Tennessee Judicial Nominating Commission

Application for Nomination to Judicial Office

Rev. 25 August 2011

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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 seventeen (17) paper copies to the Administrative Office of the Courts. Please e-mail a digital copy to debra.hayes@tncourts.gov.

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Partner at Wyatt, Tarrant & Combs, LLP

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

1990. TN BPR #14259.

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 only in Tennessee.

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).

During college, in the Summers of 1984 and 1985, I was a clerk on the New York Stock Exchange.

Between college and law school (i.e., approximately 8/86 to 8/87), I was a paralegal at Chadbourne & Parke in New York City.

1990-92: Law Clerk to the Honorable Thomas A. Higgins (U.S.D.Ct -- M.D. Tenn.).

1992-99: Associate Attorney at Wyatt, Tarrant & Combs, LLP.

1999-present: Partner at Wyatt, Tarrant & Combs, LLP.

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.

My practice is entirely civil litigation, which -- over the last 19 years -- has included the following: insurance receivership/asset recovery (20%), product liability (15%), commercial contract litigation (20%), employee/corporate fraud litigation (15%), insurance litigation (15%), civil rights defense (10%), construction (5%). Over the last two years, my practice has focused more on insurance receivership/asset recovery, employee/corporate fraud litigation, product liability, and commercial contract litigation.

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.

For two years (1990-92), I was a law clerk to the Honorable Thomas A. Higgins of the U.S. District Court for the Middle District of Tennessee. As such, I researched issues of law, wrote bench briefs, wrote opinions for the Judge (with regard to pending motions and opinions of the Court in the context of non-jury trials), and prepared jury instructions. Also, when Judge Higgins sat on the Sixth Circuit Court of Appeals by designation, I traveled with the Judge and wrote opinions for those cases assigned to the him by the panel.

Since 1992, my legal practice has been split fairly evenly between state and federal courts -- both trial and appellate. Since roughly 1993, I have represented the Commissioner of Commerce and Insurance, in the Commissioner's statutory capacity as Receiver of insolvent insurance companies, and the Special Deputy Receiver (who is appointed by the Commissioner). *See* Tenn. Code Ann. § 56-9-101, *et seq*. As counsel to the Commissioner and the Special Deputy Receiver, I have a dual role: (a) to assist the Receiver in marshaling and conserving the assets of

an insolvent insurance company for ultimate distribution to creditors if the company is liquidated, and (b) to assist in the Receiver in asset recovery efforts from parties whose actions contributed to the company's failure.

Because the federal *McCarran-Ferguson Act* vests with the States the exclusive authority to regulate the business of insurance, insurance companies may not seek the protection of federal bankruptcy courts. Instead, the individual States are charged with the responsibility of equitably apportioning the assets of insolvent insurance companies to creditors. In furtherance of that responsibility, each State has established, by statute, its own insurance insolvency/receivership procedures. In Tennessee, most of the work pertaining to the conservation and distribution of insurance company assets takes place before the Davidson County Chancery Court, which possesses exclusive jurisdiction for all Tennessee insurance insolvencies. With regard to asset recovery efforts, wherein the Receiver files suit against culpable third parties, such litigation takes place in state and federal courts across the country. In such litigation, issues of federalism, full faith and credit (particularly with regard to enforcement of Tennessee liquidation orders in sister States), and *Burford* abstention frequently arise.

Previously, I have served as counsel for the Receiver in the insurance receiverships of Anchorage Fire & Casualty Insurance Company, Congress/Genesis Reinsurance Company, Xantus Healthplan of Tennessee (a TennCare MCO), and Doctors Insurance Reciprocal. In the Xantus receivership, I co-authored an emergency appellate brief to the Tennessee Court of Appeals, which is discussed in response to Question #40, below.

Currently, I am counsel for the Receiver of Franklin American Life Insurance Company, which was one of seven insurance companies (in five different States) defrauded by ex-financier, Marty Frankel. I have participated in asset recovery litigation in the Northern District of Mississippi, the Southern District of New York, the District of Connecticut, and state courts. Last year, in *USA v. 895 Lake Avenue*, 3:99cv01772 (D. Conn.), I represented the FAL Receiver at a federal civil forfeiture trial, which pertained to a $2 million residence, which had been purchased by Marty Frankel with stolen insurance company funds. While the U.S. Justice Department had agreed to remit the forfeiture assets to the Receivers of the defrauded companies, a competing creditor -- Cheryl Lacoff -- had filed a state court judgment lien against the property for satisfaction of an unrelated debt. The non-jury trial focused on the validity of the two competing claims for the assets, and the proper priority to be afforded each claim. The Receivers prevailed at trial, and the judgment was affirmed by the Second Circuit Court of Appeals.

In addition, I appeared on behalf of the FAL Receiver at the criminal sentencing hearing of former FAL President John Hackney in Williamson County. Mr. Hackney had conspired with Marty Frankel in the looting of FAL's assets, and -- at the second sentencing hearing for Mr. Hackney -- I testified on behalf of the FAL receivership and its creditors with regard to the harm caused to the insurance company and Mr. Hackney's culpability in the scheme.

In addition to representing Commissioner of Commerce and Insurance, I have represented both large and small businesses that have been the victim of employee fraud. In one of my first cases upon joining Wyatt, Tarrant & Combs, I was part of a litigation team that brought a federal RICO suit against a mid-level manager who had defrauded General Electric Company. That individual, who managed logistics (i.e., storage, distribution and trucking issued) for GE's

Appliance Division, also was a silent partner in a trucking company and in a warehouse company. Invariably, more GE goods were stored at, and shipped by, these companies than any other -- all to this manager's benefit. The manager ultimately was convicted of wire and mail fraud in the Middle District of Tennessee.

In 1995, I represented Chic Can Enterprises in a franchise contract case brought by Shoney's, Inc. in the Davidson County Chancery Court. I filed a Motion to Dismiss for lack of jurisdiction and improper venue, which was granted. I continued my representation of Chic Can at the Tennessee Court of Appeals, and wrote the appellate brief on behalf of Chic Can. The decision was affirmed. *See Shoney's Inc. v. Chic Can Enterprises*, 922 S.W.2d 530 (Tenn. App. 1995).

In 2003, I represented the Logan Todd Regional Water Commission in Nashville federal court, as a third-party defendant involving liability for the sub-standard construction of a raw water intake and pumping station in Clarksville, Tennessee. The LTRWC was the owner of the project, and was sued by the general contractor's bonding company on two claims: (a) that the project design drawings prepared by the LTRWC's engineers were flawed and (b) that core ground sampling for the project was inadequately performed by the LTRWC's engineers. The case addressed issues of contract interpretation, standards of care relating to engineers and contractors, and subrogation. The LTRWC prevailed at the summary judgment stage, and the decision was not appealed.

In 2006 through 2008, I represented International Paper Company in Rutherford County Chancery Court, against the general manager of IP's local corrugated box plant. The general manager had been discovered receiving "commissions" with regard to special product jobs that he sub-contracted out to other box manufacturers. The details of that case are discussed in response to Question #9, below.

In 2010, I represented the Safe Step Walk-In Tub Company, which manufactures and sells ADA-compliant bathtubs in the United States and Canada. I was engaged by the co-owner, who believed that his partner was using company funds for his own purposes -- a suspicion which proved correct. I filed suit in Davidson County Chancery Court, received injunctive relief barring the defendant, and others working with him, from the company offices and from conducting company business. After the injunction was granted, we determined the amount of funds the co-owner had misappropriated; we also uncovered evidence of forgery on the part of the co-owner. Shortly thereafter, the matter settled and the defendant relinquished all right and ownership in the company.

I also have represented companies in product liability actions. For example, I have represented Archer-Daniels-Midland Company in two federal lawsuits asserting spontaneous combustion of soybean oil, which allegedly caused significant property damage. I also defended the Werner Company in an action alleging the defective design and manufacture of a step ladder, which caused injuries to a customer. Further, in state court, I have defended two manufacturers of industrial pumps and valves in litigation alleging asbestos exposure and resultant mesothelioma.

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

One of my most challenging cases was *International Paper v. Ritchie*, identified above.

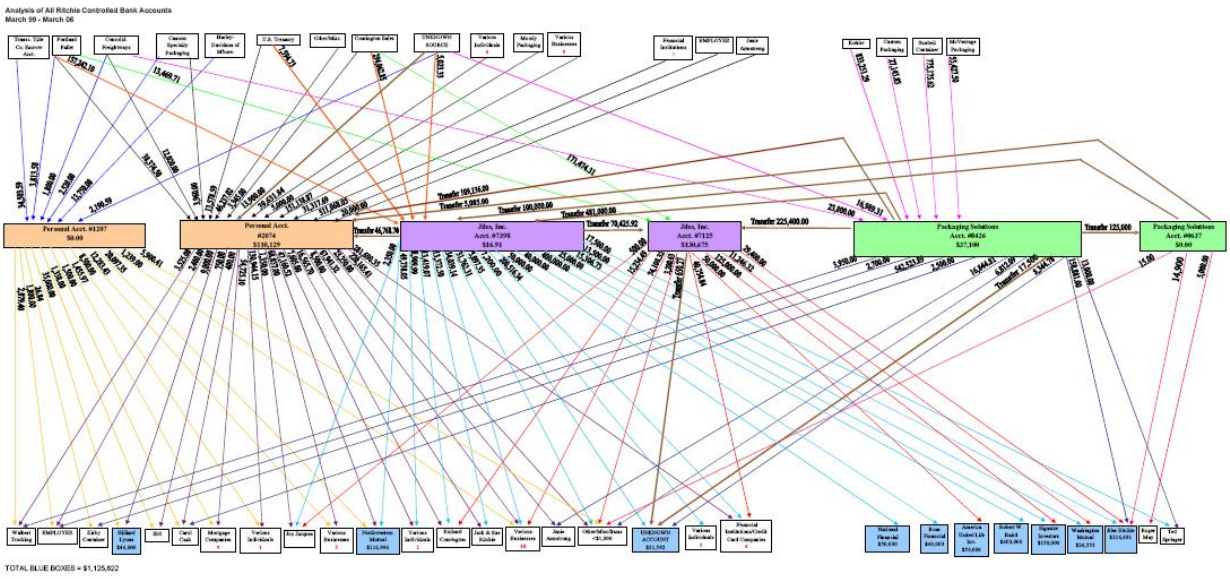
On March 20, 2006, International Paper learned that the general manager its corrugated box plant in Murfreesboro had been receiving under-the-table kickbacks from a subcontractor. The General Manager enjoyed a great deal of trust and discretion within his organization, and was -- in fact -- one of the rising stars of the company. His productivity was consistently high; his management skills were praised almost universally; and his rapport with customers, suppliers and employees was always strong. His yearly performance reviews were consistently top drawer.

In his position, this General Manager had direct contact with both customers and sub-contractors, and had a high level of flexibility to negotiate contracts on both sides of that business equation. He could negotiate contracts with customers regarding how much they would pay for a product, and he could negotiate contracts with sub-contractors regarding how much they would charge to make the product. Unfortunately, this position ultimately enabled the General Manager to build in a kick-back factor, so that monies relating to an International Paper contract would come to him personally without detection by his employer.

When confronted with his relationship with this sub-contractor, the General Manager admitted to making "a huge mistake" but denied having any other improper business dealings. This statement was not truthful.

While the size of this scheme initially appeared to be relatively modest, further investigation revealed that the General Manager -- in fact -- had engaged in six different schemes over a 10-year period of time, at a cost to International Paper of approximately $2 million. I conducted most of the investigation, which involved two sham businesses established by the plant manager and numerous bank accounts, requiring a great deal of monetary tracing.

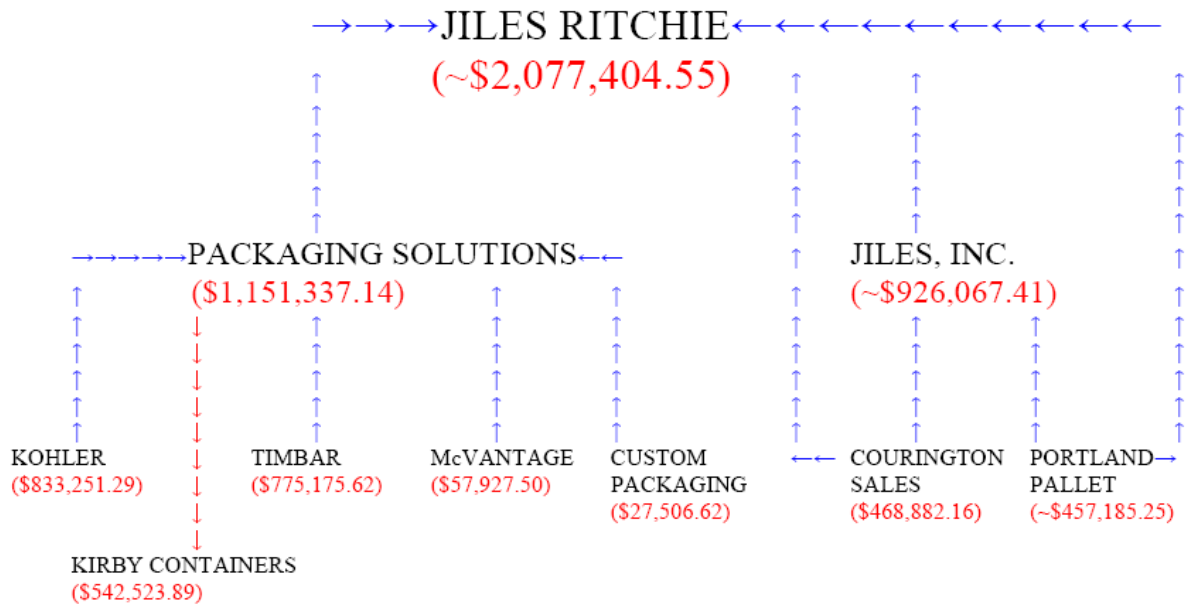
Here is what the plant manager's finances (as diagramed by our forensic accountant) looked like.



After obtaining the plant manager's bank records, I personally interviewed numerous individuals

in Tennessee and Alabama who paid large sums of money to this manager, and obtained affidavits from these witnesses as to the nature and purpose of these payments. The individual schemes, as created by the General Manager of the plant, looked like this.

Chart of Schemes



We presented this, and other evidence, to the Rutherford County Chancery Court and obtained two preliminary injunctions, which -- among other things -- froze the General Manager's assets.

In addition to amassing this evidence for the civil trial, I also served as a liaison between IP and the Rutherford County District Attorney's Office, and assisted the DA's Office with its criminal investigation and trial preparation. On the eve of the criminal trial, both matters settled: the manager pled guilty to a felony, and in an agreed civil judgment, IP recovered almost $1 million in funds and investments, over which the defendant still maintained control.

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

Not applicable.

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

Not applicable.

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

None.

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

None.

EDUCATION

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

Trinity College, Hartford, CT (1982-1986) -- B.A. English/Literary Writing.

Vanderbilt University School of Law, Nashville (1987-1990) -- J.D. Associate Editor (1989-90) *Vanderbilt Journal of Transnational Law.*

PERSONAL INFORMATION

15. State your age and date of birth.

47 years old. DOB 2/16/64.

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

I moved to Tennessee in 1987 to attend Vanderbilt Law School. I have been living here ever since.

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

I have lived at my current address in Brentwood since May of 1997.

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

Williamson 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.

None.

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

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.

No.

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

No.

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

No.

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

No.

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

Harpeth Presbyterian Church -- Elder of Worship (2007-10), Personnel Committee (2011), member of choir (2006-present).

Cub Scouts -- Den Leader (2004-06).

Laurelwood Homeowners Association -- member of board (2011).

Wildwood Swim & Tennis Club -- member since approximately 1998.

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.

John Marshall American Inn of Court -- member (2009-present).

Nashville Bar Association -- member (since approximately 1992-present).

Williamson County Bar Association -- member (2008-present).

Tennessee Bar Association -- member (since approximately 1992-present), member of Appellate Practice Section (2008-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.

Early in my legal career, I represented two sisters: Robyn Hess and Lisa Dye. When in their teens, Robyn and Lisa were orphaned when their parents died in an automobile accident. After the accident, they lived with their grandfather near Littleton, Colorado. Their parents left a modest estate and proceeds of a life insurance policy. Seeking to provide for their future, their grandfather consulted with a financial advisor for the best way to invest these funds. The advisor recommended a number of investment vehicles, including investments in REITs (real estate investment trusts). Several years later, after each had married and began starting their own families, Robyn and Lisa sought to cash out their investments, only to learn that -- in contrast to the periodic account statements which they had received over several years -- their investments were worth very little and some (like the REITs) were not liquid. I filed a lawsuit against the financial advisor and his company. Ultimately, the matter settled, and Robyn and Lisa recovered roughly half of the stated value of their accounts.

After the matter concluded, I received the attached letter from Robyn and Lisa. This is the highest form of recognition that I can think of: the simple gratitude of a client for helping right a wrong. Since then, I have had other successful cases, and other clients have offered their thanks for my work. However, this was the first time, and I still keep the letter: it serves as reminder to me of what the practice of law is about.

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

The "Ker-Frisbie Doctrine": A Jurisdictional Weapon in the War on Drugs, 23 VAND. J. TRANSNAT'L L. 385 (1990).

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.

"You've Been Subpoenaed, Now What?" -- one of several lecturers for a CLE program presented by the National Business Institute (June 2006).

"The Well-Prepared Fraud Case" -- seminar to Middle Tennessee Association of Certified Fraud Examiners (September 2008) (this was continuing education for accountants; I do not believe CLE credit was offered).

"Fraud Must-Know Cases" -- seminar to the Tennessee Society of Certified Public Accountants (October 2009) (this was continuing education for accountants; I do not believe CLE credit was offered).

"Anatomy of a Fraud" -- one of several lecturers at corporate counsel CLE seminars sponsored by Wyatt, Tarrant & Combs (December 2009 and June 2010).

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

None.

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

No.

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

1. *Spurlock v. Sumner County, Tennessee*. Brief on behalf of Sumner County to the Tennessee Supreme Court on the following certified question from the U.S. District Court of the Middle District of Tennessee: "Does a Sheriff, when he or she acts in a law enforcement capacity, serve as a state or county official under Tennessee law?"

2. *Travelers Indemnity Company of America v. Archer-Daniels-Midland Company*. Brief to the U.S. District Court for the Western District of Tennessee on behalf of ADM and in support of a Motion to Compel production of documents and information, which addresses Tennessee comparative fault principles.

I wrote both of these briefs in their entirety.

ESSAYS/PERSONAL STATEMENTS

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

When I was nearing graduation from law school, I received and accepted a federal District Court clerkship. I did so, because I wanted to be a litigator, and I thought that it would be a good idea to learn by observation and practical application how litigation is done and how a lawsuit is tried. I learned a great deal, and when my tenure was over, I told Judge Higgins that the clerkship was the best job I had ever had. In turn, he observed that "it's also the *only* job you've ever had." As it turns out, we were both right. I love the discipline and practice of law. I also know, as Robyn Hess and Lisa Dye told me, that I can "make a difference in people's lives." In many ways, that is what being a judge would enable me to do.

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)***

Wyatt, Tarrant & Combs has a long-standing policy, which requires 1st through 3rd year associates to devote 50 hours of professional time per year to *pro bono* work. As an associate, I participated for approximately 2 years in the "Early Truancy Program" sponsored by the Nashville Lawyers' Association for Women, the Metropolitan School Board and the Davidson County Juvenile Court. The purpose of the program was to address the problem of juvenile truancy in Davidson County, and to keep the child in school via the appointment of an attorney as *guardian ad litem* (in a non-fiduciary capacity). As a *guardian ad litem*, I monitored the student's attendance record by communication with the parent, school administrators/counselors and outside youth counselors.

Currently, I have an active *pro bono* matter that was referred to me through the Legal Aid Society, involving the purchase of a car from a local used car lot and the failure of the lot to repair, to the owner's satisfaction, a number of mechanical problems.

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

I am applying for the Division III Circuit Court vacancy in the 21st Judicial District (Hickman, Lewis, Perry and Williamson Counties). I understand that the 21st District has four judges, who hear civil cases in both Circuit and Chancery, as well as criminal cases in Circuit Court. I further understand that the Division III position, recently vacated by the Honorable Jeff Bivins, was assigned "Part 2" of the civil case docket. I have been a practicing civil litigation attorney for nearly 20 years. My civil litigation practice has touched upon a wide range fields, and a number of my cases have been complex from both legal and factual standpoints. I would bring to the Court an inquisitive intellect, a well-developed set of analytical skills, a dedicated work ethic, humor and humility.

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)***

When I graduated from law school, I had a great deal of knowledge regarding the *theory* of the law, and virtually little knowledge as to its practical *application*. From my judicial clerkship, I gained some level of understanding as to how one practices the law, as well as how the legal system affects the lives and enterprises of others. For this reason, and as I advanced in my practice and grew more experienced, I served as a mentor for younger attorneys in my firm. I would like to continue to participate in a mentoring program, either through my Inn of Court or through the bar association.

In addition, I intend to continue to bring whatever talents and skills I have to the administration of my church and its mission.

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)***

Born and raised in New Jersey, I initially thought that I would work in finance. My Dad was a stockbroker on the New York Stock Exchange, as was my Grandfather. However, after working as a clerk on the floor of the NYSE for two summers, I understood that I was not suited for that profession: there was nothing creative about it.

Creativity and imagination are two of my personality traits. Trinity College offered two English degrees: (a) Literary Writing and (b) Literature. I chose Literary Writing because, while I loved reading literature, I enjoyed *writing* it more. So, while those on the Literature path were dissecting the works of Shakespeare, Joyce, Faulker and Hemingway, I was writing fiction, play scripts and poetry of my own.

After graduation from college, and with utterly no legal training, I obtained a job as a paralegal for Chadbourne & Parke in Manhattan, at a starting salary of $16,000. The hiring partner told me that, based solely on my resume, he would not have given me a second look. However, he granted me an interview, because the tone and style of my cover letter impressed him.

While at C&P, the hiring partner, and the other attorneys that I worked with, told me that I had the ability to distill complex issues and explain them in clear terms. Also, I found that I enjoyed the work.

It is this love and command of language that I also would bring to the bench.

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

"What is the Court's role?" was the central issue in an emergency appeal to the Court of Appeals, in which I participated on behalf of the Receiver of Xantus HealthPlan of Tennessee. *See State of Tennessee, ex rel., Anne B. Pope v. Xantus HealthPlan of Tennessee, Inc.*, 2000 WESTLAW 630858 at *6 (Tenn. App. 5/20/10).

In *Xantus*, we argued, and the Court of Appeals agreed, that a judge "is not an avenger at large...." *Xantus*, at *10. He or she is not charged with the responsibility to set policy, and therefore cannot disregard a statute simply because he or she disagrees with the policy behind it. *Id*. Rather, the role of a judge is three-fold: to interpret the law, to resolve ambiguities or conflicts that may exist in the law, and to serve as an essential check against the improper intrusion of government into the rights of the free citizenry. In the *Xantus* case, the receivership court substituted its judgment for that of the executive branch and the legislature (with regard to the management of the TennCare program) and that of the Receiver (with regard to the propriety of continued rehabilitation efforts toward Xantus). In reversing the receivership court, the Court of Appeals found (as we had argued) that "the commissioner ha[d] violated neither constitutional provision nor statute in her response to the TennCare Xantus problems. Absent such a violation, judicial intrusion is unwarranted and beyond the limited role authorized by the rehabilitation statutes." *Xantus*, at *16 (Cain, J., concurring).

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. Hon. Thomas A. Higgins (Retired), 4307 Esteswood Drive, Nashville, TN, 37215. (615) 297-5282.

B. Ronnie A. Howell, Esq., International Paper Company, 6400 Poplar Avenue, Memphis, TN, 38197. (901) 419-3809.

C. William "Pete" Delay, Sherman-Dixie Concrete Industries, 200 42nd Avenue, N., Nashville, TN 37209. (615) 889-0700.

D. Mark A. Wildasin, Esq., Chief (Civil Division), U.S. Attorney's Office, 110 Ninth Avenue, South, Nashville, TN 37203. (615) 736-5151.

E. Ronald E. Crutcher, P.E. 1324 Adams Street, Franklin, TN 37064. (615) 794-5442.

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 21st 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: 9/20, 20 11.

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

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I hereby waive the privilege of confidentiality with respect to any information which concerns me, including any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, and I hereby authorize a representative of the Tennessee Judicial Nominating Commission to request and receive any such information.

Andrew B. Campbell
Type or Printed Name

Andrew B. Campbell
Signature

9/20/11
Date

14258
BPR #

March 14, 1999

Wyatt Tarrant & Combs
Mr. Andrew Campbell
1500 Nashville City Center
511 Union Street
Nashville, TN 37219-1750

Andrew:

Let me start by apologizing for the delay in sending you this letter. I have tried several times to draft a prolific note of appreciation that would stand out in your mind from all the others you have, no doubt received. But kids, careers, and average writing skills have let three months slip by.

Nonetheless, Lisa and I want you to know how very grateful we are for your dedication to our case for 3 full years. You took a personal interest in the case that went well beyond what was required. Your style of representation was the perfect match for the unfortunate situation we had encountered. You turned a confusing and tedious case into one both Lisa and I could understand and be comfortable with. We miss the weekly phone calls and laughs over the most recent developments. In the end, you had become our friend as much as our counsel.

We wish you much luck and success in your recent appointment to Partner. Your career enables you to make a difference in people's lives, and ours is certainly better because of you. Thank you again.

Sincerely,

Robin Hess Lisa Dye

IN THE SUPREME COURT FOR THE STATE OF TENNESSEE
AT NASHVILLE

ROBERT SPURLOCK and	)	
RONNIE MARSHALL,	)	
	)	
Plaintiff-Respondents,	)	**APPEAL NO.**
	)	**M1999-01486-SC-R23-CQ**
v.	)	
	)	**UNITED STATES DISTRICT COURT**
SUMNER COUNTY, TENNESSEE,	)	**MIDDLE DISTRICT OF TENNESSEE**
	)	**Case Nos. 3-96-0926/0927**
Defendant-Petitioner,	)	**HONORABLE ROBERT L. ECHOLS**
	)	
and	)	
	)	
LAWRENCE RAY WHITLEY;	)	
JERRY R. KITCHEN;	)	
JOHN D. COARSEY; HENRY APPLE;	)	
DANNY SATTERFIELD;	)	
CITY OF HENDERSONVILLE;	)	
	)	
Defendants.	)	

BRIEF FOR DEFENDANT-PETITIONER, SUMNER COUNTY

Barbara J. Moss, #5715
Andrew B. Campbell, #14258
WYATT, TARRANT & COMBS
511 Union Street, Suite 1500
Nashville, Tennessee 37219
(615) 244-0020

For Petitioner Sumner County

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STATEMENT OF SUBJECT MATTER JURISDICTION

This matter comes to this Court pursuant to Supreme Court Rule 23. On November 30, 1999, the Honorable Robert L. Echols entered an Order Certifying Question to the Supreme Court of Tennessee. The Certification Order was filed with the Supreme Court Clerk on December 2, 1999.

STATEMENT OF THE ISSUE

1. Does a Sheriff, when he or she acts in a law enforcement capacity, serve as a state or county official under Tennessee law?

STATEMENT OF THE CASE

On October 9, 1996, Plaintiffs-Appellees Robert Spurlock and Ronnie Marshall (hereinafter "Plaintiffs") filed two respective (and, later, consolidated) civil rights actions in the United States District Court for the Middle District of Tennessee, alleging violations of their civil rights at their respective state court criminal prosecutions for murder.

In their Second Amended Complaint, Plaintiffs alleged that Richard Sutton, as the Sheriff of Sumner County at the time of Plaintiffs' criminal prosecutions, was the final policymaker for the County with respect to law enforcement activities, and that the County is "responsible for" the Sheriff's policies, practices and

customs pursuant to Monell v. New York City Dept. of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

On August 15, 1997, Defendant Sumner County, filed its Second Restated Motion to Dismiss the Plaintiffs' Second Amended Complaint. In that Motion, Sumner County argued that former Sheriff Richard Sutton, in the exercise of his law-enforcement authority, was an officer of the State of Tennessee, and not an officer of the County. Sumner County relied upon the legislative history of the Civil Rights Act, as well as federal and Tennessee law. Based on these authorities, Sumner County argued that it was not subject to "Monell" liability under 42 U.S.C. § 1983 for any alleged law enforcement customs, policies or practices allegedly endorsed or promulgated by Sheriff Sutton, because the County possesses no police power of its own and exercises no control over the Sheriff in the discharge of his law-enforcement duties.

Plaintiffs responded to Sumner County's Motion, and Sumner County filed a reply brief. In addition, at the direction of the District Court, the Tennessee Attorney General filed an *amicus* brief (submitted herewith), which supported Sumner County's Motion.

At the conclusion of briefing, the District Court entered an Order denying the Motion on procedural grounds, but granting Sumner County leave to re-file the Motion at a later date.

On March 18, 1999, Sumner County renewed its Second Restated Motion to Dismiss. On November 30, 1999, the District Court

entered its Certification Order. Sumner County's Second Restated Motion to Dismiss remains pending.

STATEMENT OF THE FACTS AS ALLEGED[1]

This consolidated civil rights action arises out of the investigation of, and prosecution for, the 1989 murder of Mr. Lonnie Malone, whose body was found in a culvert of Bug Hollow Road in Sumner County, Tennessee. Plaintiffs assert a broad conspiracy between all of the individually-named Defendants to maliciously prosecute, convict, and incarcerate Plaintiffs for a crime they did not commit. Plaintiffs allege that this conspiracy was successfully executed by means of perjury, subordination of perjury, and the withholding of evidence -- all in alleged violation of their constitutional rights.

With respect to their cause of action against Sumner County, Plaintiffs allege that, during the time in question, Richard Sutton was the Sheriff of Sumner County, Tennessee, and that, as such, he was the "the final policy maker for that office," see Second Amended Complaint at ¶ 52, and therefore "responsible for" the law enforcement policies of the County. See Plaintiffs' Original

[1] As stated above, this matter is before the Court in a Federal Rule 12(b)(6) Motion to Dismiss context, pursuant to which a movant may not challenge the facts alleged by the Plaintiffs. See Hardy v. First American Bank, 774 F. Supp. 1078, 1080 (M.D. Tenn. 1991).

Complaints at ¶ 7. Plaintiffs further allege that Sumner County, as a political subdivision governed by a "Board of supervisors,"

> is charged with protecting the health, welfare and safety of the citizens of the county, which includes all persons subject to county jurisdiction.

Second Amended Complaint at ¶ 53. As such, Plaintiffs allege that Sumner County "is responsible for the policies, practices and customs of the Sumner County Sheriff's Department and its Sheriff." Id. at ¶ 7.

Plaintiffs allege that, during the relevant time period, two "interrelated de facto policies, practices and/or customs" existed within the Sumner County Sheriff's Department, to wit:

-- "a failure to properly hire, train, supervise, discipline, transfer, monitor, counsel and otherwise control Sheriff's officers from knowingly violating constitutional rights of citizens who are suspected of criminal acts within the jurisdiction of Sumner County and its Sheriff's Department," and

-- "a law enforcement code of silence."

Id. at 55.[2]

As a consequence, Plaintiffs seek undefined, but "substantial," monetary damages from the County for permitting the

[2] In addition to the alleged existence of these two policies, practices, or customs, Plaintiffs further allege that Defendant Ray Whitley, the District Attorney General, was a "de facto Sheriff, exercising control of the conduct of [Defendant] deputy Satterfield." Id. at ¶ 57. The issue of whether a District Attorney General may act as a policymaker for a county, in a federal civil rights context, has been resolved by the Honorable Judge Thomas A. Wiseman, Jr., in the action Chambers v. Coomer, 2-97-0065 (M.D. Tenn. 12/11/97) (submitted herewith), and is not before this Court.

existence of such alleged policies, practices or customs. See id. at ¶ 60.

SUMMARY OF ARGUMENT

Under Monell v. New York City Dept. of Social Services and its progeny, in order to state a viable civil rights claim against a municipal corporation, a plaintiff must establish that "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." Monell, 436 U.S. at 690 (emphasis added).

Sumner County contends that, pursuant to Monell and McMillian v. Monroe County, Alabama, 520 U.S. 781, 117 S.Ct. 1734, 138 L.Ed.2d 1 (1997), it may not be held liable under 42 U.S.C. § 1983, because a Tennessee Sheriff -- when acting in a law enforcement capacity -- draws his authority from, and acts on behalf of, the State of Tennessee and not the county in which he exercises such authority. See, e.g., State, ex rel., Thompson v. Reichman, 135 Tenn. 653, on rehearing, 135 Tenn. 685, 695 (1916). See also Boswell v. Powell, 163 Tenn. 445, 448-49, 43 S.W.2d 495 (1931).

ARGUMENT

I. SECTION 1983 AND MONELL LIABILITY.

A. Monell: Corporate Liability Through Delegated Authority.

The Civil Rights Act of 1871 does not specifically authorize a cause of action against a county or municipal government. Rather, the statute states that

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983 (emphasis added).

Because only a "person" may be a constitutional tortfeasor under the Act, the United States Supreme Court initially concluded that the statute could not be applied to municipal defendants. See Monroe v. Pape, 365 U.S. 167, 191-92, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961) ("[t]he response of the Congress to the proposal to make municipalities liable for certain actions being brought within federal purview by the Act of April 20, 1871, was so antagonistic that we cannot believe that the word 'person' was used in this particular Act to include them.").

Seventeen years later, however, the Supreme Court revisited the issue. In Monell v. New York City Dept. of Social Services, the Supreme Court exhaustively examined the legislative history of

the Act in order to determine whether or not Congress intended the Act to apply to municipalities of a State, as well as individual parties. While noting that section 1983 speaks only with respect to "person[s]" acting under color of law, the Supreme Court in Monell held that the word "person" included corporations as well as natural persons. The Supreme Court, thereafter, held that a political subdivision of a state could be sued under section 1983, because such subdivisions were corporate entities under the law.

As stated by the Court, "the debates show that Members of Congress understood 'persons' [as used in section 1 of the Civil Rights Act] to include municipal corporations." Monell, 436 U.S. at 686.

> [B]y 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis. This had not always been so. When the Court first considered the question of the status of corporations, Mr. Chief Justice Marshall, writing for the Court, denied that corporations "as such" were persons as that term was used in Art. III and the Judiciary Act of 1789. See Bank of United States v. Deveaux, 5 Cranch 61, 86, 3 L.Ed. 38 (1809). By 1844, however, the Deveaux doctrine was unhesitatingly abandoned:
>
> > "[A] corporation created by and doing business in a particular state, is to be deemed to all intents and purposes as a person, although an artificial person, . . . capable of being treated as a citizen of that state, as much as a natural person." Louisville R. Co. v. Letson, 2 How. 497, 558, 11 L.Ed. 353 (1844) (emphasis added), discussed in Globe 752.
>
> And only two years before the debates on the Civil Rights Act, in Cowles v. Mercer County, 7 Wall. 118, 121, 19 L.Ed. 86 (1869), the Letson principle was automatically and without discussion extended to municipal

> corporations. Under this doctrine, municipal corporations were routinely sued in the federal courts, and this fact was well known to Members of Congress.
>
> That the "usual" meaning of the word "person" would extend to municipal corporations is also evidenced by an Act of Congress which had been passed only months before the Civil Rights Act was passed. This Act provided that
>
> > "in all acts hereafter passed . . . the word 'person' may extend and be applied to bodies politic and corporate . . . unless the context shows that such words were intended to be used in a more limited sense." Act of Feb. 25, 1871, § 2, 16 Stat. 431.
>
> Municipal corporations in 1871 were included within the phrase "bodies politic and corporate" and, accordingly, the "plain meaning" of § 1 is that local government bodies were to be included within the ambit of the person who could be sued under § 1 of the Civil Rights Act.

Id. at 687-89 (emphasis in original; footnotes omitted).

Having determined that, as corporate entities, municipalities could be sued for civil rights violations, the Supreme Court thereafter defined the scope of municipal liability. Specifically, the Supreme Court forbade the imposition of liability upon a municipal corporations pursuant to a theory of *respondeat superior*. See Monell, 436 U.S. 692-93. Simply stated, "a municipality may not be held liable under § 1983 solely because it employs a tortfeasor." Board of the County Commissioners of Bryan County, Oklahoma v. Brown, 520 U.S. 397, 403, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997). Rather, as explained by Justice Powell in his concurring opinion, the salient issue with respect to municipal liability is "whether a municipality is liable in damages for

injuries that are the direct result of its official policies." Monell, 436 U.S. at 708 (Powell, J., concurring; emphasis added).

In analyzing this question, the Supreme Court stated that, while Congress "'had no power to impose any obligation upon county and town organizations'" to protect the citizenry from civil rights violations,[3] there was no impediment to "holding a municipality liable under § 1 of the Civil Rights Act for its own violations of the Fourteenth Amendment."[4]

Accordingly, since Monell, the Supreme Court consistently has held that

> [l]ocal governing bodies . . . can be sued directly under § 1983 for monetary, declaratory, or injunctive relief, where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.

Monell, 436 U.S. at 690 (emphasis added).

Stated another way,

> "municipalities may be held liable . . . only for acts for which the municipality itself is actually responsible, 'that is, acts which the municipality has officially sanctioned or ordered.'"

---

[3] Monell, 436 U.S. at 664 (emphasis in original; citation omitted).

[4] Monell, 436 U.S. at 683 (emphasis added).

City of St. Louis v. Praprotnik, 485 U.S. 112, 123, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988) (emphasis added; quoting Pembaur v. City of Cincinnati, 475 U.S. 469, 480, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986)).

Two years ago, the Supreme Court emphasized that the requirement of Monell to identify and prove a municipal "policy" or "custom"

> ensures that a municipality is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality.

Bryan County, 520 U.S. 403-04 (emphasis added).[5]

Moreover, because "'municipalities may be held liable . . . only for acts for which the municipality itself is actually responsible,'" Praprotnik, 485 U.S. at 123 (emphasis added), "only those municipal officials who have 'final policy making authority' may by their actions subject the government to § 1983 liability." Id. Whether a particular official possesses "final policy making authority" for the local government "is a question of state law." Id. (emphasis in original).

Thus, under Monell, the question of municipal liability turns on the issue of delegated authority. A corporate entity -- whether municipal or commercial -- may only act through its own officers

[5] While the analysis in Bryan County is relevant to this inquiry, it should be noted that -- unlike McMillian (discussed infra) and the instant case -- counsel for Bryan County stipulated that, under Oklahoma law, the Sheriff was the final policymaker for the county. See Bryan County, 520 U.S. at 401.

and agents, and only within the bounds of its prescribed corporate authority. In other words, "the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in that area of the [county's] business." Praprotnik, 485 U.S. at 123.

This critical issue of delegated authority was addressed in more detail by the Eleventh Circuit Court of Appeals and the United States Supreme Court in the McMillian case.

B. McMillian v. Monroe County.

Historically, the common law has always regarded a Sheriff as an executive representative of the sovereign, and not of the county he serves. In fact, this common law characteristic of the office was noted by Congress during the 1871 debates of the so-called "Sherman Amendment" to the Civil Rights Act.

> [T]here is no duty imposed by the Constitution of the United States, or usually by State laws, upon a county to protect the people of that county against the commission of the offenses herein enumerated, such as the burning of buildings or any other injury to property or injury to person. Police powers are not conferred upon counties as corporations; they are conferred upon cities that have qualified legislative power. . . . But counties are organized, at least in most of the States, for the management of the financial affairs of the counties. The county commissioners, county court, board of supervisors, or other body acting for the county, have power to levy taxes, but they do not have any control of the police affairs of the county and the administration of justice. These powers, I grant, are conferred in part by State laws upon some elective officers, such as the sheriff of a county, or justices of the peace and constables in the subdivisions of the counties and towns, etc. But still in few, if any, States is there a statute conferring this power upon the counties. Hence, it seems to me that

> these provisions[6] attempt to impose obligations upon a county for the protection of life and person which are not imposed by the laws of the State, and that it is beyond the power of the General Government to require their performance.

Cong. Globe (April 19, 1871) at 795 (remarks of Rep. Burchard of Illinois) (submitted herewith).

The United States Supreme Court itself has stated that "[a]s a conservator of the peace in his county or bailiwick, [the Sheriff] is the representative of the King, or sovereign power of the State for that purpose." South v. Maryland, 59 U.S. (18 How.) 396, 402-03, 15 L.Ed. 433 (1856) (emphasis added). Thus, while the Sheriff "has the care of the county," he "wield[s] the executive power for the preservation of the public peace." Id. (emphasis added).

---

[6] Unlike section 1 of the Civil Rights Act -- which imposes liability upon "every person" who, under color of law, subjects another person to "the deprivation of any rights, privileges, or immunities secured by the Constitution" -- the Sherman Amendment sought to assign liability upon municipal corporations for failing to protect individuals from damages caused by the citizenry of the municipality "riotously and tumultuously assembled." Monell, 436 U.S. at 664.

In this regard, the Sherman Amendment attempted to impose upon a municipality an obligation to exercise police power where no such power may have been granted to it by the State. Id. at 668 ("House opponents [to the Sherman Amendment] thought the Federal Government could not, consistent with the Constitution, obligate municipal corporations to keep the peace if those corporations were neither so obligated nor so authorized by their state charters"; emphasis added). See also id. at 673-75 ("House opponents . . . argued that the local units of government upon which the amendment fastened liability were not obligated to keep the peace at state law, and further that the Federal Government could not constitutionally require local governments to create police forces" (emphasis added); remarks of Rep. Blair, noting that the Sherman Amendment "claims the power in the General Government to go into the States of this Union and lay such obligations as it may please upon the municipalities, which are creations of the States alone . . . ."). For this reason, the Sherman Amendment failed to pass in the House of Representatives.

The historical nature of the Office of Sheriff was squarely addressed by the Eleventh Circuit in McMillian v. Johnson, 88 F.3d 1573, 1577-79 (11th Cir. 1996), cert. granted sub. nom, 117 S.Ct. 554 (1996) ("McMillian I"). In facts strikingly similar to those alleged here, the plaintiff was convicted of murder and sentenced to death. McMillian I, 88 F.3d at 1575. McMillian spent approximately six years on Alabama's death row before the Alabama Supreme Court overturned his conviction due to the state's failure to disclose exculpatory and impeachment evidence. Id. Subsequent to that decision, the state dismissed the charges against McMillian and initiated a new investigation. Id. at 1576.

Upon his release, McMillian commenced a section 1983 action, naming various officials involved in his arrest, conviction and incarceration. Id. Among those defendants, McMillian sued the Sheriff of Monroe County, Alabama, in his official and individual capacities, and Monroe County itself, for allowing the fabrication of inculpatory evidence and the suppression of exculpatory and impeachment evidence. Id. Specifically, McMillian alleged that the county sheriff's "'edicts and acts may fairly be said to represent [the] official policy [of] . . . Monroe County . . . in matters of criminal investigation and law enforcement.'" Id. (quoting McMillian's complaint).

The District Court for the Middle District of Alabama granted the county's motion to dismiss, holding that the county was not liable for the policies of the county sheriff. Id.

On appeal to the Eleventh Circuit, McMillian relied on the Supreme Court's decision in Pembaur v. City of Cincinnati, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986), which affirmed the Sixth Circuit's holding that an Ohio sheriff could establish county law enforcement policy under appropriate circumstances. McMillian I, 88 F.3d at 1576. McMillian argued that

> the relevant facts here are the same as in Pembaur: in Alabama, the sheriff is elected by the county's voters, is funded by the county treasury, and is the chief law enforcement officer within the county.

Id.

The Eleventh Circuit rejected the plaintiff's argument and affirmed the dismissal by the district court. In doing so, it relied upon its analysis as set forth in its prior opinion of Swint v. City of Wadley, 5 F.3d 1435 (11th Cir. 1993), modified on other grounds, 11 F.3d 1030 (11th Cir. 1994), vacated on jurisdictional grounds sub nom., 115 S.Ct. 1203 (1995).

> We have already addressed whether, in Alabama, sheriffs are final policymakers for their counties in the area of law enforcement. Swint v. City of Wadley, Ala., 5 F.3d 1435. In Swint, we held that sheriffs are not final policymakers for their counties in the area of law enforcement because counties have no law enforcement authority. Id. at 1451. . . . [W]e have taken a fresh look at Swint and the issue before us.
>
> . . . .
>
> The critical question under Alabama law, we emphasized, is whether an Alabama sheriff exercises county power with final authority when taking the challenged action. Id. [at 1450] (citing Parker v. Williams, 862 F.2d at 1478). Our examination of Alabama law revealed that Alabama counties have no law enforcement authority. Id. Alabama counties have only

> the authority granted them by the legislature. Id. (citing Lockridge v. Etowah County Comm'n, 460 So.2d 1361, 1363 (Ala.Civ.App. 1984)). Alabama law assigns law enforcement authority to sheriffs but not to counties. Id. (citing Ala. Code § 36-22-3(4) (1991)).[7] Thus, we concluded that a sheriff does not exercise county power when he engages in law enforcement activities and, therefore, is not a final policymaker for the county in the area of law enforcement. Id. at 1451. We continue to believe that this is the correct analysis.
>
> The Supreme Court has not addressed whether a municipality must have power in an area to be held liable for an official's acts in that area. Still, we think that such a requirement inheres in the Court's municipal liability analysis. As Justice O'Connor explained in Praprotnik, a municipal policymaker is the official with final responsibility "in any given area of a local government's business." 485 U.S. at 125, 108 S.Ct. at 925. A threshold question, therefore, is whether the official is going about the local government's business. If the official's actions do not fall within an area of the local government's business, then the official's actions are not acts of the local government.

McMillian I, 88 F.3d at 1578 (emphasis added).

In affirming the Eleventh Circuit's decision, the Supreme Court reiterated that

> English sheriffs (or "shire-reeves") were the King's "reeves" (officers or agents) in the "shires" (counties), at least after the Norman Conquest in 1066. Although locally chosen by the shire's inhabitants, the Sheriff

---

[7] In Alabama, as in Tennessee, it is

> the duty of sheriffs in their respective counties, by themselves or deputies, to "ferret out crime, to apprehend and arrest criminals and, insofar as within their power, to secure evidence of crimes in their counties and to present a report of the evidence so secured to the district attorney or assistant district attorney for the county."

Swint, 5 F.3d at 1450 (quoting Ala. Code § 36-22-3(4)). See also Tenn. Code Ann. § 38-3-102 ("[t]he sheriff is the principal conservator of the peace in the sheriff's county").

> did "all the King's business in the county," and was "the keeper of the King's peace."
>
> As the basic forms of English government were transplanted to our country, it also became the common understanding here that the sheriff, though limited in jurisdiction to his county and generally elected by county voters, was in reality an officer of the State, and ultimately represented the State in fulfilling his duty to keep the peace.
>
> This historical sketch indicates that the common law itself envisioned the possibility that state law enforcement "policies" might vary locally, as particular sheriffs adopted varying practices for arresting criminals or securing evidence.

McMillian v. Monroe County, 520 U.S. at 793-94 (emphasis added; citations and footnotes omitted) ("McMillian II"). The Supreme Court also re-emphasized that a question of Monell liability "is dependent on an analysis of state law." McMillian II, 520 U.S. at 786 (citation omitted).

> This is not to say that state law can answer the question before us by, for example, simply labeling as a state official an official who clearly makes county policy. But our understanding of the actual function of a governmental official, in a particular area, will necessarily be dependent on the definition of the official's functions under relevant state law.

Id. (emphasis added).

Whereupon, the Supreme Court -- after reviewing the Alabama Constitution, as well as statutory and common law -- found that, in Alabama, the sheriff is an executive officer of the state, and not an officer of any given county. Id. at 786-93. In doing so, the Supreme Court considered three different sources of Alabama law. First, the Supreme Court specifically noted that the Alabama

Constitution declared the sheriff to be a member of the "executive department" of the state, who could be removed from office, not by the county commission, but through impeachment proceedings, which "could" be initiated by the governor of the state. Id. at 788-89. Second, the Supreme Court gave "critical" weight to the fact that the Alabama Supreme Court "has held unequivocally that sheriffs are state officers . . . ." Id. at 789. Finally, in reviewing the Alabama Code, the Supreme Court found it "most important[]," id. at 790, that the Code vested the sheriff with the "complete authority to enforce state criminal law in their counties." Id. (citing Ala. Code § 36-22-3(4)).

> In contrast, the "powers and duties" of the counties themselves -- creatures of the State who have only the powers granted to them by the State -- do not include any provision in the area of law enforcement. Thus, the "governing body" of the counties -- which in every Alabama county is the county commission -- cannot instruct the sheriff how to ferret out crime, how to arrest a criminal, or how to secure evidence of a crime. And when the sheriff does secure such evidence, he has an obligation to share this information not with the county commission, but with the district attorney (a state official). . . .

Id. (emphasis added; citations omitted).

Upon consideration of this body of law, the Supreme Court concluded that "Alabama sheriffs, when executing their law enforcement duties, represent the State of Alabama, not their counties." Id. at 793.

The McMillian holdings are equally applicable in this action. It is the position of Sumner County that the law enforcement

authority of the Sheriff does not derive from Sumner County (which, in fact, possesses no law enforcement authority of its own). Rather, as discussed below, police powers are vested in the Sheriff because such powers are inherent in the nature of that constitutionally-created office, and are vested by the Legislature. See Reichman, 135 Tenn. at 736 (while Tennessee statutes "made the sheriff the chief conservator of the peace" he is charged with such duties "because they have always belonged to his office").

II. NATURE OF THE OFFICE OF SHERIFF.

In Tennessee, "[t]he mere fact that a person may hold an important public office whose duties are strictly confined to county affairs, and his salary paid by the county, does not make it a county office." Dykes v. Hamilton County, 191 S.W.2d 155, 158 (Tenn. 1945).

A. Executive Function of the Office: Constitution and Common Law.

1. Tennessee Constitutional Treatment.

The Sheriff is a constitutional officer, as set out in every Constitution adopted in this State, who derives his law enforcement authority directly from the state. See Tennessee Constitution (adopted 1870), Art. VII, § 1; Tennessee Constitution (adopted 1835), Art. VII, § 1; Tennessee Constitution (adopted 1796), Art. VI, § 1; Tenn. Code Ann. § 38-3-102 ("[t]he sheriff is the principal conservator of the peace in the sheriff's county"). The "qualifications and duties" of the Sheriff are "prescribed by the General Assembly." Tennessee Constitution of 1870, Art. VII, § 1. The Office of the Sheriff may not be abolished except by constitutional amendment. See Metropolitan Government of Nashville and Davidson County v. Poe, 215 Tenn. 53, 383 S.W.2d 265, 268 (1964).

Under the current Constitution, the Sheriff is one of six individual officers enumerated under the heading "County government." Specifically, Art. VII, § 1 of the Constitution of

1870 states that "[t]he qualified votes of each county shall elect for terms of four years a legislative body, a county executive, a Sheriff, a Trustee, a Register, a County Clerk and an Assessor of Property."

At first glance, the recital of "Sheriff" under the heading "County government" could lead to the conclusion that a Sheriff is a county officer. See generally Pharris v. Looper, 6 F.Supp.2d 720, 730 (M.D. Tenn. 1998) (construing the nature of the office of Tax Assessor, but stating further that "all offices commissioned by Article VII, Section 1, of the state constitution . . . are county offices"; emphasis added). However, as the U.S. Supreme Court has stated, the "label" of the office at issue (in this case, the heading "County government") is not controlling. McMillian II, 520 U.S. at 786. In fact, while the office is listed under the heading of "County government," the Sheriff is never identified in the current Constitution as a county "officer." Instead, Article VII, § 1, simply states that "[t]he qualified voters of each county shall elect . . . a Sheriff . . . ." Tennessee Constitution (adopted 1870), Art. VII, § 1 (emphasis added). The mere fact that the Sheriff is elected solely by the voters of the county he serves does not lead to the conclusion that the Sheriff is an "officer" of that county. See Dykes, 191 S.W.2d at 158; McMillian II, 520 U.S. at 794 ("the sheriff, though limited in jurisdiction to his county and generally elected by county voters, was in reality an officer

of the State, and ultimately represented the State in fulfilling his duty to keep the peace"; citations omitted).

Indeed, rather than delineating "county officers," the current Constitution identifies officers whose jurisdiction and authority are limited to the boundaries of the county and who are elected by the county populace. In this respect, it should be noted that under the original Constitution of this State, the Sheriff is identified with a number of other local officers. See Tennessee Constitution of 1796, Art. VI, § 1. Specifically, under the Constitution of 1796, the county court was required to appoint "one sheriff, one coroner, one trustee, . . . a sufficient number of constables . . . one register and ranger . . . ." Id. However, of these various appointees, only the sheriff and the coroner received commissions directly from the Governor. Id. See also McMillian II, 520 U.S. at 794 ("'Sheriffs, coroners, clerks and other so-called county officers are properly state officers for the county'"; quoting R. Cooley, Handbook on the Law of Municipal Corporations 512 (1914)). The Governor, of course, was -- and is -- vested with "[t]he supreme executive power of this state." Tennessee Constitution of 1796, Art. II, § 1. See also Tennessee Constitution of 1870, Art. III, § 1. Thus, the fact that the Sheriff is one of the officers set forth in the current Constitution under the heading "County government" does not dispose of this issue. Instead, as stated by the U.S. Supreme Court, the relevant inquiry is "dependent on the definition of the official's

functions under relevant state law." McMillian II, 520 U.S. at 786 (emphasis added).

2. The Reichman and Boswell Decisions.

Consistent with the historical definition of the office as set forth by the United States Supreme Court in McMillian II and South, this Court -- under the current Constitution of the State[8] -- described in great detail "the nature of sheriff as it has been known to the law from time immemorial," Reichman, 135 Tenn. at 695, and expressly declared that a Sheriff is an executive officer of the State when exercising his law enforcement authority.[9] Reichman, 135 Tenn. at 661-62, on rehearing, 135 Tenn. at 695-96, 705.

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[8] At the time of the Reichman decision, the current Constitution of the State was over 45 years old. In 1977, however, Article VII, § 1, of the Constitution was amended to increase the term of the Sheriff from two years to four years.

[9] In McMillian II, the Supreme Court restricted its analysis and holding to an Alabama sheriff's law enforcement authority.

> [T]he question is not whether Sheriff Tate acts for Alabama or Monroe County in some categorical, "all or nothing" manner. Our cases on the liability of local governments under § 1983 instruct us to ask whether governmental officials are final policymakers for the local government in a particular area, or on a particular issue. Thus, we are not seeking to make a characterization of Alabama sheriffs that will hold true for every type of official action they engage in. We simply ask whether Sheriff Tate represents the State or the county when he acts in a law enforcement capacity.

McMillian II, 520 U.S. at 785-86 (citations omitted).

The issue before this Court is similarly narrow: whether a Tennessee Sheriff, "as the commander in chief of the law forces of the county," Reichman, 135 Tenn. at 665, represents the State of Tennessee or the county within which he exercises his jurisdiction.

> The office of sheriff is a most ancient one. It carries with it, in America, all of its common-law duties and powers except as modified by statute.

Id. at 661-62 (emphasis added).

> In England, the sheriff was the keeper of the King's peace. In America, he is the keeper of the peace of the sovereign people or the State.

Id. at 705 (emphasis added).

As such, a Tennessee Sheriff

> is the commander in chief of the law forces of the county. All judicial and ministerial officers of justice and all city officials are required to aid him, and the male population of his county is subject to his command "in the prevention and suppression," not only of violent breaches of the peace, but of all public offenses.

Id. at 665.

Moreover, in concordance with English common law, a Tennessee Sheriff

> is, "in his county or bailiwick, the representative of the king or sovereign power of the State to preserve the peace." [He is] [t]he chief magistrate clothed, in his county, with the executive power of the State, the representative of the king, or, in America, of the sovereignty of the State . . . .

Id. at 695 (quoting South v. Maryland, supra, and 25 Am. & Eng. Enc. of Law, p. 662; emphasis added).[10] Thus, as in Alabama, a Tennessee Sheriff "'represents the sovereignty of the State and he has no superior in this county.'" McMillian II, 520 U.S. at 794

[10] This is not the only aspect of Tennessee governance which is based upon English law. For example, the Tennessee chancery court traces its origin directly from the English high court of chancery. See J.W. Kelly & Company v. Conner, 122 Tenn. 339, 360, 123 S.W. 622 (1909).

(quoting 1 W. Anderson, A Treatise on the Law of Sheriffs, Coroners and Constables 5 (1941)) See also Reichman, 135 Tenn. at 665 (the Sheriff "is the commander in chief of the law forces of the county [and] [a]ll judicial and ministerial officers of justice and all city officials are required to aid him . . . .").[11]

This holding was re-affirmed fifteen years later by this Court in Boswell v. Powell 163 Tenn. 445, 43 S.W.2d 495 (1931). In Boswell, this Court addressed whether or not an individual may serve simultaneously on a county board of education and in the General Assembly. Boswell, 163 Tenn. at 446-48. The Constitution barred an individual from holding "more than one lucrative office at the same time." Id. at 447. Interpreting the phrase "lucrative office" to mean an office "in the State government," this Court allowed the complainant to occupy both offices, as the board of education office was a county position. Id. at 447-48. In doing so, this Court distinguished a prior decision in which it held that

[11] Ironically, in addressing the discretionary law enforcement responsibilities of the Sheriff, this Court noted close similarities between Tennessee and Alabama law. Quoting from the Alabama Supreme Court, this Court stated as follows:

> "It is alike the law and common knowledge that such officers may arrest without warrant, either to preserve peace and good order or to prevent a threatened violation of law. . . . The officer may arrest upon seeing such acts as show a reasonable ground for making the arrest; and an act done in his presence which is violative of a general law, or of a municipal ordinance, or which reasonably threatens such violation, authorizes arrest without warrant."

Reichman 135 Tenn. at 706 (opinion on rehearing; quoting Jones v. State of Alabama, 100 Ala. 88, 90, 14 So. 772, 773 (1894)).

a person could not occupy a position as a deputy sheriff and a constable, saying

> [w]e think, however, that a sheriff and constable, while elected by the voters of the particular county, are both essentially state officers. The chief duties of both are to enforce the laws of the state.

Id. at 449. See also Vandergriff v. State, ex rel., Davis, 206 S.W.2d 395, 399 (1937) (Neil, C.J., concurring; re-affirming Reichman).

3. Later Tennessee Cases.

In its Certification Order, the District Court noted these cases, but further stated that "[m]ore recently . . . the Tennessee Supreme Court has implied that the office of sheriff actually is a county office." Certification Order at 5-6 (citing State, ex rel., Winstead v. Moody, 596 S.W.2d 811, 813 (Tenn. 1980) and Shelby County Civil Service Merit Bd. v. Lively, 692 S.W.2d 15, 16 (Tenn. 1985)). Neither case changes the outcome dictated by Reichman.

i. Moody.

In Moody, this Court addressed the narrow issue of whether "the office of judge of the General Sessions Court of Hamblen County was a county office within the meaning of Art. VII, § 2, of the Constitution. . . ." Moody, 596 S.W.2d at 812. The dispute arose because both the Governor and the county legislative body had attempted to fill a vacancy in the Hamilton County General Sessions Court. Id. In finding that the county was the proper body to select a successor general sessions judge, this Court stated that

the power of the county under Art. VII, § 2, was not restricted to those "county offices . . . enumerated in Art. VII, § 1" -- which, of course, include the Sheriff. Id. This Court further stated that, "the primary badge of a state officer is that the Legislature provide that the State pay the salary of the office." Id. at 813.

In rendering this decision, however, this Court did not overrule, or even discuss, its earlier treatment of the Office of Sheriff as set forth in Reichman, Boswell, and Vandergriff, and that specific issue was not before this Court. Moreover, while a county is required to pay the Sheriff's salary as well as his operational expenses, see Tenn. Code Ann. § 8-24-103, the U.S. Supreme Court discounted that fact, saying:

> [t]he county's payment of the sheriff's salary does not translate into control over him, since the county neither has the authority to change his salary nor the discretion to refuse payment completely. The county commissions do appear to have the discretion to deny funds to the sheriffs for their operations beyond what is "reasonably necessary." But at most, this discretion would allow the commission to exert an attenuated and indirect influence over the sheriff's operations.

McMillian II, 520 U.S. at 791-92 (citation omitted). See also Dykes, 191 S.W.2d at 158 ("[t]he mere fact that a person may hold an important public office whose duties are strictly confined to county affairs, and his salary paid by the county, does not make it a county office."). As in Alabama, Sumner County does not have the ability to refuse or reduce payment of a Sheriff's salary or his operational expenses. See Tenn. Code Ann. § 8-24-103. In fact,

> county governing bodies shall fund the operations of the county sheriff's department. . . . [and] [n]o county governing body shall adopt a budget absent the consent of the sheriff, which reduces below current levels the salaries and number of employees in the sheriff's department. In the event a county governing body fails to budget any salary expenditure which is a necessity for the discharge of the statutorily mandated duties of the sheriff, the sheriff may seek a writ of mandamus to compel such appropriation.

Tenn. Code Ann. § 8-20-120 (emphasis added). Thus, far from controlling way in which the Sheriff discharges his law enforcement authority, the Sheriff actually exercises control over aspects of the county's budget. Indeed, by making reference to the "statutorily mandated duties of the sheriff," the General Assembly explicitly recognized that a Sheriff's law enforcement powers are bestowed by the State and not the county.

ii. Lively.

In Lively, this Court addressed the question of whether a Private Act of the General Assembly, which placed deputy sheriffs of Shelby County under a civil service system, unconstitutionally curtailed the Sheriff's ability to terminate such deputies at will. See Lively, 692 S.W.2d at 15. This Court found that the Private Act was constitutional. Id. at 20.

In reaching this decision, this Court noted that "[t]he office of sheriff, of course, as well as those of several other county officials, is a constitutional one." Id. at 16 (emphasis added). Notwithstanding reference to the Sheriff as a "county official[]," this Court further noted that "[t]he constitution, however, does

not fix or prescribe the duties of the office or deal with the employment of personnel. This has long been done by statute." Id. This is not in conflict with the Reichman decision, wherein this Court stated that the Tennessee statutes "made the sheriff the chief conservator of the peace" because such duties "have always belonged to his office." Reichman, 135 Tenn. at 736. Once again, in determining whether the Sheriff acts on behalf of the State or the county in his law enforcement capacity, the proper focus should be directed to "the definition of the official's functions under relevant state law." McMillian II, 520 U.S. at 786 (emphasis added).

In fact, in Lively, this Court re-affirmed what it had stated twenty years earlier in Poe -- i.e., that, with respect to the hiring of deputies, the county government has no authority over such hirings. Rather, as set forth in the Code and as discussed below, "[a]pplications for such employment are made to the judge of one of the courts, such as a circuit chancery or criminal court." Lively, 692 S.W.2d at 17. See also Poe, 383 S.W.2d at 274 (while a Sheriff is empowered to hire "such deputies and assistants as may be actually necessary to the proper conducting of his office," a Sheriff must do so by making application "to the judge of the court under whose general jurisdiction he may function."). In other words, a Sheriff's determination to hire deputies is submitted to a state tribunal for review, and not to the county government.

B. Removal of a Sheriff: Impeachment v. Ouster.

Similar to the State of Alabama, a Tennessee Sheriff may not be removed by the county commission. Rather, a Tennessee sheriff is subject to statutory ouster proceedings, for -- among other things -- "knowing" and "willful" misconduct or neglect of duty. See Tenn. Code Ann. § 8-47-101; see also Reichman, supra (ousting the Shelby County Sheriff for willful failure to enforce state liquor laws); Vandergriff v. State, ex rel., Davis, 206 S.W.2d 395 (1937) (reversing the ouster of the Anderson County Sheriff). Such proceedings must be brought in the name of the state. See Tenn. Code Ann. § 8-47-110. Further, an ouster proceeding may be initiated by the State Attorney General, the District Attorney, or the County Attorney,[12] see Tenn. Code Ann. §§ 8-47-102, 103, and may be initiated at the request and direction of the Governor. See Tenn. Code Ann. §§ 8-47-108, 109. Finally, ouster proceedings are to be initiated in the circuit, chancery, or criminal court having competent jurisdiction. See Tenn. Code Ann. § 8-47-103.

At the District Court, Plaintiffs attempted to draw a distinction between the U.S. Supreme Court's analysis of

[12] See also Reichman, supra (initiation of ouster proceedings against the Shelby County Sheriff by the State Attorney General); Vandergriff, supra (consolidated ouster actions against the Anderson County Sheriff by the County Attorney and the District Attorney General).

Alabama law in McMillian II and Tennessee law, emphasizing that -- in Alabama -- a sheriff is subject to impeachment proceedings while a Tennessee Sheriff is subject to ouster proceedings. Plaintiffs further stressed that, in apparent contrast to Alabama law, a County Attorney was among those individuals authorized to initiate ouster proceedings.

As a preliminary matter, the distinctions between Alabama impeachment proceedings and Tennessee ouster proceedings are slight. While the Supreme Court observed that, under Alabama law, impeachment proceedings against a sheriff "could" be initiated by the governor, see McMillian II, 520 U.S. at 788, such proceedings can also be initiated by a grand jury for any Alabama judicial district, see Ala. Code § 36-11-3, or by "five resident taxpayers of the division, circuit, district, county, city or town for which the officer sought to be impeached was elected or appointed . . . ." Ala. Code § 36-11-6.

Tennessee's ouster proceedings are similar. Again, such proceedings may be initiated (1) at the request and direction of the Governor, Tenn. Code Ann. §§ 8-47-108, 109, (2) by the State Attorney General, the District Attorney, or the County Attorney, see Tenn. Code Ann. §§ 8-47-102, 103, or (3) by "ten (10) or more citizens and freeholders of the state, county, or city, as the case may be, upon their giving the usual security for costs." Tenn. Code Ann. § 8-47-110. Further, a Sheriff -- like "other civil officers" -- is also subject to indictment and prosecution in state

criminal court, and -- if found guilty -- "shall be removed from office by said court, as if found guilty on impeachment . . . ." Tennessee Constitution of 1870, Art. V, § 5 (emphasis added). Compare with Ala Code § 36-11-3 (reciting "the duty of every grand jury to investigate and made diligent inquiry concerning any alleged misconduct or incompetency of any public officer in the county which may be brought to its notice").

Put simply, Tennessee ouster proceedings against a Sheriff may be initiated by virtually the same people who can commence an Alabama impeachment proceeding against a Sheriff.

More importantly, however, Plaintiffs' reliance on the ouster statute as a basis for arguing that the Sheriff is a county officer is misplaced. The determinative inquiry does not rest upon a comparison of the nuances of Alabama impeachment with Tennessee ouster proceedings. Rather, the issue is whether the authority to remove a Sheriff resides directly with the county government, or elsewhere.

Indeed, from the perspective of the county government -- and what that government, as a corporate entity,[13] is authorized by state statute to do -- Plaintiffs' attempt to distinguish between these two proceedings is irrelevant. Regardless of whether a Sheriff may be removed by impeachment (as in Alabama) or ouster (as in Tennessee), the undeniable fact remains that both proceedings

[13] Monell, 436 U.S. at 686.

are brought before, and are completely dependent on, state tribunals for resolution. In Tennessee, that tribunal is a circuit, chancery or criminal court -- i.e., a state court with a state judge. See Tennessee Constitution of 1870, Art. VI, §§ 1, 4.

In other words, the procedures set forth in the ouster statute delegate to a state court the authority to remove a Sheriff, upon a proper finding made in accordance with chancery procedure. See Tenn. Code Ann. §§ 8-47-118, 119. Because the ultimate determination in an ouster proceeding is left in the hands of a state court (where, as in any trial, the outcome is never certain or inevitable[14]), it is contrary to the text and procedures of the ouster statute to suggest, as Plaintiffs have to the District Court, that an ouster proceeding is equivalent to the ability to directly supervise, or terminate at will, a department head of the local government. An ouster proceeding is not proactive, but is merely a judicial means to an uncertain outcome, dependent upon quality of evidence and burdens of proof. In contrast, the ability to terminate a department head at will is absolute and incontrovertible.[15] In this regard, neither the ouster statute, nor

[14] See, e.g., Vandergriff v. State, ex rel., Davis, 206 S.W.2d 395 (1937) (reversing the ouster of the Anderson County Sheriff)

[15] This distinction is critical. As discussed more fully below, city governments are vested with the authority to "exercise general police powers." Indeed, the chief of police is deemed to be a "department head" of the city government, who may be summarily discharged by the city mayor. This stands in stark contrast to the authority of county government, which has no police power of its own, and which may not fire its Sheriff (who is not identified by statute as a "department head" of the county) at will.

any other section of the Tennessee Code, vests Sumner County with the unfettered ability to directly supervise, or independently terminate, an elected Sheriff from his or her office.

Nor can Plaintiffs find any support in the fact that a county attorney may initiate ouster proceedings against a Sheriff. All ouster proceedings are brought in the name of the State of Tennessee, and not in the name of the county wherein the Sheriff exercises jurisdiction. See Tenn. Code Ann. § 8-47-110 ("[t]he petition or complaint shall be in the name of the state . . . ."). Section 102 of the ouster statute simply identifies those officials who are authorized to act on behalf of the State, including the Attorney General and Reporter and the District Attorney General, in addition to the county attorney. See Tenn. Code Ann. § 8-47-102.

That a county attorney is authorized to initiate ouster proceedings against a Sheriff in the name of the State is entirely consistent with the historical nature of the Office of the Sheriff. The Sheriff is elected by the voters of the County, and exercises his state-granted law enforcement authority within the confines of the County's boundaries. Nevertheless, as observed by the Supreme Court in McMillian II,

> it . . . became the common understanding here that the sheriff, though limited in jurisdiction to his county and generally elected by county voters, was in reality an officer of the State, and ultimately represented the State in fulfilling his duty to keep the peace.

McMillian II, 520 U.S. at 794. Indeed, as discussed below, a Tennessee Sheriff is vested with his law enforcement authority pursuant to enactments of the General Assembly. Therefore, it is only fitting that a county attorney possesses the authority, as granted by state statute in this limited context, to act in the name of the State when seeking, through the state judicial process, the ouster of a state official (i.e., the Sheriff) who exercises his power exclusively within that county.

In this respect, this Court's decision in Reichman is particularly remarkable, because the decision -- which held that the Sheriff is "the representative of the . . . sovereign power of the State . . . clothed, in his county with the executive power of the State,"[16] -- was rendered in the context of the very same ouster statute which Plaintiffs have cited in support of their argument that the Sheriff is a county officer. Moreover, the Reichman decision was rendered under the current Constitution of the State.

Any doubt as to Reichman's definition of the Office of the Sheriff is further put to rest by this Court's later decisions in Boswell v. Powell and Vandergriff v. State, ex rel., Davis. As previously noted, Vandergriff was a consolidated ouster action against the Anderson County Sheriff by the county attorney and the District Attorney General. Nevertheless, this Court did not

[16] Reichman, 135 Tenn. at 695.

retreat from its earlier pronouncements in Reichman. To the contrary, in his concurring opinion, Chief Justice A.B. Neil fully embraced Reichman, saying

> [t]he holding of this Court in the Reichman case, supra, as to the duty of peace officers, and especially sheriffs, in suppressing every form of lawlessness, should not be departed from.
>
> . . . .
>
> "He is not a mere process server, but his duties require initiative on his part in the enforcement of laws against public offenses. It is therefore his duty to exercise the powers conferred upon him, and to use the means provided by law to accomplish the prevention and suppression of public offenses."

Vandergriff, 206 S.W.2d at 399 (Neil, C.J., concurring; quoting Reichman).

C. Statutory Authority: Sheriff's Powers and County's Powers

Finally, both the Eleventh Circuit Court of Appeals and the U.S. Supreme Court considered it "critical" that the Sheriff draws his law enforcement authority directly from the state, and not from the county government.

> By [statutory] mandate, sheriffs are given complete authority to enforce the state criminal law in their counties. In contrast, the "powers and duties" of the counties themselves -- creatures of the State who have only the powers granted to them by the State -- do not include any provision in the area of law enforcement. Thus, the "governing body" of the counties -- which in every Alabama county is the county commission -- cannot instruct the sheriff how to ferret out crime, how to arrest a criminal, or how to secure evidence of a crime.

McMillian II, 520 U.S. at 790 (emphasis added; citations omitted). See also McMillian I, 88 F.3d at 1578 ("[t]he critical question

under Alabama law . . . is whether an Alabama sheriff exercises county power with final authority, when taking the challenged action"; emphasis added).

1. Law Enforcement Authority of the Sheriff.

Like an Alabama sheriff, a Tennessee Sheriff derives his law enforcement authority strictly from the Tennessee Constitution and the statutes of the Legislature. See Tennessee Constitution (adopted 1870), Art. VII, § 1 (the Sheriff's "qualifications and duties [are] prescribed by the General Assembly."). Indeed,

> our statutes, in line with the nature of the office from the most ancient times, made the sheriff the chief conservator of the peace in his county. . . . [H]e is charged with the duties described, not merely because he is called by statute a conservator of the peace, but because they have always belonged to his office, and because, in express terms, our statutes make it his duty to suppress and prevent public offenses and breaches of the peace.

Reichman, 135 Tenn. at 736 (opinion on rehearing; emphasis added).

Thus, pursuant to the Acts of the General Assembly, "[t]he sheriff is the principal conservator of the peace in the sheriff's county." Tenn. Code Ann. § 38-3-102 (emphasis added). As such, the Sheriff is vested with the duty and authority -- based on state statute, not county ordinance -- to "suppress all affrays, riots, routs, unlawful assemblies, insurrections, or other breaches of the peace . . . ." Id. See also Tenn. Code Ann. § 38-3-108 (duty and authority to arrest criminal suspects).

Additionally, a Sheriff, upon assuming office, is required to execute a surety bond in an amount no less than $25,000, which is

> payable to the state, and conditioned well and truly . . . and faithfully to execute the office of sheriff and perform its duties and functions during such person's continuance therein.

Tenn. Code Ann. § 8-8-103 (emphasis added).

2. Law Enforcement Authority of a County.

In contrast, no law enforcement authority is granted to the individual counties of this State. See generally Davis v. Allen, 307 S.W.2d 800, 802 (Tenn. App. 1957) ("[t]he police power inheres in the State, as an attribute of sovereignty, necessary to protect the public safety, health, morals, and welfare.").

> Counties are political subdivisions of the state, and thus have no authority except that expressly given by or necessarily implied from state law.
>
> Like the counties themselves, county legislative bodies possess only the powers vested in them by the Tennessee Constitution or by state law.

State ex rel. Witcher v. Bilbrey, 878 S.W.2d 567, 571 (Tenn. App. 1994) (citations omitted). See also Bayless v. Knox County, 286 S.W.2d 579, 585 (Tenn. 1955); Burnett v. Maloney, 97 Tenn. 697, 712-13, 37 S.W. 689 (1896).

"The police power belongs to the state, and passes to municipalities only when and as conveyed by legislative enactment. 'Statutes prescribing how the delegated police power may be exercised are mandatory and exclusive of other methods.'" Holdredge v. City of Cleveland, 402 S.W.2d 709, 712-13 (Tenn. 1966)

(quoting State ex rel. Lightman v. City of Nashville, 166 Tenn. 191, 60 S.W.2d 161 (1933)).

While incorporated towns and cities are vested with police authority by the state Legislature,[17] no similar authority is granted to the county governments. See generally Cong. Globe (April 19, 1871) at 795 ("[p]olice powers are not conferred upon counties as corporations; they are conferred upon cities that have qualified legislative power . . . ."). See also Tenn. Code Ann. § 5-5-101, et seq. (defining county governmental authority).

[17] See Tenn. Code Ann. § 6-54-301 (extending the police authority of incorporated towns and cities to a distance of one mile beyond corporate limits).

Instead, the authority of the county legislative body, as defined by the Tennessee Code, extends predominantly to the management of the financial affairs of the county, including the power to (1) vote the stock of the county in any railroad, (2) establish and supervise roads, ferries, and local improvements, (3) construct and control public buildings, and (4) levy tax for the construction and maintenance of public buildings within the county. See Tenn. Code Ann. §§ 5-5-118 through 124.[18] See also Cong. Globe (April 19, 1871) at 795 ("[t]he county commissioners, county court, board of supervisors, or other body acting for the county, have power to levy taxes, but they do not have any control of the police affairs of the county and the administration of justice."). Moveover, the chief executive officer of a county is the county executive, see Tenn. Code Ann. § 5-6-101, and nothing in the enumerated statutory duties of the county executive pertains to law enforcement or supervisory authority over the Sheriff. See Tenn. Code Ann. §§ 5-6-106 -- 108, 110, 112, and 114.

In contrast to Sumner County, a Mayoral/Aldermanic corporation -- such as the City of Hendersonville itself -- is affirmatively granted police powers by the State. See Tenn. Code

[18] A county may also regulate the consumption of alcohol in public parks outside of the boundaries of incorporated towns or cities. See Tenn. Code Ann. § 5-5-127.

Ann. § 6-6-201(22) (permitting the municipal corporation to "[d]efine, prohibit, abate, suppress, prevent and regulate all acts, practices, conduct, . . . and all other things whatsoever detrimental, or liable to be detrimental, to the health, morals, comfort, safety, convenience, or welfare of the inhabitants of the municipality, and exercise general police powers"; emphasis added). Moreover, in contrast to a county executive, the Mayor, as the "chief executive officer of the municipality," is authorized to "[e]mploy, promote, discipline, suspend and discharge all employees and department heads, in accordance with personnel policies and procedure, if any, adopted by the board." Tenn. Code Ann. § 6-3-106(b)(2)(A). For the purposes of this statute, "department head" includes the chief of police. See Tenn. Code Ann. § 6-1-101(2). Thus, in contrast to the county executive, the Mayor has the direct ability to hire, fire, or discipline the chief of police.

This distinction is crucial to the issue now before this Court. In arguing that Sumner County should be held civilly accountable for the alleged policies and customs promulgated by the Sheriff, Plaintiffs essentially argue that Sumner County functions under a Hydra-headed system of governance, whereby the Sheriff sets the law enforcement policies of the County without receiving the authority to do so from the local governing body. This construction of county governance, however, is contrary to the very nature of a corporate entity, and was expressly rejected by the Supreme Court in McMillian II. Indeed, this concept was addressed

in a colloquy between Mr. McMillian's counsel, Bryan Stevenson, and Mr. Justice Scalia, during oral argument of that case.

> **Question:** When we're interpreting Monell, why don't we use -- why aren't the same policies that inform that decision as to respondeat superior applicable equally as well to imputed liability?
>
> **Mr. Stevenson:** Because I think that the Congress intended to made localities liable. That is, the Treasury of the locality liable --
>
> **Question:** It intended to make municipalities liable because they were like corporations. That's why we decided Monell the way we did, that in fact they were municipal corporations, but surely it is an essential characteristic of a corporation that its board of directors can decide what happens within that corporation.
>
> But you're coming before us here and saying that this is a corporation which should be liable under 1983. However, the sheriff is not subject to the commands of the board of directors of the corporation, namely the governing body of the county. That's what troubles me the most, that this doesn't fit into the whole theory of section 1983 liability for municipalities, which is that they are like corporations.
>
> **Mr. Stevenson:** Well, I think two things, Justice Scalia. I think in imagining the structure of this corporation we have to imagine a board that has not only a county commission, but a sheriff, a tax assessor, and a coroner, so in that sense we're not asking for you to do anything different than you would do in that traditional context.
>
> This is just a corporate structure that has four elements: a county commission here, dealing with one part, a sheriff over here, dealing with another part, and a coroner and a tax assessor.
>
> **Question:** You say just a corporate structure that has four elements. That's a corporation I never heard of. . . . You're saying it's just a person that has four heads.

> **Mr. Stevenson:** Well, that's the second thing I'd like to say. That is, when Congress passed this law they made it clear they were talking about bodies politic and corporate to embrace just these kinds of jurisdictions where the power is separated, where the power is directed to various officials. . . .
>
> **Question:** But the decision was not to make counties liable. That was not the 1983 decision. The decision was to make corporations liable. Counties became liable only because they were corporations. That was the whole basis of our analysis.

Transcript of Oral Argument (March 18, 1997) [1997 WESTLAW 136243] at *22-24 (emphasis added) (submitted herewith).

Absent the ability to control the Sheriff in carrying our his or her duties as "principal conservator of the peace" -- i.e., to directly "instruct the sheriff how to ferret out crime, how to arrest a criminal, or how to secure evidence of a crime," McMillian II, 520 U.S. at 790 -- Sumner County cannot be held accountable for the policies, practices, or customs which the Sheriff promulgates or perpetuates in that area. In its *amicus* brief, the Tennessee Attorney General agrees with this analysis.

> Following the analysis in [McMillian II] as to Tennessee State law governing the nature and duties of sheriff, the Sumner County Sheriff was not acting as a policymaker for the County based on the allegations in the Second Amended Complaint. . . .
>
> Independent review of McMillian and underlying cases and of Tennessee constitutional provisions, statutes and interpreting cases relative to the office of sheriff, and the limited authority of a county, shows that Sumner County does not have exposure to liability in this case. Under State law, the Sumner County Sheriff's law enforcement decisions in this case were based on his authority from the State. He was not acting as a policymaker for the county.

Amicus Brief of the Attorney General at 3-4.

Again, under Monell,

> [l]ocal governing bodies . . . can be sued directly under § 1983 for monetary, declaratory, or injunctive relief, where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.

Monell, 436 U.S. at 690 (emphasis added). Because Sumner County has no law enforcement authority of its own, it is incapable under the law of establishing policies, practices, or customs relating to law enforcement. In short, the law enforcement activities of the Sheriff cannot be said to "fall within an area of [Sumner County's] business," McMillian I, 88 F.3d at 1577-87, and cannot "fairly be said to be those of the [county]." Bryan County, 520 U.S. at 404. For this reason, the Sheriff's actions "are not acts of the local government," id., and he is not the "final policy making authority" for the County. Praprotnik, 485 U.S. at 123. Accordingly, Sumner County is not answerable under 42 U.S.C. § 1983 for any injuries proximately caused from an alleged law enforcement policy, practice, or custom promulgated or condoned by the Sheriff.

As further support for this conclusion, it should be noted that, in 1997, the Legislature enacted Public Chapter No. 338, which further defines the mandatory qualifications of a Sheriff. See Pub. Ch. No. 338 (effective May 30, 1997) (submitted herewith). This Public Act amends Tenn. Code Ann. § 8-8-102, and now requires

all subsequent candidates for election or appointment to the office of sheriff to:

> (9) Possess a current and valid peace officer certification as issued by the Tennessee Peace Officer Standards and Training Commission as provided in Section 38-8-107, . . . within twelve (12) months prior to the close of qualification for the election for the office of sheriff.
>
> In the event that certification for peace officer is inactive or no longer valid, proof of the intent to run for the office of sheriff shall be presented to the POST Commission for approval to take the POST certification examination . . . .

Pub. Ch. No. 338 (effective May 30, 1997) at § 2(b). This legislation further provides for salary reductions for the failure to obtain such certification. See id. at § 2(e)(2).

In addition to requiring POST certification as a qualification for office, this legislation also requires a Sheriff to complete annual in-service law enforcement training from the Tennessee Law Enforcement Training Academy. See id. at § 2(d). Moreover, "[a]ny sheriff who does not fulfill the obligations of this training course shall lose his or her powers of arrest." Id. (emphasis added). Accordingly, in exercising its rights to define the qualifications and duties of the Sheriff as provided in Article VII, § 1, of the Tennessee Constitution, the Legislature has determined that the public interest is served by stripping the personal law enforcement authority from any sheriff who fails to meets these standards. Thus, Public Chapter No. 338 serves as a

stark example of the direct and unfettered control the State possesses over the Sheriffs.

3. Duties to the State Courts.

Further, as in Alabama, Tennessee sheriffs are required to "attend upon" the state courts in their respective counties, and

> "obey the lawful orders and directions" of those courts, and must "execute and return the process and orders" of any state court, even those outside his county.

McMillian II, 520 U.S. at 789 (quoting Ala. Code § 36-22-3(1), (2)). See also Tenn. Code Ann. § 8-8-201(1) (describing the Sheriff's duty to "execute and return, according to law, the process and orders of the courts of record of this state, and of officers of competent authority, with due diligence, when delivered to the sheriff for that purpose"); and Tenn. Code Ann. § 8-8-201(2)(A) (requiring the Sheriff to "attend upon all the courts held in the county when in session . . . and obey the lawful orders and directions of the court"). Thus, judges -- themselves state officers -- "may order the sheriff to take certain actions, even if the judge sits in a distant county." McMillian II, 520 U.S. at 789-90.

In fact, while a Sheriff is empowered to hire "such deputies and assistants as may be actually necessary to the proper conducting of his office," Poe, 383 S.W.2d at 274, a Sheriff must do so by making application -- not to the county Board of Commissioners -- but "to the judge of the court under whose general

jurisdiction he may function." Id. (emphasis added). Under the Tennessee Code, the Sheriff must apply to the presiding judge of the circuit court of his county (or, where established, the presiding judge of the criminal court of the county) for the authority to hire deputies and assistants within his office, and must "show[] the necessity therefor." See Tenn. Code Ann. § 8-20-101(a)(2). The governing body of the county has no authority over such hirings.

CONCLUSION

Under Monell -- and as re-affirmed by McMillian -- political subdivisions of a state may be held liable under the Civil Rights Act only if the alleged activities fall within the specific corporate authority granted to such county, city, or town by that state.

It is undisputed that Sumner County is a political subdivision and corporation created by state statute. See Tenn. Code Ann. § 5-1-101, 103. Indeed, "the members of the legislative body of each county assembled are the representatives of the county and authorized to act for it." Tenn. Code Ann. § 5-1-103. Sumner County, however, is not vested with any police power, and the Sheriff is not a member of, or subordinate to, the county's legislative body or the county executive. Rather, the Office of the Sheriff is created by the state Constitution, and the Sheriff's

authority to exercise powers of law enforcement is granted directly by the Legislature. See Tenn. Code Ann. § 38-3-102.

In the context of this civil rights action, wherein the Plaintiffs seek to impose "Monell" liability upon Sumner County, the District Court certified the instant legal issue. Given the legal authorities discussed above, the law enforcement policies, practices and customs of former Sheriff Richard Sutton, as alleged by the Plaintiffs, do not fall within "that area of the [county's] business," Praprotnik, 485 U.S. at 123, and such policies cannot "fairly be said to be those of the municipality" -- i.e., Sumner County. Bryan County, 520 U.S. 403-04. Accordingly, this Court should find that, in exercising his state-conveyed law enforcement powers, the Sheriff acts on behalf of the State and not Sumner County.

Respectfully submitted,

By:_____

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing were delivered by first class mail (unless otherwise indicated), on this the 21st day of December, 1999, to each of the following:

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_____
Andrew B. Campbell

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

TRAVELERS INDEMNITY COMPANY OF AMERICA,	)	
Plaintiff,	)	
v.	)	**2:10cv02619**
	)	**Jury Demand**
ARCHER-DANIELS-MIDLAND COMPANY,	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF ADM'S MOTION TO COMPEL

I. Procedural and Factual Background.

Travelers Indemnity Company of America ("Travelers") brought this action as a subrogee of Ralans, Inc. -- a Tennessee corporation that owns and operates a Sonic restaurant in Memphis (the "Memphis Sonic"), and elsewhere.[1] *See* Complaint at ¶¶ 1-2. Travelers alleges that, on August 12, 2008, the Memphis Sonic owned by Ralans caught fire, after employees "dried soiled aprons and towels in the restaurant's drying machine" and left the garments in the dryer after the store closed. *Id.* at ¶¶ 7-8. It is undisputed that the dryer at the Memphis restaurant was manufactured and/or sold, by General Electric, a non-party to this litigation.

[1] Ronald A. Solberg is a principal owner of Ralans, Inc. Mr. Solberg also is an owner of a Mississippi corporation which -- in turn -- owns a Sonic Restaurant in Hernando, Mississippi (the "Hernando Sonic"). *See* Travelers' First Amended Responses to ADM's First Requests for Admission at ##12-15 and 18. As discussed below, these facts are relevant because: (a) six months prior to the fire at issue in this case, the Hernando Sonic caught fire and burned, (b) the Hernando Sonic also was insured by Travelers, and (c) spontaneous combustion was considered by local fire investigators to be a potential cause of the fire and discussed with Mr. Solberg. *See* Deposition of Matthew Massey at 13, and 16-18; Deposition of Michael Hancock at 9-12. Excepts of these transcripts are provided herewith as Exhibits I and J.

Travelers alleges that the fire was caused by the "spontaneous combustion of vegetable oil" manufactured by ADM. *Id*. at ¶ 10. Asserting theories of negligence and strict liability, Travelers asserts that ADM is liable for damages in excess of $900,000.00, because ADM "failed to adequately warn Ralans and other potential users that vegetable oil soaked garments and rags left in a dryer posed a fire hazard." *Id*. at ¶ 15(a). *See also id*. at ¶ 19.

A. Prior Litigation and Claims Asserted by Travelers.

This is not the first time that Travelers has initiated litigation regarding fires originating in General Electric dryers. As stated in ADM's Answer, Travelers initiated two lawsuits in Connecticut (the "General Electric litigation") in 1998 and 1999. *See* ADM's Answer (Docket Entry No. 5) at 5. In those actions, Travelers alleged that General Electric dryers possessed a design defect which permitted the build up of lint around the heating coils and caused numerous dryer fires. *See Travelers Property & Casualty Corp. v. General Electric Co.*, 150 F.Supp.2d 360, 362 (D. Conn. 2001). In that litigation, Travelers' own Laboratory Director, Mr. John P. Machnicki, opined "that the design of the GE dryer permits the accumulation of lint behind the dryer drum" which "can be ignited by the dryer's heating elements that are located in close proximity to the rear of the drum, thereby causing a fire." *Travelers Property*, 150 F.Supp.2d at 362.

In addition, this is not the first time that Travelers has advanced a spontaneous combustion theory against ADM. On March 17, 2004, ADM received a notice of a claim from Travelers relating to property damage allegedly caused by spontaneous combustion at a restaurant in the State of Washington. *See* Exhibit K. ADM denied the claim, and no litigation was filed in furtherance of that claim.

On January 27, 2007, Travelers filed suit against ADM on behalf of the "Sonic Insurance Advisory Trust" (not a legally-cognizable entity), alleging damages caused by spontaneous

combustion of vegetable oil at a Sonic restaurant in Donelson, Tennessee. The case was dismissed in favor of ADM at the summary judgment stage by the U.S. District Court for the Middle District of Tennessee.

B. Status of Discovery at Issue.

After the exchange of Rule 26 disclosures on February 1, 2011, written discovery commenced. Through a series of interrogatories, requests for production and requests for admission, Defendant ADM sought the disclosure of information relative to (a) the General Electric litigation and (b) Travelers' own knowledge regarding spontaneous combustion. Specifically, ADM sought the following:

- production of all reports authored by, and all supporting documentation relied upon and/or used by John Machnicki in the General Electric litigation (*see* Travelers' Response to ADM's First Requests for Production #29[2]);
- production of all transcripts and affidavits of all sworn testimony rendered by Mr. Machnicki in the General Electric litigation (*id*. at Request #30);
- production of all settlement agreements between Travelers and General Electric relating to the General Electric litigation (*id*. at Request #31);
- production of data pertaining to all claims submitted to Travelers by restaurants and/or owners of restaurants pertaining to spontaneous combustion since January 1, 1992 (*id*. at Request #32);
- production of copies of all newsletters, bulletins, and/or loss-prevention memos published by Travelers to insureds pertaining to spontaneous combustion (*id*. at Request #33);
- production of documentary materials used in or memorializing speeches, lectures, or classes presented, or participated in, by John Machnicki or other employees of Travelers (*id*. at Requests #34 and #35);
- production of copies of all communications, reports and/or commentary submitted to the National Fire Protection Association by Travelers pertaining to spontaneous combustion (*id*. at Request #36);

[2] Travelers' Responses to ADM's First Requests for Productions are attached hereto as Exhibit A.

- production of all underwriters files pertaining to the Memphis Sonic restaurant (*see* Travelers' Response to ADM's Second Requests for Production #1[3]);

- production of all underwriters files pertaining to the Hernando Sonic[4] (*see id*. at Request #3);

- production of Travelers' investigative records relating to the prior Hernando Sonic fire (*see id*. at Request #4); and

- admission of the content of John Machnicki's lecture on "spontaneous heating and collecting samples for analysis and . . . lint issues" at a seminar entitled "Investigating Residential Dryer Fires" scheduled for May 6-7-2008 (*see* Travelers' First Amended Responses to ADM's Requests for Admission at Request for Admission #60[5]).

Relying primarily on objections related to relevance, Travelers has declined to tender responsive information relating to these discovery requests.

Lastly, ADM has sought disclosure of redacted material from a "Property Large Loss Report" which pertained to conduct by Ralans, Inc., which "could have avoided or minimized [the] loss." *See* Exhibit G.

Adversary counsel corresponded on April 25th, May 13th, July 1st, July 11th and July 20th with regard to these requests[6] and -- while certain matters have been resolved -- the issues described above remain outstanding. Accordingly, ADM moves the Court to compel the requested disclosures.

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3 Travelers' Responses to ADM's Second Requests for Productions are provided as Exhibit B.

4 *See* fn. 1, *supra*.

5 Travelers' First Amended Responses to ADM's First Requests for Admission are provided at Exhibit C.

6 Copies of these letters are provided as Exhibits D to H.

II. Argument.

Travelers' predominant objection to furnishing the requested information is premised on the relevance requirement of Rule 26(b)(1). However,

> [r]elevancy for discovery purposes is construed broadly. Discoverable evidence need not be admissible at trial; rather, material is discoverable if it is 'reasonably calculated to lead to the discovery of admissible evidence.'"

Waddell v. Greyhound Lines, Inc., 2008 WESTLAW 4982633 at *1 (W.D. Tenn. 2008). *See also Kumar v. Hilton Hotels Corp.*, 2009 WESTLAW 3681837 at *2 (W.D. Tenn. 2009). "Once an objection to the relevance of the information sought is raised, the party seeking discovery must demonstrate that the requests are relevant to the claims or defenses in the pending action." *Waddell*, at *1.

For the reasons set forth below, ADM meets this standard.

A. Information Relating to the General Electric Litigation. (First Requests to Produce ##29-31)

Again, it is undisputed that the dryer at the Memphis restaurant was manufactured and/or sold by General Electric. Further, it is a matter of public record that -- in 1998 and 1999 -- Travelers sued General Electric in two cases pending in the U.S. District Court for the District of Connecticut alleging "a design defect in certain GE clothes dryers" which "permit[ed] the accumulation of lint behind the dryer drum . . ., thereby causing a fire." *Travelers Property & Casualty*, 150 F.Supp.2d at 362.

ADM seeks disclosure of documents related to those 1998 and 1999 federal lawsuits. Specifically, ADM seeks the production of

- Mr. Machnicki's report (First Request to Produce #29), which is 3-pages in length,[7] and supporting documentation on which he relied;

[7] *See Travelers Property & Casualty*, 150 F.Supp.2d at 362.

- the transcript of Mr. Machnicki's 12-day deposition[8] (First Request to Produce #30); and

- copies of the settlement agreements between Travelers and GE (First Request to Produce #31).

The relevance of the first two items is self-evident. Cause and origin issues are critical in any fire investigation. In this case, there is no dispute that the GE dryer at the Memphis Sonic was involved in the fire, and may have been the origin. The specific cause, however, is in dispute. Travelers contends that the fire was caused by the spontaneous combustions of rags and aprons within the dryer, which it alleges were soaked with vegetable oil. In its Answer, however, ADM points out that Travelers ascribed a <u>different</u> cause to multiple fires originating in GE dryers.

John Machnicki is the Director of Travelers' Engineering Laboratory, and a Vice President of Travelers.[9] He purportedly lectures on issues of spontaneous combustion and dryer fires.[10] His methods of analysis and cause-and-origin conclusions reached in the prior General Electric litigation are relevant to the methods of analysis and cause-and-origin conclusions reached in this case. For example, if the GE dryer at the Memphis Sonic is of the same, or

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8 *See id*.

9 *See id*.; *see also* Advertisement for September 2010 National Insurance Conference of Canada (Exhibit D).

10 *See* Advertisement for September 2010 National Insurance Conference of Canada (Exhibit D); Advertisement for March 2008 seminar "Investigating Residential Dryer Fires" (Exhibit C-20).

As discussed below, while Travelers has admitted to the authenticity of the March 2008 advertisement (Exhibit C-20), it declines to confirm that Mr. Machnicki actually spoke on such topics. *See* Travelers' First Amended Responses to ADM's First Requests for Admission (Exhibit C) at Request #60.

similar design, as the multitude of dryers at issue in the General Electric litigation,[11] ADM would have a legitimate basis to discover why Travelers has discounted "dryer defect" as a potential cause in this case. Further, it also would be relevant to compare the investigative techniques employed by the Director of Travelers' Engineering Laboratory in the General Electric litigation against the techniques utilized by Travelers' cause-and-origin investigators in this case.

Travelers disagrees and argues primarily that:

> [t]he issues in the present subrogation action are limited to whether Defendant failed to property [sic] warn subrogor, Ralans, Inc., of the likelihood of spontaneous combustion of an oil-based product under certain circumstances; whether Defendant was negligent in the design, manufacture or distribution of its product[[12]]; and whether Plaintiff's insured, Ralans, Inc., had negligence that contributed to he loss.

Travelers' Response to First Request to Produce #29 (Exhibit A).

This argument is nonsensical. While Travelers certainly has alleged that this is a failure to warn case, the issues are not "limited" to those allegations. In order to prevail on its failure to warn theory, Travelers first must prove that the fire was caused by spontaneous combustion. Thus, other potential causes are relevant for discovery.

Equally meritless are Travelers' arguments that the requested documents are "protected from disclosure by attorney-client privilege or work product protection." *Id*. Again, Mr. Machnicki's report was produced in the General Electric litigation and considered by the Connecticut District Court. Further, he was deposed on the substance of his 3-page expert report for a period of 12 days. None of the information was subject to an Protective Order, and the

---

[11] The 1998 case filed against General Electric pertained to 23 different dryers; the 1999 case pertained to 22 different dryers.

[12] This statement is inaccurate. While Travelers clearly articulates a "failure to warn" theory in both of its Counts, there are no factual allegations relating to defective design or manufacture in the Complaint.

District Court freely discussed the content of Mr. Machnicki's report and testimony. *See Travelers Property*, 150 F.Supp.2d at 362-69. No privilege applies to this material.[13]

Travelers also objects "to the extent that [the Requests] seek[] disclosure of opinions of an expert whom Plaintiff has not disclosed as an expert witness." Yet, Travelers overlooks the fact that (a) the opinions already have been disclosed in the General Electric litigation and (b) Mr. Machnicki is an employee (a Vice President, in fact) of Travelers. Thus, the opinions are matters of public record, and do not enjoy the confidentiality protections reserved for consulting expert opinions. In fact, Mr. Machnicki's public opinions are admissible under Rule 801(d)(2), Fed. R. Evid.

B. Information Relating to Travelers' Knowledge Regarding Spontaneous Combustion. (First Requests to Produce ##32-36; Second Requests to Produce ##1, 3-4; First Requests for Admission #60)

In addition to seeking information regarding the General Electric litigation, ADM also sought discovery relating to Travelers' own knowledge regarding spontaneous combustion. Specifically, ADM sought

- production of data pertaining to all claims submitted to Travelers by restaurants and/or owners of restaurants pertaining to spontaneous combustion since January 1, 1992[14] (Travelers' Response to ADM's First Requests to Produce at Request #32);

---

[13] Arguably, confidentiality concerns do attach to the documents sought by ADM's Request to Produce #31 -- i.e., the settlement agreement(s) between Travelers and General Electric. However, as stated in undersigned counsel's letter of April 25th, ADM has no interest in discovering confidential, personal or financial information pertaining to either Travelers or GE, which may be reflected in the settlement document(s). For example, the amount of money that one party paid to another is not of any consequence, and ADM would accept a suitably redacted copy of the material that preserves the confidentiality of such information. ADM, however, requests the settlement agreement(s) to determine whether or not Travelers agreed never again to sue General Electric in connection with dryer fires, which is a relevant inquiry in this matter.

[14] As stated in undersigned counsel's letter of April 25, 2011 (Exhibit D), ADM would accept a production of statistics regarding the number of spontaneous combustion claims Travelers has received from restaurant insureds, rather than actual claim files.

- production of copies of all newsletters, bulletins, and/or loss-prevention memos published by Travelers to insureds pertaining to spontaneous combustion (*id*. at Request #33);

- production of documentary materials used in or memorializing speeches, lectures, or classes presented, or participated in, by John Machnicki or other employees of Travelers (*id*. at Requests #34 and #35);

- production of copies of all communications, reports and/or commentary submitted to the National Fire Protection Association by Travelers pertaining to spontaneous combustion (*id*. at Request #36);

- production of all underwriters files pertaining to the Memphis Sonic restaurant (*see* Travelers' Response to ADM's Second Requests for Production #1);

- production of all underwriters files pertaining to the Hernando Sonic (*see id*. at Request #3);

- production of Travelers' investigative records relating to the prior Hernando Sonic fire (*see id*. at Request #4); and

- admission of the content of John Machnicki's lecture on "spontaneous heating and collecting samples for analysis and . . . lint issues" at a seminar entitled "Investigating Residential Dryer Fires" scheduled for May 6-7-2008 (*see* Travelers' First Amended Responses to ADM's Requests for Admission at Request for Admission #60.

Travelers has declined to produce this readily-accessible material on the basis that, as a subrogee, it may not be subjected to a comparative fault defense in its own right. As stated by Travelers' counsel:

> This matter involves ADM's duty to warn Ralans of the potential for spontaneous combustion. As you know, Travelers is only subject to defenses that can be asserted against its insured, Ralans. The insurer's conduct is not relevant in a property subrogation action.

Correspondence dated 5/13/11 from Al Nalibotsky to Andrew Campbell (emphasis added).

Travelers' position is not accurate, nor is it consistent with Tennessee law.

1. Comparative Fault in Tennessee.

In 1992, after surveying the body of law of 45 States, the Tennessee Supreme Court determined that "it is time to abandon the outmoded and unjust common law doctrine of

contributory negligence and adopt in its place a system of comparative fault." *McIntyre v. Balentine*, 833 S.W.2d 52, 56 (Tenn. 1992). Specifically, the *McIntyre* court declared that "so long as a plaintiff's negligence remains less than the defendant's negligence the plaintiff may recover; in such a case, plaintiff's damages are to be reduced in proportion to the percentage of the total negligence attributable to the plaintiff." *Id*. at 57.

Throughout the *McIntyre* opinion, the Tennessee Supreme Court emphasized that this dramatic shift in Tennessee tort jurisprudence was necessitated by basic concepts of "fairness" to the litigants. *Id*. at 58 ("[o]ur adoption of comparative fault is due largely to considerations of fairness"). From the standpoint of a party-plaintiff, the "strict bar" to recovery presented by the old contributory negligence doctrine, *id*. at 54, "completely denie[d] injured litigants recompense for their damages." *Id*. at 56. Further, from the standpoint of the party-defendant, "fairness and efficiency required" that "a particular defendant will henceforth be liable only for the percentage of a plaintiff's damages occasioned by that defendant's negligence. . . ." *Id*. at 58 (emphasis added).

Subsequent Supreme Court decisions, which further refined the applicability of comparative fault, continued to emphasize the concept of "fairness" to all litigants. For example, in 1995, the doctrine of comparative fault was extended to strict liability actions, because "a plaintiff's ability to recover in a strict products liability case should not be unaffected by the extent to which his injuries result from his own fault." *Whitehead v. Toyota Motor Corporation*, 897 S.W.2d 684, 693 (Tenn. 1995).

Also in 1995, the Supreme Court declined to adopt a rule under the Uniform Comparative Fault Act whereby "the liability of a given defendant is enhanced beyond that defendant's percentage of fault" if another culpable party is insolvent. *Volz v. Ledes*, 895 S.W.2d 677, 680

(Tenn. 1995). In doing so, the Supreme Court reiterated that "[w]e believe that a system wherein a particular defendant is liable only for the percentage of the plaintiff's damages that are caused by that defendant's fault is the system that best achieves our stated goal in *McIntyre* . . . of linking liability and fault." *Id.*

To this end, a defendant also is permitted to allege, "as an affirmative defense, that a nonparty caused or contributed to the injury or damage for which recovery is sought." *McIntyre*, 833 S.W.2d at 58. This is true, even if the nonparty is itself immune from suit. *Carroll v. Whitney*, 29 S.W.3d 14, 19 (Tenn. 2000) ("we hold that when a defendant raises the nonparty defense in a negligence action, a jury may generally apportion fault to immune nonparties"; "the standard we announce today is generally applicable in comparative fault cases"). Again,

> the goal of fairness that underlies our adoption of comparative fault is not met when a plaintiff is free to shift to some defendants the fault which is properly allocated to other nonparties.

Id. at 21; *see also id*. at 20 ("'[l]ogic dictates that, if the negligence of an actor who is not a party is not included in the comparative-negligence calculation, the percentage of negligence of defendants who are parties may be inflated'"; *quoting Kirby Bldg. Sys. v. Mineral Explorations Co.*, 704 P.2d 1266, 1272-73 (Wyo. 1985)).

It is against this body of law that the present discovery dispute must be viewed. ADM has requested that Travelers provide information pertaining to its own knowledge and conduct -- specifically with regard to protecting its own financial interests -- as related to spontaneous combustion.

Travelers maintains that it

> is only subject to defenses that can be asserted against its insured, Ralans. The insurer's conduct is not relevant in a property subrogation action.

This, however, is not correct. While Travelers, as a subrogee, certainly stands in the shoes of its insured, and -- thus -- is subject to defenses that can be asserted against Ralans, Travelers is not insulated from Tennessee's comparative fault doctrine merely because it is an insurance company. To the contrary, comparative fault principles apply to any party that "caused or contributed to the injury or damage for which recovery is sought." *McIntyre*, 833 S.W.2d at 58. Indeed,

> no law supports the plaintiff's [i.e., insurer's] apparent argument that the fact it brings the action as subrogee or assignee exempts it in its independent capacity from the operation of the comparative negligence [doctrine] altogether. Such an interpretation is contrary to the intent of the [doctrine] to ensure "that a defendant would be liable only for that portion of the damages for which he was responsible." The subrogatory nature of the action does not prevent the plaintiff [insurer] from being considered a party in its own capacity for the purposes of the comparative negligence [doctrine]. Thus, the plaintiff's [insurer's] alleged negligence is properly subject to scrutiny both pursuant to the [doctrine] and for the purposes of the court's determination of equity.

Infinity Insurance Co. v. Worcester Insurance Co., 39 Conn. L. Rptr. 72, 2005 WESTLAW 941405 (Conn. Superior Ct. 2005) (citing the Connecticut comparative fault statute; quoting *Collins v. Colonial Penn Ins. Co.*, 257 Conn. 718, 737-38 (2001); emphasis added).

Over 40 years ago, the Tennessee Supreme Court held that the actions of a subrogee are relevant to such party's ability to maintain a cause of action.

> "To entitle one to subrogation, his equity must be strong and his case clear, since it will not be enforced where the equities are equal . . . . Where equities are equal, there is no right of subrogation."

Castleman Construction Company v. Pennington, 222 Tenn. 82, 432 S.W.2d 669, 675 (1968) (quoting COUCH ON INSURANCE 2d, Subrogation, § 16:21). Thus, "[r]elevant to the equitable balancing is the degree of negligence, if any, of the party asserting a claim for subrogation." *Lawyers Title Insurance Corporation v. United American Bank of Memphis*, 21 F. Supp.2d 785, 792 (W. D. Tenn. 1998). Even if the negligence of the insurer is not sufficient to constitute a

"complete bar" to a subrogation action, such negligence still may be "taken into consideration in ascertaining whether he be entitled to the equitable relief of subrogation." *Castleman Construction*, 432 S.W.2d at 677.

2. The Requested Information is Discoverable.

In this case, Travelers is the real party in interest. Indeed, Travelers has alleged that, as a consequence of the Memphis fire, it "paid Ralans [its insured] Nine Hundred Twenty Thousand Nine Hundred Nineteen Dollars and 85/100 ($920,919.85)." Complaint at ¶ 11. It is relevant, therefore, for ADM to inquire into the scope of Travelers' own knowledge relating to spontaneous combustion issues, and the steps that Travelers took to protect its own assets and reduce its own loss exposure. Again, under Tennessee's comparative fault doctrine,

> the reasonableness of a party's conduct in confronting a risk should be determined under the principles of comparative fault. Attention should be focused on whether a reasonably prudent person in the exercise of due care knew of the risk, or should have known of it, and thereafter confronted the risk; and whether such a person would have behaved in the manner in which the plaintiff acted in light of all the surrounding circumstances, including the confronted risk.

Perez v. McConkey, 872 S.W.2d 897, 905 (Tenn. 1994).

Assuming the validity of its theory of liability against ADM, Travelers clearly possessed its own knowledge of the potential for spontaneous combustion. In fact, it asserted two previous claims against ADM on such a theory. Its own employee, John Machnicki, purportedly has lectured on the topic. Thus, data pertaining to spontaneous combustion claims submitted to Travelers by restaurants and/or owners of restaurants (Travelers' Response to ADM's First Requests to Produce at Request #32) and commentary by Travelers to the National Fire Protection Association (*id*. at Request #36), are relevant to establish the scope of Travelers' own knowledge of spontaneous combustion. Similarly, documents related to speeches, lectures or

classes presented or participated in by Mr. Machnicki[15] and other Travelers employees (*id*. at Requests ##34-35) are equally as relevant.

Indeed, lacking documents produced by Travelers, ADM presented Travelers with an advertisement that ADM obtained through its own investigation. *See* Exhibit C-20. The advertisement pertains to a seminar (titled "Investigating Residential Dryer Fires") at which Mr. Machnicki is identified as a presenter. *See id*. at p. 2. The advertisement, which Travelers admits is authentic, states that Mr. Machnicki "will explain spontaneous heating and collecting samples for analysis and discuss lint issues."[16] *Id*. Via Request for Admission #60, ADM sought an admission that Mr. Machnicki did, in fact, speak on such a topic. In response, Travelers demurred, stating that

> Exhibit 20 only evidences intended topic discussions and does not provide any transcript of said discussions or evidence that the event ever actually took place.[17]

This is a circular objection and an improper basis for denying the Request -- <u>especially</u> when Travelers has declined to produce the very documents (i.e., "transcripts" or prepared lectures) that were requested by ADM.

If concepts of fairness dictate that "a particular defendant is liable only for the percentage of the plaintiff's damages that are caused by that defendant's fault," *Volz*, 895 S.W.2d at 680, the question becomes: what (if anything) did Travelers do to warn its insureds of conditions that can give rise to possible spontaneous combustion events, and -- thereby -- attempt to protect itself

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15 *See*, *.e.g.*, Exhibit C-20.

16 Again, lint was an "issue" raised in the General Electric litigation. *Travelers Property*, 150 F.Supp.2d at 362.

17 *See* Travelers' First Amended Responses to ADM's First Requests for Admission (Exhibit C) at #60.

against financial loss? To be sure, Travelers does send so-called "risk control" newsletters to its insureds. *See* Exhibits C-15 through C-19.[18] Yet, those newsletters which have been authenticated do not address spontaneous combustion,[19] and Travelers declines to produce any newsletters itself. *See* Travelers' Response to ADM's First Requests for Production #33.

Travelers also declines to produce its underwriting files for the Memphis Sonic and the Hernando Sonic on the basis of relevance. *See* Travelers' Response to ADM's Second Requests for Production #1 and #3. The import of the underwriting files for both of these restaurants (which share a common owner and both of which caught fire) is two-fold.

An insurer's underwriting file "is the file generated by an insurer in the process of negotiating and issuing policies to different policyholders." *Nestlé Foods Corporation v. Aetna Casualty & Surety Company*, 1990 WESTLAW 191922 at fn.1 (D. N.J. 1990). As such, the file contains (or should contain) all documentation associated with the insurer's evaluation of the risk of loss. *See*, *e.g.*, *Presbyterian Manors, Inc. v. SimplexGrinnell, L.P.*, 2010 WESTLAW 3880027 at *12 (D. Kan. 2010). *See also Chubb Custom Ins. Co. v. Grange Mut. Cas. Co.*, 2009 WL 243034 at *8 (S.D. Ohio 2009). In this instance, such documentation could include (a) assessment the Ralans, Inc.'s method and manner of operations, (b) assessment of the construction type and design of the applicant's buildings, (c) the types of equipment present on the site (including a washer and dryer), (d) the presence of fire-prevention and fire-suppression

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[18] These documents were not produced by Travelers, but independently obtained by ADM's counsel.

[19] Travelers contends that, as an insurer, it has no duty to warn its insureds of possible hazards to property. While ADM disagrees with this contention, the fact remains that Travelers has chosen do so through its "risk control" publications. "'One who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully.'" *Biscan v. Brown*, 160 S.W.3d 462, 482-83 (Tenn. 2005) (quoting *Stewart v. State*, 33 S.W.3d 785, 793 (Tenn. 2000)).

equipment, (e) an appraisal of the insurable value of the building, (e) pre-loss photographs[20] and (f) any other observable factors which may affect the insurability and level of the risk. An underwriting file also may contain a record of recommendations from the insurer to the applicant with regard to reduction of the risk of loss.

Thus, on one hand, the information in the underwriting file may be relevant as to the state of the Ralans, Inc.'s knowledge of potential risk. Recently, this issue was decided against Travelers in an action involving the failure of a service company to maintain, inspect and test a sprinkler system. *See Presbyterian Manors*, *supra*. The sprinkler system froze, causing damage to the plaintiff's building, which was insured by Travelers. The defendant service company sought production from Travelers of its underwriting files of the plaintiff, arguing that

> insurance companies frequently evaluate fire suppression systems installed in a property when evaluating the risk of loss with that property. Thus, . . . the underwriting and loss control files will contain information regarding installation and maintenance of Plaintiff's fire suppression systems.

Id. at *12. The court agreed and ordered such documents produced.

The same argument applies here. The underwriting files may contain notation and/or assessment of the very thing that Travelers contends ADM should have warned about: i.e., the hazard of spontaneous combustion from laundered fabrics placed in a dryer. Such information would be relevant to the knowledge possessed by Ralans, Inc. (Traveler's insured). *See Arch Trims, Inc. v. W.W. Grainger, Inc*., 872 F. Supp. 473, 475 (E.D. Tenn. 1994) ("[a] person with actual knowledge of a product's hazard is not entitled to a warning of it. [P]roximate cause cannot exist when the product's user knows of the hazard.") (construing Tennessee law), *aff'd*, 145 F.3d 1329 (6th Cir. 1998) (table).

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[20] Certainly, such assessments, photos and pre-loss appraisals of the value of the property is relevant.

On the other hand, the information in the underwriting file may be relevant as to the state of the Travelers' knowledge of the possible risk of spontaneous combustion. The extent of the insurer's knowledge was raised in *Western Surety Company v. Alliance Steel Construction, Inc.*, 2007 WESTLAW 5514730 (W.D. Wis. 2007). In that case, Western Surety had issued a performance bond for a subcontractor, which went out of business before completing its work for Alliance (the general contractor). *Id*. at *1. After completing the subcontractor's work, Western Surety sued Alliance for unpaid balances. *Id*. Alliance counterclaimed, and asserted negligence on the part of Western Surety for failing to investigate the performance history of the subcontractor. In furtherance of the counterclaim, Alliance sought production of Western Surety's underwriting file in furtherance of that counterclaim, and the court agreed. *Id*.

> [I]n modern American civil litigation, one tenet of pretrial discovery is "trust your mother but cut the cards." Western Surety, as the party who filed this lawsuit and who is seeking about a quarter million dollars from Alliance, does not occupy the ideal perch from which objectively to determine which of its own records Alliance is entitled to review to prepare its defense and its counterclaims. There are enough indicia of relevance from enough separate sources for this court to deem Western Surety's underwriting file in play. Perhaps Western Surety already has disclosed every document from its underwriting file that Alliance possibly could consider relevant. But Alliance is entitled to verify this for itself, subject to the confidentiality stipulation between the parties.

Id.

In this regard, Travelers' underwriting files for the Memphis Sonic and the Hernando Sonic may contain information demonstrating Travelers' awareness of the on-site laundering activities occurring at each restaurant. If such information relating to on-premises laundering and/or the possibility of spontaneous combustion is contained in the underwriting files and not conveyed to Ralans, Inc., representatives, ADM contends that Travelers is accountable in its own right under comparative fault principles.

Indeed, it also is logical to conclude that Travelers' investigative files of the prior Hernando fire (*see* Travelers' Response to ADM's Second Requests for Production #4), which also have been withheld on the basis of relevance, would have noted the owner's use of an on-premises dryer, and potential negligence of the owner's employees. If noted, such information would be relevant to (a) Travelers' potential comparative fault with regard to Memphis fire at issue here and (b) the owner's potential comparative fault with regard to possible failures in training and supervision. In light of the common ownership of these two restaurants, if such information was noted and cautionary warnings related to on-premises drying were given by Travelers to the owner, it would be relevant to Ralans' conduct and comparative fault.

C. Disclosure of Redacted Material Pertaining to Conduct of Ralans, Inc. (Exhibit G)

On July 11th, counsel for ADM sought disclosure of redacted material from a "Property Large Loss Report" (produced as RAL 00676-679). *See* Exhibit G. On the last page of the Report, under the heading "**Loss Prevention by Insured that Could Have avoided or minimized loss**", the text is marked as "**REDACTED**". *Id*.

Even Travelers agrees that the conduct of its insured -- certainly conduct which could have "avoided" or "minimized" the loss -- is relevant to the question of comparative fault. Indeed, under Tennessee law, if a plaintiff's negligence is equal to or greater than the defendant's, no recovery may be had. *McIntyre*, 833 S.W.2d at 57. Travelers, however, has withheld this information, citing the attorney work-product privilege.

As a preliminary matter, Travelers has failed to "describe the nature of the [information] not . . . disclosed . . . in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim" as required by Rule 26(b)(5)(A)(ii). Further, the purpose of the work-product privilege is to "'safeguard[] [the] fruits of attorney's

trial preparations from discovery attempts of opponents.'" *Edwards v. Whitaker*, 868 F.Supp. 226, 229 (M.D. Tenn. 1994) (citation omitted; emphasis added). *See also In re Antitrust Grand Jury*, 805 F.2d 155, 163 (6th Cir. 1986). The "Property Large Loss Report" was not prepared by an attorney; nor does it appear to have been prepared at an attorney's direction. Rather, it was prepared by EGA[21] George E. Schoenborn, Jr., and its content was "discussed . . . with underwriting." Exhibit G at 3 (emphasis added).[22] Again, underwriting personnel assess risks of loss for purposes of insurability -- not for purposes of litigation. Accordingly, the work-product privilege does not attach to the redacted portions of this document. At a minimum, the redacted portions should be reviewed by the Court *in camera* to determine whether the information is discoverable.

III. Conclusion.

For these reasons, the information sought by the discovery requests at issue is discoverable under Rule 26(b)(1). Accordingly, ADM requests entry of an appropriate Order compelling substantive responses to such requests.

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[21] "EGA" stands for Executive General Adjuster.

[22] Note also the discussion of the March 23, 2008 fire at the Hernando Sonic, *id*. at 3, which further demonstrates the relevance of the underwriting and investigative documents related to that fire.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon the following via the District Court's ECF delivery system on this the 22nd day of July, 2011.

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