

The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: Michael Wayne Mitchell

Office Address: 5100 Poplar Avenue #2008, Memphis, Shelby County, TN 38137-2008
(including county)

Office Phone: 901-591-8800

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INTRODUCTION

The State of Tennessee Executive Order No. 41 hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application 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 Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website www.tncourts.gov). The Council requests that applicants obtain the 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 document.) Please read the separate instruction sheet prior to completing this document. Please submit original (unbound) completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with electronic or scanned signature via email to debra.hayes@tncourts.gov, or via another digital storage device such as flash drive or CD.

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Member, Gentry Arnold & Mitchell, PLLC

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

1988, 013350

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

Tennessee, 013350, 11/3/1988, active

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

no

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

Associate, Petkoff and Lancaster, 1989-1990

Partner, Weissman, Ostrow and Mitchell, 1991-2012

Member, Gentry Arnold & Mitchell, PLLC, 2013-present

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.

Consumer and debtor bankruptcy , 20%

Domestic Relations, Custody and Support, 20%

Criminal, mostly misdemeanor defense, 10%

Probate (estates, conservatorships) , 10%

Civil including contracts, construction disputes, personal injury, FED and foreclosure disputes, debt negotiation-40%

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 Council needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Council. Please provide detailed information that will allow the Council to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application.

Initially at Petkoff and Lancaster, my work was in insurance defense (mostly accident cases, but some worker's compensation and GTLA defense) as well as subrogation work of behalf of insurance companies.

While at Weissman, Ostrow & Mitchell, I worked on about every type of case imaginable. I did both some misdemeanor and felony defense work until around 1996, when the civil case load became more demanding. I handled matters in all Civil courts, probably 40% in general sessions, with quite a bit in Circuit and Chancery. In Circuit the work was 2/3 divorce and post divorce litigation, with 1/3 being Circuit trial work, largely collection or contract cases above

General Sessions' jurisdictional limit. There were also Chancery domestic matters handled exactly the same. There were some administrative matters as well, either unemployment appeals or Social Security disability matters.

I have excellent organizational skills and if anything, am a bit compulsive in making sure all things are properly calendared and done in a diligent manner. Communication with clients and opposing counsel paramount. Always very professional and willing to compromise when available for expediency.

At my current firm, the practice is a little less varied simply because of the larger amount of bankruptcy cases. My experience has been that the civil judges have very, very limited knowledge of the bankruptcy code and how it affects civil litigation, particularly after the 2005 code amendments which render the stay of the bankruptcy court virtually meaningless in domestic support issues.

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

I do involuntary commitments for the mental health patients. I was able to get two people released this year. (There have only been a handful ever released. One of the ones I was able to release was a practicing corporate attorney.)

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

I have served as a Special Judge in General Sessions Civil Courts in Shelby County, Tennessee, easily a hundred times over the last 20 years.

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

I have been either an Executor or an Administrator of at least 6 estates over the last 20 years.

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

Adjunct Professor, paralegal studies, Southwest TN Community College, 1994-2009

Adjunct Professor, paralegal studies, University of Memphis, 1994-1996

Instructor, LSAT prep class. 1996-1998

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

Not applicable

EDUCATION

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

Associate of Science, Motlow State Community College, Tullahoma, TN 1984

(Honors Award, Economics)

Bachelor of Science, Middle TN State University, Murfreesboro, TN 1985 (top 10%)

Juris Doctorate, Memphis State University, 1988 (top 20%)

PERSONAL INFORMATION

15. State your age and date of birth.

54, 1/28/1962

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

53 years

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

31 years

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

Shelby

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

Not applicable

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

Guilty reckless driving, 1/88

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

no

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

2 complaints, one dismissed. One pending that, according to the BPR, will be dismissed. It involves a divorce client that entered into both a MDA and Parenting Plan after two separate mediation sessions, and then reneged on both agreements "alleging he did not understand what he was agreeing to".

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 that you have held in such organizations.

Not applicable

27. Have you ever belonged to any organization, association, club or society that limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.
- If so, list such organizations and describe the basis of the membership limitation.
 - 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 that you have held in such groups. List memberships and responsibilities on any committee of professional associations that you consider significant.

Memphis Bar Association, 1995-present

Current Chairman, bankruptcy section-responsible for 10 1-hour CLE's during year and annual seminar in October (6 hours). Also raise money to support University of Memphis Duberstein Moot Court Team

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

Certificate of Appreciation, Memphis Chapter of Nation Association of Legal Secretaries, 2008

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

Not applicable

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

6/2/16 Planes, Trains and Automobiles, and a House or Two-secured claims

11/20/15 Security and Unsecured claims in Bankruptcy Litigation

5/8/13 Basics of Bankruptcy for Beginners

10/26/12 Ethical Issues in Bankruptcy Preparation

10/28/11 Ethical Pitfalls aka Don't Believe Your Client

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.

Not applicable

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 that reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

attached

ESSAYS/PERSONAL STATEMENTS

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

My sincere hope is to continue to be a positive influence in Memphis and Shelby County and to continue to assist those that interact with our legal system. As a Judge I have an even greater opportunity to make a difference. With greater opportunity comes greater responsibility. I am up to this challenge. I have been an active member of the legal community in Shelby County ever since law school. My history shows I have a diverse and extensive background on just about any kind of case imaginable. Almost thirty years of experience has caused me to interact with every Judge and most of the attorneys here. My reputation is one of diligence, promptness and professionalism. In addition to my professional experience, I have a history of community service which indicates my desire and my willingness to work very hard to make Memphis and Shelby County a better place.

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

I have been a pro-bono volunteer for Memphis Area Legal Services for over a decade. I have handled many chapter 7 bankruptcies, as well as contract and domestic disputes. In the past I have done criminal work for free and currently am handling a felony defense for someone in a local drug rehabilitation center for about 25% of the normal fee. For another at the same center I handled a felony and misdemeanor case, pro bono. I firmly believe that everyone is entitled to adequate representation in legal matters regardless of their economic status, or race, creed, etcetera, and everyone should be able to at least understand why a Court has to rule a certain way, whether in that person's favor or not. Lack of understanding breeds contempt and mistrust. As attorneys we have a duty to help the general public understand the processes and the rules we and the Judges must follow.

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)*)

Circuit Court Division VII seat being vacated by the Honorable Donna M. Fields. This is one of nine Circuit Court seats in Shelby County, Tennessee. It is the second tier of civil trial courts in Tennessee, handling civil matters with no theoretical monetary limit. I believe my selection would be a very positive impact on the court. I have a stellar reputation for integrity, promptness, and being well prepared. I am also even-tempered and not prone to make knee-jerk decisions. I understand and appreciate that whether the case is an appeal from General Sessions over a \$500 claim, or a personal injury case with injured plaintiffs with the potential for a large monetary award, both situations are equally as important to the litigants involved. I would like to think making clear, concise and well-thought-out rulings would result in the fair and efficient application of the law to all litigants that would appear in front of me.

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)*

Currently I am active in my neighborhood association and was the President for three years in my former neighborhood. I was an auxiliary probation office for Juvenile Court in the past, and was on Memphis City Beautiful for 5 years. Though undeniably Memphis and Shelby County have problems, there is a rich history here of community involvement and charity. As a Judge what I do and say can have a powerful effect. There are days when the Judges have dockets all day, and others where the tasks at hand may be few. I would be disingenuous if I said it was easy to find a Judge or Chancellor in the Courthouse past 2 PM on a Friday. We have some Judges who are very diligent, and others that don't seem quite as dedicated. I would fall into the first category. When not on the bench, I would use my time to help speak and educate the public, and especially our children and youth, about how the court system in Tennessee works. We have a problem with educating the public about this, and that tends to make people suspect that we have a system where your economic status, or "who you know" has a very real impact on what happens during litigation. While my general experience has been that we have very fair judges here, many people, especially those that endeavor to represent themselves, feel it is a system stacked against them. A better informed public on the way the system works would help dispel some of this incorrect belief. No matter what the result, everyone should believe they were treated fairly. I have another thing I would speak on as described in paragraph 39.

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

When I was 14 I had a near-fatal condition that caused chronic kidney failure. In 1982 I had a kidney transplant that has worked like a dream for the last 34 years and I am in excellent health. (I can pass for 40 in dim light!) What I learned from that experience is that we all bleed the same color. In the simplest terms, we all generally want the same things, but just have different

levels of income, education, and life experiences. That made me fully appreciate that no one is any less deserving of justice and fairness than someone else. As a Judge I would also help educate the public on the importance of organ donation. Because of the demographics here, we have the highest need for organs, and one of the lowest donation rates, of anywhere in Tennessee. There is a need for public education on this issue.

My sense of fairness is derived from my family. My grandfather was a successful businessman, who always treated his customers fairly. He used to say, "I am trying to make a living, not a killing." He never once went back on his word or did anything improper to make a dollar. He also said "if you can't make a million dollars working 5 days a week, you might as well work 4", a rule he also lived by. He was very happy and well respected. In all my years as an attorney I have tried to establish and maintain a reputation as an attorney that will keep his word when he says something, and to be a person you could trust not to do something underhanded to get an advantage.

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)*

Certainly. One of the great things about our legal system is the concept of Stare Decisis. While the law does change over time and occasionally there are big changes (*McIntyre v. Balentine* as an example), predictability and the uniform application of the law are absolute requirements. Judges, especially at the trial level, should be very reluctant to change the law. That is the prerogative of our legislative body and not the judiciary. As an attorney often times my sense of compassion conflicts with what the law explicitly requires. Once or twice a year I am faced with a situation where I am evicting a tenant from an apartment or a former homeowner that has lost his home in foreclosure. The law very clearly gives the occupant ten days from the date of the judgment to vacate, before the possibility of a writ being issued and their belongings placed on the curb. In the past I have had defendants who have been in a property for years and who are either aged or infirm and they plead it is impossible to be out in ten days. As uncomfortable as I am with what the law says, it is not within my prerogative to extend more time to the defendant without the express consent of my client. I do see circumstances in the future where Judges will be faced with complicated decisions that might result in rulings that conflict with current laws. The US Supreme Court's ruling in *Obergefell vs Hodges* has placed the domestic relations law of many states into a state of uncertainty and turmoil. Some of the current laws on the books in Tennessee and many other jurisdictions are not consistent with the principles behind the *Obergefell* decision and it may take several years for all this to get ironed out. It will force some Judges to make some very difficult rulings. While I say I have no problem applying the law, that doesn't necessarily mean I have to agree with what it requires.

REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least

two persons who are not lawyers. Please note that the Council or someone on its behalf may contact these persons regarding your application.

A. Larry A. Weissman, Atty.,

B. Aaron Ivey, Principal, Enterprise Property Realtors, Inc.,

C. Honorable Phyllis B. Gardner, Shelby County General Sessions Court, Division 2,

D. William T. Hill, Attorney,

E. Roger Stone, Attorney,

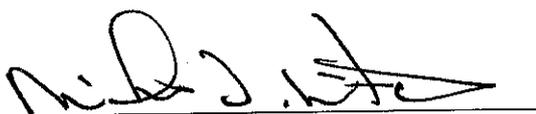
AFFIRMATION CONCERNING APPLICATION

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

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the [Court] Circuit, 30th Judicial Dist of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended questionnaire with the Administrative Office of the Courts for distribution to the Council 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 Council may publicize the names of persons who apply for nomination and the names of those persons the Council nominates to the Governor for the judicial vacancy in question.

Dated: 7 / 5, 2016.



Signature

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



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

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

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

WAIVER OF CONFIDENTIALITY

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

Michael A. Hittell
Type or Print Name

[Signature]
Signature

7/5/16
Date

13350
BPR #

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

IN THE CHANCERY COURT OF TENNESSEE FOR THE THIRTIETH
JUDICIAL DISTRICT AT MEMPHIS

PATTI ANN CALLAN
Plaintiff

No. CH-16-0305
Part: II

RONALD WILLIAM CALLAN, SR.,
Defendant.

JOINT MOTION FOR RECUSAL

Come now the parties, by and through their counsel of record, pursuant to Tennessee Supreme Court Rule 10B, section 1.01, and file this Joint Motion for Recusal from this case. For grounds, the parties would state the following:

1. On February 24, 2016, a Complaint for Divorce was filed in the cause and assigned to Part II of Chancery Court to be heard by the Honorable Chancellor Jim Kyle.
2. This Court has not heard any issues related to this divorce proceeding.
3. It appears that Chancellor Kyle was "of counsel" for the law firm of Shuttleworth, Smith, Williams, Sabbatini, & Harper, PLLC, currently known as Shuttleworth Williams, PLLC (hereinafter known as "Shuttleworth"), while Husband and his businesses were active clients of the firm.
4. The parties believe that a potential conflict of interest has occurred. The fact that the judge was of counsel to a law firm while that firm did legal work for the Husband and his businesses creates the appearance and/or perception of impropriety.
5. Since the divorce case was filed only two weeks ago and the court has not heard any matters, both parties state that this Motion is not presented for any improper

purpose, such as to harass or to cause unnecessary delay or needlessly increase the cost of litigation.

6. Both parties respectfully request that this Court recuse himself from further proceedings in this matter.

7. As Tennessee case law and statutory law requires, Judges are instructed to “act at all times in a manner that promotes public confidence in the independence, integrity and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.” Tenn. Sup. Ct. R. 10, RJC 1.2. The comments further explain the test for impropriety is “whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge’s honest, impartiality, temperament, or fitness to serve as a judge.”

8. As explained by the Tennessee Supreme Court:

Motions for recusal call into question the integrity of the judicial process and require serious and careful consideration. Persons appearing in Tennessee’s courts have a fundamental right to have their cases heard and decided by fair and impartial judges. Bean v. Bailey, 280 S.W. 3d 798, 803 (Tenn. 2009); Chumbley v. People’s Bank & Trust Co., 165 Tenn. 655, 659, 57 S.W. 2d 787, 788 (1933). This right “guard[s] against the prejudgment of the rights of litigants and [assists in] avoid[ing] situations in which the litigants might have cause to conclude that the court...reached a prejudiced conclusion because of interest, partiality, or favor.” State v. Austin, 87 S. W. 3d 447, 470 (Tenn. 2002) (appendix).

In re Hooker, 340 S.W. 3d 389, 394 (Tenn. 2011).

9. In making a decision on recusal, a court must take an objective approach and not a subjective one. *Id.* The court is not to determine whether he or she believes, subjectively, that he or she can maintain impartiality. *Id.* at 395. Instead, the court must consider whether “a person of ordinary prudence in the judge’s position, knowing all of

the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality." *Id.* The judge must recuse himself even if he has found subjectively that he can maintain impartiality and neutrality. The purpose of this standard is to protect the public confidence in our judicial system, which the judiciary is charged with promoting at all times. Camp v. Camp, 361 S.W. 3d 539, 548 (Tenn. Ct. App. 2011); Tenn. Sup. Ct. R. 10, RJC 1.2.

WHEREFORE PREMISES CONSIDERED, both parties respectfully move this Court to recuse himself from hearing any proceedings in this matter to eliminate any appearance of impropriety since the court served as "of counsel" to a law firm while Husband was actively using the services of that law firm.

Michael Mitchell (#13350)
Attorney for Ms. Patti Callan
Suite 2008
Memphis, Tennessee 38137
(901) 591-8800

AMY J. AMUNDSEN, (#12923)
Attorney for Mr. Callan
275 Jefferson Avenue
Memphis, Tennessee 38103
(901) 526-6701

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

IN RE:

CLYDE JAMISON,

CASE NO. 98-21325-L

Debtor,

JOYCE STOKES,

Plaintiff,

v.

ADV. PROC. NO. 02-0695

CLYDE JAMISON,

Defendant.

**ADVERSARY DEFENDANT'S OPPOSITION TO ADVERSARY PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT OF
ADVERSARY DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT**

COMES NOW your Defendant, Clyde Jamison, and submits this Opposition to Plaintiff's Motion for Summary Judgment. In support of his position that Plaintiff's Motion for Summary Judgment should be denied and that Summary Judgment should be entered in his favor, Defendant would show as follows:

FACTS

Defendant was the owner of a 1993 Lexus that was involved in an accident on November 1, 1997. Tarius Guy was the driver of the vehicle, and Courtney Stokes, deceased, was a passenger. Defendant was neither a driver nor a passenger at any time Courtney Stokes was a passenger in the car.

Plaintiff's assertion that Mr. Guy was acting as an employee, agent or servant of the Defendant is incorrect. Mr. Guy was operating the vehicle without the knowledge or permission of the Defendant. Mr. Guy's use of the vehicle and the presence of the deceased and another passenger in the vehicle were not authorized by the Defendant, and therefore Defendant was not negligent. Absence of negligence on the part of the Defendant must lead to the conclusion that negligence was not a proximate cause of the injuries to the deceased.

Further, Plaintiff's action against the Defendant filed in the Circuit Court of Tennessee was filed outside the statute of limitations and should have been barred. Plaintiff's reliance on Mississippi law was in error, as the laws of Tennessee should have been applicable to the case. Mississippi had no interest in the case aside from being the state in which the accident occurred. Tennessee had a more significant relationship with all parties involved and the laws of this State should have applied. Tennessee's statute of limitations in an action for wrongful death is one (1) year. The accident at issue in this matter occurred on November 1, 1997 and the action was not brought until October 7, 1999. Therefore, the statute of limitations had run and the action should have been time-barred.

Finally, Defendant filed Chapter 13 bankruptcy on January 28, 1998, prior to the filing of any Complaint for Damages against the Defendant. As a result of his filing bankruptcy, Defendant was protected by the automatic stay pursuant to 11 U.S.C § 362 which enjoins actions against the debtor. Therefore, the judgment entered against the Defendant on January 17, 2001 should be declared invalid, unenforceable and set aside. The case law relied upon by the Plaintiff can be easily distinguished from the present matter, and all arguments set forth by the Plaintiff regarding this issue are without merit.

For the above-mentioned reasons, Plaintiff's motion for summary judgment should be denied.

LAW AND ARGUMENT

I. Applicable State Law in the Circuit Court of Tennessee

The law of the State of Mississippi was erroneously applied to the proceedings in the Circuit Court of Tennessee which gave rise to the judgment entered against the Defendant in this matter. The Plaintiff presumably sought to file her case in Tennessee while using the statute of limitations provided by Mississippi law pursuant to the conflicts-of-law theory of *lex loci delicti* for the reason that the statute of limitations under Tennessee law had long since expired. However, the Supreme Court of Tennessee has ruled that this theory is "outmoded" and has adopted the approach of the Restatement (Second) of Conflicts of Law (1971), which provides:

§ 145. The General Principle

(1) The rights and liabilities with respect to an issue in tort are determined by the local law of the state, which with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

§ 175. Right of Action for Death

In an action for wrongful death, the local law of the state where the injury occurred determines the rights and liabilities of the parties, *unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and to the parties, in which event the local law of the other state will be applied.*

Restatement (Second) of Conflicts of Law (1971) *emphasis added* cited in Hataway v. McKinley, 830 S.W.2d 53, 57-60 (Tenn. 1992). Mississippi has also adopted this approach. Id. at 57. In its decision in Hataway, the Supreme Court of Tennessee stated that the Restatement approach is the most logical approach because it allows a court to apply the law of the State that legitimately has a stronger interest in the controversy, as opposed to a state that may have no

interest at all in the proceedings. Id. at 59. As was the case in Hataway, the only contact the parties had with the State of Mississippi was that the accident occurred there. Both the decedent and the Defendant were residents of Shelby County, Tennessee and their relationship was centered in this State. It was merely a “fortuitous circumstance” that the accident occurred in Mississippi and the State of Mississippi had no interest in applying its laws to the dispute between Tennessee residents. Id. at 60. Although the accident occurred in Mississippi, the State of Tennessee has a “more significant relationship” to the occurrence and the parties under the Restatement (Second). Id.

Because the law of Tennessee should have been applied to this matter, the action against the Defendant should never have been permitted due to the fact that under applicable Tennessee law, the statute of limitations of one (1) year under T.C.A. § 28-3-104 had already run. In order for the action to have been allowed, it necessarily should have been filed prior to November 1, 1998. Because it was not filed until October 7, 1999, the matter should have been barred.

II. Action Invalid Due to the Automatic Stay

Assuming arguendo that the action against the Defendant was permissible as a matter of applicable State law, the action nevertheless was invalid as a result of the automatic stay afforded the Defendant pursuant to his filing Chapter 13 bankruptcy on January 28, 1998, more than nine months prior to the filing of the action against him in the Circuit Court of Tennessee. As a result, the automatic stay operated to render the action against him invalid.

§ 362. Automatic Stay

(a) Except as otherwise provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title operates as a stay, applicable to all entities, of--

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that

was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

11 U.S.C. § 362. Any actions taken after the bankruptcy filing are without effect. Easley v. Pettibone Michigan Corp., 990 F.2d 905 (6th Cir. 1993). This is true whether or not the violator acted with knowledge of the stay, though there are limited exceptions to this general rule. In re Smith, 876 F.2d 524 (6th Cir. 1989). Regarding the Defendant's standing to litigate causes that are not part of his bankruptcy, the Plaintiff apparently misunderstands the application of the automatic stay and relies on Olick v. Parker & Parsley Petro Co., 145 F.3d 513 (2nd Cir. 1998). The Court there stated that a Chapter 13 debtor has standing to litigate causes of action that are not part of a case under title 11. However, the holding in this case in the Second Circuit was in reference to the ability of a debtor to *bring* a cause of action. The automatic stay enjoins actions *against* the debtor and not actions *by* the debtor. Id. at 516. Therefore, this case is not applicable to the present issue.

The automatic stay extends to virtually all formal and informal actions brought against property of the bankruptcy estate and is effective upon the date of the filing of the petition. In re Nita B. Smith, 876 F.2d 524, 525-526 (6th Cir. 1989). No formal service of process is required and actions taken in violation of the automatic stay are generally void, even if the creditor had no notice of the stay. Id. Because the automatic stay applies immediately upon filing of the petition, the judgment entered against the Defendant in the Circuit Court should be found to be invalid and unenforceable.

In light of the fundamental role of the automatic stay in the Code's debtor protection scheme, any equitable exception to the stay must be applied sparingly. Roseman v. Roseman, 14 F.3d 602 (6th Cir. 1993). A bankruptcy court may not set aside the automatic stay unless the debtor has (1) attempted to exploit the stay to gain an unfair advantage or (2) fraudulently or willfully delayed asserting the stay as a defense. Id. In this case, it cannot be said that the Defendant was attempting to exploit the stay or fraudulently or willfully delay asserting the stay as a defense to obtain an unfair advantage. This is a simple case of a pro se defendant who was unaware of his potential liability for the injuries sustained by the deceased as a result of the accident. The action against the Defendant had not been filed at the time the Defendant filed bankruptcy. Consequently, it cannot be said that he acted in bad faith or attempted to exploit the stay when he did not include a potential liability that was not certain to materialize, and in fact never should have due to the protection afforded the Defendant under the automatic stay pursuant to his bankruptcy, regardless of notice to the Plaintiff. However, had he been aware of the possibility of vicarious liability for the accident, the Defendant most certainly would have included such in his bankruptcy. There was no bad faith, intentional delay of notice, or attempt to exploit the stay.

The Plaintiff asserts that a defendant's pro se status does not excuse him from satisfying his duties and responsibilities imposed upon a Chapter 13 debtor. Simmons v. Cosby, 256 B.R. 578 (D.C. Md. 2001). The Defendant does not dispute this. However, the Defendant was represented by counsel in his bankruptcy proceedings and did in fact satisfy all duties and responsibilities imposed on him as a Chapter 13 debtor. The Defendant did not proceed pro se until the action was brought against him in Circuit Court by the Plaintiff, and such proceeding was invalid due to the protection of the automatic stay. The Court in In re Richard Potaski Jeweler, 222 B.R. 816 (D.C. Oh. 1998) stated that less stringent standards apply when dealing with pro se pleadings, though this leniency has limits which deny pro se litigants special treatment for their failure to comply with those legal requirements that are easily understood by a layman. The Defendant, as a lay person, should not reasonably be expected to understand the sophisticated details of choice of law issues, statutes of limitations, vicarious liability and notice to creditors when even seasoned attorneys make errors in these complex areas.

The Defendant does not seek to re-litigate a new defense as is suggested by the Plaintiff. The Defendant is merely seeking to void a voidable judgment entered against him in violation of the automatic stay. This is not a new defense. It is an automatic defense that is not waived simply by failure to mention it.

CONCLUSION

For these reasons, the Defendant respectfully prays that this Court deny the Plaintiff's Motion for Summary Judgment and enter Summary Judgment in his favor.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of February, 2003, I have served a true copy of the foregoing on adverse counsel, Sam F. Cole, Jr., 100 North Main Street, Suite 2519, Memphis, Tennessee 38103, by first class U.S. Mail, postage pre-paid.

Michael W. Mitchell