Tennessee Judicial Nominating Commission

Application for Nomination to Judicial Office

Rev. 26 November 2012

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INTRODUCTION

Tennessee Code Annotated section 17-4-101 charges the Judicial Nominating Commission with assisting the Governor and the People of Tennessee in finding and appointing the best qualified candidates for judicial offices in this State. Please consider the Commission's responsibility in answering the questions in this application questionnaire. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Commission needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website http://www.tncourts.gov). The Commission requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the word processing document.) Please read the separate instruction sheet prior to completing this document. Please submit the completed form to the Administrative Office of the Courts in paper format (with ink signature) ***and*** electronic format (either as an image or a word processing file and with electronic or scanned signature). Please submit fourteen (14) paper copies to the Administrative Office of the Courts. Please e-mail a digital copy to debra.hayes@tncourts.gov.

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

I am presently a Partner in the Law Firm of Medley & Spivy, 111 West Commerce, Suite 201, Lewisburg, Tennessee 37091.

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

I have been licensed to practice since 1990. My Board of Professional Responsibility number is 14103.

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

I am licensed to practice law in the State of Tennessee. My Board of Professional Responsibility number is 14103. My license was issued in 1990 and has been active since that time.

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

No.

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

For the past 23 years, since the completion of my legal education, I have been continuously engaged in the private practice of law in Lewisburg, Tennessee. I began working for Walter W.

Bussart in his Law Office as his associate in 1990. He and I formed the association of Bussart & Medley in 1995. In 2003, I started practicing with Cecilia W. Spivy and we formed the association of Medley & Spivy where I have practiced for the past ten years.

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.

Not applicable.

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

Currently, I am a trial attorney with a general practice of law. Approximately 10% of my practice is devoted to criminal matters and approximately 90% is devoted to civil matters. My civil practice would be broken down into 25% workers' compensation, 25% other personal injury cases, including medical malpractice, products liability, premises liability, motor vehicle collisions, governmental tort liability, railroad litigation and civil rights litigation, 25% domestic relations and 25% I would attribute to miscellaneous general practice areas such as wills, estates, contracts and defense work.

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Commission needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Commission. Please provide detailed information that will allow the Commission to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

I have maintained a general practice of law, handling both civil and criminal matters, my entire legal career. After law school, I went to work as an associate attorney for Lewisburg lawyer Walter W. Bussart after clerking for him in his Lewisburg office as well as Thompson & Bussart in Nashville, Tennessee. I gained invaluable training, guidance and experience from this

respected trial attorney. Within the first several years of my practice, I was trying both jury and non-jury cases. I served as co-counsel in the first degree murder case of State v. Roberts, 1993 WL 266835 where the defendant was convicted of voluntary manslaughter. This gave me the experience to handle several other felony jury trials on my own. I worked for Walter Bussart until 1995 at which time he and I formed the association of Bussart & Medley. We continued to work together on many cases; however, at that time, we each handled our own cases. We worked out of the same office and shared overhead. The nature of my practice remained about the same, a general practice of law. At that time I would estimate about 10% of my practice was criminal. I handled criminal matters in City Court, General Sessions and Circuit Court. At that time a big majority of my practice was workers' compensation, with 80% plaintiff's work and 20% defendant's work. I also handled domestic relations cases, personal injury cases, including medical malpractice, motor vehicle collisions, premises liability and products liability. A small percentage of my practice I devoted to various other miscellaneous general practice areas such as wills, estates and other defense work.

In 2000, I was certified by the National Board of Trial Advocacy and the Tennessee Commission on Continuing Legal Education and Specialization as a Civil Trial Specialist.

In 2003, I moved my law practice to a different location in Lewisburg, Tennessee, and started the association of Medley & Spivy where I practice with another local attorney, Cecilia Spivy, in a similar manner. We each have our own cases and share overhead. Mrs. Spivy practices predominately in the area of real estate and therefore, she and I rarely work on cases together. However, we have handled several large estate cases together.

The nature of my practice has remained about the same with the exception of workers' compensation decreasing significantly over the past several years because of the changes in the workers' compensation laws.

I have reviewed my closed case files for the past 10 years. On average, I handle approximately 75 cases a year. Of that, approximately 10% are criminal and 90% are civil.

I have had a very busy personal injury practice consisting of medical malpractice, motor vehicle collisions, premises liability and products liability. I've handled social security disability cases. I have also had a fairly regular federal and appellate practice. I would estimate that I have handled at least 200 workers' compensation cases over my career and tried at least 25% of those. Many involved the Second Injury Fund as a party. I have tried many bench trials, both criminal and civil.

I have tried the following types of jury trials:

Criminal: Co-Counsel: 1st Degree Murder; Lead Counsel: Robbery, Receiving and Concealing Stolen Property, Sell of a Controlled Substance and Criminal Responsibility.

Civil: Lead Counsel: Medical Malpractice, Motor Vehicle Collisions, Retaliatory Discharge, Title VII/Wrongful Termination and Will Contests.

In recent years, it has become routine for several attorneys in my area to regularly associate me

as lead counsel in matters where they anticipate extensive discovery and/or litigation is likely.

Last year I successfully handled a civil rights, wrongful death case in federal court which settled after successfully defeating the defendant's motion for summary judgment. I have recently been involved in railroad litigation resulting in a successful mediation.

I have always had a regular domestic relations practice handling many divorce trials as well as cases as the appellate level.

I have enjoyed practicing law in a small town and feel fortunate to have gained the degree of expertise that I have in representing my clients in diverse areas, both criminal and civil.

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

The following two reported cases established legal precedent in Tennessee. I was sole counsel in both cases.

Church v. Perales, 39 S.W. 3d 149 (Tenn. Ct. App. 2000). This is a medical malpractice case where I represented the plaintiff. The trial court dismissed the case on summary judgment. I filed an appeal and the Court of Appeals reversed the trial court. Since 2000, this case has been cited as legal precedent and is cited in two Tennessee Pattern Jury Instructions, i.e. *T.P.I. Civil 6.15 Duty to not Abandon Patient* and *T.P.I. Civil 6.16 Medical Negligence-Referring Patient.*

Tryon v. Saturn Corp., 254 S.W. 3d 321 (Tenn., 2008). This is a workers' compensation case that I tried where I represented the plaintiff. The employer appealed the issue of the statutory caps and a meaningful return to work. The Workers' Compensation Panel reversed the Trial Court; however, the Supreme Court reversed the Panel and reinstated the Trial Court's judgment. This case established legal precedent as to what constitutes a meaningful return to work and is regularly cited as authority on this issue.

I was co-counsel in State v. Roberts, 1993 WL 266835 (Tenn. Crim. App. 1993). This was a first-degree murder case where the defendant was convicted of voluntary manslaughter after having been charged with first-degree murder where the defendant's estranged wife pulled a gun on the defendant and a struggle ensued and the defendant gained control of the gun and shot his wife. The court found that the facts corresponded to "voluntary manslaughter, which is defined as the intentional or knowing killing of another in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner." Citing T.C.A. 39-13-211(a); WL 266835, at 2.

I was sole counsel in each of the following cases with the exception of case 9 below where I was co-counsel:

1. Chapman v. Davita, Inc., 380 S.W.3d 710 (2012).

2. Civil Constructors, Inc., et al. v. George Haynes, III, No. M2008-00165-WC-R3-WC, (Tenn. 3/19/2009) (Tenn., 2009).

3. Hill v. Hill, WL 1822453 (MS Tenn. App. 4/23/2008).

4. William Stevie Holton v. Marshall County and Sue Ann Head, Administrator for the Second Injury Fund, No. M2005-01980-WC-R3-CV, (Tenn. 2/14/2007)(Tenn., 2007).

5. Polly v. Saturn Corporation, No. M2006-00488-WC-R3-CV,(Tenn. 4/18/2007)(Tenn., 2007).

6. Walls v. NHC, No. M2005-02384-WC-R3-CV, (December 27, 2006).

7. Lamb v. Lamb, No. M2004-01768-COA-R3-CV, (TN 2/28/2006)(TN, 2006).

8. In re: The Estate of Martha G. Spencer, No. M2001-02187-C08-R3-CV, (Tenn. Ct. App., 2002).

9. Peoples Bank of Elk Valley v. American Bankers Financial Services, Inc., No. 01A01-9506-CV-00260, (December 10, 2001).

10. Clark, et al. v. Lemley, No. M1999-01271-COA-R3-CV, (Tenn. Ct. App., 2000).

11. Carter v. NHC, No. 10S01-9704-CH-00093, (April 1, 1998).

12. Tepedino v. Tepedino, No. CA-01A01-9701-CH-00035, (Tenn. December 30, 1997)

13. Scruggs v. NHC d/b/a Merihil Healthcare Center, Inc., Supreme Court of Tennessee Special Workers' Compensation Appeals Panel at Nashville, Case No. 01S01-9504-CH-00052, (May 16, 1997).

14. Hand v. Hand, No. 01A01-9607-CH-00325, (April 18, 1997).

15. Purdom v. Teledyne Systems Co., Inc., No. 01S01-9601-CH-00009, (October 15, 1996).

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.

In 2002 I was appointed by the Tennessee Supreme Court to serve as a Hearing Committee Member for the Board of Professional Responsibility. I served from 2002 until 2008 for 2 terms. As such, part of my duties included approving or modifying recommendations by Disciplinary Counsel for dismissals and informal admonitions for attorneys. Further, during this tenure I had the opportunity to serve in a quasi-judiciary capacity by conducting formal hearings for attorneys charged with misconduct. Pursuant to Rule 9 of the Rules of the Tennessee Supreme Court, 3 district committee members conducted hearings on formal charges of misconduct. Disciplinary Counsel had to prove the case by a preponderance of the evidence. We, as a panel, were required to submit our findings and judgment, in the form of a final decree of a trial court, to the Board within 15 days after the hearing. Prior to these hearings, we conducted pre-hearing conferences and issued scheduling orders.

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

On several occasions, at the request of the Chancellor or Judge, I have served as guardian ad litem for children in legal matters. Recently, I was guardian ad litem for a mentally incapacitated adult in a significant medical malpractice case at the request of counsel for the Plaintiff and Defense where I was asked to review the medical proof and give my opinion on the reasonableness of the settlement.

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

I assisted with the SCALES project in the 17th Judicial District in 1998 when the Tennessee Supreme Court held its session in Bedford County, Tennessee.

13. List all prior occasions on which you have submitted an application for judgeship to the Judicial Nominating Commission or any predecessor commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

I submitted an application to the Judicial Nominating Commission for the vacancy in the 17th Judicial District when Chancellor Tyrus Cobb retired. The meeting took place on July 12, 1999. My name was submitted as a nominee, but I did not receive the appointment.

EDUCATION

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

1982-1984 Columbia State Community College. I graduated Cum Laude with an Associates degree in Computer Science.

1984-1986 University of Tennessee at Knoxville. I received a Bachelor of Arts degree with honors with a major in Psychology and a minor in Political Science.

1986-1989 University of Memphis School of Law. I received a Doctor of Jurisprudence degree. I was a member of the Moot Court Board during my second and third year and served as Associate Justice my third year. I also received an American Jurisprudence Award in Trial Advocacy and in Decedent's Estate.

PERSONAL INFORMATION

15. State your age and date of birth.

I am 48 years old. My date of birth is June 8, 1964.

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

I have lived continuously in Tennessee all of my life.

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

With the exception of college, I have always lived in Marshall County, Tennessee.

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

I am registered to vote in Marshall County.

19. Describe your military Service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

Not applicable.

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

No.

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

No.

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

Not applicable.

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

No.

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

No.

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

No.

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and

fraternal organizations. Give the titles and dates of any offices which you have held in such organizations.

I am a member of the First Presbyterian Church in Lewisburg, Tennessee. I served as Clerk of the Session from 1997 to 2000. I was a member of the Lewisburg Middle School Booster Club and I am currently a member of Marshall County High School Booster Club.

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

  a. If so, list such organizations and describe the basis of the membership limitation.

  b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

No.

ACHIEVEMENTS

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

Marshall County Bar Association, member 1990 to present

Tennessee Bar Association, member 1990 to present. I served on the House of Delegates for the 17th Judicial District from (appx. 1998 to 2000).

I was Middle Tennessee Director-at-Large for Tennessee Lawyer's Association for Women, 1991-1993 and 1996-1998.

American Bar Association, 1990-1996, 2012 to present.

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

In 2000, I was certified as a Civil Trial Specialist by the National Board of Trial Advocacy and the Tennessee Commission on Continuing Legal Education and Specialization. To be certified, attorneys must have years of experience in their field, special education, pass an examination and receive positive recommendations from other lawyers, judges and their clients.

On March 17, 2008, I received a Recognition of Distinguished Service from the Board of Professional Responsibility of the Supreme Court of Tennessee for serving as a Hearing Committee Member from 2002-2008.

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

Not applicable.

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

Not applicable.

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

In 1998, I was a candidate for Marshall County General Sessions and Juvenile Court Judge, an elected position. In 1999, I was an applicant for the 17th Judicial District vacancy, an appointed position as set forth in paragraph 13 above.

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

No.

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

Exhibit A Jackie Wayne Clark v. Councill Rudolph, M.D., Circuit Court of Franklin County, Tennessee. September 25, 2012. This is the Plaintiff's Motion in Limine to exclude the testimony of the defendant's standard of care expert George Maish, M.D. for failure to satisfy the locality rule. This writing reflects 100% of my own personal effort.

Exhibit B Doris Rollins v. Randall Boyce, Sheriff of Bedford County, et al., In the United States District Court for the Eastern District of Tennessee. October 23, 2011. I was lead counsel in this wrongful death case involving the 8th Amendment right to receive necessary medical treatment. After defeating the defendant's motion for summary judgment, the defendant, on the eve of trial, filed a motion for a stay of trial proceedings seeking an interlocutory appeal on the issue of qualified immunity. This motion was denied and the case shortly thereafter settled. This Memorandum represents 100% of my own personal effort.

Exhibit C Johnny David Hill, Sr. v. Connie Sue Hill, Court of Appeals for the State of Tennessee for the Middle District of Tennessee at Nashville. June 28, 2007. I represented the wife in this divorce trial where the trial court granted a legal separation rather than an absolute divorce. The appeal involved this issue as well as whether the trial court was correct in its equitable distribution of property and awarding the wife $2,000.00 per month in permanent alimony. This brief reflects 100% of my own personal effort.

Exhibit D Earl Douglas Tryon v. Saturn Corp., Supreme Court for the State of Tennessee at Nashville. Brief of Appellant filed September 7, 2007. This is a workers' compensation case where I represented the employee and the employer appealed arguing that the plaintiff had made a meaningful return to work. The Special Workers' Compensation Appeal Panel modified the trial court's judgment holding that the award was subject to the lower statutory cap. On behalf of the plaintiff, I filed a motion for review by the entire Supreme Court which was granted. The Supreme Court reversed the Panel and affirmed the trial court in its entirety. This case established legal precedent in Tennessee as to what constitutes a meaningful return to work. This brief represents 100% of my own personal effort.

Exhibit E Barbara O. Plemons v. Tennessee Technical Coatings Corp., In the Circuit Court for Marshall County, Tennessee at Lewisburg. October 12, 2000. This is a Memorandum in support of the defendant's motion for summary judgment which involved the application of exemptions under the Fair Labor Standards Act, in particular, the administrative exemption. I represented the defendant, Tennessee Technical Coatings Corp. who has been a regular corporate client of mine for years. The summary judgment motion was overruled because of issues of fact; however, we were successful at trial and the case was dismissed. This memorandum represents 100% of my own personal effort.

Exhibit F State of Tennessee v. Tony Lee Gentry, In the Circuit Court of Marshall County, Tennessee, May 29, 1996. I represented the defendant in this matter who was charged with robbery. I have attached the Memorandum in support of the defendant's motion for discovery. This memorandum represents 100% of my own personal effort.

ESSAYS/PERSONAL STATEMENTS

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

I have had the privilege over the past 23 years of my practice to represent and help hundreds of clients with a wide variety of legal matters. In doing such, I have always done my best to offer

my clients competence, diligence and good judgment.

During the course of my practice, I have been in many court rooms and practiced before many different judges in this state. In doing so, I have learned what qualities lend themselves to a good judge. A judge is a public servant charged with the responsibility of fairly and impartially administering the laws that govern us. A good judge is capable and willing to do so with competence, patience, humility and decency. I believe that my diverse experience as a trial lawyer, my knowledge of the law and capability of reading and understanding it and my life experiences render me uniquely qualified to serve the public of the 17th Judicial District as Circuit Court Judge.

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

Throughout my career, I have provided pro bono services, including providing services through Legal Services of South Central Tennessee. The majority of pro bono cases sent from Legal Services involved domestic issues including divorce, custody and orders of protection. On several occasions, I have represented indigent clients referred to me by my church. I regularly represent indigent child support defendants by way of court appointment without applying for payment for services through the State. Similarly, before our judicial district had the regular presence of a public defender, I represented indigent criminal defendants. When representing clients on an hourly basis, on many occasions I have forgiven balances and continued representing clients to the best of my ability even though they couldn't finish paying bills that were due.

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 the position of Circuit Court Judge for the 17th Judicial District which includes Bedford, Lincoln, Marshall and Moore Counties. The district has two Circuit Court judges and one Chancellor. The Circuit Judges exercise both criminal and civil jurisdiction. The Circuit Judges may also hear chancery matters by interchange in accordance with the local rules. The Circuit Judges also hear General Sessions and certain Juvenile appeals. If selected, I would offer extensive experience, integrity, competence, good judgment and fairness to the litigants, attorneys, witnesses, jurors and others involved in our court system. I would do my best to oversee the administration of justice in an efficient and respectful manner.

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

In the past, I have been very active in the Lewisburg Kiwanis Club having served as Secretary, President-Elect, President and Director. The primary duty of Kiwanians is that of assisting children. After my own children got older, I redirected my involvement more to school related activities. I was a parent/teacher liason at Oak Grove Elementary School. I have served as President of the Lewisburg Middle School Booster Club. I am currently Treasurer for the Marshall County High School Softball Booster Club. This past summer I worked with "Wills for Heroes," a program sponsored by the YLD of the TBA. I assisted first responders and spouses with estate planning documents at no charge. I will continue to support local charitable organizations in fundraising efforts and be actively involved in community service.

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

I was born and raised in Marshall County, Tennessee, as were my parents who recently celebrated their 50th wedding anniversary. I have two sisters who reside in Marshall County with their families. My father is retired from the Marshall County School System and my sisters are teachers as well.

I have been married to Brad Medley for 22 years. He is also a life-long resident of Marshall County and we both graduated from Marshall County High School. We have three children. Our oldest daughter, Mary (19), is a freshman at the University of Tennessee in Knoxville. Our youngest daughter, Grace (15), is a sophomore at Marshall County High School and our son Will (12) will begin Lewisburg Middle School in the fall.

My husband is the supervisor of the linemen and groundmen at Lewisburg Electric System. Our children are good students and have been involved in extracurricular activities including various sporting activities, student government, music and the Marshall County Community Theater. It has been very challenging to maintain a full-time busy law practice and raise three active children. As a result, I am a more patient person and have gained life experiences that will allow me to bring an experienced perspective to the bench.

Based upon my experiences in the courtroom, I believe that a judge who promotes civility tends to create a less stressful environment in one which is typically adversarial by nature.

I believe that my diverse practice makes me uniquely qualified to serve as Circuit Court Judge. It would allow me to review cases from a wide variety of perspectives and to rule without predisposition to favor any particular litigant.

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. If I am chosen to fill the judicial vacancy, I will perform my judicial duties impartially and fairly. I will always uphold the law regardless of my personal beliefs and even if I disagree with the substance of the law.

For example, on a certain level, I have always disagreed with the Locality Rule in a medical malpractice case. The law provides that experts testifying on behalf of the plaintiff or on behalf of the physician charged with negligence must be familiar with the medical community in which the defendant practices or a similar community. The standard of care is considered to be a local standard of care as opposed to a national standard of care. Over the years, I have found that many doctors believe that the standard of care, in many areas, is, in fact, a national standard of care. I have found this to be so whether the expert is testifying on behalf of the plaintiff or on behalf of the defendant. Certainly, on many issues that standard of care does depend on the size of the medical community and the resources available. However, many doctors will tell you that there is a minimum standard of care to which they should adhere, which is a national standard of care when it comes to certain treatment. I tend to agree with them. The Locality Rule has recently been relaxed in the Supreme Court case of Shipley v. Williams. The Locality Rule was not abolished but the court held that an expert need demonstrate only a modicum of familiarity with the medical community at issue. The court also held that referencing a national standard of care would not be fatal to the expert's opinion.

When making admissibility determinations as to experts, in both criminal and civil cases, a trial court's role as gatekeeper is critical. As judge, when making admissibility determinations as to expert witnesses, I would follow the law and determine whether the proposed expert's testimony meets the levels of relevance and reliability established by the Tennessee Rules of Evidence.

An independent and honorable judiciary is indispensible to justice in our society. As set for in the Preamble to the Code of Judicial Conduct, our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us.

REFERENCES

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

A. William B. Marsh, CEO, First Commerce Bank, 500 N. Ellington Parkway, Lewisburg, Tennessee 37091, phone number 931-359-4322

B. Jackie Abernathy, [redacted]

C. Walter W. Bussart, Attorney, 520 North Ellington Parkway, Lewisburg, Tennessee 37091, phone number 931-359-6264
D. J. Stanley Rogers, Attorney, 100 N. Spring. St., Manchester, TN 37355, phone number 931-728-0820
E. Stephen S. Bowden, Attorney and former General Sessions Judge, 107 1st Ave. South, Lewisburg, Tennessee 37091, phone number 931-359-3039

AFFIRMATION CONCERNING APPLICATION

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

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the Circuit Court of the 17th Judicial District of Tennessee, and if appointed by the Governor, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended questionnaire with the Administrative Office of the Courts for distribution to the Commission members.

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

Dated: Feb. 13, ______, 20 13.

Signature

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

TENNESSEE JUDICIAL NOMINATING COMMISSION

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

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

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information which 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 Tennessee Judicial Nominating Commission to request and receive any such information and distribute it to the membership of the Judicial Nominating Commission and to the office of the Governor.

Barbara G. Medley
Type or Printed Name

Barbara G. Medley
Signature

Feb. 13, 2013
Date

14103
BPR #

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

EXHIBIT A

IN THE CIRCUIT COURT OF FRANKLIN COUNTY, TENNESSEE

JACKIE WAYNE CLARK, as next friend and personal representative of KARLA RAE CLARK, deceased and the Estate of KARLA RAE CLARK,

Plaintiff,

vs.

COUNCILL RUDOLPH, M.D.,

Defendant.

Case No. 17019-CV
Jury Demand

PLAINTIFF'S MOTION IN LIMINE NO. 1 TO EXCLUDE THE TESTIMONY OF GEORGE MAISH, M.D.

The Defendant plans on offering the testimony of George Maish, M.D., a board certified surgeon, who is an associate professor at the University of Tennessee Health Science Center in Memphis, Tennessee. (Maish depo., p. 6 and 7). Dr. Maish has been licensed in the State of Tennessee since 2005 after moving to Tennessee upon completion of his residency and internship at the Hershey Medical Center in Hershey, Pennsylvania. (Maish depo., p. 5).

Tennessee Code Annotated § 29-26-115 governs medical malpractice cases and provides, in relevant part, as follows:

> Section 29-26-115. Burden of Proof; Expert Witnesses.
>
> (a) In a malpractice action, the claimant shall have the burden of proving by evidence as provided by subsection (b):
>
> (1) The recognized standard of acceptable professional practice in the profession and the speciality thereof, if any,

that the defendant practices in the community in which the defendant practices or a similar community at the time the alleged injury or wrongful action occurred;
(2) That the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standards; and,
(3) As a proximate result of the defendant's negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred.

(b) No person in a healthcare profession requiring licensure under the laws of this state shall be competent to testify in any court of law to establish the facts required to be established by sub-section (a), unless the person was licensed to practice in the state or a contiguous bordering state a profession or specialty which would make the person's expert testimony relevant to the issues in the case and had practiced this profession or specialty in one of these states during the year preceding the date that the alleged injury or wrongful act occurred. **This rule shall apply to expert witnesses testifying for the defendant as rebuttal witnesses.** ***Emphasis added.***

The requirement contained in *T.C.A. § 29-26-115(a)(1)* is known as the "Locality Rule," and it is based upon the premise that "doctors charged with negligence in this state must receive a fair assessment of their conduct in relation to the **community standards** similar to the one in which they practice. Sutphin v. Platt, 720 S.W. 2d 455, 457 (Tenn. 1986).

The Locality Rule requires that the claimant demonstrate the recognized standard of acceptable professional practice....in the community in which the defendant practices or in a similar community. *T.C.A. §29-26-115(a)(1)*. Shipley, et al. v. Williams, 2011 WL3505281, p. 28 (Tenn. 2011). The statute does not require a particular means or

manner of proving what constitutes a "similar community" nor does it define the term. Id. Generally, an expert's testimony that he or she has reviewed and is familiar with pertinent statistical information such as community size, hospital size, the number and type of medical facilities in the community, and medical services or specialized practices available in the area; has discussed with other medical providers in the pertinent community or a neighboring one regarding the applicable standard of care relevant to the issues presented; or has visited the community or hospital where the defendant practices, will be sufficient to establish the expert's testimony as relevant and probative to substantially assist the trier of fact to understand the evidence or to determine a fact or issue under *Tennessee Rule of Evidence 702* in a medical malpractice case and to demonstrate that the facts on which the proffered expert relies are trustworthy pursuant to *Tennessee Rule of Evidence 703*. Id.

A proffered medical expert is not required to demonstrate first hand and direct knowledge of a medical community. Id. There is substantial Tennessee precedent allowing experts to become qualified by educating themselves by various means on the characteristics of a Tennessee medical community. Id. A proffered expert may educate himself or herself of the characteristics of a medical community in order to provide competent testimony in a variety of ways, including but not limited to reading reference materials on pertinent statistical information such as community and/or hospital size and the number and type of medical facilities in the area, conversing with other medical

providers in the pertinent community or a neighboring or similar one, visiting the community or hospital where the defendant practices, or other means. Id. at p. 29.

The testimony of Dr. Maish does not satisfy the locality rule. He is questioned about the standard of care in Franklin County, Tennessee in May of 2007, as follows:

> Q: How do you know the standard of care in Franklin County, Tennessee?
>
> A: Well, I'm licensed - - I was licensed in Tennessee at the time. And to the best of my ability, I - - the standard in Shelby County isn't all that different from the standard in Franklin County.
>
> Q: Okay. Do you know the county seat of Franklin County?
>
> A: I believe it's Chattanooga.
>
> Q: And do you know the population of Franklin County?
>
> A: No, I do not.
>
> Q: What about the medical facilities that are available in Franklin County, do you know what types of medical facilities are available in Franklin County?
>
> A: Certainly I know that there's Erlanger Medical Center in Chattanooga and Southern Tennessee. But, no, I don't know all the medical institutions in Franklin.
>
> Q: Okay. Do you know what type of medical facility Southern

Tennessee Medical Center in Winchester is?

A: My understanding was that it's a several hundred bed hospital. I don't - -

Q: Okay.

A: I've never been inside it.

Q: All right. My next question was the number of beds. So you said several hundred. So it's your understanding there are about 300 beds?

A: That's my understanding. But, again, that's not - - I don't have the - - I can't testify to - - to certainty on that.

Q: Okay. And do you know what types of specialty services are provided at Southern Tennessee Medical Center?

A: Well, I know that Dr. Clark (sic) is a general surgeon, and so I was testifying regarding his ability as a general surgeon.

Q: Okay. Do you know the number of general surgeons on staff there?

A: No, I do not.

Q: Do you know if the - - there is nutritional support staff offered by Southern Tennessee Medical Center?

A: No, I do not.

Q: Do you know if they have a pulmonologist on staff?

A: I believe there was a consult from a pulmonologist for concerns of exacerbation of COPD.

Q: Okay.

A: So I'm almost positive I saw a pulmonologist consult.

Q: Okay. Do you know if there was a gastroenterologist specialist there?

A: Not for certain, no.

Q: What about an infectious disease specialist?

A: I believe they had the ability to contact Vanderbilt's infections disease folks for consultation if they needed it. So it would lead me to believe that they did not have an infectious disease at Southern Tennessee.

Q: Okay. Other than the department of general surgery and then I think you said you believe there was a pulmonologist on staff, do you actually know any other specialty doctors that were represented?

A: No, I don't.

Q: Have you ever talked to any of the doctors at Southern Tennessee Medical Center?

A: No, I have not.

Q: Do you know Dr. Rudolph?

A: No.

Q: Never met him?

A: No.

Q: Do you know the attorneys involved in this case, Dean Clements or Art Moore (sic), prior to meeting them in this case?

A: No.

Q: Have you ever practiced medicine in a community similar to - - similar to that of Franklin County?

A: Yes, Hershey is a town of 19,000. That's a tertiary care center that services close to 2 ½ million people but over a very large geographic area. So whether that's similar to Franklin County, I don't know.

Q: Have you ever practiced medicine at what I call a community hospital?

A: I have rotated at community hospitals both - - during residency, but I have only practiced at university hospitals.

(Deposition of George Maish, M.D., pp. 16 - 19, l. 6 - l. 19).

In summary, Dr. Maish believes the county seat of Franklin County is Chattanooga, which is erroneous. He does not know the population of Franklin County. He knows very little about the medical facilities in Franklin County and most of what he

does know is erroneous. He believes Erlanger Medical Center is a medical facility in Franklin County. He can't testify to the number of beds at Southern Tennessee Medical Center. He does not know the number of surgeons on staff on Southern Tennessee Medical Center. He thinks there may be a pulmonologist on staff at Southern Tennessee Medical Center but honestly testifies that he does not know any other specialty doctors represented at Southern Tennessee Medical Center.

He has never talked to any of the doctors at Southern Tennessee Medical Center. He has never practiced medicine at a community hospital. He testified that he practiced in Hershey, Pennsylvania, a town of about 19,000 which had a tertiary care center that serviced close to 2 ½ million people but whether that is similar to Franklin County, he testified, "I don't know."

While a medical expert is not required to demonstrate first hand and direct knowledge of the medical community, he must at least demonstrate some familiarity with the medical community. Dr. Maish is not familiar with the statistical information of the community or of the hospital. He has not had any discussion with medical providers in the pertinent community. He has not visited the medical community or the hospital.

In summary, Dr. Maish's testimony does not satisfy the locality requirement as set forth in *T.C.A. § 29-26-115(a)(1)*. Specifically, there is a lack of any familiarity with the medical community in which the defendant practices or similar community and therefore is not admissible under the *Tennessee Rules of Evidence 702* and *703*.

Respectfully submitted,

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PLEASE TAKE NOTICE PLAINTIFF'S COUNSEL WILL APPEAR ON THIS MOTION ON SEPTEMBER, 25, 2012, AT 9:00 A.M. IN THE CIRCUIT COURT OF FRANKLIN COUNTY.

CERTIFICATE OF SERVICE

I hereby certify that I have on this the ____ day of __________, 2012, served a true and exact copy of the foregoing Motion in Limine by placing in the U.S. Mail, postage prepaid to:

Arthur P. Brock, Esq.
SPEARS, MOORE, REBMAN & WILLIAMS
801 Broad Street, Sixth Floor
P.O. Box 1749
Chattanooga, TN 37401-1749

BARBARA G. MEDLEY

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

DORIS ROLLINS, Next of Kin of LARRY DALE BYFORD, Plaintiff, vs. RANDALL BOYCE, Sheriff of Bedford County, CAPTAIN TIM LOKEY of Bedford County Workhouse, DONNA DELRIO, Nurse for Bedford County Sheriff's Department, BEDFORD COUNTY, TENNESSEE, and JOHN OR JANE DOE, Employees fo Bedford County, Tennessee, Defendants.	)	Civil Action File No.:4:10-CV-78 Judge Mattice Administrative Judge Lee JURY DEMAND

PLAINTIFF'S MEMORANDUM IN RESPONSE TO AND IN OPPOSITION TO DEFENDANTS' MOTION FOR A STAY OF TRIAL PROCEEDINGS

Comes now the Plaintiff and files this Memorandum in Response to and in Opposition to the Defendants' Motion for Stay of Trial Proceedings.

Defendants' Waived Right to Present Issue of Qualified Immunity On Appeal

The Plaintiff would submit that the Defendants waived the right to present the issue of qualified immunity on appeal as they did not pursue this argument before the court in their motion for summary judgment.

The denial of a defendant's pre-trial claim of qualified immunity, to the extent that it turns on an issue of law, is appealable on an interlocutory basis. *Mitchell v. Forsyth*, *472 U.S.*

511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985). An interlocutory appeal is not available where defendants did not raise qualified immunity in motion for summary judgment or motion to dismiss. *Elliott v. Latar*, 497 F.3d 644, 649-651 (6th Cir. 2007). Defendants waived right to present issue of qualified immunity on appeal, where "although the defendants preserved the defense in their first responsive pleading and in their answer to Brown's complaint, they did not pursue this argument before the district court in the motion for summary judgment that they had filed after the case was remanded." *Brown v. Crowley, 312 F. 3d 782, 787 (6th Cir. 2002).*

The Plaintiff would submit that the Defendants have waived the right to pursue this issue on appeal because the argument for qualified immunity was not pursued in their Motion for Summary Judgment. The Defendants' summary of argument as it pertains to the Defendant, Donna Delrio is as follows:

The Plaintiff's claim against Donna Delrio fails because she provided treatment for Larry Dale Byford's medical needs and any challenge to the sufficiency of this treatment is merely an attempt to constitutionalize the state law claim for medical malpractice.

(Defendants' summary argument set forth in Motion for Summary judgment at Document No. 31, p. 1). Further, the Defendant argues "Nurse Delrio did not violate Byford's Eighth Amendment Right to medical treatment because Nurse Delrio treated Byford's medical needs." (Document No. 31, p. 12). This court has interpreted the claim against Nurse Delrio as a "failure to secure medical treatment.......pursuant to the Eighth Amendment." *Id.* A failure to provide medical treatment claim under the Eighth Amendment requires Plaintiff to allege that Defendants acted with "deliberate indifference to serious medical needs." *Id.* To prove deliberate indifference that violates the Eight Amendment protection against acts or omissions

that offend the "evolving standards of decency," a claim must satisfy two requirements. Id. First, based on an objective standard, the alleged deprivation must be sufficiently serious in nature or pose a substantial risk of serious harm. (Document No. 31, page 13). This means that the deprivation must result in the denial of "the minimal civilized measures of life's necessities." Id. Second, based on a subjective standard, the prison official must have the "sufficiently culpable state of mind" to violate the cruel and unusual punishments clause of the Eighth Amendment. Id. The state of mind required must be one more blameworthy than negligence. Id. The official must subjectively know about and disregard an excessive risk to a prisoner's health or safety. Id. Prison officials who act reasonably are not liable under the Eighth Amendment. Id.

For purposes of the Summary Judgment Motion, the Defendants do not dispute that Byford had a sufficiently serious medical need. Id. They argue that Nurse Delrio is entitled to qualified immunity[1] because the undisputed facts fail to establish that she "subjectively perceived facts from which to infer substantial risk to Byford, that she did in fact draw the inference and that she then disregarded that risk." (Document No. 31, p. 14).

In support of this argument, the Defendants then go on to allege a number of facts they claim are undisputed. (Document No. 31, p. 14-17).

As this Court points out in its Memorandum and Order, the Sixth Circuit acknowledges

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[1] Although the Defendants include the statement that Nurse Delrio is entitled to qualified immunity here, the argument that follows is that the undisputed facts establish Nurse Delrio was not deliberately indifferent. The Defendants did not analyze or argue the law of qualified immunity. The Plaintiff includes in this Memorandum a section titled Qualified Immunity which includes a brief outline of the applicable law to demonstrate that this in fact was not argued by the Defendants in their Motion for Summary Judgment.

special issues of proof facing a plaintiff as to the subjective component, noting that because government officials do not readily admit the subjective component of this test, it may be demonstrated in the usual ways, including inference from circumstantial evidence....and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious. (Document No. 72, p. 18). The Court notes in this case, the Defendant largely relies on the depositions of its employees — Nurse Delrio in particular — and then attempts to undermine Plaintiff's responsive evidence grounded in the written records provided by Bedford County using those same depositions. *Id.* The issues of whether Delrio ordered the treatment she did and when she saw Byford, how he appeared are the very heart of the matters at issue in this case and the credibility of Defendant Delrio's testimony on those issues are crucial to the determination of this claim. (Document 72, p. 20). Such credibility is a matter reserved to the factfinder and therefore, at this stage of the proceedings, summary judgment is simply not appropriate on Plaintiff's claim against Nurse Delrio. *Id.*

Qualified Immunity Claim

The Defendants did not argue qualified immunity in their Motion for Summary Judgment. Under the Qualified Immunity Doctrine, government officials performing discretionary functions generally are shielded from liability from civil damages in so far as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Perez v. Oakland Co.*, 466 F. 3d 416, 427 (6th Cir. 2006).

In evaluating a qualified immunity defense, the court engages in a two part analysis. *Id.* The Court first determines whether, on the facts alleged, the official violated the constitutional

or statutory right. *Id.* The court views the facts alleged in the light most favorable to the parties seeking to defeat immunity. *Id.* If the plaintiff does not establish the violation of a constitutional or statutory right, the inquiry ends there and the official is entitled to immunity. *Id.*

It is well established that the Eighth Amendment's prohibition of cruel and unusual punishment provides the basis to assert a claim, under 42 U.S.C. § 1983, of deliberate indifference to a prisoner's serious medical needs. *Estelle v. Gamble, 429 U.S. 97, 104-105 (1976); Phillips v. Roane County, 534 F. 3d 531, 539 (6th Cir. 2008).*

The Defendants have stipulated that Larry Byford had a sufficiently serious medical need. There is no issue in this case as to whether Larry Dale Byford had a constitutional right as guaranteed by the Eight Amendment to be free from deliberate indifference to his medical needs.

The second step of the qualified immunity test is whether this right violated was "clearly established" at the time of the violation. *Perez at 466.* The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in this situation he confronted. *Id.* The Defendants have made no such showing or argument. The Plaintiff would submit that such an inquiry would be a question of fact in this case.

Summary

In summary, the Defendants are not entitled to an automatic interlocutory appeal because this argument was not pursued in their Motion for Summary Judgment. Further, even

if the Defendants' argument in their Motion For Summary Judgment is interpreted as an argument for qualified immunity, they still would not be entitled to an automatic interlocutory appeal because the determination of whether qualified immunity exists in this case would not turn on an issue of law but rather on an issue of fact which is appropriate for the factfinder as opposed to an interlocutory appeal. Finally, even if the court finds that the Defendants did not waive the issue of qualified immunity and that the question of whether qualified immunity exists turns on an issue of law as opposed to an issue of fact, the Plaintiff is requesting that the stay be denied and that this matter proceed to trial against the county.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF, DORIS ROLLINS

CERTIFICATE OF SERVICE

I hereby certify that I have on this the 23rd day of October, 2011, forwarded a true and exact copy of the foregoing Plaintiff's Memorandum in Response to and in Opposition to Defendants' Motion for a Stay of Trial Proceedings, via U.S. Mail, and electronic mail, to:

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ATTORNEYS FOR DEFENDANTS

/s/ Barbara G. Medley
BARBARA G. MEDLEY

EXHIBIT C

IN THE COURT OF APPEALS OF THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

JOHNNY DAVID HILL, SR.	)
	)
PLAINTIFF/APPELLANT,	)
	) CASE NO. M2007-00471-COA-R3-CV
vs.	) Appealed from the Chancery Court of
	) Lincoln County, Tennessee No. 00012454
CONNIE SUE HILL,	)
	)
DEFENDANT/APPELLEE.	)

BRIEF OF APPELLEE

ORAL ARGUMENT REQUESTED

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DESIGNATIONS

The pleadings will be referred to as the Technical Record and cited as "T.R., p. ___".

The trial transcript will be referred to as "T.T. p.____ ".

The exhibits shall be referred to as "Ex.___".

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. WHETHER THE TRIAL COURT ERRED IN GRANTING A LEGAL SEPARATION RATHER THAN AN ABSOLUTE DIVORCE IN THIS CASE.

II. WHETHER THE TRIAL COURT MADE AN EQUITABLE DISTRIBUTION OF THE MARITAL DEBTS AND PROPERTY.

III. WHETHER THE TRIAL COURT ERRED IN AWARDING THE WIFE $2,000 PERMANENT ALIMONY.

STATEMENT OF THE CASE

The wife agrees with the husband's statement of the case with the following additions.

The wife's Motion to Amend her Counter-Complaint and the husband's Motion to Dismiss the Amended Complaint were heard by the trial court on November 8, 2006, prior to the trial. (T.T. at p. 4.- 12). Prior to ruling, the court asked counsel for the husband if her client would be prejudiced if the court allowed the amendment. (T.T. p. 8, l. 7-9). Counsel for husband responded that he would not. (T.T., p. 8, l. 14). The court offered the husband a continuance but counsel for the husband stated that they were not in need of further time and ready to proceed. (T.T., p. 11, l. 1-20).

While the matter was under advisement, the wife filed a Motion to Consider Additional Evidence. However, said motion was not set, argued or considered. (T.R. 22-24).

STATEMENT OF THE FACTS

At the time of trial, the parties had been married for 43 years. (T.T. p. 24, l. 4, p. 105, l. 12). Mr. Hill was 62 years old and Mrs. Hill was 60. (T.T. p. 23, l. 25, p. 105, l. 6). The parties have two adult children. (T.T. p. 24, l. 15). Mr. Hill had been driving a truck since 1984. (T.T. p. 26, l. 24). The parties owned and operated a dairy farm from the beginning of the marriage until 1984 when it went bankrupt. (T.T. p. 27, l. 22 - p. 28, l. 9).

Mr. Hill graduated from high school. (T.R. p. 1). Mrs. Hill was 17 when the parties were married so she did not graduate high school. (T.T. p. 105, l. 23). Approximately 10 years after the parties were married, she obtained her GED. (T.T. p. 106, l. 4).

When the parties first married, Mrs. Hill worked for a short period of time, less than a year, for Williams Home Decorating. (T.T. p. 106, l. 8-17). She kept the books, waited on customers and did the ordering. (T.T. p. 106, l. 12-14). Mrs. Hill quit this job when she became pregnant with the parties' first child. (T.T. p. 106, l. 19). After the parties' son was born on November 2, 1964, she did not return to work. (T.T. p. 106, l. 24).

Mrs. Hill took care of the house, mowed the yard, raised a garden and took care of the children. (T.T. p. 107). From 1974 until 1977, the parties had a feed store in Fayetteville. (T.T., p. 108, l. 6). Mrs. Hill worked in the feed store in addition to the dairy farm during this time. (T.T. p. 108, l. 7-16).

After the dairy farm went bankrupt, she worked for a construction company for about 18 months where she kept the books, did the ordering and measured houses for carpet. (T.T. p. 109, l. 19-25). She went to work as a bookkeeper for Coca-Cola Bottling Company from 1983 until it

closed in 1991. (T.T. p. 110, l. 9-15).

Mrs. Hill did not work outside the home after the Coca-Cola plant closed in 1991.

From 1984 until present Mr. Hill worked as a long haul truck driver. (T.T. p. 26-27).

In the early 1980's, Mrs. Hill had a very brief extramarital affair. (T.T. p. 113, l. 7, p. 110, l. 6). The man she had an affair with, Nelson Chunn, confirmed to her that her husband was involved with another woman. (T.T. p. 114, l. 7-8).

At the time of trial, Mrs. Hill was taking care of her mother. (T.T. p. 115, l. 10). She helps with her grandchildren and keeps up the marital home. (T.T. p. 115, l. 116-22). Mrs. Hill also has helped to take care of Mr. Hill's mother. (T.T. p. 116, l. 3).

Mrs. Hill has arthritis, ulcers, chronic pulmonary disease and allergies. (T.T. p. 116, l.20 and p. 117, l. 3-10). At the time of trial, Mrs. Hill was on six regular prescriptions totaling $520.82 per month. (T.T. p. 118, l. 7-11; trial exh. 6). Mrs. Hill's current insurance with her husband was paying part of this and she was paying $200.00 per month. Id. Mrs. Hill has back problems similar to Mr. Hill's back problems. Mr. Hill's back pain has never prevented him from working. (T.T. p. 119, l. 1-3).

Mrs. Hill admitted that one time after Mr. Hill had lied to her about the affairs, she tried to scare him with a gun but there was no ammunition. (T.T. p. 119, l. 15-22).

According to Mrs. Hill, her husband had an affair with Joan Hawkins from 1980 until around 1992. (T.T. p. 120, l. 23 - p. 121, l. 1). Mr. Hill confirmed that the affair may have lasted as long as ten years. (T.T. p. 47, l. 3). Once she kicked the door when she found a cell phone bill confirming that he was talking to his girlfriend. (T.T. p. 122, l. 1-18). Most all of the arguments that the Hills had were over his affairs. (T.T. p. 122, l. 22).

Mrs. Hill's mother retained a life estate in the real estate that was transferred to the parties. (T.T. p. 123, l. 1-4). The parties had originally planned to do the same thing with Mr. Hill's mother's property. (T.T. p. 123, l. 9). Her mother's warranty deed was signed December 19, 2005, after the parties had separated. (T.T. p. 124, l. 22).

Mrs. Hill obtained a quote for health insurance which was going to cost $1,019.00 per month with a $300.00 deductible, or $853.00 with a month with a $500.00 deductible, or $721.00 with an $1,000.00 deductible. She would not have coverage for pre-existing conditions for 12 months. (T.T. p. 127, l. 1-8).

After the parties separated for the first year, Mr. Hill paid to Mrs. Hill, $4,500.00 and then he reduced it to $4,000.00 after he filed for divorce. (T.T. p. 128, l. 18-22). With this money, she paid all marital expenses other than those associated with his business. (T.T. p. 129, l. 7-9).

Mr. Hill admitted that the parties had talked about transferring his mother's property to their names as well. (T.T. p. 60, l. 11-12). He had power of attorney for her mother because she was not capable of making decisions. (T.T. p. 59, l. 6-10).

According to Mr. Hill, Mrs. Hill stayed home and took care of the children and she was a good mother and did a good job taking care of the children. (T.T. 61, l. 1-5).

Mr. Hill admitted that he had a sexual relationship with Joan Hawkins for years at the same time he was having sexual relationship with his wife. (T.T. p. 67-68). His second long term relationship began in 2001. (T.T. p. 69, l. 5). At that time he had been married for 35 years and a friend set him up with Janet Thigpen. (T.T. p. 69, l. 11).

He did not regularly give his wife birthday presents or anniversary presents. (T.T. p. 70,

l. 11).

No doctor has told Mr. Hill that he cannot work. (T.T. p. 81, l. 22). He has only seen an orthopaedic doctor once. (T.T. p. 82, l. 1-9).

According to the 2005 tax returns, Mr. Hill's income was $87,789.00. (See Ex. 1). When you add back the depreciation that was deducted in the amount of $11,056.00, he has a total income for 2005 of $108,845.00 for the year. (See Ex. 1). According to Mr. Hill's sworn income and expense statement, he monthly income is $16,358.33. (See Ex. 2). Mrs. Hill has no income from any source. (See Ex. 8).

LAW AND ARGUMENT

STANDARD OF REVIEW

Unless otherwise required by statute, reviews of findings of fact by the trial court in civil actions shall be de novo upon the record of the trial court, accompanied by a presumption of the correctness of the findings unless a preponderance of the evidence is otherwise. *Tenn. Rule of App. Proc. 13(d).*

In divorce actions decided by a trial court without a jury, trial court's are vested with broad discretion in adjudicating the rights of the parties. Fisher v. Fisher, 648 S.W.2d 244, 246 (Tenn. 1983). Decisions based upon this discretion are entitled to great weight. Edwards v. Edwards 501 S.W.2d 283, 288 (Tenn. App. 1973). Thus, in such cases, the role of the trial court is to review the record of the trial court de novo with the presumption that the trier of fact acted correctly unless evidence preponderates otherwise. Farrar v. Farrar 553 S.W.2d 741, 743 (Tenn. 1977).

I. THE TRIAL COURT DID NOT ERR IN GRANTING A LEGAL SEPARATION INSTEAD OF AN ABSOLUTE DIVORCE.

The husband submits that it was erroneous to grant a legal separation. The husband argues that a separation is inappropriate because the court found that it did not contemplate reconciliation but contemplated a final divorce w hen the wife becomes eligible for federal medicare benefits.

The husband also argues that the wife initially filed an answer and counter-complaint

admitting that the parties have irreconcilable differences. However, the wife would submit that she filed an amended counter-complaint praying for a legal separation instead of a divorce and said motion was granted. (T.T. p. 4-12). The husband argues that the trial court erred in denying his motion to dismiss the amended counter-complaint and placed the husband in the unenviable position of having to decide whether to delay the trial or proceed. In response to this argument, the wife would submit that the husband admitted that he would not be prejudiced to proceed. (T.T. p. 8, l. 14). Further, the husband was given an opportunity to continue the trial if additional was necessary; however, said offer was denied. (Id.; T.T. p. 11, l. 1-20).

The husband argues that the trial court made no findings of fact to justify the granting of a legal separation and therefore the decision is not entitled to any presumption of correctness. This is inaccurate. The trial court submitted a detailed findings of fact in this case. (T.R. p. 25-34).

Tenn. Code Ann. § 36-4-102 provides that a party who alleges grounds for a divorce from the bonds of matrimony may, as an alternative to filing a complaint for divorce, file a complaint for legal separation.......(b) if the other party specifically objects to legal separation, the court may, after a hearing, grant an order of legal separation, not withstanding such objections if the grounds are established pursuant to *§ 36-4-101.*

Since the statute provides that if there is an objection to a legal separation, the court may grant an order of legal separation, it is within the discretion of the trial judge as to whether it is appropriate to grant a legal separation or a divorce.

Because the granting of a legal separation is made permissive and the granting of an absolute divorce is specifically in the power of the trial court, it appears that the legislature intended to grant the trial judge discretion to award legal separation or absolute divorce if the

respondent has requested an absolute divorce. Asher v. Asher 2001 WL 490745 (Tenn. Ct. App. 2001).

The court found that both parties had been unfaithful to each other during the course of the marriage. The husband and wife both forgave early mistakes, but the wife did not forgive the husband's last affair. The husband's last affair was long term and his fault in contributing to the ending of the marriage was great. The court found that grounds for a legal separation had been showed pursuant to *Tenn. Code Ann. § 36-4-102* and that pursuant to *Tenn. Code Ann. § 36-4-101*, the husband was guilty of inappropriate marital conduct consisting of adultery which entitled the wife to a legal separation.

The wife has no income, significant health problems and a substantial pharmacy bill each months. By remaining legally separated, she continues to be covered under the husband's health insurance to cover her expenses until she becomes eligible for federal medicare benefits.

No doctor has told Mr. Hill that he can not work. He is able and capable of working and earning a substantial income as he has in the past. It was appropriate and within the discretion of the trial court to grant a legal separation in this case.

II. THE TRIAL COURT MADE AN EQUITABLE DISTRIBUTION OF THE MARITAL DEBTS AND PROPERTY.

The Appellant's only argument regarding the property division is that it was not equitable. *Tenn. Code Ann. § 36-4-121* sets out the statutory criteria for equitable distribution:

1. Duration of the marriage;
2. Age of each party;

3. Health of each party;

4. Mental health of each party;

5. Vocational skills of each party;

6. Employability of each party;

7. Earning capacity of each party;

8. Marital estate of the parties;

9. Separate estates of each party;

10. Obligations of each party;

11. Financial needs of each party;

12. The contribution of one party to the education, training or increased power of the other party;

13. Relative ability of each party to acquire capital assets in the future;

14. Relative ability of each party to earn future income;

15. Contribution of each party to the acquisition, preservation, appreciation, depreciation or dissipation of the separate and marital assets of the parties, including the contribution to the marriage as homemaker, wage earner or parent;

16. The estate of each party at the time of the marriage;

17. The economic circumstances of each party at the time the division of marital property is to become effective including social security benefits;

18. All costs which will accompany the sale of any of the assets which will be sold;

19. The tax consequences of the division; and,

20. Such other factors as are necessary to consider the equities of the party.

An equitable distribution does not necessarily mean an equal one. Ellis v. Ellis, 748 S.W.2d 424, 427 (Tenn. 1988); Word v. Word, 937 S.W.2d 931, 933 (Tenn. Ct. App. 1996). Rather, it is achieved by considering and weighing the most relevant factors in light of the unique facts of the case. Tate v. Tate, 138 S.W.3d 872, 875 (Tenn. Ct. App. 2003).

In reaching this equitable division, the court notes that equities of the case demand that the Lancer Drive property be awarded to the wife in the property division of the marital estate. (T.R. at p. 29). It is uncontroverted that the transfer of the property by the wife's mother was part of her plan to transfer one piece of real property from her side of the family and one piece of property from his side of the family to the parties. Id. It is uncontroverted that the plan existed and the husband determined that sometime later that he would not go through with the rest of the plan. Id. The court found that it would be unequitable to award him an interest in this property. Id.

The wife would submit that the parties actually only had a fee in the Lancer Drive property since the wife's mother retained a life estate. The wife's mother is still alive and living in said house. Under the facts of this case, it certainly was equitable for the court to award this property to the wife. The husband sets forth the division of assets in Appendix A. There is a miscalculation in the total set forth in Appendix A.[1]

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[1] The husband failed to include the personal property awarded to the husband in said calculation. The wife's personal property was included in said calculation. The property received by the wife totaled $365,000.00 and property received by the husband totaled $215,076.35. If the value of the Lancer Road property is not considered, the wife's share totals $275,000.00. This is only approximately $59,000.00 more than what the husband received.

The wife would submit that the trial court's division of property was equitable in view of the financial resources and earning potential of the parties. Among the primary factors to be considered based upon the proof at trial were:

1. The duration of the marriage;

2. The vocational skills, employability and earning capacity of each party;

3. The relative ability of each of the parties for future acquisitions, capital assets and income; and,

4. The economic circumstances of each party at the time of the property division.

Tenn. Code Ann. § 36-4-121(c).

This is a marriage of 43 years. Mr. Hill's vocational skills, employability and earning capacity far exceeds that of Mrs. Hill. He received the Peterbilt truck and trailer which will enable him to continue to earn a significant income.

In cases where there is a disparity between the relative earning capacities of the parties, a trial court may consider adjusting the award of marital assets to assist the disadvantaged spouse. Crabtree v. Crabtree, 16 S.W.3d at 361, n. 4 (Tenn. 2002).

The trial court's division of the marital property in this case was equitable and should be affirmed.

III. WHETHER THE TRIAL COURT ERRED IN AWARDING THE WIFE $2,000.00 PER MONTH PERMANENT ALIMONY.

There are no hard and fast rules for spousal support decisions. Manis v. Manis, 49 S.W. 3d 295, 304 (Tenn. Ct. App. 2001); Anderton v. Anderton, 988 S.W. 2d 675, 682 (Tenn. Ct.

App. 1998). Trial courts have a broad discretion to determine whether spousal support is needed and, if so, its nature, amount and duration. Bratton v. Bratton, 136 S.W.3d 595,605 (Tenn. 2004); Burlew v. Burlew, 40 S.W.3d 465, 470 (Tenn. 2001). Accordingly, appellate courts are generally disinclined to second-guess a trial court's spousal support decision unless it is not supported by the evidence or in contrary to the public policies reflected in the applicable statues. Nelson v. Nelson, 106 S.W.3d 20, 23 (Tenn. Ct. App. 2002); Brown v. Brown, 913 S.W.2d 163, 169 (Tenn. Ct. App. 1994). Our role is not to fine tune a trial court's spousal support award, Fox v. Fox, No. M2004-021616-COA-R3-CV, 2006 WL 2535407 at *9 (Tenn. Ct. App. Sept. 1, 2006) (No Tenn. R. App. P. 11 application filed); Hartman v. Hartman, No. E2000-01927-COA-R3-CV, 2001, WL 823188, at *7 (Tenn. Ct. App. July 20, 2001)(No Tenn. R. App. P. 11 application filed), but rather to determine whether the trial court applied the correct legal standard and reached a decision that is not clearly unreasonable. Bogan v. Bogan, 60 S.W.3d 721, 733 (Tenn. 2001).

Tennessee law recognizes several separate classes of spousal support, including long-term periodic spousal support (alimony in futuro), alimony in solido, rehabilitative spousal support, and transitional spousal support. *Tenn. Code Ann. § 36-5-121(d)(1) (2005).* Long-term periodic spousal support is intended to provide long-term support to an economically disadvantaged spouse who is unable to be rehabilitated. Burlew v. Burlew, 40 S.W.3d at 471; Loria v. Loria, 952 S.W. 2d 836, 838 (Tenn. Ct. App. 1997). It is not, however, a guarantee that the recipient spouse will forever be able to enjoy a lifestyle equal to that of the obligor spouse. Wright v. Quillen, 83 S.W.3d 768, 773 (Tenn. Ct. App. 2002). Rehabilitative spousal support is intended to enable an economically disadvantaged spouse to acquire additional education or training that

will enable the spouse to achieve and maintain a standard of living comparable to the standard of living that existed during the marriage or to the post-divorce standard of living expected to be available to the other spouse. *Tenn. Code Ann. § 36-5-121(e)(1)*; *see also* Robertson v. Roberston, 76 S.W.3d 337, 340-341 (Tenn. 2002); Smith v. Smith, 912 S.W. 2d 155, 160 (Tenn. Ct. App. 1995).

Tenn. Code Ann. § 36-5-121(d)(2) reflects a statutory preference favoring rehabilitative spousal support and transitional spousal support over long-term periodic spousal support. Bratton v. Bratton, 136 S.W. 3d at 605; Perry v. Perry, 114 S.W.3d 465,467 (Tenn. 2003); Crabtree v. Crabtree, 16 S.W.3d 356, 358 (Tenn. 2000). However, this statutory preference does not displace the other forms of spousal support when the facts of the case warrant tong-term or more open-ended support. Aaron v. Aaron, 909 S.W.2d 408, 410(Tenn. 1995).

The purpose of spousal support is to aid the disadvantaged spouse to become and remain self-sufficient and, when economic rehabilitation is not feasible, to mitigate the harsh economic realities of divorce. Shackleford v. Shackleford, 611 S.W.2d 598, 601 (Tenn. Ct. App. 1980). While divorced couples often lack sufficient income or assets to enable both of them to retain their pre-divorce standard of living, Brown v. Brown, 913 S.W.2d 163, 169-170 (Tenn. Ct. App. 1994), the obligor spouse may be able to provide some "closing in money" to enable the disadvantaged spouse to approach his or her former financial condition. Aaron v. Aaron, 909 S.W.2d at 411.

Initial decisions regarding the entitlement to spousal support, as well as the amount and duration of spousal support, hinge on the unique facts of each case and require a careful balancing of all relevant factors, including those identified in *Tenn. Code Ann. § 36-5-121(i).*

Robertson v. Robertson, 76 S.W.3d at 338; Dube v. Dube, 104 S.W.3d 863, 868 (Tenn. Ct. App. 2002); Wilder v. Wilder, 66 S.W.3d 892, 894 (Tenn. Ct. App. 2001). Among these factors, the two that are considered the most important are the disadvantaged spouse's need and the obligor's spouse's ability to pay. Robertson v. Robertson, 76 S.W.3d at 342; Bogan v. Bogan, 60 S.W.3d at 730; Sullivan v. Sullivan, 107 S.W.3d 507, 510 (Tenn. Ct. App. 2002). Of these two factors, the disadvantaged spouse's need is the threshold consideration. Aaron v. Aaron, 909 S.W.2d at 410; Watters v. Watters, 22 S.W.3d 817, 821(Tenn. Ct. App. 1999).

Considering Mrs. Hill's age, educational background, and lack of work experience, her ability to earn income will never approach that of Mr. Hill's income. This is a marriage of 43 years. Mrs. Hill has significant health problems and monthly medical expenses. As the trial court notes, the wife is in great need of income and economically disadvantaged in relation to the husband who has shown an ability to make a substantial income despite any health concerns he has.

The husband argues that alimony is not intended to be punitive. However, *Tenn. Code Ann. § 36-5-101* sets forth the specific criteria for determining alimony. One of which is the relative fault of the parties. The court appropriately found that the husband has a far greater relative fault than the wife in this case.

The husband's income is significant. In 2005, his income was $108,845.00.[2] As the husband concedes, he has been paying his wife at least $4,000.00 per month since they separated in February of 2005. This is just less than 50% of his income. The wife has monthly expenses of

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[2] According to the 2005 tax return, his income was $97,789.00 plus he enjoyed the benefit of depreciation in the amount of $11,056.00 for a combined income of $108,845.00.

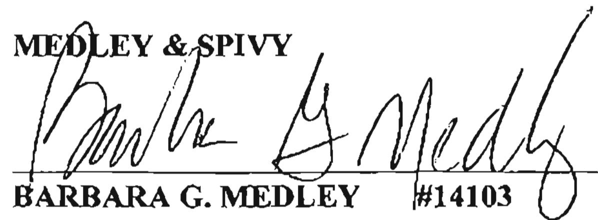
$4,662.32. She has no monthly income without the support. The wife would submit that the husband is able and capable of continuing to pay $4,000.00 per month as he has in the past and would ask that this court modify that portion of the trial court's award and order that the husband pay permanent alimony in the amount of $4,000.000 per month instead of $2,000.00.

CONCLUSION

For the reasons set forth in the brief, the wife submits that the trial court committed no error in its determination to grant a legal separation in this case and its equitable division of marital. The wife would submit that the court's award of alimony in the amount of $2,000.00 per month is not a sufficient amount to meet the needs of the wife and respectfully requests that this award be modified from $2,000.00 per month to $4,000.00 per month.

Respectfully submitted,

MEDLEY & SPIVY



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CERTIFICATE OF SERVICE

I hereby certify that I have on this the 28 day of June, 2007, forwarded a true and exact copy of the foregoing Brief of the Appellee, Connie Sue Hill, by U.S. Mail, postage prepaid to:

Randy Hillhouse, Esquire
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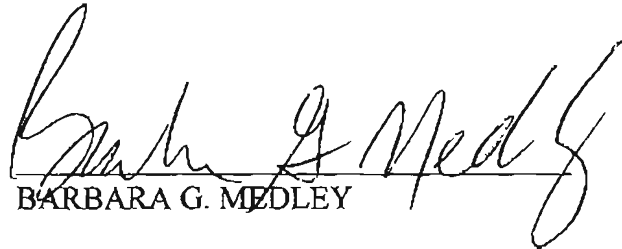

BARBARA G. MEDLEY

EXHIBIT D

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

EARL DOUGLAS TRYON,	)
	)
PLAINTIFF/APPELLANT,	)
	) CASE NO. M2006-00940-SC-WCM-CV
vs.	) Appealed from the Supreme Court of
	) Tennessee Special Workers Compensation
SATURN CORPORATION,	) Appeals Panel at Nashville - March 26, 2007
	) Session - Case No. M2006-0940-WC-R3-CV
DEFENDANT/APPELLEE.	)

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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DESIGNATIONS

The pleadings will be referred to as the Technical Record and cited as "T.R., p. ___".

The trial transcript will be referred to as "T.T. p.____ ".

The exhibits shall be referred to as "Ex.___".

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. WHETHER MR. TRYON'S VOLUNTARY RETIREMENT WAS REASONABLY RELATED TO HIS NECK INJURY OF JUNE 24, 2003, THEREBY PREVENTING A MEANINGFUL RETURN TO WORK.

STATEMENT OF THE CASE

The Plaintiff, Earl Douglas Tryon, filed this workers' compensation lawsuit on October 17, 2003, as a result of a neck injury that occurred on June 24, 2003, and a bilateral upper extremity claim.[1] The employer filed its answer on March 9, 2006, accepting the plaintiff's neck claim as compensable, but disputed the total impairment related to the work injury and the extent of vocational disability.

The Honorable F. Lee Russell presided over the trial of this matter which took place on March 10, 2006. The trial court awarded the plaintiff 20% to each upper extremity and a 55 % permanent partial disability benefit award for the plaintiff's neck injury.

The employer appealed the trial court's judgment arguing that the plaintiff had a meaningful return to work and that the award should be capped at 2 ½ his 10% impairment rating. The employer also argued on appeal that the court failed to make specific findings of fact detailing the reasons for awarding more than 5 times the impairment rating as required by T.C.A. §50-6-241(c).[2]

The Special Workers' Compensation Appeal Panel modified the trial court's judgment from a 55% to a 25% permanent partial disability, reflecting the 2.5 statutory cap. The plaintiff, pursuant to T.C.A. § 50-6-225(e)(5)(6) filed a motion for review by the entire Supreme Court which was granted.

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1 The employer, the original Appellant in this matter, did not appeal the trial court's award as to the bilateral upper extremity claim and therefore it is not at issue.

2 This issue was not addressed by the Panel because it modified the trial court's award by capping it at 2 ½ times 10%. The plaintiff includes his original argument on this issue as set forth in his first brief in the event it becomes necessary for the Court to address this issue.

STATEMENT OF THE FACTS

The Plaintiff, Earl Douglas Tryon, was 52 years of age as of the date of trial. (T.T., p. 33). Mr. Tryon graduated from high school in 1971. (T.T., p. 33-34). He made B's and C's in high school (Id.). Mr. Tryon went to Rochester Business Institute for about six months but did not obtain any type of degree. (T.T., p. 34). After his brief enrollment in business college, he entered the United States Air Force for 2 ½ years and received an honorable discharge at the end of the Vietnam War. (T.T., p. 34).

After his discharge from the military, he went to work for General Motors for whom he worked up until the time of his retirement. (T.T., p. 34). He first worked for General Motors in Syracuse, New York where he worked in tool and die, setup and as a machine operator. (T.T., p. 35). He transferred to Saturn in 1993 where he worked as an op-tech. While working as an op-tech, he worked in general assembly on the doors team and the body side. (T.T., p. 36).

Mr. Tryon first injured his neck requiring surgery in June of 1999. (T.T., p. 46). After that surgery, he was able to return to work and felt like he recovered from that neck surgery. (T.T., p. 47).

His second neck injury, which is the subject of this suit, occurred on June 24, 2003, at work when he was riding a vehicle through a door which came down and hit him on top of the head. (T.T., p. 48). This injury required a second neck surgery in March of 2004. (T.T., p. 49). After this second neck surgery, when he returned to work, he had a lot of pain in his neck. (T.T., p. 49). He did not feel like he was rehabilitated like he was after the first surgery. (T.T., p. 50).

It was necessary for Mr. Tryon to return to see Dr. Wade in August of 2005 after reinjuring his neck at work. (T.T., p. 50). At that time, he was doing repetitive loading and

lifting when his neck popped and caused him so much pain, he went to his knees. He was afraid he had messed up Dr. Wade's work. (T.T., p. 50).

Mr. Tryon quit working for GM on October 31, 2005, upon advice from Dr. Wade. (T.T., p. 51-52).

Prior to his retirement, Mr. Tryon had a meeting with Saturn officials during his ADAPT interview. (T.T., p. 52). The ADAPT Program at Saturn is a placement program to determine if they have a job he could do. (T.T., p. 53). His understanding of the company's position after his ADAPT meeting is that if you have restrictions that would place you outside of your current job, you must have seniority to be able to gain a position within your restrictions. Mr. Tryon did not have the required seniority. (T.T., p. 56).

According to Mr. Tryon, he could not have gone back and reasonably continued to do physical manual labor or any of the jobs he had in the past. (T.T., p. 60, 63). He tried and it was hurting his neck. (T.T., p. 60).

Mr. Tryon would not have retired from Saturn at age 52 if he had not injured himself. (T.T. p. 61).

The entire time he worked at Saturn, it was in general assembly performing physical manual labor. (T.T., p. 62).

November 1, 2005, was the effective date of Mr. Tryon's retirement. (T.T., p. 65).

When Mr. Tryon was released to return to work after his neck surgery in June of 2004, he did not have any restrictions on his neck or he would not have been able to continue working. (T.T., p. 76-77). With Mr. Tryon's seniority, there were no jobs at Saturn that he was offered or could do after his ADAPT meeting.

Debra Finn works in the ADAPT Program at Saturn. ADAPT stands for Assisting Disabled Persons in Transition. (T.T., P. 124). According to Ms. Finn, she is not sure exactly what benefits Mr. Tryon received upon retirement. She did not know if he got health insurance. Ms. Finn was not involved in Mr. Tryon's ADAPT interview and could not dispute his testimony about not having seniority that would allow him to get a job within his restrictions. (T.T., p. 132).

Mark Boatner, a vocational expert, presented by the Plaintiff, gave the opinion that Mr. Tryon has a 99.73% vocational disability rating.

Mark Boatner read the report of Mr. Galloway, the defense vocational expert in this case. (T.T., p. 107). He disagrees with the opinion that Mr. Tryon would have no vocational impairment because no formal restrictions were assigned. (T.T., p. 107). Mr. Boatner does not think it was reasonable for Mr. Galloway not to consider Dr. Wade's opinion set in his August 11, 2005, note which states: "I believe that his days of continuing to work with the production line are very limited. I have recommended that he seek deep tissue massage with a massage therapist for his neck. I believe that should he continue to seek disability and retirement issues from Saturn, that this is reasonable given the physical limitation from his severe cervical spondylosis." (T.T., p. 109).

Michael Galloway testified as a vocational expert on behalf of the defense. According to Mr. Galloway, it is his opinion that Mr. Tryon retains no vocational disability based upon the lack of medical restrictions. (T.T., p. 146). If you consider Dr. Wade's opinion that he can no longer work at Saturn, in Mr. Galloway's opinion he would have a 45-50% disability.

TESTIMONY OF FREDERICK WADE, M.D.

Dr. Wade performed the first surgery on Mr. Tryon's neck on June 28, 1999, at the level of C 6-7. (Wade depo, p. 10, Trial Ex. 1). During that surgical procedure, he went through the front of Mr. Tryon's neck and removed the disc to take the pressure off the nerves and replaced the disc with a piece of bone locking it into place with a screw-in apparatus. (Id.). When he released him to return to work on August 22, 1999, he was doing quite well. (Wade depo., p. 11).

He did not see Mr. Tryon again until October 29, 2003, after he was injured while riding a bike at Saturn going under a door when the door closed and struck him on the top of the head. (Wade depo, p. 12-13). The MRI revealed he had arthritic changes at C 5-6 disc level and he had a disc herniation at said level compressing the left sided nerve root. (Wade depo, p. 15). He was schedule for surgery which was performed on March 11, 2004. (Id).

Dr. Wade saw Mr. Tryon in July and August of 2005 for continued problems with his neck when at work he reached to pull back a hoist and felt a pop in his neck. (Wade depo, p. 18). The doctor felt this to be a straining incident. (Id.). According to Dr. Wade, if you have two discs in your neck fused, you are always set up to have problems. This reported incident aggravated his symptoms and was a definite and sudden onset of worse symptoms. (Wade depo, p. 19).

According to Dr. Wade, Mr. Tryon reached maximum medical improvement on June 25, 2004. (Wade depo., p. 20). Dr. Wade was asked whether Mr. Tryon was under any permanent restriction. He responded as follows:

"....not restrictions, he had these two fusions, he is showing some signs of another disc

starting to wear out and I just told him that it would probably be reasonable that he look into a non-industrial type job." (Wade depo., p. 21).

When Dr. Wade last saw Mr. Tryon in August of 2005 after having more symptoms related to work, Mr. Tryon asked, "What do I need to do?" (Wade depo., p. 22). Dr. Wade responded, "You need to do anything that would keep these symptoms from necessitating you having another surgery. Because a third surgery on his neck would have a very high likelihood of not giving him that much pain relief. So, I just told him, if you have retirement options, that's probably your best interest right now." (Wade depo., p. 23).

Dr. Wade was again asked about Mr. Tryon's restrictions with the following question: "I guess just to follow up on that: You haven't told him specifically not to work because of his neck problems, have you? Answer: I mean, I think there is a difference between telling somebody you can't work, it's unsafe for you to work and saying it's probably smart for you to look into something less strenuous. And I told him the later of the two." (Wade depo., p. 23).

After Mr. Tryon's first surgery, he had very little residual symptoms. After his second surgery, he had at least moderate residual symptoms. So he was worse after his second one. (Wade depo., p. 24). According to Dr. Wade, he retains a 25% permanent partial impairment after the second injury. (Wade depo., p. 26). He assigned a 15% because of the first surgery and an additional impairment of 10% after the second surgery. (Wade depo, p. 26). In his opinion, the cause of the second neck injury was the door striking him on top of the head.

According to Dr. Wade, Mr. Tryon's days of continuing to work on a production line are limited and he should continue disability and retirement. (Wade depo., p. 38).

TESTIMONY OF RICHARD F. FISHBEIN, M.D.

Mr. Tryon saw Richard F. Fishbein, M.D., for the purpose of an independent medical evaluation. According to Dr. Fishbein, Mr. Tryon retains a 25% permanent impairment as a result of his described work injury. According to Dr. Fishbein, Mr. Tryon is to work as tolerated and use proper body mechanics when it comes to lifting, carrying, pushing and pulling. (Trial Ex. 3, Notice of Intent and C-32 of Richard Fishbein, M.D.).

LAW AND ARGUMENT

I. STANDARD OF REVIEW

This appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness unless the preponderance of the evidence is otherwise. T.C.A. 50-6-225(e)(2); Brock v. Brock, 94 S.W. 2d 896 (Tenn. App.1996).

Considerable deference is owed to the trial judge's findings which depend on the credibility of witnesses. Clarendon v. Baptist Memorial Hosp., 796 S.W. 2d 685 (Tenn. 1990). The trial judge is afforded discretion even in the evaluation of deposition testimony because he may have considered the deposition testimony in conjunction with the testimony of witnesses in court. Thomas v. Aetna Life and Casualty Co., 812 S.W. 2d 287 (Tenn. 1991).

The employee's own assessment of his physical and resulting disability is competent testimony that should be considered as well. Nelson v. Walmart Stores, 8 S.W. 3d 625-629 (Tenn. 1999).

"The resolution of what is reasonable must rest upon the facts of each case....." Newton v. Scott Health Care Center, 914 S.W. 2d 884, 886 (Tenn. 1995). Workers' compensation laws must be construed so as to ensure that injured employees are justly and appropriately reimbursed for debilitating injuries suffered in course of service to the employer. Hill v. Wilson Sporting Goods Company, 104 S.W. 3d 844,946 (Tenn. 2002).

The employer bears the burden of proving that the employee had a meaningful return to work. Ogren v. House Call Health Care, Inc., 101 S.W. 3d 55,57 (Tenn. 1998).

II. THE PLAINTIFF'S AWARD SHOULD NOT HAVE BEEN LIMITED TO 2.5 TIMES HIS 10% PERMANENT PARTIAL IMPAIRMENT.

For injuries arising on or after August 1, 1992, in cases where an injured employee is eligible to receive any permanent partial disability benefit pursuant to T.C.A. §50-6-207(3)(A)(i)(f), and the pre-injury employer returns the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of the injury, the maximum permanent partial disability that the employee may receive is 2 ½ times the medical impairment rating....T.C.A. § 50-6-241(a)(1).

The caps set out in the statute apply when the employer has offered a "meaningful return to work." Newton v. Scott Healthcare Ctr., 914 S.W.2d 884, 886 (Tenn. 1995). The determination of whether there has been a meaningful return to work is a question of fact. (Id.) The employer bears the burden of showing by a preponderance of the evidence that the offer is at a wage equal to or greater than the pre-injury employment and that the work is within the medical restrictions appropriate for the employee. Ogren v. House Call Healthcare, Inc., 101 S.W. 3d 55, 57 (Tenn. Workers' Comp. Panel 1998).

The Tennessee Supreme Court has consistently stated that the ability of the injured employee to perform the offered employment is determinative of whether the return to work or offer of return to work is meaningful. In Lay v. Scott County Sheriff's Dept., 109 S.W.3d 293, 298 (Tenn. 2003), the Court stated: "[c]learly, if an employee returns to work but is unable to perform his or her duties due to a work-related injury, then the worker's resignation would be reasonably related to the injury, and there would be no meaningful return to work." In Hardin v. Royal Sunalliance Ins., 104 S.W.3d 501 (Tenn. 2003), the Court stated that a trial court could

consider a previous award and exceed the 2.5 times cap if the subsequent resignation was reasonably related to the injury as where the resignation is "due to the employee's inability to perform the work." Id. at 506. While Hardin was a reconsideration case brought pursuant to T.C.A. § 50-6-241(a)(2), the Tennessee Supreme Court has held the same standard should be applied to an initial assessment. Lay, 109 S.W.3d at 298.

A determination of whether there has been a reasonable return to work can be made based upon circumstances both before and after the employee reaches maximum medical improvement. Lay v. Scott County Sheriff's Dept., 109 S.W.3d 293, 297 (Tenn. 2003).

The issue of how a voluntary retirement factors into a meaningful return to work is set forth in the case of Hill v. Wilson Sporting Goods Co., 104 S.W. 3d 844 (Tenn. 2002). The plaintiff in Hill, just as Mr. Tryon, had worked for a long time for his employer. (Id. at 846). He injured his back in April of 1997 and returned to work in May of 1997. (Id.). Two treating physicians assigned a 0% permanent partial impairment rating and the third physician gave him a 5% impairment rating to the whole person. (Id.).

Upon his return to employment, Mr. Hill continued to work for more than a year and a half while still suffering with back pain. (Id.). In October of 1999, Mr. Hill took sick leave and retired under his employer's disability plan. (Id. at 846-847). He testified that the pain in his back had worsened over time. (Id. at 847). The trial court found that his claim for permanent partial benefits was limited to 2.5 times his anatomical impairment rating. (Id.). In a reported opinion the Panel reversed. (Id. at 848).

According to the Hill court, the issue under Section 241(A)(1) was whether the return to work was successful or unsuccessful. (Id.) In addition, the defendant argued, that a claimant

ought not be allowed to retire and "thereby unilaterally entitle himself to an increased award." (Id.). The Panel rightly rejected such an argument, stating:

> "The employer also argued successfully in the trial court that the employee should not be entitled to retire and thereby unilaterally entitle himself to an increased award. We agree that the statute was not intended to allow reconsideration for every injured employee who has returned to work and subsequently retires. However, we are not prepared to declare that retirement absolutely precludes reconsideration. The appropriateness of allowing reconsideration must be evaluated under the facts and circumstances of each case, applying the standards of reasonableness established by Newton and its progeny. For example, an award could be reconsidered if retirement is due to the employee's inability to perform the work because of injury or if it is due to the employer's refusal to accommodate restrictions." (Id.).

This issue is also addressed in the case of Hardin v. Royal & Sun Alliance, 104 S.W.3d 501 (Tenn. 2003). In Hardin, the court sets forth the issue of a meaningful return to work when an employee resigns: "While a trial court may reconsider a previous workers' compensation award, when the employer resigns, it may increase the award only if the resignation was reasonably related to the injury.....the resolution of what is reasonable must rest upon the facts of each case and be determined thereby." (Id.).

Mr. Tryon's return to work was not successful. After he was released to work on June 25, 2004, after his second cervical fusion, Mr. Tryon went back and tried to work. However, he still had significant pain in his neck. Then in August of 2005, while doing repetitive lifting and loading, his neck popped, causing him so much pain he went to his knees. (T.T., p. 50).

According to Dr. Wade, this August, 2005 incident at work was a straining incident that aggravated his symptoms. (Wade depo. p. 18-19). According to Dr. Wade, if you have two discs in your neck fused, you are always set up to have problems. Id. According Dr. Wade, Mr. Tryon has had two fusions, was showing some signs of another disc starting to wear out and it would be

reasonable that Mr. Tryon look into a non-industrial type job. (Wade depo. p. 21). Dr. Wade told Mr. Tryon that he needed to do anything that would keep these symptoms from necessitating him having another surgery. Because a third surgery on his neck would have a very high likelihood of not giving him that much pain relief. (Wade depo. p. 23). Dr. Wade told Mr. Tryon if he had retirement options that would be in his best interest. Id.

The panel found that Dr. Wade's suggestion of retirement was based in large part on subsequent injuries. While the plaintiff did suffer with bilateral carpal tunnel syndrome which was diagnosed after his cervical injury, that was not at all a significant factor in Mr. Tryon's decision to retire or Dr. Wade's advice to retire. Dr. Wade did mention the problems he had with his extremities; however, his opinion on the plaintiff's retirement was primarily, if not totally, based on his cervical injury. Dr. Wade was asked:

> Question: "Now at any time during your treatment did you ever suggest that the plaintiff should stop working?
>
> Answer: Well, not really until the last visit with him, which was August, 2005. And I think he basically— and this is paraphrasing some of my memory— he'd been moved to a heavier job, having more neck symptoms 'I've got these other problems.' He had tendinitis in his hands; he had carpal tunnel in his hands. He said what do I need to do? My advice was, 'you need to do anything that would keep these symptoms from necessitating you having another surgery.' Because a third surgery on his neck would have a very high likelihood of not giving him that much pain relief, so I just told him, 'if you have retirement options, that's probably your best interest right now.' " (Wade depo. p. 22, l. 14, p. 23, l. 16)

Dr. Wade's response includes his memory of what the plaintiff said to him. Dr. Wade's opinion on retirement is based upon the neck. He states that he was set up to have problems because of the fusions. Accordingly, he needed to do what was necessary to keep from having

the third surgery.

Dr. Wade testified that after the first neck surgery, the claimant had "very little residual symptoms and after the second surgery, the claimant had "at least moderate residual symptoms" and that the claimant was worse after the second surgery.

The trial court's determination as to whether there was a meaningful return to work was quoted verbatim from Dr. Wade's deposition and was decisive on the issue of a meaningful return to work. (T.R. p. 79-80). As the trial court pointed out, the most reasonable interpretation of Dr. Wade's testimony with regard to this issue is that Dr. Wade is saying that the claimant cannot work at Saturn with grave, unwarranted and inadvisable risk to the claimant's medical condition. Id.

This testimony from both the Plaintiff and the treating physician in this case establishes that Mr. Tryon's retirement was reasonably related to the work injury. There was no meaningful return to work. The trial court's award was proper and should be reinstated.

III. THE JUDGMENT OF 55% DISABILITY SHOULD NOT BE REDUCED. THE TRIAL COURT DID MAKE SPECIFIC FINDINGS PURSUANT TO T.C.A. § 50-6-241(c).

The Panel doesn't address this issue because it capped the award and it was therefore not necessary. The Plaintiff includes the original argument because he believes the Panel was incorrect in capping the award and it therefore may become necessary to address this original issue raised by the employer.

T.C.A. § 50-6-241 (c) provides for the court to make specific findings of fact detailing the reasons for awarding an impairment using a multiplier of five (5) or greater. In making such

determinations, the court shall consider all pertinent factors, including lay and expert testimony, employee's age, education, skills and training, local job opportunities and capacity to work at types of employment available in claimant's disabled condition.

The court filed a detailed memorandum opinion setting forth its findings of fact which was incorporated into the final order in this case. (T.R. at 74-84; Appendix A).

The memorandum opinion makes an initial determination that the claimant be awarded 55% permanent partial disability benefits for the neck injury for the reasons set out in the memorandum opinion. (Id. at p. 74). The court specifically found there was not a meaningful return to work. (Id. at. p. 75).

The court found that at the time of trial, the claimant was 52 years of age. (Id.). He graduated from high school where he made B's and C's. (Id.). He attended the Rochester Business Institute for six months but did not obtain a degree. (Id.). He served 2 ½ years in the United States Air Force and received an honorable discharge at the end of the Vietnam War. (Id.).

The claimant began at General Motors as an installer and as a tool and die set up operator for approximately 18 years (Id.). The court specifically set forth his duties. (Id.). At Saturn, the claimant worked as an op-tech in general assembly, body sides, hoods and roof, and doors and frames. (Id.). The claimant worked on the dock for a period of time handling shipping and inventory. (Id.). Up until the time of his retirement, he was involved in assembly. (Id.). These jobs were repetitive and involved heavy lifting to thirty (30) pounds. (Id. at p. 75, para. 2).

The court made a detailed finding of the medical proof in this case with much emphasis placed on Dr. Wade's opinion on his ability to continue working.

The court noted that Dr. Wade concluded that the claimant reached MMI on June 25, 2004 and released him without restrictions. (Id. at p. 77). He saw him again for the last time on August 11, 2005, when the claimant returned to Dr. Wade because the symptoms he was having related to his neck after he had returned to work. (Id.). Dr. Wade recalls that meeting as follows:

> Q. Is he under any permanent restrictions now?
>
> A. Not restrictions, but on his last visit - you can look at my last paragraph - he had been treated for carpel tunnel syndrome in the interim. He had these two fusions, he's showing some signs of another disc starting to wear out, and I just told him that it would probably be reasonable that he look into a nonindustrial-type job. We didn't formalize any work restrictions for him.

Wade Depo., p. 20, line 23-p.21, line 10.

Wade Depo., p. 20, line 23-p. 21, line 10.

> Q. Now, at any time during your treatment, did you ever suggest that the plaintiff should stop working?
>
> A. Well, not really until the last visit with him, which was August, 2005. And I think he basically - and this is paraphrasing some of my memory - he said he'd been moved to a heavier hob, having more neck symptoms. "I've got these other problems." He had tendonitis in his hands; he had carpel tunnel in his hands. He said, "What do I need to do?" My advice was, "You need to do anything that would keep these symptoms from necessitating you having another surgery." Because a third surgery on his neck would have a very high likelihood of not giving him that much pain relief, so I just told him, "If you have retirement options, that's probably your best interest right now."
>
> Q. I guess just to follow-up on that: You haven't told him specifically not to work because of his neck problems, have you?
>
> A. I mean, I think there's a difference between telling somebody you can't work, it's unsafe for you to work and saying it's probably smart for you to look into something less strenuous. And I told him the latter of those two.

Wade Depo., p. 22, line 14-p. 23, line 16. (Id. at p. 77 and 78).

The court notes further that Dr. Wade testified that after the first neck surgery that the claimant has "very little residual symptoms" and after the second surgery the claimant had "at least moderate residual symptoms" and that the claimant was "worse" after the second [surgery]." (Id. at p. 78).

The court also found that Dr. Hunter, the orthopedic surgeon who treated the claimant for his problems to his arms, conceded that Dr. Wade's conclusions with regard to vocational disability from the neck problems are probably correct. (Id. at p. 78).

The trial court also set out findings with regard to the vocational proof in this case. Mark Boatner, the plaintiff's vocational expert, concluded that the plaintiff's disability rating would be 99.33% or 100% if pain is considered. This expert concludes that the only jobs that the claimant could do would be unskilled light jobs. (Id. at p. 78).

A vocational expert presented by the defense, Michael Galloway, concluded that the claimant had no vocational disability because he had no formal permanent restrictions. (Id. at 79). However, Mr. Galloway testified that when he takes into account the remarks of Dr. Wade concerning the claimant's ability to do industrial jobs and Dr. Fishbein's remarks about pain being a limiting factor, then the claimant's disability could be 45 to 50%.

The court found that when the claimant was released by Dr. Wade on June 25, 2004, and worked until October 31, 2005, it was with great pain from both of these injuries. (Id.)at p. 80.

The court found that Dr. Wade's testimony concerning his advice to the claimant on continued employment in manufacturing is decisive on the issue of a meaningful return to work.

(Id.) The court found that the most reasonable interpretation of Dr. Wade's testimony with regard to the issue of the claimant's ability to return to work is that Dr. Wade is saying that the claimant cannot work at Saturn without grave, unwarranted, and inadvisable risk to the claimant's medical condition. The court found that Dr. Wade believes that the claimant should be out of that work environment. (Id. at p. 80).

The court found that the claimant has very real, if not formal, work restrictions. (Id.) His work is restricted by his pain, and he was entirely credible in describing the difficulties that he experienced with pain when he returned to work the last time. (Id. at p. 81). Mr. Galloway's fall back position of 45-50% disability is far closer to an accurate assessment than his zero disability rating. The claimant's past work, most of which was at GM and Saturn, involved repetitive, manual labor, often involving a great deal of repetitive lifting. As Dr. Wade concluded, factory work is no longer an option for him. Landscaping is no longer an option. (Id.).

This is not a situation where the court summarily ruled from the bench. The court wrote and filed a very detailed findings of fact setting forth why there was not a meaningful return to work and why he awarded 55% to the body as a whole as a result of the claimant's neck injury.

The defendant argues in its brief, "the trial court failed to make such detailed findings and therefore, the judgment should be reduced." The court did make detailed findings in this case and this argument is without merit. As set forth in its Memorandum, the court considered the employee's age, education, skills and training, and local job opportunities. Finally, the court considered as decisive, the testimony of Dr. Wade who concluded that Mr. Tryon cannot return to work at Saturn without gave, unwarranted and inadvisable risk to claimant's medical condition. The court found that Dr. Wade believed that Mr. Tryon should be out of the work

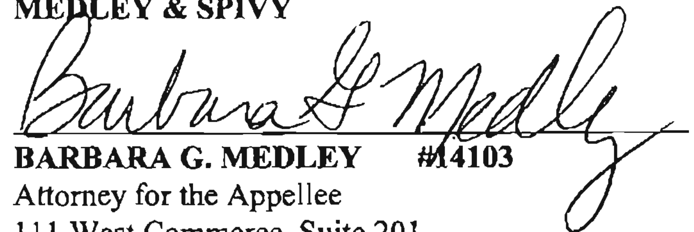
environment.

CONCLUSION

Mr. Tryon's voluntary retirement was reasonably related to the work injury. The trial court properly found that there was no meaningful return to work and its award of 55% vocational disability should be affirmed.

Respectfully submitted,

MEDLEY & SPIVY



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CERTIFICATE OF SERVICE

I hereby certify that I have on this the 7th day of September, 2007, forwarded a true and exact copy of the foregoing Brief of the Appellant, Earl Douglas Tryon, by U.S. Mail, postage prepaid to:

Marcia M. Watson, Esquire
MANIER & HEROD
150 Second Avenue North, Suite 201
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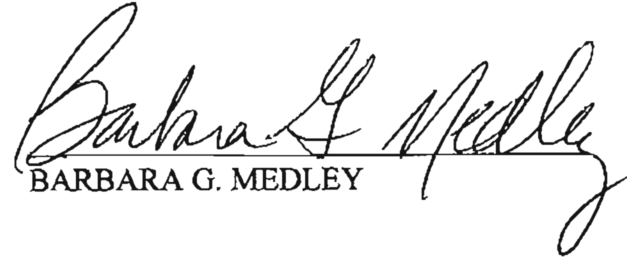

BARBARA G. MEDLEY

APPENDIX A

IN THE CIRCUIT COURT OF MARSHALL COUNTY,
AT LEWISBURG, TENNESSEE

EARL DOUGLAS TRYON,)
)
Plaintiff,)
)
VERSUS) NO. 15843
)
SATURN CORPORATION,)
)
Defendant.)

FILED 2006 APR 21 AM 11 04

ORDER

This cause came to be heard upon this the 10th day of March, 2006, upon the Plaintiff's Complaint for Workers' Compensation Benefits, the Defendant's Answer, testimony of the Plaintiff, witnesses, vocational experts, and medical proof, from all of which the Court finds that this case involves two claims for benefits under the Tennessee Workers' Compensation Act. One claim is for a neck injury suffered on June 24, 2003, and the other is a claim for bilateral de Quervain's tenosynovitis. The Claimant seeks permanent total disability benefits. For the reasons set out in the Memorandum Opinion, attached hereto and incorporated by reference, the Claimant will be awarded 55% permanent partial disability benefits for the neck injury and 20% to both upper extremities under T.C.A. Section 50-6-207(3)(A)(ii)(w) for the gradual onset injury, for a total of Three Hundred (300) weeks of disability.

The Court finds that the Plaintiff can wisely manage his money, has a special need for a lump sum and therefore, said benefits are awarded to the Plaintiff in a lump sum.

The costs of this cause are assessed against the Defendant for which execution

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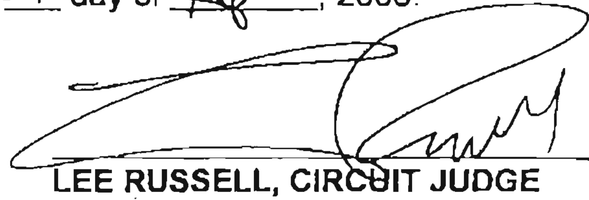
may issue if necessary.

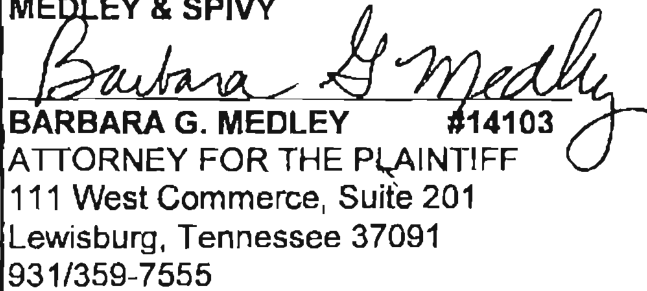
IT IS SO ORDERED this the 21st day of April, 2006.



LEE RUSSELL, CIRCUIT JUDGE

APPROVED FOR ENTRY:

MEDLEY & SPIVY



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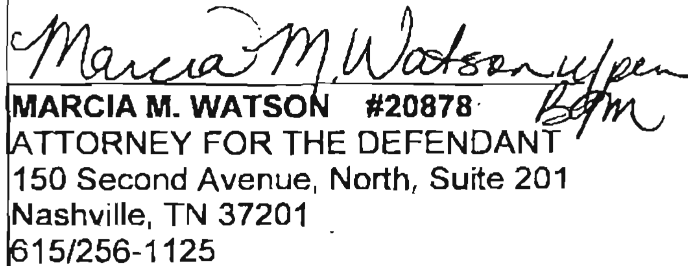

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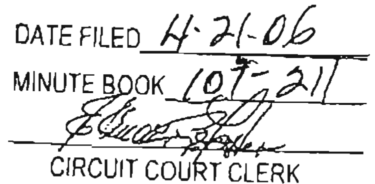

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IN THE CIRCUIT COURT FOR MARSHALL COUNTY, TENNESSEE

EARL DOUGLAS TRYON,	)	
Plaintiff,	)	
v.	)	CASE NO. 15,843
SATURN CORPORATION,	)	
Defendant.	)	

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MEMORANDUM OPINION

This case involves two claims for benefits under the Tennessee Workers Compensation Act filed by Earl Douglas Tryon ("Claimant") against Saturn Corporation ("Employer"). Proof was presented by the parties as to both claims on March 10, 2006. One claim is for a neck injury suffered on June 24, 2003, and the other is a claim for bilateral de Quervain's tenosynovitis. The Claimant seeks permanent total disability benefits. For the reasons set out below, the Claimant will be awarded fifty-five percent (55%) permanent partial disability benefits for the neck injury and twenty percent (20%) to both upper extremities under T.C.A. § 50-6-207(3)(A)(ii)(w) for the gradual-onset injury, for a total of 300 weeks of disability.

There is no issue in this case as to notice or as to the existence of either injury or as to the cause of either injury, except to the extent that there is a disagreement as to how the court (and whether the court) should apportion impairment between this neck injury and a prior neck injury on the job. There is an issue as to whether there was a meaningful return to work and therefore an issue as to which caps apply to the neck injury. For the reasons set out below, it will be found that the proper impairment rating for the neck

injury is ten percent (10%), but that it is the six-times caps which apply because there was not in fact a meaningful return to work.

The Claimant was born on September 4, 1953, is male, and on the date of the trial was fifty-two years old. He has been married to the same wife for thirty years, and the couple has three adult daughters. The Claimant graduated from high school with his class in 1971 and had grades of B and C for the most part. He attended the Rochester Business Institute for six months, but did not take a degree. He served two and a half years in the United States Air Force and received an honorable discharge at the end of the Vietnam War.

The Claimant began at General Motors as an installer and as a tool and die set up operator for approximately eighteen years. His duties included the assembly of plastics, carpet, and other interior components, taking parts off of the die, inspecting parts, and changing out colors for particular parts. These jobs involved light lifting and a great deal of bending and reaching. At Saturn, the Claimant worked as an op-tech whose duties included general assembly, body sides, hoods and roofs, and doors and frames. The Claimant worked on the dock for a period of time handling shipping and inventory. Up until the time of retirement, the Claimant was involved in assembly. These jobs were repetitive and involved lifting twenty to thirty pounds.

In 1975, the Claimant went to work for General Motors in Syracuse, New York, and went to work for the Saturn division in 1993. In 1995, the Plaintiff began to have problems with both thumbs while installing door seals. On December 4, 1995, the Claimant began treatment with Dr. Michael Muhan with the Middle Tennessee Bone and Joint Clinic ("MTBJC"). At that time Dr. Muhan diagnosed the Claimant with wrist

tendonitis, and this treatment lasted into 1996. The Claimant then began to treat with Dr. Kenneth Moore of the MTBJC on July 89, 2003.

Dr. Moore did release surgery on both of the Claimant's wrists on August 12, 2003. Dr. Moore released the Claimant on September 10, 2003, restricting the Claimant to light duty. On September 19, 2003, Dr. Moore released the Claimant to perform his full duties. Dr. Moore assigned a 4% impairment to each extremity. Dr. Alton Hunter first saw the Claimant on December 13, 2004, and he adopted Dr. Moore's impairment ratings and agreed that it was appropriate not to assign restrictions. Dr. Richard Fishbein performed an IME on the Claimant on May 3, 2005, and assigned a 4% impairment to the left upper extremity and a 5% impairment to the right upper extremity.

On May 19, 1999, the Claimant was picking up parts and injured his neck. The Claimant saw Dr. Frederick Wade of the MTBJC for his neck injury on May 19, 1999. Dr. Wade obtained an MRI, which revealed a disc herniation at C6-7 on the left. Dr. Wade did surgery on June 25, 1999, and removed the discs and replaced them with a piece of bone and a screw-in apparatus. Dr. Wade released the Claimant on August 22, 1999, without restrictions. The Claimant made no claim for permanent partial disability benefits from this injury on the job and therefore of course received no permanent partial benefits. The Claimant was able to perform his duties on the job, and he testified that he did not have neck symptoms after he returned to work and until an incident on June 24, 2003.

On June 24, 2003, the Claimant was riding a bicycle at work and was struck in the head by a door. Dr. Wade first saw the Claimant, following this second accident, on October 29, 2003. He performed surgery on the Claimant on March 1, 2004. After a

new MRI, Dr. Wade concluded that the Claimant had some spondylitic narrowing, that is, arthritic changes, at C5-6 and a left-sided disc herniation at C5-6. Dr. Wade performed a second surgery March 11, 2004, which was essentially the same procedure he had perfiormed on June 28, 1999, except that the plate previously implanted was removed and a metal device put on both discs. Dr. Wade concluded that the Claimant reached MMI on June 25, 2004, and released him without restrictions. Dr. Wade saw the Claimant for the last time on August 11, 2005.

At that August 11, 2005, appointment, the Claimant had returned to work and returned to Dr. Wade because of symptoms he was having related to the neck. Dr. Wade recalls that meeting as follows:

> Q. Is he under any permanent restrictions now?
>
> A. Not restrictions, but on his last visit – you can look at my last paragraph – he had been treated for carpel tunnel syndrome in the interim. He had these two fusions, he's showing some signs of another disk starting to wear out, and I just told him that it would probably be reasonable that he look into a nonindustrial-type job. We didn't formalize any work restrictions for him.

Wade Depo., p.20, line 23-p.21 line 10.

> Q. Now, at any time during your treatment, did you ever suggest that the plaintiff should stop working?
>
> A. Well, not really until the last visit with him, which was August 2005. And I think he basically -- and this is paraphrasing some of my memory – he said he'd been moved to a heavier job, having more neck symptoms. "I've got these other problems." He had tendonitis in his hands; he had carpel tunnel in. his hands. He said, "What do I need to do?" My advice was, "You need to do anything that would keep these symptoms from necessitating you having another surgery." Because a third surgery on his neck would have a very high likelihood of not giving him that much pain relief, so I just told him, "If you have retirement options, that's probably your best interest right now."
>
> Q. I guess just to follow-up on that: You haven't told him specifically not to work because of his neck problems, have you?

A. *I mean, I think* there's a difference between telling somebody you can't work, it's unsafe for you to work and saying it's probably smart for you to look into something less strenuous. And I told him the latter of those two.

Wade Depo., p.22, line 14-p.23, line 16.

Dr. Wade testified that after the first neck surgery, the Claimant had "very little residual symptoms" and that after the second surgery the Claimant had "at least moderate residual symptoms" and that the Claimant was "worse after the second [surgery]." Dr. Wade believed that the Claimant had 25% impairment to the body as a whole after the second neck injury, 15% of which he attributed to the 1999 neck injury and 10% to the second neck injury.

Dr. Alton Hunter, an orthopedic surgeon with the MTBJC, first saw the Claimant on October 18, 2004. This doctor saw the Claimant for the wrist problems. On this occasion, the Claimant complained of wrist pain on the thumb side. This doctor saw the Claimant again on December 13, 2004 and again in May of 2005. The Claimant still had wrist pain and in addition had developed carpal tunnel syndrome. Dr. Hunter saw the Claimant again in August and September, 2005, after which the patient was released PRN and without restrictions from the wrist tendonitis. Dr. Hunter believed that the Claimant "could find some type of employment" from the arm problems, but this doctor opines that Dr. Wade's conclusions with regard to vocational disability from the neck problems are probably correct.

Mark Boatner is a vocational expert who saw the Claimant at the request of the Claimant. Mr. Boatner concludes that the Claimant's disability rating would be 99.33% or 100% if pain is considered. This expert concludes that the only jobs that the Claimant could do would be unskilled light job titles. Michael Galloway is a vocational expert

who saw the Claimant at the request of the Employer. Mr. Galloway concluded that because the Claimant had no formal permanent restrictions, he has no vocational disability. However, Mr. Galloway testified at trial that when he takes into account the remarks of Dr. Wade concerning the Claimant's ability to do industrial jobs and Dr. Fishbein's remarks about pain being a limiting factor, then the Claimant's disability could be 45-50%.

There are several issues to be determined preliminarily. First, as to the neck injury, it is necessary to determine whether the impairment rating should be the full 25% which he has from his neck condition or only the additional 10% which results from the second neck injury. Dr. Wade testified in his deposition that the rating from the second neck injury alone could be 25%. The Claimant received nothing for his prior on-the-job injury, and his counsel argues that T.C.A. § 50-6-207(3)(f) (limiting recovery from a second injury to only the *additional* injury caused by the second injury as opposed to the injury received in the first injury) only applies when there has been a recovery for the first injury. Counsel for the Claimant argues with strong logic that the statute is meant to prevent double recovery and that double recovery is not going to occur if there was no recovery at all for the original injury.

With considerable reluctance, this trial judge must conclude that the Claimant's impairment rating should be limited to the additional impairment that has resulted from the second neck injury. To hold otherwise would allow an injured worker to avoid the notice requirements and the statute of limitations as to the first injury. Potential problems similar to those seen in gradual onset cases could be created in discrete injury cases if carriers change between the two injuries. The effect of this conclusion is mediated in this

particular case as a result of this trial court's conclusion about a meaningful return to work.

As to whether there was a meaningful return to work, it is true that the Defendant was released by Dr. Wade on June 25, 2004, without formal restrictions. The Claimant then worked until October 31, 2005, and his retirement began on November 1, 2005. He was working for that period of time at a wage equal to or higher than his pre-injury wage. However, his testimony was that he worked with great pain from both of his injuries.

Dr. Wade's testimony concerning his advice to the Claimant on continued employment in manufacturing, which testimony is quoted *verbatim* above, is decisive on the issue of a meaningful return to work. There is evidence that Saturn company doctors routinely (though not always) return employees to work without formal restrictions, and the Claimant testified that he did not want formal restrictions when he was initially released because he wanted to try to work.

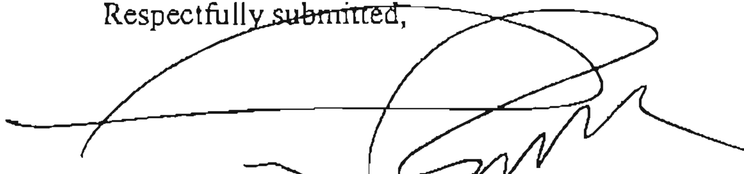
Rather than do an all-or-nothing, mechanical analysis of the Claimant's restrictions, it is necessary to inquire as to what Dr. Wade is actually saying about the claimant's ability to return to work at Saturn. The most reasonable interpretation of Dr. Wade's testimony with regard to this issue is that Dr. Wade is saying that the Claimant cannot work at Saturn without grave, unwarranted, and inadvisable risk to the Claimant's medical condition. Dr. Wade believes that the Claimant should be out of that work environment. It must be noted that Dr. Wade was a company doctor, not the Claimant's IME doctor or a doctor the Claimant had selected on his own. There was no meaningful return to work, and the six-times caps will apply to the 10% impairment rating.

The Claimant is not permanently, totally disabled. He could perform light duty, low skilled jobs. The vocational disability rating of 0% by Mr. Galloway is not credible because it is based on the fiction that the Claimant has no restrictions. Having no *formal* restrictions is not the same as having no restrictions. An industrial worker who has had two major neck surgeries cannot possibly be said to have a zero disability rating.

The Claimant has very real, if not formal, work restrictions. His work is restricted by his pain, and he was entirely credible in describing the difficulties that he experienced with pain when he returned to work the last time. Mr. Galloway's fall back position of 45-50% disability is far closer to an accurate assessment than his 0% disability rating. The Claimant's past work, most of which was at GM and Saturn, involved repetitive, manual labor, often involving a great deal of repetitive lifting. As Dr. Wade concluded factory work is no longer an option for him. Landscaping is no longer an option. For the new neck injury the Claimant is entitled to an award of 55% to the body as a whole. As to the wrist injuries, the Claimant would be entitled to an additional 20% to both upper extremities. The two awards would combine to 300 weeks of compensation. The award will be paid in a lump sum.

Counsel for the Claimant will generate and circulate for signature an order consistent with this Memorandum Opinion.

Respectfully submitted,

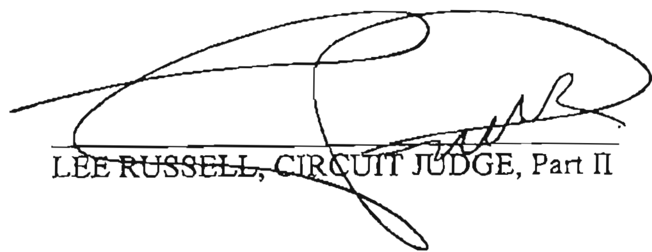


LEE RUSSELL, CIRCUIT JUDGE, Part II

CERTIFICATE OF SERVICE

I do hereby certify that I have placed and true and exact copy of the foregoing Memorandum Opinion in the United States Mail, postage prepaid, to: **Hon. Barbara Medley,** 111 West Commerce Street, Suite 201, Lewisburg, Tennessee 37091; and **Hon. Marcia McShane Watson,** 150 Second Avenue North, Suite 201, Nashville, Tennessee 37201.

This 3 day of April, 2006.



LEE RUSSELL, CIRCUIT JUDGE, Part II

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EXHIBIT E

IN THE CIRCUIT COURT FOR MARSHALL COUNTY, TENNESSEE
AT LEWISBURG

BARBARA O. PLEMONS,)
)
PLAINTIFF,)
)
vs.) NO. 13889
)
TENNESSEE TECHNICAL COATINGS)
CORP.)
)
DEFENDANT.)

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

The Plaintiff has filed this Complaint for unpaid overtime wages pursuant to the Fair Labor Standard Act as amended. *United States Code Annotated, Title 29 § 201 et seq.* The Plaintiff is seeking damages in the amount of $9,727.49 for overtime compensation together with liquidated damages of an equal amount for a sum of $19,454.98 plus costs and attorney's fees. (See prayer for relief in Complaint). The Plaintiff is seeking damages for alleged overtime from May 1, 1996 through April 6, 1998. (See paragraph 17 through 21 of Plaintiff's Complaint).

The Plaintiff alleges that the work she did for the Defendant was predominantly routine in nature such as keeping records of checks written, writing checks, invoicing clients and submitting payroll, but not making any decisions relating to what would be paid regarding payroll. (See paragraph 13 of Plaintiff's Complaint) The Plaintiff alleges further that the significant majority of her responsibilities involved bookkeeping, writing checks, answering the phone and invoicing customers. (See paragraph 7 of Plaintiff's Complaint).

The Defendant filed an Answer admitting that the Plaintiff's responsibilities involved bookkeeping, writing checks, answering the phone and invoicing customers; however, qualifies that these were not by any means her exclusive responsibilities and also held responsibilities such as Human Resources Manager, Benefits Administrator and Solicitor, and Accountant. (See paragraph 7 of Defendant's

Answer).

The Defendant denies that any overtime is due and raises as an affirmative defense that the Plaintiff was employed by the Defendant in a bonafied administrative capacity and is therefore exempt from the provisions of *29 U.S.C. § 206 and 207.* (See § 1 affirmative defenses in Defendant's Answer).

I. SUMMARY JUDGMENT

Summary judgment is to be rendered by a trial court when it is shown that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Daniels v. White Consol. Indus., Inc., 692 S.W. 2d 422 (Tenn. Ct. App. 1985).* A party moving for summary judgment may demonstrate an entitlement to a judgment as a matter of law by conclusively establishing an affirmative defense that defeats the nonmoving parties' claim. *Brown v. J C Penney Life Ins. Co., 861 S.W. 2d 834 (Tenn. Ct. App. 1992).* The phrase "genuine issue" contained in this rule refers to genuine factual issues and does not include issues involving legal conclusions to be drawn from the facts. *Byrd v. Hall, 847 S.W. 2d 208 (Tenn. 1993).*

II. WHETHER THE PLAINTIFF IS EXEMPT FROM THE OVERTIME REQUIREMENTS OF THE WAGE AND HOUR LAW

The Fair Labor Standards Act requires the payment of overtime compensation for employees who work in excess of forty (40) hours per week. *29 U.S.C. § 207 (a).* Employees in an executive, administrative or professional capacity are exempt from the overtime pay requirements. *29 U.S.C. § 213 (a)(1).* Under the statute, these terms are left for definition and delineation by regulations promulgated by the Department of Labor. *Hills v. Western Paper Company, 825 F. Supp. 936, 937 (D. Kn. 1993).*

The relevant exemption in this case is the administrative exemption. The basic provision concerning the administrative exemption is *29 C.F.R. § 541.2* which describes the administrative exemption as applicable to an employee:

(a) Whose primary duty consists of either:

(1) The performance of office or nonmanual work directly related to management policies or general business operations of his employer of his employer's customers, or......

(2) .....an employee who is compensated on a salary or fee basis at a rate of not less than $250 per week.... whose primary duty consists of the performance of work described in paragraph (a) of this section, which includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all requirements of this section.

29 C.F.R. § 541.2(a)(1), (e)(2).

The case of Brock v. National Health Corp., *667 F. Supp. 557 (M.D. Tenn. 1987)* contains a good discussion of the requirements for making out an administrative exemption in the context of office workers performing duties in the area of bookkeeping and accounting. Brock also explains the important difference between the "long test" and the "short test," with the "short test" applicable to those more highly compensated employees such as the plaintiff here.

Since the plaintiff in this case was compensated far in excess of $250.00 per week,[1] the applicable burden is established by the "short test" and it must be shown that the plaintiff's primary duty consisted of:

> The performance of office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers which includes work requiring the exercise of discretion and independent judgment.

Id. *at 561 citing 29 C.F.R. § 541.201(a)(2)(1984).*

An employee meets the administrative exemption only if his or her primary duty is office or nonmanual work directly related to the employer's management policies or general business policies. Id.

The employee must also exercise discretion and independent judgment to fall within the administrative exemption exception. The meaning of discretion and independent judgment is explained in *29 C.F.R. § 541.207(a):*

---

[1] The Plaintiff's salary in 1998 was $35,500.00, or $736.57 a week.

> In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The term as used in the regulations in subpart a of this part, moreover, implies that the person has the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance.

Id. at 564.

More responsibility than the tabulation of data is necessary to classify an employee as exempt under the act. The employees activities must include analysis and conclusions. *Id. at 566.*

The regulations use an ordinary bookkeeper as an example of one who does not exercise the requisite discretion:

> *Decisions in significant matters.*
> The second type of situation in which some difficulty with this phrase has been experienced relates to the level or importance of the matters with respect to which the employee may make decisions. In one sense almost every employee is required to use some discretion and independent judgment. Thus, it is frequently left to a truckdriver to decide which route to follow in going from one place to another; the shipping clerk is normally permitted to decide the method of packing and the mode of shipment of small orders; and the bookkeeper may usually decide whether he will post first to one ledger rather than another. Yet it is obvious that these decisions do not constitute the exercise of discretion and independent judgment of the level contemplated by the regulations in subpart A of this part.

29 C.F.R. § 541.207(d).

Initially, the burden is on the employer to establish the existence of an exemption. *Corning Glass Works v. Brennan, 417 U.S. 188 (1974).*

In the case at bar, it is important to establish that the Plaintiff performed duties that went beyond those of an ordinary bookkeeper. For example, in *Clark v. J.M. Benson Co., 789 F.2d 282 (4th Cir. 1986),* the court reversed a summary judgment granted to the employer because the evidence showed that the plaintiff, although she was the sole person performing financial recordkeeping for a substantial period of time, it was not established that the employee performed functions that went beyond normal bookkeeping. She may have been important because she represented the entire accounting department, but importance was not the criterion. It must be shown that the nature of the work directly related to management policies or general business operations, and the exercise of discretion and independent judgment.

On the other, if it is shown that the actual duties went beyond simple bookkeeping, an exemption can be made out. *See Walling v. Newman, 61 F. Supp. 971 (N.D. Iowa), 152 F. 2d 967 (8th Cir. 1945)*(employee designated as office manager and bookkeeper, who was sole full-time office employee of livestock commission business, dealt with customers, conferred daily with officers of company, wrote checks, bought supplies, and directed workers in absence of officers, was exempt).

A most useful modern case is *Hills v. Western Paper Co., 825 F. Supp. 936 (D. Kan. 1993)*. The Court granted summary judgment to the employer on the basis that the former employee was exempt as an administrative employee. The plaintiff was the accounting and credit manager for defendant, supervised an assistant and exercised discretion in approving sales on credit. Factors similar to those present in the matter at hand include the supervision of an assistant, the substantial difference in salary between the plaintiff and the assistant, the importance of the position, and the fact that the plaintiff was in charge of the financial center of the company. Moreover, the court rejected the argument that because the plaintiff spent much of her time performing routine clerical tasks, she could not be exempt. The court noted that the rule to the effect that an employee's primary duties need to involve the exempt functions, and that "primary" usually means more than 50%, was only a rule of thumb. The court went on to hold that the importance of plaintiff's other duties overrode the significance of the amount of time spent on routine tasks.

The facts in the *Hills* case were analyzed under the "short test." As mentioned earlier, under the "short test," an employee is deemed exempt if

> (1) their primary duty consists of the performance of office or nonmanual work directly related to management policies or general business operations of the employer or the employer's customers, and
>
> (2) such duty includes work requiring the exercise of discretion and independent judgment.

Id. at 937. The employer who asserts the exemption has the burden of establishing both of these requirements by clear and affirmative evidence. *Id.*

DIRECTLY RELATED TO MANAGEMENT POLICIES OR GENERAL

BUSINESS OPERATIONS

According to the regulations, the phrase "directly related to management policies or general business operations" describes those type of activities relating to the administrative operations of a business as distinguished from production or sales work. *Id., 29 C.F.R. § 541, 205 (a).*

In the case at bar, the Plaintiff's duties, similar to the employee's duties in the *Hills'* case, directly related to the administrative aspects of the Defendant Tennessee Technical Coatings' business.

The Plaintiff in *Hills* supervised and evaluated another employee under her. In the case at bar, the Plaintiff supervised another employee under her.

The Plaintiff in *Hills* was responsible for training and orienting new employees in her department. In the case at bar, the Plaintiff was responsible for training a new employee as well as orienting all new employees regarding company benefits.

Supervisory functions directly relate to and are the means through which management policies are implemented in a business. They have a continuing impact on productivity levels. *Id. at 938.*

As the accounting and credit manager, the Plaintiff in *Hills* was responsible for managing the financial nerve center of Western's business. *Id.* The Court noted the importance of her job to the smooth and effective functioning of Western's business with Hills being responsible for keeping track of bills, payments and insuring that customers to whom Western extended credit were credit worthy. *Id.* Thus, the Court found that Hills' duties directly related to both Western's management policies and its general business operations.

Similarly, the Plaintiff in the case at bar, was considered to be the Chief Financial Officer for the corporation. She was responsible for managing the financial matters of the business, keeping track of bills, and payments. Her duties were such that the owners needed and counted on her input on a lot of business decisions. The Plaintiff handled all of the insurance needs of the company including the medical

insurance for the employees as well as keeping up with workers' compensation insurance. She also solicited insurance quotes from various companies. The Plaintiff helped rewrite the company manual and attended seminars and advised the owners about what she learned. The Plaintiff's vital administrative role in this small company is reflected in the various correspondence attached to her deposition.

Clearly, the Plaintiff's duties in the case at bar directly related to the Defendant's management policies and general business operations.

EXERCISE OF DISCRETION AND INDEPENDENT JUDGMENT

According to the regulation found at *29 C.F.R. § 541.207 (a)*:

> The exercise of discretion and independent judgment involves the comparison and evaluation of possible courses of conduct in acting or making a decision after the various possibilities have been considered. The term....implies that the person has the authority or power to make an independent choice free from immediate direction or supervision with respect to matters of significance.

The court in *Hills* found that the Plaintiff's performance of supervisory functions, standing alone, qualified as work requiring the exercise of discretion and independent judgment. *Id. at 938.* The Plaintiff in *Hills* exercised the authority to approve the release of orders on credit on a daily basis. *Id.* Although *Hills* states that she did so only in accordance with guidelines established by the employer, she does not identify what those guidelines are. *Id.* The Court found that this was insufficient to create a genuine issue of material fact. *Id.*

In the case at bar, the Plaintiff supervised 1 employee, an office worker by the name of Karen Townsend. The Plaintiff put the figures together in preparing the financial statements for the company, had general ledger responsibilities and actually made adjustments to the general ledger. The Plaintiff states that she was either told to make the adjustments or knew what was to be done. The Plaintiff admitted she made the adjustments to the inventory. The Plaintiff had the discretion to buy supplies for the company and wrote checks for such supplies. When there wasn't enough money to pay accounts payable, the Plaintiff had the discretion to decide which invoices to pay and which ones not to pay. The Plaintiff exercised discretion and independent judgment in her important administrative role in this company dealing

with all the financial matters, human resource matters and various other duties required of an office manager.

CONCLUSION

In conclusion, it is uncontroverted that the Plaintiff spent time doing bookkeeping and clerical work. Clearly, her primary duties related to both the Defendant's management policies and general business operations. The Plaintiff exercised discretion and independent judgment. The Plaintiff was paid a salary commensurate with these responsibilities. The undisputed material facts show that the requirements of the "short test" are established and for this reason, the Defendant should be granted summary judgment.

Respectfully submitted,

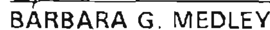
BUSSART & MEDLEY

By

BARBARA G. MEDLEY #14103
Attorney for Defendant
520 North Ellington Pkwy.
P.O. Box 2456
Lewisburg, Tennessee 37091
931/359-6264

CERTIFICATE OF SERVICE

I hereby certify that I have on this the 12 day of October, 2000, served a true and exact copy of the foregoing Memorandum by placing a copy of same in the United States Mail postage prepaid to John R. Callcott, BLACKBURN, SLOBEY, FREEMAN & HAPPELL, P.C., 414 Union Street, Suite 2050, Nashville, Tennessee 37219.

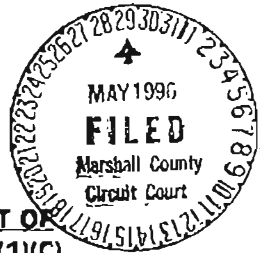


BARBARA G. MEDLEY

EXHIBIT F

IN THE CIRCUIT COURT OF MARSHALL COUNTY, AT LEWISBURG, TENNESSEE

STATE OF TENNESSEE	)	
	)	
VERSUS	)	NO. 12870
	)	
TONY LEE GENTRY	)	



MEMORANDUM OF DEFENDANT IN SUPPORT OF MOTION FOR DISCOVERY UNDER RULE 16(a)(1)(C)

This Memorandum is filed in support of the Motion of Defendant for discovery under T.R.Cr.P. 16(a)(1)(C).

This Motion requests the production of all documents in the possession, custody and control of the State which are material to the preparation of the Defendant's defense.

Rule 16(a)(1)(C) provides that Defendants are entitled, as a matter of right, to the documents and tangible objects requested in this Motion. The Rule provides that "[u]pon request of the Defendant, the State shall permit the Defendant to inspect and copy" these documents. The State's production of the requested documents is, therefore, mandatory and cannot be refused.

The broad scope of Rule 16(a)(1)(C) must be emphasized. The requirement that the State produce all documents "material to the preparation of his defense" places an obligation of disclosure on the State even broader than that required by Brady v. Maryland, 373 U.S. 83(1963). Under Brady, the State is required to disclose to the Defendant any evidence which is favorable to the Defendant. Under Rule 16(a)(1)(C), disclosure is required of all evidence that is material to the preparation of the defense. This standard embraces far more than just the evidence which is exculpatory or favorable.

Access to incriminating documents, for instance, would certainly be significant to the Defendant in preparing to defend this action. The fact that incriminating documents are "material" and within the contemplation of T.R.Cr.P. 16 was demonstrated in State v. Butts, 640 S.W.2d 37 (Tenn.Cr.App.

1982). In that case, the Court conditioned Defendant's broad discovery request for certain documents and tangible objects pursuant to Rule 16 upon a showing by the Defendant of materiality to the preparation of his defense.

Numerous other types of documents may be material to the preparation of the defense even though they are neither exculpatory nor incriminating. For example, certain documents may lead to exculpatory evidence. All of these documents are obviously responsive to a Rule 16(a)(1)(C) Motion.

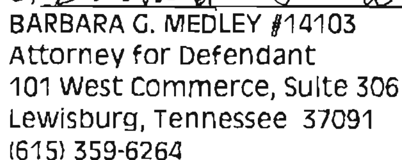
Documents obtained by the State from third parties during the investigation which relate to the charges in the presentment would necessarily be material in the preparation of the defense. Further, a similar request has been held to be "reasonable" within the meaning of T.R.Cr.P. 16. State v. Brown, 522 S.W.2d 383 (Tenn. 1977).

As stated in the Motion, notes or memoranda reflecting grand jury testimony which are material to the preparation of Defendant's defense must be produced. See Tiller v. State, 600 S.W.2d 709 (Tenn. 1980). Since the rules of evidence permit the use of grand jury testimony as independent substantive evidence, such testimony - whether it be exculpatory, incriminatory, corrobative, impeaching or otherwise - is obviously material to the preparation of the defense.

The materials requested herein are essential for the preparation of a proper and adequate defense to the State's charges. The Court should order production without delay.

Respectfully submitted,

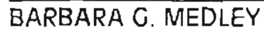
BUSSART & MEDLEY

By 

BARBARA G. MEDLEY #14103
Attorney for Defendant
101 West Commerce, Suite 306
Lewisburg, Tennessee 37091
(615) 359-6264

CERTIFICATE OF SERVICE

I hereby certify that I have this 28 day of May, 1996, forwarded a true and accurate copy of the foregoing Memorandum to Mr. Michael McCown, District Attorney General, Marshall County Courthouse, Lewisburg, TN 37091, by United States mail, postage pre-paid.



BARBARA G. MEDLEY