

The Governor’s Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

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INTRODUCTION

The State of Tennessee Executive Order No. 54 (May 19, 2016) hereby charges the Governor’s Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council’s responsibility in answering the questions in this application. For example, when a question asks you to “describe” certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in Microsoft Word format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website www.tncourts.gov). The Council requests that applicants obtain the Microsoft Word form and respond directly on the form using the boxes provided below each question. (The boxes will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit your original, hard copy (unbound), completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with your electronic or scanned signature. The digital copy may be submitted on a storage device such as a flash drive that is included with your hard-copy application, or the digital copy may be submitted via email to ceesha.lofton@tncourts.gov. See section 2(g) of the application instructions for additional information related to hand-delivery of application packages due to COVID-19 health and safety measures

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Commissioner (Judge), Tennessee Claims Commission, Middle Division.

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 2009. My BPR number is 028495.

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

- Tennessee, 028495, 11/18/2009, active
- Kentucky, 097592, 08/21/2017, inactive
 - I requested inactive status after being appointed to my current position.

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 suspended or denied admission by the Bar of any state.

I requested inactive status for my Kentucky license after being appointed to my current position.

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).

Since law school

- Commissioner (Judge), Tennessee Claims Commission, Middle Division, Nashville, TN (September 2019-present)
- Partner, Nelson Mullins Riley & Scarborough, LLP, Nashville, TN (Associate from May 2014 to December 2016 and Partner from January 2017 to September 2019)
- Associate, Burr & Forman, LLP, Nashville, TN (August 2009-May 2014)
- In addition to practicing law, I have invested in several food and beverage businesses.

Prior to law school

- I served as a public school teacher in rural Mississippi with the Teach for America program (2003-2004). I taught second grade and coached high school football. After a year of teaching, I was called into active-duty military service in support of Operation Iraqi Freedom (2004-2006), as noted below.

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

I have been continuously employed since 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.

I serve as the Commissioner (Judge) of the Middle Division of the Tennessee Claims Commission. The Claims Commission is a special statutory court that has exclusive jurisdiction to hear lawsuits filed against the State pursuant to Tenn. Code Ann. § 9-8-301, *et seq.*

The Middle Division hears cases originating from 42 counties in Middle Tennessee. My Division maintains around 200-250 active cases and adjudicates approximately 20 to 30 cases a month. On average, I author more than a dozen formal legal opinions each month. Any appeal of a decision rendered by the Claims Commission is filed with the Tennessee Court of Appeals.

The lawsuits include negligence related to dangerous conditions on state-owned property (15%); Criminal Injury Compensation Act appeals (15%); state employee workers' compensation lawsuits (10%); breach of contract claims (10%); negligent care, custody, or control of persons under state care (10%); defamation lawsuits against state employees (5%); negligent deprivation of statutory rights (5%); state legal or medical malpractice claims (5%); negligent construction or maintenance of state buildings or roadways (5%); negligent operation of motor vehicles by state employees (5%); negligent operation of machinery/equipment (5%) and other claims allowed pursuant to Tenn. Code Ann. § 9-8-307 (10%).

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 to properly evaluate your application, the Council needs information about your range of experience, your own personal work and work habits, and your work background, as your legal

experience is a very important component of the evaluation required of the Council. Please provide detailed information that will allow the Council to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application.

My entire legal career has focused exclusively on civil litigation. I have substantial courtroom experience in state, federal, bankruptcy, and appellate courts, ranging from Tennessee General Sessions Court to the U.S. Supreme Court. In my current role sitting as a trial judge of record, I regularly rule on dispositive motions and hear multiple-day trials.

In my private practice, I developed a state-wide litigation practice across West, Middle, and East Tennessee. I also regularly handled matters in Kentucky. As a sample of the breadth and depth of my courtroom experience, I served as counsel of record in over 100 cases in Davidson, Shelby, Knox, and Hamilton Counties in Circuit and Chancery Courts, in more than 100 cases in U.S. Federal District Courts in the Eastern, Middle, and Western Districts of Tennessee, and regularly litigated adversarial proceedings in Bankruptcy Courts across Tennessee. I also served as counsel of record for appeals filed with the Tennessee Court of Appeals and the U.S. Sixth Circuit Court of Appeals.

My litigation career started as an associate attorney in the Nashville office of Burr & Forman, LLP. Burr Forman is an American Lawyer Top 200 law firm with offices across the Southeast. During nearly five years with the firm, I served as the primary litigation associate for cases involving business litigation, commercial disputes, tort claims, and financial services litigation. I regularly served as first-chair in depositions, dispositive motions, and trials. I also worked on complex litigation cases as a member of a team of attorneys. The cases included serving as second chair in a week-long federal jury trial and a week-long state court bench trial.

In 2014, I joined the Nashville office of Nelson Mullins Riley & Scarborough, LLP. Nelson Mullins is an American Lawyer Top 100 law firm with offices across the United States. My practice focused on resolving complex business litigation, bet-the-company lawsuits, bankruptcy adversarial proceedings, securities litigation, broker-dealer lawsuits, financial services litigation, real-estate disputes, and health care fraud and abuse cases. As part of my practice, I served as the coordinating partner for a national bank client across multiple states, where I supervised a team of attorneys and monitored the status of approximately 200 legal cases. I also served as the primary attorney across Tennessee and in parts of Kentucky for a national mortgage servicing company. In those roles, I routinely appeared in court weekly and sometimes daily. During five years with the firm, I helped grow the litigation section in the Nashville office from two litigation attorneys to a multi-state regional practice. As evidence of my hard work, I was named a Mid-South Rising Star for Business Litigation, "40 under 40" by the Nashville Business Journal, and a Fellow of the Nashville Bar Association Foundation.

In August of 2019, I was appointed by Governor Bill Lee to serve as the Commissioner (Judge) of the Middle Division of the Tennessee Claims Commission, as noted in the prior question.

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

Below is a representative sample of cases:

As trial judge of record:

- *Pillow v. State*, M2019-02274-SC-R3-WC (Tenn. Supreme Court, Special Workers' Compensation Appeals Panel, Dec. 11, 2020). This case involved a state employee who was injured by a public transit bus on her way to work. I granted summary judgment to the State applying the "coming and going" rule to determine the injury did not arise within the course and scope of employment. The judgment was affirmed by the Tennessee Supreme Court Special Workers' Compensation Appeals Panel.
- *Pierce v. State*, M2020-00533-COA-R3-CV (Tenn. Ct. App., June 25, 2021). This case involved a tragic death in a state park. I granted a Motion to Dismiss on the basis that Tennessee's Recreational Use Statute barred the claim. The Court of Appeals affirmed, and the Tennessee Supreme Court denied an appeal by permission.
- *Howard v. State*, M2020-00735-COA-R3-CV (Tenn. Ct. App., Aug. 26, 2021). This lawsuit involved an appeal to the Claims Commission from the Tennessee Department of Claims and Risk Management. I determined the appeal was not timely filed and was not saved by a separate one-year statute of limitations because no conflict existed between deadlines set forth in Tenn. Code Ann. §§28-3-104 and 9-8-402(c). The Court of Appeals affirmed, and the Tennessee Supreme Court denied an appeal by permission.
- *Bumbalough v. State*, T20181704 (Tenn. Claims Commission, Middle Division, Oct. 22, 2021). This case involved an automobile accident caused by a Tennessee Bureau of Investigation (TBI) special agent. The agent hit the Claimant after entering an intersection with a red light while traveling to an officer involved shooting. After considering trial testimony, I determined the special agent failed to exercise due care for the safety of all persons in an emergency, causing the accident. The State did not appeal.
- *O'Guin v. State*, M2020-00732-COA-R3-CV (Tenn. Ct. App., July 28, 2021). A patient at a state-owned rehabilitation facility fell off a sidewalk, striking his head, which ultimately resulted in his death. I granted summary judgment on lack of sufficient evidence of causation. The Court of Appeals affirmed.
- *A.B. Normal, LLC v. State*, M2020-01390-COA-R3-CV (Tenn. Ct. App., Dec. 3, 2021). The case involved lightning striking a house, which subsequently burned to the ground. A bridge to the house was impassible from flooding. A lawsuit was filed alleging the Tennessee Department of Transportation failed to maintain the bridge, which prevented firefighters from accessing the property. I dismissed the case on the basis that lightning is an act of God, and the lightning, not the bridge access, was the proximate cause of the injury. The Court of Appeals affirmed.

Cases in private practice:

- *Ritzen Group, Inc. v. Jackson Masonry, LLC*, 140 S.Ct. 582 (2020). This lawsuit originated as a dispute between the buyer and seller of commercial property in Nashville. I served as the original trial counsel and co-appellate counsel until after the case reached the U.S. Supreme Court (which coincided with my appointment to the Claims Commission). The case started in 2014 when I filed a lawsuit to enforce the commercial

property agreement on behalf of the buyer. On the eve of trial in state court after 18 months of litigation, the seller filed for bankruptcy. The case then proceeded through Bankruptcy Court, Federal District Court, the Sixth Circuit Court of Appeals, and eventually to the Supreme Court on the issue of whether denial of the bankruptcy automatic stay constituted a final appealable order. In one of the last opinions authored by Supreme Court Justice Ruth Bader Ginsburg, the Supreme Court clarified that denial of relief from the bankruptcy court automatic stay does constitute a final appealable order. The case was 1 of only 74 cases granted *certiorari* by the Supreme Court during the 2019-2020 term.

- *Chapman v. JPMorgan Chase Bank, N.A.*, 651 Fed. App. 508 (6th Cir., 2016). I served as trial and appellate counsel in a case involving the Fair Debt Collection Practices Act and Truth in Lending Act. The U.S. District Court granted summary judgment for my client. The Sixth Circuit Court of Appeals affirmed. This case is representative of more than 100 cases I handled on behalf of banks and financial services clients involving detailed contract disputes, complex federal law issues, and related state laws, such as the Tennessee Consumer Protection Act.
- *Doe v. Rhodes College*, 2:19-cv-023336-FTF-tmp (W.D. Tenn.). The case involved a Title IX dispute seeking an injunction related to the college's sexual misconduct policy after a student was expelled and prevented from graduating. My firm represented the college. The case proceeded with expedited discovery. An injunction was granted in part and denied in part. The case was significant because the U.S. District Court held private colleges may be obligated to provide the equivalent of constitutional due process requirements, which was a departure from other court rulings.
- *Smith v. Prudential Ins. Co.*, 3:10-cv-00845 (M.D. Tenn.). The case was a week-long federal jury trial involving a dispute over a multi-million-dollar life insurance policy on the issue of whether the insured's death was a suicide. The case is representative of numerous complex insurance policy disputes that I handled in both state and federal court while in private practice. *See also Johnson v. Prudential Ins. Co.*, 939 F. Supp. 2d 845 (M.D. Tenn.). In *Johnson*, the lawsuit alleged breach of contract related to insurance policy ratings upon conversion of a term policy. The U.S. District Court granted summary judgment on behalf of my client, and an appeal to the Sixth Circuit Court of Appeals was voluntarily dismissed.
- *Overhead Door Co. v. G & W Door Co.*, 17-0986-IV (Davidson County Chancery Ct.). In this case, I represented the plaintiff and successfully obtained a temporary injunction related to breach of contract and to stop the use of intellectual property. This case is representative of complex business disputes involving injunctions that was part of my private practice.
- *In re: Smith*, 2017 WL 943905 (Bankr. E.D. Tenn.). In this bankruptcy court adversarial proceeding, the court granted a motion to dismiss on behalf of my bank client related to an alleged violation of the automatic stay. This case is representative of lawsuits in bankruptcy court that I handled on a routine basis.
- *J M Smith Corp. d/b/a Smith Drug Co. v. Cherokee Pharmacy*, 1:17-mc-00006-HSM-SKL (E.D. Tenn.). This case involved a complex business dispute related to opioid drug distribution, which resulted in a significant judgment against the defendant pharmacy by a federal court in South Carolina. I represented the plaintiff and filed for injunctive relief in Bradley County, Tennessee to prevent the disbursement of assets by the defendant

after the federal judgment was entered in South Carolina against the defendant company. The defendant sought a federal court order in Tennessee to stay execution of the judgment pending an appeal in the U.S. Court of Appeals, which was denied. This case is representative of multi-state complex litigation involving state and federal courts that I handled routinely.

- *Thomas v. Thomas*, 15-0896-IV (Davidson County Chancery Ct.). In this pro bono case, I represented an indigent client in a bench trial in a real estate partition and accounting case that threatened to leave my client effectively homeless. While not a particularly significant legal case, it is representative of legal matters that I regularly handled pro bono while in private practice.

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.

My prior response includes significant cases that I handled as the trial judge of record. I have not served as a mediator or arbitrator.

11. Describe generally any experience you have serving in a fiduciary capacity, such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

Not applicable.

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

Not applicable.

13. List all prior occasions on which you have submitted an application for judgeship to the Governor's Council for Judicial Appointments or any predecessor or similar 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.

In 2019, I applied to the Governor's Council for Judicial Appointments for my current position. My name was submitted in July 2019 as a nominee. I was selected by Governor Lee for appointment to the Claims Commission and subsequently confirmed by the State Legislature.

EDUCATION

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

University of Mississippi School of Law, Juris Doctorate, *cum laude* (2006-2009)

- Elected Student Body President (2008-2009); Treasurer (2007-2008)
- Selected for the *Mississippi Law Journal* and served as the Office Manager
- Selected for the Moot Court Board and served as a national trial team member
- Recipient, Edmund C. Lynch Fellowship (partial scholarship)

University of North Carolina at Chapel Hill, Bachelor of Arts, Dean's List (1999-2003)

- Elected President, Order of the Old Well (An honorary organization to honor UNC students for exemplary and otherwise unrecognized service to the university)
- Elected Vice President for Public Affairs, UNC System Student Government
- Recipient, Walter S. Spearman Award (Presented to a man in the senior class whose academic achievements, co-curricular activities, leadership qualities, and strength of character are considered by a panel of judges to be most outstanding)
- First person in my immediate family to attend college

In the fall of 2003, while serving with the Teach for America program, I took a graduate level continuing education course at Delta State University in Cleveland, Mississippi and received an "A" in the course. I did not continue with additional coursework because I was called to active-duty military service.

PERSONAL INFORMATION

15. State your age and date of birth.

I am 41 years old. My date of birth is [REDACTED] 1980.

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

I have lived continuously in the State of Tennessee for 14 years.

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

I have lived continuously in Davidson County for 13 years.

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 continuously served in the Army National Guard for over 20 years.

I joined the National Guard immediately following the tragic events of 9/11 and was commissioned as an officer in May 2003. My current rank is Lieutenant Colonel (O-5). As further described below, I currently serve as the Deputy Commander of a 1,500-soldier unit.

From March 2004 to August 2006, I was called to active-duty military service in support of Operation Iraqi Freedom. During a year-long deployment to Iraq, I served as a platoon leader of approximately 20 soldiers, leading about 200 combat missions. My platoon members were citizen-soldiers, who left normal jobs to fight a war. As the commanding officer, I regularly made difficult decisions under pressure. I personally survived multiple improvised explosive device (IED) detonations and experienced the fragility of human life. For my service in Iraq, I was individually awarded a Combat Action Badge for direct engagements with the enemy, along with other military awards, and our brigade was awarded the Navy Unit Commendation ribbon for outstanding heroism against the enemy while attached to the II Marine Expeditionary Force.

While in law school (2006-2009), I continued my reserve military service in the Mississippi Army National Guard. For approximately 16 months, I served as the leader of a Mechanized Scout Platoon with approximately 50 soldiers. I was next given the opportunity to serve as the Commander of a Mechanized Infantry Company. I was responsible for approximately 150 soldiers, two National Guard armories, and millions of dollars of equipment, while attending law school.

I permanently moved to Nashville in 2009 and transferred to the Tennessee Army National Guard. From 2009 to 2018, I held various staff leadership positions, including serving as the Fiscal Accounting Branch Chief at the National Guard Joint Force Headquarters in Nashville.

Since 2018, I have served in the headquarters element of the 30th Troop Command in Tullahoma, Tennessee. The 30th Troop Command operates as a brigade with over 1,500 soldiers in multiple subordinate units across the State of Tennessee. The unit was substantially involved with the military response to COVID-19, along with other recent foreign and domestic operations. From 2019-2021, I served as the Executive Officer (Chief of Staff). Since February 2021, it has been my honor and privilege to serve as the Deputy Commander of the brigade.

A representative sample of my military training includes graduating from the Armor Officer Basic Course, the Military Intelligence Officer Transition Course, the Infantry Captain's Career

Course, the Reserve Component National Security Course, the (national) Defense Strategy Course, and the Advanced Operations Course from the U.S. Army Command and General Staff College, where I graduated 3rd peer-rated and 4th overall in an exceptionally competitive cohort of field grade officers.

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

In 1999 (at age 18), I received a misdemeanor citation with a deferred prosecution. The citation was subsequently dismissed.

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No.

22. Please identify the number of formal complaints you have responded to that were filed against you with any supervisory authority, including but not limited to a court, a board of professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you. Please provide any relevant details on any such complaint if the complaint was not dismissed by the court or board receiving the complaint.

One complaint was filed eight years ago in 2014 and dismissed. After a lawsuit was resolved with an Agreed Order, a lawyer complained that he did not receive a copy of a subpoena for documents to a third-party during the litigation. I was part of a team working on the case and my personal involvement was limited. The oversight, if any, was unintentional. The Tennessee Board of Professional Responsibility reviewed the facts and dismissed the complaint.

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

No.

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

No.

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

In 2003, I was briefly a party in an automobile insurance subrogation case, docket 03CVD934. The case was withdrawn and dismissed.

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices that you have held in such organizations.

- Board of Trustees, The Andrew Jackson Foundation, *The Hermitage* (2020-present)
 - Vice-Chair, Buildings and Grounds Committee
- Board of Trustees, National Guard Association of Tennessee Insurance Trust (2020-present)
- Board of Directors, The Better Business Bureau of Middle Tennessee (2015-2018)
- National Executive Council, Chi Psi Fraternity (2013-Present)
 - Chair (2016-2018); Vice-Chair (2014-2016)
- Member, Old Hickory Flyers Club (2013-present)
 - I am a licensed pilot. The club was formed in 1957 to promote aviation safety.
- Member, Otter Creek Church (2009-present)

27. Have you ever belonged to any organization, association, club or society that limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.

- a. If so, list such organizations and describe the basis of the membership limitation.
- b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

In college, I joined a social fraternity. Upon graduation from college in 2003, my membership transitioned from an active member to an alumni member. As an alumni member, I serve on the national board of directors. My term is scheduled to conclude in July 2022.

ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices that you have held in such groups. List memberships and responsibilities on any committee of professional associations that you consider significant.

- American Bar Association, 2009-2019
- Tennessee Bar Association, 2009-present
- Nashville Bar Association, 2009-present
 - Member, Veterans' Committee (Co-Chair 2014-2016, current member)
 - Member, Circuit and Chancery Court Practice Committee (2009-2019)
 - Member, Federal Court Practice Committee (2009-2019)
- Harry Phillips American Inns of Court (2013-2015 and 2018-present)
- The Federalist Society (2019-present)

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

- Fellow, Nashville Bar Foundation (2020)
- White House Fellows, Regional Finalist (2020 application)
- 40 Under 40, Nashville Business Journal (2019)
- Mid-South Rising Star for Business Litigation (2014-2019)
- President's Award, Nashville Bar Association (2012)
- I was selected for the Tennessee Bar Association Leadership Law program but deferred acceptance until 2023 based on scheduling conflicts for the 2022 program.

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

- Contributing author, *Recent Developments in Business and Corporate Litigation*, American Bar Association Business & Corporate Litigation Committee's Annual Review of Developments in Business and Corporate Litigation, 2018 Edition
- Contributing author, *Recent Developments in Business and Corporate Litigation*, American Bar Association Business & Corporate Litigation Committee's Annual Review of Developments in Business and Corporate Litigation, 2016 Edition
- Author, *Earwigging the Chancellor Prohibited: A Violation of Legal Ethics*, 79 Miss. L. J. 115 (2010)

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.

- Group presentation, *Canons of Construction*, Harry Phillips American Inns of Court, Nashville, TN (September 21, 2021)
- Group presentation, *Understanding the Complicated Landscape of Civil War Monuments*, Harry Phillips American Inns of Court, Nashville, TN (March 16, 2021)
- Group presentation, *Give It a Shot: Vaccines and the Law*, Harry Phillips American Inns of Court, Nashville, TN (November 19, 2019)
- Panel, Residential Mortgage Regulatory Enforcement and Litigation Conference, Dallas, TX (October 22, 2018)

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.

As noted above, I was appointed in 2019 to serve as the Commissioner (Judge) of the Tennessee Claims Commission, Middle Division.

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

No.

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

See attached. The writing samples exclusively reflect my personal effort.

ESSAYS/PERSONAL STATEMENTS

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

I seek appointment to the Court of Appeals to continue my long-standing commitment to public service and the rule of law. In 2019, I made the decision to leave my financially lucrative private law practice to serve in my current position. In my view, serving as a judge, especially as an appellate judge, is the most honorable position that a lawyer can aspire to achieve.

36. State any achievements or activities in which you have been involved that demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. *(150 words or less)*

When I started practicing law, I noticed a need for pro bono legal services for veterans. I helped form the Nashville Bar Association's Veterans' Committee to address the issue. In 2012, I received the President's Award from the Nashville Bar Association for helping to establish the program. From 2010 to 2016, I helped coordinate monthly legal aid clinics at Operation Stand Down Tennessee, which is the largest non-profit resource center for veterans in Tennessee. As a member of the Operation Stand Down Tennessee Board of Directors, I also helped develop a referral program to facilitate pro bono legal services for veterans. In addition, during my entire private practice career, I served on various pro bono panels for individual clients. One of the more significant cases involved approximately 80 hours on behalf of a pro bono client, which included a bench trial. My current ability to participate in pro bono legal work is limited based on my position as a trial judge.

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

I seek a position on the Tennessee Court of Appeals which considers civil appeals from trial courts and certain state boards and commissions, such as the Tennessee Claims Commission.

Service on the Court of Appeals is detail-oriented work with extensive legal research and writing. I have demonstrated a high aptitude for detailed legal research and writing throughout my career. As noted above, I have authored legal articles and taught continuing legal education courses. In my current position, I write detailed legal opinions, a number of which have been affirmed by the Tennessee Court of Appeals. In addition, my entire legal career has focused exclusively on civil litigation. Moreover, as a former teacher, combat veteran, lawyer, and current trial judge, I believe I have the right temperament to serve effectively in this role. I am decisive, but compassionate; fair and impartial, and fully committed to the rule of law.

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

My community service can be organized into four categories: legal, military, education, and historical/nonprofit.

In the legal category, I have actively been involved in committees, panels, and groups that focus on ethics, education, civility, and mentorship in the legal profession. In my view, it is important for judges, especially appellate judges, to be leaders in the community and bar associations.

In the military category, my work has focused primarily on veterans' services and support for citizen-soldiers. I am a former board member of Operation Stand Down Tennessee and current board member on the Tennessee National Guard Insurance Trust. I intend to continue my long-standing commitment to veterans.

In the education category, I served on the Teach for America Nashville Rising Leaders board and currently serve on a national collegiate board. If I am appointed to the Court of Appeals, I will likely shift my education advocacy efforts towards education and mentorship within the legal community.

In the historic/nonprofit area, I currently serve on the board of *The Hermitage*, Home of President Andrew Jackson. It is important to share the evolution of our democracy and educate future generations on the importance of civic engagement. I also support community services organized by my church. If appointed, I intend to remain involved in *The Hermitage*, my church, and other nonprofit organizations, to the extent permitted by the Code of Judicial Conduct.

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

The Tennessee Code of Judicial Conduct states a judge must respect the judicial office as a public trust and demonstrate impartiality, integrity, and competence, which I learned from my grandfather. He taught me to value hard work, humility, and fairness. I have applied those attributes as a public school teacher, soldier, lawyer, and trial judge. I feel my life experiences make me uniquely qualified and competent to serve on the Court of Appeals.

My grandfather was born on a farm without electricity or running water. At 13, he quit school to tend the family farm when his father died, and his brothers were away fighting in WWII. The Army and railroad later allowed him to provide a stable, but modest life for his family. Despite his lack of a formal education, he served as a leader in his community until his death in 2020.

Based on my grandfather's encouragement, I was the first person in my immediate family to attend college. After graduation, I moved to rural Mississippi to teach disadvantaged students with the Teach for America program. I joined the Army National Guard after the tragic events of 9/11, served in combat in Iraq, and have spent 20 years balancing reserve military service with a professional career. After developing a successful law career, I made the difficult decision to leave a lucrative position in private practice to pursue a judicial appointment. The decision was not easy, but was made based on my long-standing commitment to public service and to honor the legacy of my grandfather.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. (250 words or less)

Yes, I will absolutely uphold the law as written. The legislative branch is the only branch of government that can make new laws or change existing laws. The judiciary's role is limited to interpreting and applying the law as written, based on the applicable facts, even if the judge disagrees with the substance of the law. As a judge on the Court of Appeals, I would apply a textualist view of the law.

A situation arose early in my career as a trial judge on the Claims Commission which involved the tragic death of a toddler in a Tennessee State Park. The facts were heartbreaking. I had enormous sympathy for the family. However, the Tennessee Recreational Use Statute states that landowners, including the State, shall have no duty of care for recreational activities, except for limited circumstances involving gross negligence or willful disregard for dangerous conditions. In this situation, the dangerous conditions were created by a force of nature, effectively negating any statutory exceptions that might apply. Despite the heartbreaking facts, and my personal sympathy for the family, I had to apply the law as written and dismiss the case. The Court of Appeals affirmed my decision, and the Tennessee Supreme Court denied the plaintiffs' appeal.

REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Council or someone on its behalf may contact these persons regarding your application.

A. Major General Jeff Holmes, Commissioner and Adjutant General, Tennessee Department of Military; contact information: [REDACTED]

B. Hon. Emily Reynolds, Former Secretary of the U.S. Senate, and Current Vice Chair of the Tennessee Board of Regents; contact information: [REDACTED]

C. Brigadier General (Ret.) Kurt Winstead, Attorney and Recent Director of the Joint Staff for the Tennessee National Guard; contact information: [REDACTED]

D. Howard Kittle, President & CEO, The Hermitage, Home of President Andrew Jackson; contact information: [REDACTED]

E. Laurence (Larry) Papel, Attorney and Office Managing Partner, Nelson Mullins Riley & Scarborough, LLP (Nashville office); contact information: [REDACTED]
[REDACTED]

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

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

Dated: February 22, 2022.

/s/ James A. Haltom_____

Signature

When completed, return this application to Ceesha Lofton, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.



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

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

**TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY
TENNESSEE BOARD OF JUDICIAL CONDUCT
AND OTHER LICENSING BOARDS**

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information that concerns me, including public discipline, private discipline, deferred discipline agreements, diversions, dismissed complaints and any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, the Tennessee Board of Judicial Conduct (previously known as the Court of the Judiciary) and any other licensing board, whether within or outside the State of Tennessee, from which I have been issued a license that is currently active, inactive or other status. I hereby authorize a representative of the Governor's Council for Judicial Appointments to request and receive any such information and distribute it to the membership of the Governor's Council for Judicial Appointments and to the Office of the Governor.

James A. Haltom

Type or Print Name

/s/ James A. Haltom

Signature

February 22, 2022

Date

028495

BPR #

Please identify other licensing boards that have issued you a license, including the state issuing the license and the license number.
Tennessee BPR, 028495
Kentucky BPR, 097592

IN THE CLAIMS COMMISSION OF THE STATE OF TENNESSEE
MIDDLE DIVISION

FILED

SEP 08 2020

Tennessee Claims Commission
Clerk's Office

A B NORMAL, LLC,)
) Claim No. T20192248
 Claimant,)
)
 vs.)
)
 STATE OF TENNESSEE,)
)
) Regular Docket
 Defendant.)

ORDER GRANTING MOTION TO DISMISS

The matter before the Middle Division of the Tennessee Claims Commission is a Motion to Dismiss filed by the State of Tennessee on December 19, 2019. The Claimant filed a response on February 12, 2020. A hearing was originally scheduled for April 15, 2020, but was reset to May 8, 2020, and eventually reset to August 14, 2020. Upon review of the pleadings, the argument of counsel, and the entire record in this action, the Tribunal hereby finds that the Motion to Dismiss should be GRANTED.

PROCEDURAL HISTORY

The Complaint

As alleged in the Complaint, A B Normal, LLC is the owner of real property located at 4770 Gladdice Highway, Gainesboro, Tennessee 38562. Charles Cummings and his family lived on the property, which is located off State Highway 85. According to the Complaint, the State is responsible for maintenance of an easement bridge that allows access to the property.

On February 6, 2019, a fire took place at the property, causing a total loss to the real estate and personal property. For five (5) months prior to the fire, Claimant's representatives had conversations with the Tennessee Department of Transportation ("TDOT") concerning persistent

flooding and degradation of the easement bridge, including that the bridge frequently became submerged underwater as a result of any hard rain, and thus making the property inaccessible. More specifically, in September 2018, TDOT representative Lisa Scantland inspected the easement bridge. In December 2018, Ms. Scantland returned to the property, along with Joshua Neal, to inspect the bridge with respect to the flooding issues that left the property inaccessible. A later telephone conference was conducted with Bo Hoskins and Joshua Neal with TDOT.

On February 6, 2019, during a heavy thunderstorm, lightning struck the property, causing a fire. Mr. Cummings called 911. When firefighters arrived, the fire had only destroyed the bathroom; however, emergency services were limited in their ability to fight the fire. One fire truck was able to cross the bridge, but became immobilized and stuck. After making minimal progress on the fire, the firefighters were ordered to evacuate and let the house finish burning due to the safety risks and concerns of rising and encroaching floodwater. Other emergency responders were unable to cross the easement bridge because it was submerged in 30+ inches of water. After the house burned, the fire eventually burned at least eight (8) acres of farmland used to produce hay. Based on those facts, the Claimant alleges negligence against the State, based on the unreasonably dangerous and defective condition of the bridge, which the State had actual notice. The Claimant also seeks for the Claims Commission to require the State to repair or replace the bridge.

The State's Motion to Dismiss

The State's Motion to Dismiss succinctly argues that (1) the Claimant cannot recover damages caused by lightning under Tennessee law; and (2) the Claims Commission does not have jurisdiction to grant injunctive relief. First, the State argues that Tenn. Code Ann. § 9-8-307(c) sets forth that liability against the State is based on traditional tort concepts. Based on

case law, if the duty is not reasonably foreseen, there is no negligence or liability. The State then cites to case law for the position that lightning is unpredictable and is unforeseen under Tennessee law as an act of God. The State then argues that where there are two distinct causes, one direct, and the other furnishing the condition by which the injury occurred, the former is the proximate cause. Finally, the State argues that the Claims Commission only has jurisdiction to determine monetary claims and cannot issue injunctive relief to compel repairs to the bridge.

Following oral argument, the State filed a Notice of Filing Supplemental Authority in Support of Defendant's Motion to Dismiss with supplemental authority on August 21, 2020.

Claimant's Response to the State's Motion to Dismiss

Claimant's Response to the State's Motion to Dismiss recites the general allegations of the Complaint, the legal standard for a Motion to Dismiss, the legal standard for a claim of negligence, and then the statute regarding the foreseeability of the risk for dangerous conditions on state maintained highways. Claimant's argument section incorporates nearly the entire complaint, while making general arguments regarding the risk, standard for a motion to dismiss, foreseeability, and policy arguments. Finally, Claimant distinguishes *Hames v. State*, 808 S.W.2d 41 (Tenn. 1991) and asserts that *Ki v. State*, 78 S.W.3d 876 (Tenn. 2002) is more comparable. The response does not address the State's position that the Claims Commission is unable to grant injunctive relief.

LEGAL STANDARD

The State of Tennessee, as a sovereign government, is immune from lawsuits unless it consents to be sued. *See Stewart v. State*, 33 S.W. 3d 785, 790 (Tenn. 2000).

As set forth in Article I, Section 17, the Tennessee Constitution authorizes the General Assembly to create exceptions to the rule of immunity. Acting in accordance with Article I,

Section 17 of the Tennessee Constitution, in 1984 the Tennessee General Assembly passed the Claims Commission Act, which waived sovereign immunity for limited claims against the State.

As specifically set forth pursuant to Tenn. Code Ann. § 9-8-307(a)(1):

The commission or each commissioner sitting individually has exclusive jurisdiction to determine all monetary claims against the state based on the acts or omissions of state employees, as defined in § 8-42-101(3), falling within one (1) or more of the following categories:

The statute then lists each category of claims that the Claims Commission has exclusive jurisdiction. More specifically under the Claims Commission Act, the General Assembly enacted legislation that allows claims against the State for the negligent design and maintenance of state highways and bridges, pursuant to Tenn. Code Ann. § 9-8-307(a)(1)(I) and dangerous conditions on state maintained highways, pursuant to Tenn. Code Ann. § 9-8-307(a)(1)(J).

As noted above, the State filed a Motion to Dismiss. A motion to dismiss under Tennessee Rule of Civil Procedure 12.02(6) for failure to state a claim is a test of the legal sufficiency of the complaint. *See Lanier v. Rains*, 229 S.W.3d 656, 660 (Tenn. 2007). It admits the truth of all relevant and material allegations but asserts that such allegations do not constitute a cause of action as a matter of law. *See Riggs v. Burson*, 941 S.W.2d 44, 47 (Tenn. 1997). These motions are not favored and are rarely granted in light of the liberal pleading standards contained in the Tennessee Rules of Civil Procedure. When reviewing a Rule 12.02(6) motion to dismiss, “courts ‘must construe the complaint liberally, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences.’” *See Phillips v. Montgomery Cty.*, 442 S.W.3d 233, 237 (Tenn. 2014) (*quoting Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011)) (citations omitted). Courts should only

grant the motion if “it appears that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief.” *Webb*, 346 S.W.3d at 426.

APPLIABLE LAW AND DISCUSSION

The State of Tennessee, as a sovereign government, is immune from lawsuits unless it consents to be sued. The State has consented to be sued for “[n]egligently created or maintained dangerous conditions on state controlled real property.” See *Parent v. State*, 991 S.W.2d 240, 242 (Tenn. 1999) citing Tenn. Code Ann. § 9-8-307(a)(1)(C); see generally *Hames v. State*, 808 S.W.2d 41, 45 (Tenn. 1991). The bare existence of a dangerous condition does not establish a breach of duty and is not sufficient proof for the Claims Commission to hold the State liable. See *Francoeur v. State*, No. W2007-00853-COA-R3-CV, 2007 WL 4404105, at *10-11 (Tenn. Ct. App. Dec. 18, 2007). Under Tenn. Code Ann. § 9-8-307(a)(1)(J) for “[d]angerous conditions on a state maintained highways,” the claimant “must establish the foreseeability of the risk and notice given to the proper state officials at a time sufficiently prior to the injury for the State to have taken appropriate measures.” *Francoeur*, 2007 WL 4404105, at *10.

To prevail under Tenn. Code Ann. § 9-8-307(a) for a negligence claim, a claimant must prove by a preponderance of the evidence the elements of negligence consisting of (1) a duty of care owed by the defendant to the Claimant; (2) a breach of that duty; (3) an injury or loss; (4) cause in fact; and (5) proximate, or legal cause. *King v. Anderson County*, 419 S.W.3d 232, 246 (Tenn. 2013). While the claim is authorized by statute, the State’s liability is based on traditional common law elements of negligence and the reasonable person’s standard of care. See Tenn. Code Ann. § 9-8-307(c); *Lucas v. State*, 141 S.W.3d 121, 130 (Tenn. Ct. App. 2004).

Negligence Claim against the State

The threshold issue here is whether the status of the bridge was the proximate or legal cause of Claimant's loss. The State argues that the Claimant cannot establish proximate or legal cause for liability under Tenn. Code Ann. § 9-8-307(a)(1)(J). The State attests that lightning is an act of God and was the proximate cause of the injury, citing *Davis v. County Club, Inc.*, 381 S.W.2d 308 (1963) and *Hames v. State*, 808 S.W.2d 41 (Tenn. 1991), which involves lightning that killed a golfer. In *Hames*, the State owned a golf club that did not build lightning shelters, despite United States Golf Association's suggestion and warnings. The golfer was tragically killed when he was struck by lightning. The golfer's surviving widow sued the State on the theory that while lightning is an act of God, or force of nature, the State was negligent for failing to maintain a warning system or erecting lightning proof shelters.

The Claims Commission dismissed the case, but the Court of Appeals reversed. Upon review, the Tennessee Supreme Court reinstated the Claims Commission's dismissal, finding that the death was caused by an act of God, or force of nature, opposed to anything the State may or may not have done. The Court noted:

As to proximate causation, it appears that the proximate cause of the death was the bolt of lightning, as opposed to anything that the State may or may not have done. While the argument can be made that the absence of lightning proof shelters and warning devices was to some extent responsible for the death, the rule is that where two distinct causes, unrelated in operation, one of them being the "direct cause" and the other furnishing the condition by which the injury was made possible, the former alone is to be regarded as the proximate cause of the result.

See Hames, 808 S.W.2d at 45 citing *Ward v. University of the South*, 209 Tenn. 412, 354 S.W.2d 246, 251 (1962).

The Claimant's responses focuses on *Ki v. State*, 78 S.W.3d 876 (Tenn. 2002). That case involved a tragic situation in which a state university student died in a dormitory fire. The issue

on appeal was whether the decedent and his parents had separate claims. The Claims Commission determined that the student and parents were separate “claimants” for purposes of statutory “per claimant” damages cap and awarded a total of \$600,000 in damages. The State appealed. The Court of Appeals affirmed in part, reversed in part, and remanded. The Parents appealed. The Supreme Court held that the student was the sole “claimant.” As discussed by the Court of Appeals, 2001 WL 935449 (Tenn. Ct. App. Aug. 13, 2001), the Claims Commissioner found that the State of Tennessee negligently created and allowed dangerous conditions under Tenn. Code § 9-8-307(a)(1)(C), on state controlled real property. *Ki* is not analogous to the facts of the pending claim because the proximate or legal cause of the student’s death was the State’s failure to follow the minimum acceptable standards for fire safety and prevention for buildings. While not specified in the Complaint, Claimant acknowledges in the Response to the Motion to Dismiss, that the claim is based on Tenn. Code § 9-8-307(a)(1)(J), for dangerous conditions on state maintained highways.

Here, assuming the facts are true, during a heavy thunderstorm, lightning struck the property, causing a fire. When firefighters arrived, the fire had only destroyed the bathroom; however, emergency services were limited in their ability to fight the fire. One fire truck was able to cross the bridge, but became immobilized and stuck. After making minimal progress on the fire, the firefighters were ordered to evacuate and let the house finish burning due to the safety risks and concerns of encroaching floodwater. Other emergency responders were unable to cross the easement bridge because it was submerged in 30+ inches of water. *See Complaint.*

The issue before the Tribunal is proximate cause. As set forth in *Goodermote v. State*, 856 S.W.2d 715 (Tenn. Ct. App. 1993), the Court of Appeals addressed the issue of whether the

state's failure to install safety features on a bridge was the proximate, or legal, cause of the plaintiff's injury. As discussed in *Goodermote* at 721:

The Supreme Court, in *McClenahan v. Cooley*, 806 S.W.2d 767 (Tenn. 1991), suggested a three-pronged test to determine proximate cause, as follows:

(1) [T]he tortfeasor's conduct must have been a "substantial factor" in bringing about the harm being complained of; and (2) there is no rule or policy that should relieve the wrongdoer from liability because of the manner in which the negligence has resulted in the harm; and (3) the harm giving rise to the accident could have reasonably been foreseen or anticipated by a person of ordinary intelligence and prudence. *Id.* at 775 (citations omitted).

In this matter, it is necessary to determine whether the condition of the bridge was a "substantial factor" in bringing about the harm. Had the bridge collapsed and injured the Cummings family, or a third party, the condition of the bridge might very well be the proximate or legal cause of the plaintiff's injury. However, those are not the facts. Here, lightning started a fire, which was the proximate, or legal, cause of the plaintiff's injury. The lightning was the substantial factor in the harm done to the Claimant, as opposed to anything the State did or did not do. *See Hames*, 808 S.W.2d at 45.

While the Tribunal was unable to locate an exact case on point, a similar Tennessee case is instructive. In *Irvine v. City of Chattanooga*, 101 Tenn. 291 (Tenn. 1898), the Tennessee Supreme Court affirmed dismissal against a plaintiff who sued the City of Chattanooga alleging loss of a dwelling house by fire, as a consequence of the negligence and inefficiency of the fire department. While an old case, and the basis for the decision are not applicable to the jurisdiction of the Claims Commission, the issue of proximate, or legal cause, is analogous.

Moreover, similar facts have also been adjudicated outside of Tennessee which are instructive. For example, in *McAfee v. State of New York*, 1 Misc. 2d 545 (New York Court of Claims, March 7, 1956), a plaintiff brought a claim against the State of New York when the

condition of a road required the fire department to take a circuitous route to extinguish a fire at the plaintiff's residence, which caused more fire damage to the property, than if the fire department had arrived sooner. In that case, the New York Court of Claims (which has exclusive jurisdiction for civil litigation against the State of New York, similar to the exclusive jurisdiction of the Tennessee Claims Commission), held that the State was not liable for damages caused by fire, due to the impediment or delay of firefighting services. *Citing Small v. Board of Council of City of Frankfort*, 203 Ky. 188 (Kentucky Ct. App. 1924) (a municipality is not liable in damages for loss of citizens' property by fire because it allowed the street to remain in such bad repair that a fire engine could not reach the property) and *Hazel v. City of Owensboro*, 99 S. W. 315 (Kentucky Ct. App. 1907) (the defective condition of a street delayed a fire department in responding to an alarm did not make the city liable for loss caused by the burning of plaintiff's property, such condition not being the proximate cause of the loss); *see also Sheley v. Swing*, 65 Ohio App. 109 (Ohio Ct. App. 1939) (dismissal affirmed that loss of plaintiff's house by fire, when fire apparatus could not reach it because of a defect in the road, was not the proximate cause of the damage). Accordingly, the negligence claim against the State is DISMISSED.

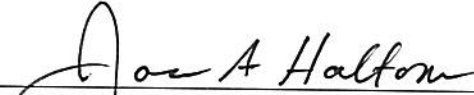
Injunctive Relief

Claimant seeks for the Claims Commission to order the State to repair or replace the subject bridge. The State argues that the Claims Commission only has jurisdiction to hear monetary claims against the State, pursuant to Tenn. Code. § 9-8-307(a)(1). Claimant did not address the issue in its Response to the Motion to Dismiss. While case law on the issue is sparse, the Tennessee Court of Appeals has affirmed that statutory authority only grants the Claims Commission with monetary relief. *See Burchfield v. State*, 774 S.W.2d 178 (Tenn. Ct. App. 1989) (cert. denied). Accordingly the injunctive relief claim against the State is DISMISSED.

CONCLUSION

For the reasons more specifically set forth hereinabove, the Tribunal GRANTS the State's Motion to Dismiss. The matter is DISMISSED and this Order shall constitute a final judgment.

IT IS SO ORDERED this the 8 day of Sept, 2020.



JAMES A. HALTOM
Commissioner (Judge)
Claims Commission, Middle Division
Sitting as Trial Court of Record

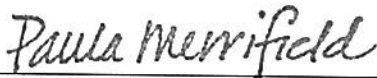
CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing document has been served upon the following parties of record:

MICHAEL EVANS
Attorney General's Office
P.O. Box 20207
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CODY GALAHER
Attorney for Claimant
Fifth Third Center, Suite 2000
424 Church St
Nashville, TN 37219

This 8th of September, 2020.



PAULA MERRIFIELD
Administrative Clerk
Tennessee Claims Commission

IN THE CLAIMS COMMISSION OF THE STATE OF TENNESSEE
MIDDLE DIVISION

FILED
IN CLAIMS COMMISSION
CLERK'S OFFICE

IRENE HOWARD,)
)
 Claimant,)
)
 vs.)
)
 STATE OF TENNESSEE,)
)
 Defendant.)
)
)
)
 Regular Docket)
)

2020 MAY -1 A 11:52

ORDER OF DISMISSAL

This matter is pending before the Tennessee Claims Commission, Middle Division. As reflected in the record, on March 28, 2019, Claimant, then *pro se*, submitted a Claim for Damages to the Division of Claims Administration related to an automobile accident that occurred on March 12, 2019. The Claimant alleges that she was rear-ended by a state employee. The claim was denied on June 24, 2019 on the basis of insufficient evidence to prove that the alleged damages were proximately caused by the negligence of a state employee. The denial letter specifically instructed the Claimant that she had a right to file an appeal within ninety (90) days of the denial. The Claimant did not timely appeal.

On December 18, 2019, Claimant, then represented by counsel, filed a Notice of Appeal, which included a Notice of Claim in the form of a formal Complaint.

Upon an initial review of the Notice of Appeal, the Tribunal had concerns regarding whether it had subject matter jurisdiction.¹ Tenn. Code § 9-8-402(c) states in applicable part:

¹ “A court may raise the issue of subject-matter jurisdiction *sua sponte*, even where no party objects.” *Wilken v. Wilken*, 2012 WL 6727197, *11 (Tenn. Ct. App. Dec. 27, 2012) (*citing Ruff v. State*, 978 S.W.2d 95, 98 (Tenn. 1998) (additional citations omitted)... Not only must a court determine its subject matter jurisdiction, but “[a] trial court must [also] dismiss an action whenever it appears that it lacks jurisdiction of the subject matter.” *See Jack R. Owen Revocable Trust v. City of Germantown*, 2019 WL 2233886, *3 (Tenn. Ct. App. May 23, 2019).

The division of claims and risk management shall investigate every claim and shall make every effort to honor or deny each claim within ninety (90) days of receipt of the notice. If the claim is denied, the division shall so notify the claimant and inform the claimant of the reasons therefor and of the claimant's right to file a claim with the claims commission within ninety (90) days of the date of the denial notice.

As reflected in the record, the Division of Claims Administration reviewed the claim within ninety (90) days, denied it, and notified the Claimant of the right to file an appeal within ninety (90) days. Accordingly, on February 18, 2020, the Tribunal *sua sponte* entered an Order to Show Cause on the basis that Tenn. Code Annotated § 9-8-402(c) states an appeal must be filed within ninety (90) calendar days from the division's denial of the claim.

On March 5, 2020, the Claimant submitted a Response to Order to Show Cause arguing that Tenn. Code Annotated § 28-3-104(a)(1)(A) provides that injuries to persons are subject to a one (1) year statute of limitation. The Claimant argues that construing statutes is the duty of the court to avoid constructions that place one statute in conflict with another, citing *Hunter v. State*, 1993 WL 133240 (Tenn. Ct. App., April 28, 1993) and *Parkridge Hosp. v. Woods*, 561 S.W.2d 754 (Tenn. 1978). Claimant argues that the one (1) year personal injury statute of limitation had not expired and dismissal under Tenn. Code Annotated § 9-8-402(c) would create a conflict between the two statutes. The Claimant requests to be allowed to refile her claim, provided that the claim is filed again within the applicable statute of limitation.

On April 17, 2020, the State filed a Reply to the Order to Show Cause, arguing that under that Tenn. Code Ann. § 9-8-402(a)(1), if a claim is denied by the Division of Claims Administration, a claimant has the right to appeal the adverse decision to the Claims Commission within ninety (90) days of the denial notice. If a claimant does not file her notice of appeal within ninety (90) days of the notice of denial, the Claims Commission does not have jurisdiction over the action, and the action must be dismissed as barred by sovereign immunity, citing *McGinnis v. State*, 2015 WL 1955300, at *2 (April 30, 2015). The State further argues

that Tenn. Code Ann. § 28-3-104 and 9-8-402 do not conflict. The State asserts that Tenn. Code § 28-3-104 establishes the statute of limitations for personal injury actions, whereas § 9-8-402 establishes the procedures for filing an action against the State in the Claims Commission. The State argues that a claimant must not only satisfy the statute of limitation requirement, but must also submit a notice of appeal within ninety (90) days if the division denies the claim. The State asserts that since these statutes establish the procedural requirements for bringing actions against the State in derogation of the State's sovereign immunity, the Tribunal must strictly construe these statutes and find that the Claimant must satisfy both the statute of limitations requirement and the requirement that a Claimant must file her appeal within ninety (90) days.

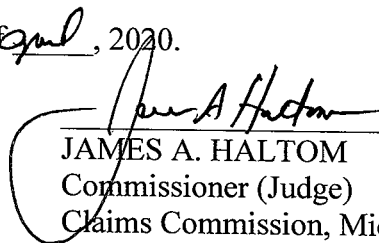
The Tribunal has reviewed the statutes and case law cited by the parties. The *Hunter* case is instructive and cites to *Brown v. State*, 783 S.W.2d 567, 571 (Tenn. App. 1989). In *Brown*, a claim filed with the Division of Claims Administration was filed seventy-seven (71) days late and was barred, even though the claim had been filed in the circuit court within the time provided by the applicable statute of limitations. The *Brown* case cites a number of cases for the position that the statute allowing lawsuits against the State must be strictly construed and jurisdiction cannot be enlarged by implication. In *Brown*, the Court of Appeals held that Tenn. Code Ann. § 9-8-402(a) and (b) must be strictly construed because the State may be sued only in the manner and in the forum specified by the legislature. *Brown* is also instructive by clearly stating that “[t]he time for pursuing a remedy against the State can be extended neither by filing an unauthorized suit in an unauthorized forum, nor by the application of the “Savings Statute” which does not specifically apply to claims against the State.”

The State's citation to *McGinnis v. State*, 2015 WL 1955300 (Tenn. Ct. App., April 30, 2015) is also instructive. In *McGinnis*, the Court of Appeals reversed denial of a Motion to Dismiss for a claim not being appealed within ninety (90) days. The facts are straight forward.

On March 21, 2013, the claimant was allegedly injured on state property. On May 7, 2013, she filed a claim. On July 10, 2013, the claim was denied and she was notified of the right to file an appeal within ninety (90) days. She filed an appeal late on October 9, 2013. The Claims Commission denied the State's Motion to Dismiss finding that the "mailbox rule" under Tenn. Rule Civ. Pro. 6.05 extended the ninety (90) day deadline by three (3) days for service by mail. In reversing and dismissing the claim, the Tennessee Court of Appeals ruled that a party that "who wishes to file an appeal from an adverse Division decision to the Commission, to comply with the 90-day time period outlined in Tennessee Code Annotated Section 9-8-402(c) in order to confer jurisdiction on the Commission to hear the claim." *Id.* * 2.

Tennessee Code Annotated 9-8-402(c) clearly states that an appeal must be filed within ninety (90) calendar days from the date of denial. The record shows that the Division of Claims Administration denied the claim on June 24, 2019. The Claimant filed her on December 26, 2019, after the ninety (90) day period expired. Even though the one (1) year statute of limitations had not expired, the Claimant was also required to satisfy the statutory requirements to pursue a claim before the Claims Commission. Here, the Claimant did not timely file her Notice of Appeal within the statutory period, the Claims Commission does not have jurisdiction, and the claim must be respectfully **DISMISSED**.

So **ORDERED** this the 30 day of April, 2020.



JAMES A. HALTOM
Commissioner (Judge)
Claims Commission, Middle Division
Sitting as Trial Court of Record

CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing document has been served upon the following parties of record:

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This 1st of May, 2020.

Paula Merrifield
PAULA MERRIFIELD
Administrative Clerk
Tennessee Claims Commission

IN THE CLAIMS COMMISSION OF THE STATE OF TENNESSEE
MIDDLE DIVISION

DENNIS BUMBALOUGH,)	
)	Claim No. T20181704-2
Claimant,)	
)	
vs.)	
)	
STATE OF TENNESSEE,)	
)	Regular Docket
Defendant.)	

TRIAL ORDER

The pending lawsuit originated as a Claim for Damages filed on July 13, 2018, with the Tennessee Division of Claims Administration.¹ The claim was transferred to the Middle Division of the Claims Commission on October 12, 2018. Claimant Dennis Bumbalough, along with his wife Patsy Bumbalough, filed a formal Complaint on October 29, 2018.

As generally alleged in the Complaint, the lawsuit arises out of an automobile accident. On November 25, 2017, Robert Simmons was working in his course and scope of employment with the State of Tennessee (the "State") when he caused a vehicle collision with Mr. Bumbalough. The lawsuit alleges the negligence of Mr. Simmons caused Mr. Bumbalough to suffer injuries and damages. The State filed an Answer on October 15, 2018, which admits an automobile collision occurred at the intersection of Memorial Boulevard, Compton Road and W. Thompson Boulevard in Rutherford County. The State also admits Mr. Simmons was operating a vehicle within the scope of his employment with the State. However, the State denied the allegation of negligence. The State raised the affirmative defenses of Tenn. Code Ann. § 55-8-

¹ The Division of Claims Administration is now called the Division of Claims and Risk Management, *see* Tenn. Code Ann. § 9-8-402(a)(1).

108, related to when emergency vehicles have lights and sirens activated, and comparative fault of Mr. Bumbalough for allegedly failing to yield the right-of-way to an emergency vehicle pursuant to Tenn. Code Ann. § 55-8-132. The State acknowledged the Commission has jurisdiction under Tenn. Code Ann. § 9-8-307(a)(1)(A) for the negligent operation of a motor vehicle by a state employee.

The claim was tried before the Tennessee Claims Commission on August 9, 2021.² The trial transcript was filed with the Clerk of the Claims Commission on September 3, 2021.

FINDING OF FACTS

On August 6, 2021, the parties filed Stipulations for purposes of trial. At trial, the Stipulations were marked as Exhibit 1 and read into the record, which state as follows:

1. A crash occurred between vehicles driven by Tennessee Bureau of Investigation (TBI) Agent Robert Simmons and Dennis Bumbalough on November 25, 2017, at approximately 5:12 pm at the four-way intersection of Memorial Blvd. and West Thompson Blvd./Compton Rd. in Murfreesboro, Rutherford County, Tennessee.
2. The weather conditions were dark and clear.
3. Agent Simmons was operating a state-owned 2014 dark blue Dodge Durango, equipped with emergency lights and sirens, and traveling north on Memorial Blvd.
4. Mr. Bumbalough was operating a rented 2018 silver Chevrolet Silverado and traveling west on Compton Rd.
5. At all times relevant to this case, Agent Simmons acted within the course and scope of his employment with the State of Tennessee.
6. The speed limit at the intersection was 40 mph in all directions.
7. Agent Simmons entered the intersection on a red light.
8. Mr. Bumbalough's vehicle came to a final rest at a utility pole on the corner of Memorial Blvd. and West Thompson Blvd.
9. Roman Kickirillo is qualified as an expert in accident reconstruction.
10. Sgt. Timothy Hearn is qualified as an expert in accident reconstruction.

The parties further agreed the following exhibits are admissible:³

² On August 9, 2021, an Agreed Order of Dismissal of Patsy Bumbalough's Claims against the State was entered.

1. Exhibits attached to the deposition for proof of Dr. Stephen Neely [Trial Ex. 2].⁴
2. Roman Kickirillo's CV [Trial Ex. 3].
3. Mr. Kickirillo's report of November 1, 2019 [Trial Ex. 4] and addendum of May 26, 2021 [Trial Ex. 5].
4. Google images of the crash scene, both aerial and street views [Trial Ex. 6].
5. Photographs of the crash scene and vehicles involved in the crash [Trial Ex. 7, marked 7-A, 7-B, 7-C, and 7-D].
6. TBI Emergency Vehicle Operation Policy [Trial Ex. 8]
7. Sgt. Timothy Hearn's CV [Trial Ex. 9].
8. Excerpt from Fundamentals of Crash Reconstruction by Neil F. Robar and George L. Ruotolo [Trial Ex. 10]

Pursuant to Tenn. Code Ann. § 9-8-403(a)(1) and (j), the Tribunal makes the following findings of fact and conclusions of law.⁵

Testimony of Expert Roman Kickirillo

Roman Kickirillo obtained a Bachelor of Science in mechanical engineering in 1993. Afterwards, he worked for General Motors, Donan Engineering, and for himself reconstructing motor vehicle accidents. He has been recognized as an expert and testified in multiple courts in Tennessee, Kentucky, and Alabama, among others. Provided with the Tennessee Electronic Crash Report, he reviewed the depositions of Agent Simmons, Mr. Bumbalough, and Agent Savley. He went to the crash location and took various photographs and measurements. He also reviewed the crash data recording information from Agent Simmons' vehicle [known as the EDR], along with additional photographs.

Agent Simmons was traveling northbound on Memorial Blvd., which has two straight lanes and a dedicated left turn lane. As Agent Simmons approached the intersection, all three lanes were occupied by other vehicles. Agent Simmons moved into the southbound lane of

³ The Stipulations were admitted as Exhibit 1 at trial, and therefore the exhibit numbers listed in the Stipulations do not match the trial exhibit numbers.

⁴ The Deposition of Dr. Neely included Claimant's medical records and expenses.

⁵ The Tribunal has only included testimony relevant for findings of facts and conclusion of law.

traffic (the opposite lane) to go around the stopped vehicles. Mr. Bumbalough was traveling westbound on Compton Blvd., which has two straight lanes and a dedicated left turn lane. Mr. Bumbalough was traveling in the left of the two straight lanes.

As testified by Mr. Kickirillo, the three vehicles stopped at the traffic lanes on Memorial Blvd. would have obscured Agent Simmons' view toward the right (where Mr. Bumbalough was approaching) and would have obscured Mr. Bumbalough's view of Agent Simmons' vehicle. Mr. Bumbalough was traveling between 43 and 47 miles per hour.

As noted by Mr. Kickirillo, Agent Simmons testified in his deposition he stopped at the red light. The EDR data indicates Agent Simmons did not stop at the red light. The EDR in Agent Simmons' vehicle recorded five (5) seconds of pre-crash data, which recorded Agent Simmons slowed down from 30 mph to 17 mph, and then accelerated to 24 mph at the time of impact. Agent Simmons was applying 91% throttle up to ½ second before impact.

It was approximately 2.3 seconds from the time Agent Simmons cleared the three vehicles stopped on Memorial Blvd. to the impact with Mr. Bumbalough's vehicle. A typical reaction time is 1.5 seconds to perceive a threat and initiate a response, which does not include the time for a vehicle to respond to slow down or stop. In this instance, Mr. Bumbalough had approximately .8 seconds to slow down, swerve, or take other action. Mr. Bumbalough did not have time to avoid the collision. Even if Mr. Bumbalough were traveling at 40 mph, the collision would still occur.

Testimony of Agent Joshua Savley

Assistant Special Agent in Charge ("ASAIC") Joshua Savley is employed with the Tennessee Bureau of Investigation ("TBI") and testified credibly. As testified by ASAIC Savley, TBI Emergency Vehicle Operation policy (Ex. 8) indicates on page one, "[m]ost TBI vehicles

are unmarked and are therefore more difficult for the public to recognize than marked units. TBI personnel shall exercise great care when performing emergency vehicle operation, particularly in unmarked vehicles.”

Agent Simmons was operating an unmarked vehicle. The lighting systems on TBI vehicles are internal, and there are no mounted lights on top of Agent Simmons’ vehicle.

ASAIC Savley testified TBI Emergency Vehicle Operations policy provides at Section C (2)(b) that a law enforcement vehicle may proceed past a red or stop signal, but only after slowing down as may be necessary for safe operations. Section C (3) further notes:

3. Note the statute contains the following admonition:

"The foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of the driver's own reckless disregard for the safety of others."

Then Section D (1) states:

D. General Regulations (applicable to both pursuit and emergency vehicle operation):

1. TBI Special Agents/TBI Uniformed Officers shall be familiar with the law regarding emergency vehicle operation, and shall at all times exercise caution and regard for the well-being of the public when operating a Bureau vehicle in an emergency situation:
 - a. Special Agents/Uniformed Officers shall never assume that a member of the public, whether in a vehicle or on foot, sees/hears his/her emergency equipment; and
 - b. Special Agents/Uniformed Officers shall be prepared to stop at an intersection when driving against the sign or signal.

ASAIC Savley testified Agent Simmons did not stop at the red light.⁶

⁶ ASAIC Savley was called by Claimant as a witness, and then recalled by the State as a witness.

On Saturday November 25, 2017, ASAIC Savley received a call from his supervisor reporting a situation in Smith County. The event started by a man shooting his wife, and then shooting at some other family members. Local law enforcement responded. The suspect shot at the local law enforcement, which returned fire, resulting in an officer-involved shooting. The suspect was eventually hit and taken into custody. Normally when TBI is called, the suspect is already in custody. ASAIC Savley believes the suspect was already in custody when he was notified of the situation. ASAIC Savley traveled from his home in Mount Juliet to the scene in Smith County, which is approximately thirty (30) miles. ASAIC Savley was at the shooting scene prior to contacting Agent Simmons.

Testimony of Agent Robert Simmons

Robert “Bobby” Simmons is a TBI special agent, assigned to the Criminal Investigation Division. Agent Simmons was driving a TBI vehicle on the day of the accident, which occurred on a Saturday. He was home when ASAIC Savley called him. He took a few minutes to get dressed before leaving his home. As he approached the accident intersection, he made the decision to proceed into the southbound traffic, around the vehicles stopped at the light.

Agent Simmons testified at his deposition he stopped at the light, which was not an accurate statement. The EDR data later revealed he did not stop at the red light.

As he entered the intersection, he looked in multiple directions, but prior to impact,⁷ he did not see Mr. Bumbalough’s vehicle.

The shooting incident occurred in Smith County. When an event requires TBI assistance, the ASAIC for the incident will call potential TBI agents to respond, then determines who will respond, and will normally start a group text message. After speaking with ASAIC Savley,

⁷ Agent Simmons was called by Claimant as a witness, then recalled by the State as a witness.

Agent Simmons received a text from him suggesting the event was still an active scene. After Agent Simmons left his house, he drove normally through his neighborhood, and then he activated his lights and siren. Agent Simmons lives in Murfreesboro. The shooting location was in Smith County. During his testimony, Agent Simmons identified the location of the stopped vehicles, the collision, and the final resting position of his and Claimant's vehicles on Ex. 6, which was admitted as Exhibit Ex. 6-A.

Testimony of Dennis Bumbalough

Dennis Bumbalough works as an armed security guard at St. Thomas Rutherford Hospital in Murfreesboro and testified credibly. He works nights. The hospital is about 13 ½ miles away from his house. His shift starts at 6 p.m. and the accident took place a little after 5 p.m. At the time of the accident, he was not late for work and normally arrives early for work. His phone was in his pocket. He was not eating or drinking. His music would have been on a low volume. It was cold and dark that evening. He had his headlights on. He was traveling a little over 40 as he approached the intersection, with a green light. As he drove over the crosswalk, he noticed Agent Simmons vehicle enter the intersection. He had no time to react and braced for impact. The collision deployed both airbags. As depicted in the photographs and testimony, Mr. Bumbalough was driving a full-size, four-door Silverado truck, silver in color.

Following the collision, he was in a daze. He remained in the truck until EMS arrived because he was unable to get out on his own. He was immediately taken to St. Thomas Rutherford. He was injured from his center core around his left side, back center, and shoulder up to his cheek. X-rays, CTs and other tests were conducted to make sure the pain in the center of his chest was not a heart attack or stroke. He was in the emergency room for two or three hours before being discharged. His wife took him home.

His next scheduled workday was Wednesday, after the Saturday wreck. For the next few days after the wreck, he rested and took it easy. He went back to work, but his shoulder pain kept getting worse. His shoulder went through the window of the vehicle and the airbag deployed on the front and side, which left a “pretty good” abrasion and small cut above his left eye. He returned to work because he was unable to afford to be off but was still in discomfort. He made an appointment to check his back for damage from his prior surgeries. He had three prior procedures on his back. Prior to the wreck, he was doing “fairly well” and was able to perform all his job functions. After the wreck, his shoulder pain kept him from lifting his elbow above his shoulder. He obtained an MRI and the doctor recommended surgery. Following the surgery, the doctor recommended six to eight weeks of physical therapy. Mr. Bumbalough was able to regain his movement in about 4 ½ weeks of physical therapy. He missed work on the day of his surgery and during his 4 ½ weeks of physical therapy. His lost wages totaled \$2,665.38.

During his recovery, he was not able to perform his daily living activities, including getting dressed, lifting anything over five (5) pounds, or helping around the house. It was hard to stand for long periods. He remains in pain most days, on a scale of 6 to 8.

On cross-examination, additional photographs were admitted, Ex. 7-E and 7-F.

Testimony of Patsy Bumbalough

Patsy Bumbalough is the wife of Dennis Bumbalough, and she testified credibly. They have been married for 32 years. After the wreck, Ms. Bumbalough went to the hospital. Mr. Bumbalough was in a lot of pain. He had some blood and scratches on his face. She could see he was hurting. After returning home, Mr. Bumbalough continued to have pain and overall body aches, particularly his left side. The pain was in his shoulder, neck, middle of his back, and he was not getting better. He was unable to help with any of the household or yard work. He

eventually had surgery. During his recovery, he slept in the recliner and was unable to help around the house. Everything is much harder now for Mr. Bumbalough than before the accident.

Testimony of Sergeant Timothy Hearn

Sergeant Timothy Hearn is employed by the Tennessee Highway Patrol on the critical incident response team (“CIRT”), which mainly does crash reconstruction and crime scene work for the highway patrol. He has been a member of the CIRT team since 2013 and with the highway patrol since 2008. He had five years of law enforcement experience before joining the highway patrol. He is certified as a Crash Reconstructionist, following multiple 80-hour courses. Sergeant Hearn reviewed the Tennessee Crash Report, photographs, depositions, and reports from Mr. Kickirillo. Sergeant Hearn felt the photographs were insufficient to document the scene. Sergeant Hearn felt there was insufficient data due to the lack of measurements and evidence, and therefore, he did not perform an accident reconstruction in this case. Sergeant Hearn did not go out to the scene or seek to obtain any measurements. Sergeant Hearn did not prepare a report. Sergeant Hearn did not offer any independent opinions as to how the accident took place; more specifically, he did not offer any conclusions or opinions as to the way the crash happened. Sergeant Hearn testified EDR data is reliable. While Sergeant Hearn was stipulated as an expert, he offered no substantive opinion or conclusions; therefore, the Tribunal finds the testimony is not relevant.⁸

APPLICABLE LAW

The State, as a sovereign government, is generally immune from suit. However, the Tennessee Constitution in Article 1, Section 17, authorizes the General Assembly to create exceptions whereby certain suits may be brought against the State. Thus, the Claims Commission

⁸ During Sergeant Hearn’s testimony, photograph Exhibits 7-G, 7-H, and 7-I were admitted.

Act was created, which allows certain tort claims to be brought against the State for the acts or omissions of State employees. Tenn. Code Ann. § 9-8-307 (Supp. 2011). For the claim in this case, the Tennessee Claims Commission has jurisdiction under Tenn. Code Ann. § 9-8-307(a)(1)(A) for negligent operation of a motor vehicle.

The State's liability in tort is based on the traditional tort concepts of duty and the reasonably prudent person's standard of care. *See* Tenn. Code Ann. § 9-8-307(c).

"In order to establish a prima facie claim of negligence... a plaintiff must establish the following essential elements: '(1) a duty of care owed by defendant to plaintiff; (2) conduct below the applicable standard of care that amounts to a breach of that duty; (3) and injury or loss; (4) cause in fact; and (5) proximate, or legal, cause.'" *Giggers v. Memphis Hous. Auth.*, 277 S.W.3d 359, 364 (Tenn. 2009), quoting *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995); *see also Begley v. State*, 162 S.W.3d 535, 543 (Tenn. Ct. App. 2004).

The emergency vehicle operator's standard of care is set forth in Tenn. Code Ann. § 55-8-108. It provides, in pertinent part:

(a) The driver of an authorized emergency vehicle, when responding to an emergency call, or when in the pursuit of an actual or suspected violator of the law, or when responding to but not upon returning from a fire alarm, may exercise the privileges set forth in this section, but subject to the conditions stated in this section.

(b)(1) A driver of an authorized emergency vehicle operating the vehicle in accordance with subsection (a) may: . . .

(B) Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation;

(C) Exceed the speed limits so long as life or property is not thereby endangered;
And

(D) Disregard regulations governing direction of movement or turning in specified directions.

For these provisions to apply, the driver must have activated audible and visual signals, i.e., lights and sirens. *See* Tenn. Code Ann. § 55-8-108(c)(1). The driver must still exercise due care for the safety of all persons under the emergency circumstances. *See* Tenn. Code § 55-8-108(b)(2). The driver is required to operate the vehicle in such a manner and at such a speed that is consistent with what a reasonable and prudent person would do under *the same or similar circumstances*. *See Cawthon v. Mayo*, 325 S.W.2d 629, 637 (Tenn. Ct. App. 1958); *Coleman v. Byrnes*, 242 S.W.2d 85, 89 (Tenn. Ct. App. 1950) (emphasis added).

The Tennessee Supreme Court has held that “[u]nusual circumstances may make it reasonable to adopt a course of conduct which causes a high risk of harm to the public. However, such conduct is not justified unless the end itself is of sufficient social value.” *Haynes v. Hamilton County*, 883 S.W.2d 606, (Tenn. 1994). The ability for emergency vehicles to deviate from basic traffic laws is not an absolute right, but a qualified right. The qualified right has been characterized as equal to that imposed upon the average motorist to exercise due care. *See Wright v. City of Knoxville*, 898 S.W.2d 177, 180 (Tenn. 1995).

The purpose of damages is to compensate the injured person for the harms and losses caused by the Defendant’s conduct and the goal is to make the injured person whole with a sum of money. *See Overstreet v. Shoney’s Inc.*, 4 S.W.3d 694, 703 (Tenn. App. Ct., 1999).

CONCLUSIONS OF LAW

At trial, the Tribunal issued a partial oral ruling, which is contained in the trial transcription starting at page 227, line 19 to page 240, line 25, which is adopted and incorporated, as if stated herein. *See* Exhibit A.

As noted in the trial stipulation, a crash occurred between vehicles driven by TBI Agent Robert Simmons and Dennis Bumbalough on November 25, 2017, at approximately 5:12 pm at the four-way intersection of Memorial Blvd. and West Thompson Blvd./Compton Rd. in Murfreesboro, Rutherford County, Tennessee. The weather conditions were dark and clear. Agent Simmons was operating a state-owned 2014 dark blue Dodge Durango, equipped with emergency lights and sirens, and traveling north on Memorial Blvd. Mr. Bumbalough was operating a rented 2018 silver Chevrolet Silverado and traveling west on Compton Rd. At all times relevant to this case, Agent Simmons acted within the course and scope of his employment with the State of Tennessee. The speed limit at the intersection was 40 mph in all directions. Agent Simmons entered the intersection on a red light. Mr. Bumbalough's vehicle came to a final rest at a utility pole on the corner of Memorial Blvd. and West Thompson Blvd.

Prior to the collision, Mr. Bumbalough was in route to work. He was not late and normally arrives early for work. His phone was in his pocket. He was not eating or drinking. His music would have been on a low volume. It was cold and dark that evening. He had his headlights on. He was traveling a little over 40 mph as he approached the intersection, with a green light. As he drove over the crosswalk, he noticed Agent Simmons' vehicle enter the intersection. He had no time to react and braced for impact. The collision deployed both airbags. As depicted in the photographs and testimony, Mr. Bumbalough was driving a full-size, four-door Silverado truck, silver in color, which should have been easily visible to Agent Simmons.

Photographs 6, 7-E, and 7-F depict that as Mr. Bumbalough approached the intersection, a residence, vegetation, and a gas station obscured his visibility of Agent Simmons approaching on Memorial Blvd. Moreover, vehicles stopped in each lane on Memorial Blvd. further obscured

Mr. Bumbalough's visibility, as Agent Simmons passed those vehicles on their left, into the southbound traffic. Agent Simmons TBI vehicle did not have top-mounted lights. Testimony indicates Agent Simmons' siren was activated; however, nothing in the record established when Mr. Bumbalough could have heard the siren based on his location, terrain, and proximity to the subject intersection. The Tribunal finds Mr. Bumbalough did not knowingly fail to yield the right-of-way to an emergency vehicle pursuant to Tenn. Code Ann. § 55-8-132. Based on the totality of the circumstances, the Tribunal finds no fault or negligence on behalf of Mr. Bumbalough.

The emergency vehicle operator's standard of care is set forth in Tenn. Code Ann. § 55-8-108, which allows emergency vehicles to run red lights, but the driver must still exercise due care for the safety of all persons under the emergency circumstances. *See* Tenn. Code § 55-8-108(b)(2). Moreover, TBI Emergency Vehicle Operation policy (Ex. 8) indicates on page one that "[m]ost TBI vehicles are unmarked and are therefore more difficult for the public to recognize than marked units. TBI personnel shall exercise great care when performing emergency vehicle operations, particularly in unmarked vehicles." TBI Emergency Vehicle Operations policy provides at Section C (2)(b) that a law enforcement vehicle may proceed past a red or stop signal, but only after slowing down as may be necessary for safe operations. Sections C (3) and D further provided that TBI agents should exercise caution and regard for the well-being of the public when operating a Bureau vehicle in an emergency.

The fact finder must examine the circumstances surrounding the collision and whether those circumstances justify the driver's actions in order to determine whether an emergency vehicle operator breached this duty of care, *Hardeman Cty. v. McIntyre*, 420 S.W.3d 742, 753

(Tenn. Ct. App. 2013). The facts establish a shooting occurred in Smith County at some point on Saturday November 25, 2017, which involved an officer-involved shooting of the suspect. As a result, TBI was notified. ASAIC Savley traveled from his home in Mount Juliet to Smith County. ASAIC Savley testified prior to his involvement, the suspect was likely in custody, although it was still an active crime scene.

After arriving at the scene, ASAIC Savley telephoned TBI agents, including Agent Simmons to respond. Agent Simmons was at his residence in Murfreesboro, Rutherford County, which does not border Smith County. After leaving his house, Agent Simmons drove his unmarked TBI vehicle. The lights and siren on Agent Simmons' vehicle were activated; the vehicle did not have roof-mounted lights.

As Mr. Bumbalough approached the subject intersection, photograph evidence demonstrates the route of Agent Simmons' approaching vehicle was obscured with a residence, trees, vegetation, and a gas station. Three vehicles were in each lane of traffic on Memorial Blvd. As Agent Simmons approached the subject intersection, he entered the southbound, opposite lane of traffic to go around three vehicles stopped at the red light.

Although Agent Simmons testified at his deposition he stopped at the red light, the EDR data from his vehicle indicates in the five (5) seconds before the collision Agent Simmons slowed down from 30 mph to 17 mph, then accelerated to 24 mph at the time of impact. Agent Simmons was applying 91% of throttle up to ½ second before impact. It was approximately 2.3 seconds from the time Agent Simmons cleared the three vehicles stopped on Memorial Blvd. to the impact with Mr. Bumbalough's vehicle. A typical reaction time is 1.5 seconds to perceive a threat and initiate a response, which does not include the time for a vehicle to respond to slow

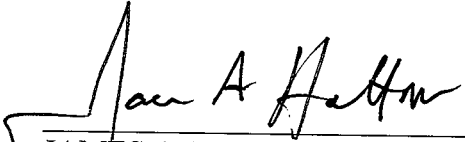
down or stop. In this instance, Mr. Bumbalough had approximately .8 seconds to slow down, swerve, or take other action. Mr. Bumbalough was traveling in a full-size light-colored truck, with the headlights on, traveling near the posted speed limit.

Agent Simmons was responding to an incident, multiple counties from his home, where local law enforcement officers were already on the scene, and his TBI supervisor was on the scene. Stopping at the red light would have taken mere seconds.

Tenn. Code Ann. § 55-8-108, allows emergency vehicles to run red lights, but the driver must still exercise due care for the safety of all persons under the emergency circumstances. *See* Tenn. Code § 55-8-108(b)(2). Moreover, TBI Emergency Vehicle Operation policy (Ex. 8) indicates on page one that “[m]ost TBI vehicles are unmarked and are therefore more difficult for the public to recognize than marked units. TBI personnel shall exercise *great care* when performing emergency vehicle operations, particularly in unmarked vehicles.” (emphasis added). TBI Emergency Vehicle Operations policy provides at Section C (2)(b) that a law enforcement vehicle may proceed past a red or stop signal, but only after slowing down as may be necessary for safe operations. Agent Simmons failed to exercise due care for the safety of all persons under the emergency circumstances, violating Tenn. Code § 55-8-108(b)(2). Agent Simmons failed to slow down as may be necessary for safe operations. Considering the totality of the circumstances, Agent Simmons was negligent in his actions. Claimant Dennis Bumbalough was injured, required surgery, has continued to be in pain, and has missed work resulting from Agent Simmons’ negligence. Accordingly, the Tribunal grants judgment to Claimant Bumbalough and against the State of Tennessee.

As to damages, the Tribunal awards Fifty-Four Thousand Seven Hundred Seventeen Dollars and 90/00 (\$54,717.90) in medical expenses, Two Thousand Six Hundred Sixty-Five Dollars and 38/00 (\$2,665.38) in lost wages, and noneconomic damages of Seventy-Five Thousand Dollars and no/00 (\$75,000.00),⁹ for total damages of One Hundred Thirty-Two Thousand Three Hundred Eighty-Three Dollars and 28/00 (\$132,383.28). The court costs, if any, are taxed to the State of Tennessee, including the costs of the trial court reporter. This Order constitutes a final order, adjudicating all claims.

It is so **ORDERED**.



JAMES A. HALTOM
Commissioner (Judge)
Claims Commission, Middle Division
Sitting as Trial Court of Record

⁹ The categories of non-economic damages include past and future pain and suffering, permanent impairment, and past and future ability to enjoy life. *See Johnson v. Nunis*, 383 S.W.3d 122, 128 (Tenn. Ct. App. 2012) and *Rippy v. Cintas Corp. Servs.*, No. M2010-00034-COA-R3-CV, 2010 WL 3633469, at *1 (Tenn. Ct. App. Sept. 17, 2010). As for pain and suffering, such damages are not easily quantified and do not lend themselves to easy valuation. *See Duran v. Hyundai Motor Am., Inc.*, 271 S.W.3d 178, 210 (Tenn. Ct. App. 2008) (citing *Pomeroy v. Ill. Cent. R.R. Co.*, No. W2004-01238-COA-R3-CV, 2005 WL 1217590, at * 19 (Tenn. Ct. App. May 19, 2005).

CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing document has been served upon the following parties of record:

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This 22nd of October, 2021.

Paula Merrifield

PAULA MERRIFIELD
Administrative Clerk
Tennessee Claims Commission