreported decision of the Court Appeals) (a copy of which is attached hereto in Appendix "B"). A review of all of the cases leave but one conclusion that it is difficult, not easy to pierce the corporate the veil and that the reasons must be based upon some misconduct, fraud or bad dealings on the behalf of those persons and the Plaintiff seeks to impose liability. The burden of proof is on the Plaintiff to prove those facts. (*Schlater* at p. 295.)

In *Boles*, Judge Clement discusses the "Allen Factors". (*Boles* at p. 245.) (Citing *Federal Deposit Ins. Corp. vs. Allen*, 584 F. Supp. 386 (E.D. Tenn. 1984) (a copy of which is attached hereto as Appendix "C").) All of those factors are designed to determine whether or not the person or entity upon whom liability is sought to be imposed, either cause the insolvency for its own benefit to the derogation of creditors or committed actions of fraud, malice or false dealing. In this case, there is simply no proof offered by the Plaintiffs that any of those actions took place. Rather the proof in this record set out in the Appellees' Statement of Undisputed Material Facts and the testimony of the various witnesses previously provided shows that these parties did everything to insure the viability of Nursing, Inc.

On a number of occasions in response to the Statement of Undisputed Material Facts filed as a part of the original Motion for Summary Judgment the Appellent herein claims that the statements are hearsay. Hearsay is defined by Rule 801 in the Tennessee Rules of Evidence as:

> 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to proof the truth of the matter asserted.

TRE 801

What the Appellant is really complaining of is that on different occasions witnesses have testified as to what was done and the reason for those things being done, which actions the Appellant declares to be hearsay. Unfortunately, the Appellant is mistaken. The testimony of Charles J. Friddell and that of Mary Friddell along with the documentary evidence presented to the Court shows that exactly what is asserted by the Appellees in this cause. The Trial Court recognized those assertions as being correct and the Appellant has not offered admissible, relevant material proof to contradict the Appellees statements and position. (TR p. 181 & 209) As discussed in Section III of this Brief, the Appellant also confuses the concepts of inference and assumption.

The Appellant cannot prove under any circumstance that the insolvency of Nursing, Inc. was caused as a result of the actions of any of these Appellees. The only proof on that point is the proof offered by the Appellees which proof the Trial Court found to be credible and undisputed.

A review of the two volumes of the record below would show that at no time after the filing of the Motion for Summary Judgment did the Appellant file any countervailing

Affidavits nor did the Appellant file any proof which contradicts the proof, Affidavits and/or evidence presented on the behalf of the Appellees.

II. The Trial Court was correct in finding that the transactions conducted by certain Appellees as fiduciary of the corporation were under the close scrutiny of the Internal Revenue Service and that there were no indications that the actions were taken fraudulently, deceptively or with malice.

On December 20, 2006, the Trial Court, the Honorable Ellen Hobbs Lyle, Chancellor, made three specific findings regarding this matter. First, the Appellant cannot show a material breach of fiduciary duty by the Appellees and that that there was no zone of insolvency caused by any acts of these Appellees in this cause. (TR p. 209)

Secondly, the Court found that the Appellees carried the burden justifying their transactions with the corporation as fiduciary and that the Internal Revenue Service of the United States of America conducted close scrutiny in reviewing those transactions. (TR p. 209)

Thirdly, the Court found that all the actions of the Appellees, regarding their relationships with the corporation in this case in making and repaying loans were justified and above board, conducted in good faith, and with fair dealing. (TR p. 210)

As previously stated, every decision previously cited dealing with the issue of either piercing the corporation veil or requiring a second corporation to be liable for the actions of the first (or an alter ego theory) require that there be fraud, false dealing, misrepresentation or some other act which would be considered to be a violation of a fiduciary duty to impose liability. (*Tennessee Tape* at p. 213; *Schlater* at p. 924, 925; *Boles* at p. 244, 245.) The list would go on from there and it is not necessary to cite that proposition over and over.

In this case, there is no proof offered by the Appellant which contradicts the factual findings and determinations made by the Trial Court. Even taking all of the facts

and the reviewing them in the best light for the Appellant, the Trial Court made the inescapable conclusion that these Appellees did nothing to either: (a) cause the insolvency of Nursing, Inc; or (b) that they acted outside their fiduciary obligations in responsibilities to Nursing, Inc.; or (c) that they received any inappropriate compensation or benefits from Nursing, Inc. (TR p. 181 & 209)

The un-contradicted proof shows that these Appellees, particularly Mary Friddell and Rosa Mary Humphreys (during her life time), did everything within their power to try to keep Nursing, Inc. afloat and to keep it a productive corporate entity. The un-contradicted proof is that there was simply not enough income from the business of the company to justify its continued existence.

The un-contradicted proof is that after the assets of the corporation known as Nursing, Inc. were sold to NATS, Inc. and Rosa Mary Humphreys the business model changed; it began doing other similar type actions but engaged in a different way which did lend to it becoming financially viable. (Deposition of Charles J. Friddell, June 15, 2006, p. 65) However, the Appellant can point to no act of either Appellees, which gives rise to their being held liable for the debts or obligations of Nursing, Inc.

One of the arguments made by the Appellant in her Response to the Appellees' Statement of Undisputed Material Facts in the Trial Court was that it was incredulous that an attorney would say that a corporation within its defense of an action because there was nothing left to protect. (TR p. 111) That statement is naive at best. Such statements are in fact an admission by the Appellant that there were no assets of Nursing, Inc. to protect. One of the major purposes for the creation of corporations is to protect shareholders, officers and directors from personal or individual liability. Therefore, when it becomes

economically unfeasible to continue a defense of a corporate entity where there are no assets to protect or the assets are worth less then that of any potential lawsuit this is exactly what one would do.

In light of fact that one of the primarily reasons for the insolvency of the corporation known as Nursing, Inc. was the failure of various students to pay their tuition. (Deposition of Charles J. Friddell, December 18, 2003 at p. 13.) It is incredulous that she now complains of the lack of funds to pay a judgment when she one of the principle reason said entity is without funds.

III. Trial Court was correct in determining that there are no genuine issues of material facts subject to dispute. Therefore, Summary Judgment was appropriate.

In her Brief, the Appellant on a number of occasions makes the claim that there are genuine issues of material fact; that there is contradictory testimony of the various Appellees and/or witnesses which gives rise to disputed issues. Respectfully, the Appellant confuses inferences which may be drawn from facts with assumptions, which the Appellant draws.

Black's Law Dictionary defines 'inference' as a logical and reasonable conclusion of a fact not presented by direct evidence but which, by process of logic and reason, a trier fact may conclude exist from the established facts. (Black's Law Dictionary, Sixth Addition 1990 p. 778) What the Appellant does is makes assumptions regarding certain statements made taken out of context.

The undisputed facts are as testified to by both Affidavit and Deposition of the parties and other relevant witnesses, are that neither Mary Carol Friddell nor Rosa Mary Humphreys or NATS, Inc. profited from the sale and/or purchase of Nursing, Inc. Additionally, there is no proof that any of these Appellees acted with any fraud, deception or malice as specifically found by the Trial Court. (TR p. 181) The Trial Judge specifically held:

> The Court further finds that in examining the record as a whole the Court is unable to find that there are any genuine issues of material facts: the Court also finds that there are no indication of badges of fraud, deception or malice by these Defendants that would give rise to the Court, piercing the corporate veil of the corporation known as Nursing Assistance Training Specialist, Inc. and imposing any liability on these three Defendants for any action taken by them.

(TR p. 181)

The Trial Court went on to find that these Appellees were not the alter ego of Nursing Assistance Training Specialist, Inc. and that they did not undertake to harm or defraud any of the creditors of the same. (TR p.182)

Upon reviewing the Appellant's Motion to Alter or Amend the Trial Court found as follows:

> The Court further finds that all actions of the Defendants in regards to their relationships with the corporation in making and repaying loans were justified and above board conducted in good faith and with fair dealing.

(TR p. 210)

The Trial Court also found that any contradictions by the Appellees in their testimony were not material and that therefore no genuine issues in material fact existed. (TR p.210) (*Byrd vs. Hall,* 847 S.W. 2d 208 (Tenn.1993))

There is no question but that this Court in reviewing the Motion for Summary Judgment, which has been granted, must make all reasonable inferences on behalf of the non-moving party. (*Byrd* Id.)Yet, the inferences that can be drawn from the evidence presented are quite different from the assumptions made by the Appellant.

The un-contradicted proof is that Mary Friddell did not profit at the expense of creditors from Nursing, Inc. Rosa Mary Humphreys purchased Nursing, Inc. through NATS, Inc. in an arms length transaction for the fair market value of that entity. (Deposition of Charles J. Friddell, June 15, 2006, p. 9, 15, 29.) There was no fraud. No creditors were harmed by the purchase because the corporation, Nursing, Inc., had no value greater then what was paid for it. (TR p. 181)

The gravemen of all the cases previously cited regarding the piercing of the corporate veil or alter ego theories or whatever other legal theory one would use all come

down to whether or not the new person or entity either defrauded creditors or did not deal in good faith with the pre-existing entity. No fact adduced in this case substantiates any of those theories. As the Trial Court found, when discussing the issue of the Internal Revenue Service matters where the un-contradicted proof shows that the Appellee, Mary Friddell had to pay out of her own pocket the trust fund portion of the IRS lien. (Supplemental Affidavit with attachments of Charles J. Friddell, TR p. 193).

Further, as testified to by Charles J. Friddell, who is an attorney and certified public accountant, since the Internal Revenue Service did not assess NATS to pay the employers portion of the payroll taxes or any penalties on those monies they recognized the legitimacy of the transaction in question. (Deposition of Charles J. Friddell, June 15, 2006 at p. 13 - 16) The Trial Court found in its Order of December 20, 2006 that the Internal Revenue Service conducted a close scrutiny in reviewing the asset sale transaction of these Appellees and justified the transaction with the corporation as a fiduciary. (TR p.209)

The Appellate Courts have consistently held that whether or not to disregard a corporate entity and impose liability on either other corporations or individuals is particularly within the province of the Trial Court. (*Tennessee Tape, Inc.* at p. 213) The Courts have also held that there is a presumption that corporations are a distinct legal entity wholly and apart from their share holders, officers, directors or affiliated corporations and where debt exists is caused by some misconduct on the part of the officer and directors can liability be imposed upon them. Tennessee ID. (*Schlater* at p. 295)

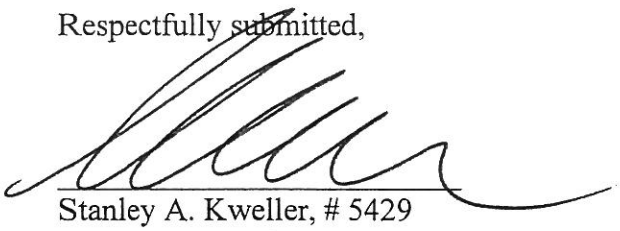
The Trial Court in this case specifically found that there were no genuine issues of material fact on these specific issues and that therefore Summary Judgment was appropriate. (TR p. 184 and 209.) There has been no evidence presented by the Appellant which contradicts that finding or which would support this Court's overturning that finding. Rather all of the relevant evidence contained in the Affidavits of Charles J. Friddell, Mary Carol Friddell and their depositions specifically show that no fraud took place, no creditors were harmed by misconduct, and that these individuals including the Estate of Rosa Mary Humphreys and she during her life time never dealt unfairly with either corporation or with their creditors.

CONCLUSION

The Trial Court was correct in granting the Motion for Summary Judgment filed on the behalf of the Appellees in this cause. There are no genuine issues of material fact subject to dispute and that the Appellees were and are entitled to a judgment as a matter of law.

The Appellants arguments are based not upon inference drawn from fact but from assumptions. These Appellees did not create the insolvency of Nursing, Inc. nor did they act fraudulently, in bad faith or maliciously towards that corporation or its creditors. Therefore, they should not be found to be liable for any debt or obligation of that entity. Respectfully, these Appellees ask that this Court affirm the decision of the Trial Court and dismiss this Appeal.

Respectfully submitted,



Stanley A. Kweller, # 5429
Attorney for Defendants
Jackson, Kweller, McKinney
Warden & Hayes
214 2nd Avenue North, Ste. 103
Nashville, TN 37201

CERTIFICATE OF SERVICE

I hereby certify that a true and original copy of the forgoing document has been forwarded via U.S. postage pre-paid mail to the following:

Stephen E. Grauberger, Esq.
1161 Murfreesboro Pike, Ste. 200
Nashville, TN 37218

On this the 29th day of August, 2007.

Stanley A. Kweller