IN THE JUDICIAL NOMINATING COMMISSION FOR TENNESSEE

APPLICATION FOR NOMINATION TO CHANCELLOR,
EIGHTH JUDICIAL DISTRICT

ANDREW R. TILLMAN
B.P.R. 013979

Tennessee Judicial Nominating Commission

Application for Nomination to Judicial Office

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INTRODUCTION

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

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

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Senior Law Clerk to Honorable Charles D. Susano, Jr., Judge, Tennessee Court of Appeals, 505 Main Street, Suite 200, Knoxville, TN 37901.

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

1989, B.P.R. No. 013979.

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 only.

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).

(A) June 2009 to Present. Senior Law Clerk to Honorable Charles D. Susano, Jr., Judge, Tennessee Court of Appeals.

(B) 1991 to 1998 associate, 1998 to 2007 partner, 2007 to 2009 managing partner. Paine, Tarwater, Bickers and Tillman, LLP (formerly Paine, Swiney and Tarwater), 1100 First Tennessee Tower, (now Riverview Tower), 800 S. Gay St., Knoxville, Tennessee 37929.

(C) August 1989 to August 1991. Law Clerk, Honorable H. Ted Milburn, Judge, United States Court of Appeals for the Sixth Circuit, Chattanooga, Tennessee.

(D) Summer 1988. Clerk, Baker, Worthington, Crossley, Stansberry and Woolf, Knoxville, Tennessee.

(E) Summer 1987. Clerk, Ludeka, Hodges and Neely, Knoxville, Tennessee.

(F) 1984-1986 (est.). Owner, Transfiguration Equipment Repair, Huntsville, Tennessee 37756. I purchased and repaired forestry equipment, some of which was used for logging and sawmilling

operation.

(G) 1982-1983 (est.). Mechanic, Welder, Operator and Foreman, James E. Coffey Construction, Inc., Huntsville, Tennessee 37756.

(H) 1979-1982. Owner-operator, various sawmill and logging operations in and about Huntsville, Tennessee area. During this time frame, I wrote a grant application for alternative fuels to the United States Department of Energy which was funded. I successfully ran a truck and sawmill off the combustible by-products of waste wood. The project was covered by a segment of "Six on the Road," a local news program.

(I) 1978-1979. Parts Manager, Evans Coal Company, Poteau, Oklahoma.

(J) 1976-1978. Assistant Superintendent, Titan Mining, Inc., Lamar, Arkansas.

(K) 1976. Parts and Warehouse Manager, Paul Reese Coal Co., Heavener, Oklahoma.

(L) 1974-1976. Engineering Technician, United States Dept. of Interior, McAlester, Oklahoma.

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

I have been employed as an attorney continuously since taking the bar the summer I graduated law school.

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

I am currently senior law clerk to Charles D. Susano, Jr., Judge of the Tennessee Court of Appeals. Primarily, I review records from trial court proceedings, research the law and draft opinions for Judge Susano's consideration in civil cases. In the three and one-half years with Judge Susano, I have seen practically all types of issues in all types of civil cases, with the exception of workers compensation which goes to another court. For example, I have drafted opinions in personal injury cases, boundary disputes, adverse possession cases, employment disputes, contract disputes, commercial litigation, divorces, parental termination cases, contempt orders, and appeals from administrative bodies, to name a few. The issues cover all phases of cases, from service of process to final judgment, including personal and subject matter jurisdiction, recusal, discovery, summary judgment, evidentiary rulings, jury instructions, and findings of fact. Questions of statutory construction and constitutional law are often in the mix. No single category of civil case or issue predominates. This job has allowed me the unique experience of reviewing the record in civil cases conducted by trial judges in East Tennessee from start to finish, with the goal of determining whether any error occurred that affected the outcome of the case. The cases originate primarily from circuit and chancery court, including

the chancery court for the 8th Judicial District. I have also worked on cases on remand from the United States Supreme Court as well as the Tennessee Supreme Court and have worked with Judge Susano concerning what was necessary and what was permissible on remand. I also advise the Judge, as requested, on legal issues raised in pleadings and motions. I have become familiar with reasoning and writing from a judicial perspective. It is important to note that this job has allowed me to see and work on the very same issues and the very same types of cases I would see as a chancellor.

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.

My experience inside the courtroom began with a two-year clerkship with the Honorable H. Ted Milburn, Judge, United States Court of Appeals for the Sixth Circuit. I pursued the clerkship because as the son of a sharecrop farmer with no close association to anyone in the legal profession, I felt like someone on the outside looking in. My application letter to Judge Milburn said as much. Judge Milburn took me under his wing, and as I helped him by researching the facts and law and drafting opinions in the cases he was assigned, he made a point of reviewing the cases with me to tell me what the trial judges did right and what they did wrong. I left the clerkship with Judge Milburn knowing exactly what trial judges do in the course of arriving at a ruling in a given case. I also left with the confidence that my legal writing was on a level acceptable to the bench and bar.

I joined a firm formed by Don Paine, Dwight Tarwater, and, now Court of Appeals Judge, D. Michael Swiney. When Judge Swiney was appointed, the name of the firm was changed to include my partner Tom Bickers and me. Eventually, I was named managing partner. During my time as managing partner, we opened an office in Austin, Texas.

At the firm, I generally represented defendants, but within the firm we maintained the creed that if someone needed help and someone needed to be sued, we were willing. I followed that creed

with Betty Potter, a lady rendered paraplegic in an automobile accident who was facing the exhaustion of insurance and financial ruin. I found co-counsel that had handled cases against automobile manufacturers who utilized untested seat designs, and we sued Ford Motor Company. After a lengthy trial, we secured a sizeable verdict and successfully defended the judgment on appeal. *See* ***Potter v. Ford Motor Company***, 213 S.W.3d 264 (Tenn. Ct. App. 2006).

I have experience trying a variety of civil cases, with and without a jury, in federal court and in the state court and before numerous administrative agencies. One of my clients was an outdoor sign company, and I regularly handled administrative hearings for that client. I have tried a case in arbitration. I have successfully challenged arbitration agreements, and I have successfully enforced arbitration agreements.

Although the firm's office was located in Knoxville, my practice area was not limited to Knoxville. I have trial and motion experience in most of the courtrooms in most of the counties surrounding Knoxville, including Scott County where I lived most of my tenure with the firm. I particularly enjoyed handling cases in the rural counties. I have tried personal injury cases, medical malpractice cases, workers compensation cases, divorce cases, and contract disputes to name a few examples. I have represented individuals, corporations, municipalities and citizen groups in and out of court. I have handled significant transactional matters in and out of the courtroom. I have handled a few criminal cases, the most significant of which was arraigned as a charge of attempted murder, and later reduced to assault. With regard to civil cases, my experience covers all phases and all tasks, from intake interview to satisfaction of judgment.

I routinely handled appeals and post-trial motions in state and federal court, some at the request of trial counsel in cases that I did not handle at the trial level. I have provided a partial list of cases that might be viewed as significant in response to question 9.

I left the firm to work for Judge Susano. I have described my experience with Judge Susano in answer to the previous question. This job has provided the unique perspective of reviewing the work of trial judges, including those in the 8th Judicial District.

In summary, I have extensive experience from the lawyer's perspective and the judiciary's law clerk perspective in the exact same issues and the exact same type cases I would see as chancellor. This experience includes cases in chancery court for the 8th Judicial District.

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

Huntsville v. Duncan, 15 S.W.3d 468 (Tenn Ct. App. 1999). This is a Scott County Chancery Court case. I successfully challenged the constitutionality of the "Tiny Town" law that allowed the incorporation of Helenwood into the existing city limits of Huntsville. The cited opinion reversed the trial court's judgment. The case is often cited in constitutional challenges to statutes.

Barger v. Huntsville, 63 S.W.3d 397 (Tenn. Ct. App. 2001). This is another Scott County Chancery case. The trial court dismissed a quo warranto annexation challenge for insufficiency of service of process. The dismissal was upheld on appeal.

REM Enterprises, LTD v. Frye, 958 S.W.2d 747 (Tenn. Ct. App. 1996). This is a case that originated in the Chancery Court for Blount County. I won in the trial court, but in the same case, at 937 S.W.2d 920, the court held against my client. My client prevailed on the petition to rehear as reflected in the cited opinion. The case is significant because it illustrates a proper and successful use of a petition to rehear.

Potter v. Ford Motor Company, 213 S.W.3d 264 (Tenn. Ct. App. 2006). This is the product liability case I have previously referenced. We secured a $7,000,000 net judgment in a product liability case and successfully defended the verdict on appeal.

McNabb v. Highways, Inc., 98 S.W.3d 649 (Tenn. 2003). I was hired by trial counsel after his case was dismissed in the trial court. The case involved the question of whether ***McIntyre v. Ballentine***, 833 S.W.2d 52 (Tenn. 1992), and its progeny, including ***Samuelson v. McMurtry***, 962 S.W.2d 473 (Tenn. 1998), prevented a party from bringing suit against a second defendant (well within the statute of limitations) after he had filed and settled an action against the first defendant. The Tennessee Court of Appeals and the Tennessee Supreme Court held that the trial court erred in dismissing the case.

Wyatt v. A-Best, 924 S.W.2d 98 (Tenn. Ct. App. 1995). This case held that an amendment to the products liability statute of repose that attempted to extend the statute violated the vested rights doctrine if applied to claims that were barred at the time of the amendment. The Sixth Circuit Court of Appeals had predicted, in ***Murphree v. Raybestos-Manhattan, Inc.***, 696 F.2d 459 (6th Cir. 1982), that Tennessee would abandon the vested rights doctrine in this situation. See ***Wyatt*** at 104, n.8. ***Wyatt*** reaffirmed the state court's commitment to the constitutional doctrine and is one of the leading cases, if not the leading case, on vested rights. I was the principal author of our client's brief.

Northeast Knox Utility District v. Stanfort Construction Co., 206 S.W.3d 454 (Tenn. Ct. App. 2006). This is a case from Knox County Chancery Court. It involved a claim that my client, the excavation subcontractor, was forced by misrepresentations to do work beyond that specified in the contract. The trial court dismissed my client's claim on summary judgment. The judgment was reversed on appeal and settled on remand.

Love v. College Level Assessment Services, 928 S.W.2d 36 (Tenn. 1996). This is a Scott County Sessions Court case that went to the Tennessee Supreme Court. The Supreme Court held that my opponent's fax-filed notice of appeal was not timely. The Court's discussion of the need for a detailed rule on fax-filing apparently was some of the impetus behind Tenn. R. App. P. 20A, which allows the fax-filing of certain documents in the appellate courts, and Tenn. R. Civ. P. 5A, which allows the fax-filing of certain documents in the trial court, but not a notice of appeal.

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.

Does not apply.

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.

Does not apply.

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

As an adjunct professor at the University of Tennessee College of Law, I have experience teaching trial and appellate advocacy courses. I taught a seminar in appellate procedure two semesters. My goal was to instruct the students in the procedural steps of handling an appeal as of right and an appeal by permission. I also taught a trial advocacy class called "Case Development." There was no book or compilation of materials available for the course at that time. I assembled materials on client interview, privilege, engagement letters, informal discovery, formal discovery, expert retention and discovery and mediation. Each student participated in mock steps in the process and was given feedback as to his or her performance. The simulation was based on a chancery court case I tried in Anderson County.

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.

1970-1974, Northeastern Oklahoma State University, Tahlequah, Oklahoma.

B.S. Degree; 3.8 GPA, mathematics major, computer science and physics minors, 4.0 GPA in major and minors.

1986-1989, University of Tennessee College of Law, Knoxville, Tennessee.

J.D. Degree; Highest Honors, Order of Coif, Hooding Speech, Outstanding Graduate Award, Law Review, Hunton & Williams award for outstanding writing, various jurisprudence awards.

PERSONAL INFORMATION

15. State your age and date of birth.

I am 61 years of age; my birthdate is November 10, 1951.

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

I have lived in Tennessee 33 years, 6 months, since June 1, 1979.

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

I have lived continuously in Scott County fourteen years, since June 1998. Before that I lived in Scott County continuously from June 1979 to August 1989, and intermittently from 1989 to 1998.

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

I am registered to vote in Scott County, Tennessee.

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, with the possible isolated exception of paying a traffic citation.

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. Does not apply.

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.

Yes. In approximately 2002, I brought an action for property damage in the general sessions court for Scott County against the driver of a tractor-trailer who lost control of his rig in broad daylight on dry pavement. The truck destroyed several cars and injured one driver. The case was settled before trial. I do not recall the case name of the docket number.

U.S. Golf & Tennis, et al. v. Andrew R. Tillman, et al., No. CV004963, Circuit Court, Cumberland County. This case was filed in early 2009, dismissed without prejudice January 19, 2010, and never refiled. This was an alleged legal malpractice action brought by a disgruntled client after he agreed to settle the case and later claimed it was worth more than he got in the settlement. The case had no merit.

David Lewis v. Pigeon Forge Marketing Group, et al., No. 11-CI-00186, Harlan County, KY. This case was filed by an opponent, pro se, after he lost a case in Knox County Circuit Court, No. 3-211-08, styled Lewis v. Heynan. The case was filed in April 2011 and dismissed April 14, 2011. He even sued the judge in the Knox County Case, Wheeler Rosenbalm.

Financial Freedom Acquisition LLC v. Buck et al., No. CJ 2011-169, District Court for Cherokee County, Oklahoma, filed July 12, 2011. This is a foreclosure action against another party that alleges I, as an adjoining landowner, "may" have a claim against the parcel being foreclosed upon. This case remains pending. There is a dispute about the southern boundary line.

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.

White Rock Baptist Church, Huntsville, TN (2007 to present). I am a member, but I have not held office.

Bethlehem Baptist Church, Oneida, TN (1999-2007). I moved from Bethlehem to White Rock in about 2007 to be with extended family. I was a Sunday School teacher, and I served a term on the board of directors of the day-care center.

Scott Appalachian Industries , Huntsville, TN (1997 to 1999, and 2010 to present). This is a not-for-profit agency that serves the handicapped and impaired. It is one of the largest employers in the county. I am presently serving a second term on the board of directors. I was recently elected chairman, and before that I was secretary.

Alliance Defense Fund. I participated in an intensive and extended litigation skills seminar sponsored by a Christian organization named the Alliance Defense Fund that is devoted to preserving religious liberty. As part of my involvement in that effort, I pledged 450 hours pro bono and community service time. I began working on that commitment in 2001 and fulfilled it in 2004. Among other things, I appeared in numerous public forums, including my home church, to educate groups of the constitutional guarantees of their religious liberties and of the support provided by the ADF. I have been named to the Honor Corps of the organization for fulfilling my commitment. This organization was founded by Dr. James Dobson, Dr. D. James Kennedy, and Bill Bright, of Campus Crusade for Christ, and others.

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.

I was in the Boy Scouts of America briefly as a youth.

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.

Tennessee Bar Association, 1991 to 2009. I was a member and committee member of the litigation section.

Knoxville Bar Association, 1991 to 2012. I was a member of the fee dispute committee from approximately 2003 to 2012. I was chair in approximately 2003 to 2004. While I was chair, we held at least two hearings on significant fee disputes. The goal of the committee was to resolve disputes according to common sense, the common law, and rules of ethics. I also participated in several Habitat for Humanity blitz builds at the request of Sam Doak, Habitat chair.

Scott County Bar Association (dates unknown). I was a member, and I gave one seminar that qualified for CLE credit.

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.

August 1991, Certificate of Distinguished Service to Honorable H. Ted Milburn. The clerkship in and of itself is viewed as an honor and post-graduate education in many circles.

Recognized by Knoxville Bar Association for service as chair of the Fee Dispute Committee.

September 2006, Named member of Alliance Defense Fund National Litigation Academy Honor Corps for commitment to the rule of law and the Christian faith.

April 10, 2006, Guest Speaker on "Comparative Fault, . . . the Defendant's Perspective" at symposium, "The Tennessee Supreme Court's Impact on Law and Policy: Celebrating the Legacies of Justices Anderson, Birch, and Drowota." Comments published in 3 Tennessee Journal of Law and Policy (Fall 2006).

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

Tennessee Bar Journal, *You Might Be A Problem Client If . . .*, p. 37 (August 2009).

Dicta, Knoxville Bar Association, *Lessons I have learned that I thought I already knew*, p. 10 (April 2009).

56 Tenn. L. Rev., p. 735, *Expert Testimony on Eyewitness Identification* (Summer 1989).

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.

I provided written materials and lecture components for the following: National Business Institute Seminars, December 8, 2005 (expert witnesses); November 2006 (expert witnesses); October 25, 2007 (case management); September 23, 2008 ("The Art of Depositions"); TBA Seminar, Trial Practice for Today's Litigator (April 24, 2009).

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.

Candidate for election, County Commissioner, Scott County, 3rd district, 1986; Candidate for election, Scott County Attorney (1992).

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

No, I have never been a registered lobbyist.

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.

(Attachment 1), Huntsville v. Duncan (Court of Appeals Brief). This is 100% my work product.

(Attachment 2), Northeast Knox Utility District v. Stanfort (Court of Appeals Brief). This is probably 75% my work product. I had the help of a very able associate in gathering information and including some of it into the brief, but Stanfort was my client and I had worked on the case for years. I made the final decision as to how to structure the brief and what to exclude and what to include.

ESSAYS/PERSONAL STATEMENTS

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

It would be a tremendous honor to serve in the position of chancellor. More importantly, I believe my experience, inside and outside the courtroom, qualifies me and compels me to seek this position.

My life experience began far from any courtroom. My father was a sharecrop farmer, and when the days of sharecrop farming went by the wayside, he became a carpenter – a very good carpenter. I worked with him on the farm and on the job in my youth. This experience started me with a strong work ethic, and the realization that a man's station in life does not determine his worth.

I married a Tennessee girl and became fast friends with her father. He was a courageous and tenacious man who had lots of experience in business. He helped me get started in the sawmill and logging business, and he helped me daily after we started. In this business endeavor with my father-in-law, and those that followed, I learned a lot about risk, and courage, and Appalachia and its people. This practical, hands-on experience, I believe, will serve me and the judiciary well.

In law school, I worked hard and excelled. I was given the Hunton and Williams award for outstanding legal writing as a member of the Law Review. I was named the outstanding graduate, and I gave the hooding speech. I spoke about the inspiration I gathered from the spent cartridge I carried in my pocket from my father-in-law's military funeral service honoring his march through North Africa, Normandy, and onward nearly to Berlin. I told my fellow

graduates that with courage, hard work, and tenacity, we could succeed.

As clerk to a Judge on the United States Court of Appeals, I gained valuable experience in reviewing the work of trial judges under the tutelage of a veteran judge. In practice, I gained experience in courtrooms all across East Tennessee, including the chancery court for the 8th Judicial District, in a wide variety of cases. As a law clerk to Judge Susano, I gained even broader experience in all kinds of civil cases, including chancery cases, from yet another perspective.

If given the opportunity to serve as chancellor, I will bring all my experience, inside and outside the courtroom, to bear.

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)***

As a practicing attorney, I felt it was my duty to help those that could not afford to pay. I gained considerable and valuable experience by and through my pro bono service.

My first victory before the Tennessee Court of Appeals was for a pro bono client who was sued for damages caused when she lost control of her automobile during an epileptic seizure. I lost at the trial level but won on appeal. The case citation is ***Knoxville Optical v. Thomas***, No. 03A01-9207-CV-00267, 1993 WL 574 (Tenn. Ct. App. E.S. filed Jan. 3, 1993).

I regularly accepted assignments from legal aid, many of which I do not recall by name. I also contributed financially when my finances allowed

I performed approximately 450 hours of pro bono and community service work between 2001 and 2004 in fulfillment of a pledge that I made to the Alliance Defense Fund. The matters included:

A step-parent adoption of John Dawson Thomas by Bryan Thomas;

Opposition of a beer permit on behalf of a neighborhood;

Representation of a college student in a disciplinary proceeding who claimed he was being singled out for his religious beliefs;

Preparation of documents for a church;

Advice to church elders concerning forms of government;

Representation of First Christian Church in federal lawsuit against City of Maryville which imposed use restrictions based on inclusion of the church in a historic district. The case was settled on favorable terms after discovery and expert disclosures.

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 believe my experience, both inside and outside the courtroom, and from a lawyer's and

judiciary clerk's perspective, will impact the court and the community in a favorable manner. As previously stated, I grew up on a small farm. My business interests after that and before law school involved timber, mining, excavation, or the equipment used in those operations. Timber, coal, and farming have been the lifeblood of the counties in the 8th Judicial District for over a century. The people are colorful and independent. There are numerous small municipalities with tight budgetary constraints. There is a good bit of oil and gas drilling in the area. I am familiar with all these elements. I have worked in the log woods, at the sawmill, at the well site (road and site preparation and assistance), and at the courthouse in the annexation cases I have litigated in the trial and appellate courts.

There is only one chancellor and one civil circuit judge for the district, as well as one sessions judge for each county. The cases in chancery court are a mixture of divorce, contract disputes, land and boundary disputes with a good number of adverse possession claims, workers compensation cases, annexation disputes, and varied lease disputes. I have extensive experience will all these types of cases from a variety of perspectives.

I am confident that other judges in the area are fair and knowledgeable. I have appeared numerous times before Circuit Judge John McAfee, and I am confident he would help me in any way possible. I am also hopeful that if I am appointed I will be able to share the benefit of my unique experience with other judges inside the district.

In summary, I believe my broad experience, inside and outside the courtroom, would give litigants, counsel and the judiciary comfort that I can handle any case filed in the chancery court with insight, competence, and absolute fairness.

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

My community service has largely been through the church and the bar. I have been involved in a local church to a certain extent since my youth, although my commitment became more serious after marriage. I have consistently supported a local church, both financially and by attendance, to the extent I was able. I have also been asked at times to serve as teacher, maintenance advisor, and board member. Further, I have been involved in organizations like the Alliance Defense Fund which attempts to undergird churches and their members with legal support.

I have also served the Town of Huntsville in various capacities. I served a term on the planning commission in the early to mid 1980s at the request of my friend, Mayor Jim Morrow. After that I served a number of years as a volunteer in the annual "Firemen's Fourth." This event involved games, craft booths, vendors, entertainment, and fireworks with the goal of raising money for the local volunteer fire department. As an attorney, I have often represented the town for a reduced fee.

I have served as guest speaker for the Tennessee Forestry Association Master Logger Class in Campbell County and Claiborne County on the topics of law and business.

As I have stated, I was a long-time member of the Tennessee Bar Association and the Knoxville Bar Association and served on active committees in both organizations.

In the last two or three years, I have been a member of the STAND Coalition, which is a group

of citizens and officials who commit to make a stand against illicit drug usage in the Scott County area. The idea of STAND is to attack the drug abuse problem through education and community involvement. Recently, through the auspices of White Rock Baptist Church, I participated in the prayer walk to collectively ask for God's divine intervention with the problems of our local community, including apathy, child abuse, drug abuse and unemployment.

If appointed chancellor, I will continue my involvement in church. I believe that I could also use the office to lead an effort to strengthen or revitalize local bar associations either on a county or multi-county level. My involvement in the Knoxville Bar Association convinces me that a strong local bar association is valuable to the bench, the bar, and the community. A local bar association promotes civility in the practice of law, strengthens bench and bar relations, and can do much to place the bar in a positive light in the community.

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)***

There is a line in a song that says "life is a highway." If that is true, mine has doubtless been along the scenic route. I can easily see how my critics would say there is no rhyme or reason to what I have done. Yet, the Bible tells me that the steps of a good man are ordered of the Lord. I cannot claim to be good in my own right, but I can see that my steps have been ordered, I believe, toward this position.

As a shy farm boy in eastern Oklahoma, there was not much chance I would end up in Scott County, Tennessee. But, along came the talented and beautiful Claudia Coffey, a charismatic gospel and patriotic singer from Huntsville, Tennessee. I was immediately smitten. We married in 1975 after a brief courtship and remain married to this day. I was more or less a child myself at that time, but she had a young son, and we both grew up a lot in the course of raising him.

There was not much chance a guy like me would get an education, much less a law degree. But it happened. We moved to Tennessee in a mobile home in 1979 to log and saw lumber. All the money I thought I would make with a sawmill, a dozer and a log truck did not materialize. Still, I learned things in those years that were worth a fortune in their own way. When a driver wrecked my only truck, I decided to take a stab at something different. Law made sense. I took the LSAT, and I did well. I worked as hard in law school as I had with the logging equipment and did extremely well in law school. It might bear repeating that I gave the hooding speech and was named outstanding graduate of my class.

There was not much of a chance a 39 year old law graduate would have an opportunity for a clerkship with a United States of Appeals, just one court away from the United States Supreme Court, but it happened. Judge Milburn was an accomplished singer, and I think he hired me because he admired my wife's singing, but he said it was my honest application letter and my academic record that did it.

Claudia was 40 years old at that time, and we had been married 14 years. There was not much chance we would have another child of our own, but my daughter Andi was born while we were in Chattanooga for the clerkship.

There was not much chance that one of the top lawyers in the state, Don Paine, would ask me to join his firm, but he did. I stayed there until I had the honor of my name on the door, along with Mr. Paine, Mr. Tarwater, and Mr. Bickers.

Then, after nearly 20 years at the law firm, there came a fork in the road. A job as senior clerk to Judge Susano came open. Most people were amazed I would even consider it. To them it did not make sense. It meant a tremendous cut in pay. To me it did make sense. Shortly before that, Claudia had a serious injury, complicated by a staph infection, to the point that for a brief period of time I feared for her life. We jointly decided that I should take the job with Judge Susano. She knew that I had a secret desire to serve as a judge. This was the next best thing, and it allowed us a "breather" to get through her health issues and have some time as a couple.

The open chancellor's position presents yet another fork in the road. I believe all my prior experiences have prepared me well for this position and have led me toward it. This includes my experience inside the courtroom, from the perspective of a lawyer and an appellate judge's law clerk, and outside the courtroom, from the dirt farm in Oklahoma to the log woods of Scott County.

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

Yes, I will uphold the law even if I disagree with the law. That is required of a chancellor by Canon 3B(2) of the Code of Judicial Conduct. I can offer evidence of my commitment to the law from my experience as an attorney, both as a litigator and as a law clerk.

In my present position, I have been required by the law to draft opinions reversing a trial court's dismissal of a case before trial even though I had serious personal doubts about the merits of the case. The law generally does not allow weighing the merits on a pretrial motion.

In one case I litigated, my client had been temporarily enjoined from certain actions in an ex parte order filed before I became involved in the case. I took the case thinking that the injunction was issued in error, and that, after hearing our side of the case, the chancellor would surely vacate the injunction. The chancellor refused to lift the injunction. I was forced to advise my client to obey the injunction even though I thought it was issued and reaffirmed in error.

A version of this problem came up often in the course of evidentiary hearings. I certainly did not agree with every evidentiary ruling, and sometimes thought that the court was letting in or keeping out evidence to the prejudice of my client. However, I invariably obeyed the court's ruling until such time as I could challenge it in a later motion or on appeal. Discovery orders presented a similar problem. I obeyed them even if I disagreed with them.

Thus, even though I have often found myself questioning the wisdom of a rule or a statute or a trial court's ruling, or some rule of common law for that matter, I have never felt at liberty to disregard that aspect of the law. I think it is fair to say that my respect for the law has always trumped my personal opinion, as it would continue to do if I were chosen to serve as chancellor.

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. Judge Charles D. Susano, Jr., 505 Main Street, Suite 200, Knoxville, TN, 37901; Ph. (865) 594-5246; Fax. (865)594-2825; Judge.Charles.D.Susano.Jr@tncourts.gov
B. Don C. Stansberry, Jr., 3 Courthouse Square, P.O. Box 240, Huntsville, TN 37756; Ph. (423) 663-2323; Fax (423) -663-2311; dstansberry@spmblaw.net
C. Dwight E. Tarwater, Paine, Tarwater, and Bickers, 900 S.Gay St., Suite 2200, Knoxville, TN 37902; Ph. (865) 525-0880; Fax (865) 521-7441; det@painetar.com
D. Dwayne Potter, Potter Southeast, LLC, Principal Member and Manager, 511 Monticello Pike, Huntsville, TN 37756; Ph. (cell) (423) 215-7122; Fax (423) 663-9574; dwaynepotter@hotmail.com.
E. Tim Smith, M.D., Grace Primary Care, 950 Baker Highway # 4, Huntsville, TN 37756; Ph. (office)(423) 663-4200, (cell) (423) 215-5646; Fax (423) 663-4256; smithtd@highland.net.

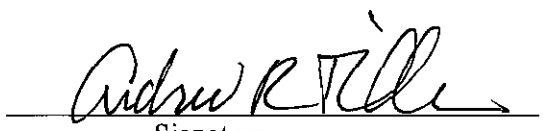
AFFIRMATION CONCERNING APPLICATION

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] _Chancery Court for the 8th 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: December 11, 2012.



Signature

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

TENNESSEE JUDICIAL NOMINATING COMMISSION

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

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY
TENNESSEE COURT OF JUDICIARY
AND OTHER LICENSING BOARDS

WAIVER OF CONFIDENTIALITY

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

_Andrew R. Tillman_____
Type or Printed Name

Andrew R Tillman
Signature

December 11, 2012
Date

013979
BPR #

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

Not applicable

ATTACHMENT 1

IN THE COURT OF APPEALS OF TENNESSEE
EASTERN SECTION AT KNOXVILLE

TOWN OF HUNTSVILLE and STANLODGE, LLC	)	
Plaintiffs/Appellants,	)	**C/A No. 03A01-9901-CH-00024**
vs.	)	**Scott County Chancery Court**
WILLIAM I. DUNCAN, ET AL.,	)	**Billy Joe White, Chancellor**
Defendants/Appellees.	)	

BRIEF OF PLAINTIFFS/APPELLANTS, TOWN OF HUNTSVILLE AND STANLODGE, LLC

ANDREW R. TILLMAN
ATTORNEY FOR PLAINTIFFS/APPELLANTS
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1100 FIRST TENNESSEE PLAZA
KNOXVILLE, TENNESSEE 37929
(423) 525-0880

ORAL ARGUMENT REQUESTED

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ISSUES PRESENTED FOR REVIEW

1. Whether Section 9(f)(3) of Chapter 1101 of The Public Acts of 1998 violates Article XI, Section 9 of the Tennessee Constitution by granting Helenwood and four other communities a special right to incorporate.

2. Whether Section 9(f)(3) of Chapter 1101 violates Article XI, Section 8 of the Tennessee Constitution by (a) creating a class of territories that can incorporate despite the general population and distance requirements applicable to municipalities statewide, (b) without any rational basis for the classification.

3. Whether Section 9(f)(3) violates the separation of powers doctrine by attempting to nullify TML v. Thompson through a clause giving retroactive effect to a second incorporation election.

4. Whether the subject of incorporation of tiny towns is outside the restrictive caption of Chapter 1101.

5. Whether the trial court erred in holding as a matter of law that the legislature is not constrained by the Public Meetings Act.

STATEMENT OF THE CASE

Arguably this case dates back to Tennessee Municipal League v. Thompson, 958 S.W.2d 333 (Tenn. 1997), which struck down Helenwood's first incorporation election held under Chapter 98 of the Public Acts of 1997. When the legislature passed Chapter 1101 of the Public Acts of 1998, Helenwood was one of five "tiny towns" authorized to hold a second election that dated back to its first incorporation election. Helenwood successfully held its second election. Because Helenwood's incorporation had the effect of de-annexing a portion of Huntsville and moving Stanlodge out of Huntsville into Helenwood, Huntsville and Stanlodge filed suit asking that Chapter 1101 be declared unconstitutional. In defense of the statute, the Attorney General filed a motion to dismiss or for summary judgment. Plaintiffs filed a response and countermotion. On December 28, 1998, the Chancellor entered an order granting defendants' motion, denying plaintiffs' motion, and dismissing the case. The plaintiffs filed a timely Notice of Appeal.

STATEMENT OF THE FACTS

A good reference point for this dispute is the intersection of U.S. Highway 27 and State Highway 63 in Scott County, Tennessee. U.S. Highway 27 runs north and south from Florida to Michigan. (See App. 1). Highway 27 intersects with State Highway 63 near the town of Huntsville, Tennessee. (See App. 2). As of September, 1997 the western boundary of Huntsville's city limits ran along Highway 27 a short distance north and south of Highway 63. (See App. 3).

On September 22, 1997, the town of Huntsville passed Ordinance 97-98-03, annexing a small area to the west of the Highway 63/US 27 intersection including the Holiday Inn hotel owned by Stanlodge, LLC and a small area just east of Highway 27 south of the existing city limits. (Record at 4-5; App. 3).

In the meantime, residents of the neighboring community of Helenwood, Tennessee undertook to incorporate as a "tiny town" under Chapter 98 of the Public Acts of 1997. (Record at 4). The incorporation election held November 20, 1997 passed and was later certified by the Scott County election commission. (Record at 22, Answer Paragraph 16). The area incorporated included part of the area annexed into Huntsville by ordinance 97-98-03, including the Holiday Inn. (See App. 3; Record at 5, Record at 103). However, Chapter 98 of the Public Acts of 1997 was struck down by Tennessee Municipal League v. Thompson, 958 S.W.2d 330 (Tenn. 1997).

Thus, at the time of the Tennessee Supreme Court's ruling in Tennessee Municipal League v. Thompson, ordinance 97-98-03 became effective and the

Holiday Inn Hotel site became part of the Town of Huntsville. (See App. 3). Huntsville residents are subject to a tax rate of .29¢ per $100.00 assessed value and are entitled to receive services from the town of Huntsville, including service by the local fire department. (Record at 5, Record at 103).

Then, on May 1, 1998, The Tennessee General Assembly passed Chapter 1101 of the Public Acts of 1998: "An Act To Amend Tennessee Code Annotated, Title 4; Title 5; Title 6; Title 7; Title 13; Title 49; Title 67 and Title 68, relative to growth." (Record at 6, Record at 103). Despite its caption, Chapter 1101 contains language which purports to revive certain tiny town incorporations:

> (f)(1) After the effective date of this act but prior to January 1, 1999, a new city may be incorporated under the provisions of this act as long as the population requirements and the distance requirements of Sections 6-1-201, 6-18-103 or 6-30-103 and the requirements of Section 13(c) of this act are met.
>
> (2) After January 1, 1999, a new municipality may only be incorporated in accordance with this act and with an adopted growth plan.
>
> (3)(A) Notwithstanding any other provision of law to the contrary, if any territory with not less than two hundred twenty-five (225) residents acted pursuant to Chapter 98 of the Public Acts of 1997 or Chapter 666 of the Public Acts of 1996 from January 1, 1996, through November 25, 1997, and held an incorporation election, and a majority of the persons voting supported the incorporation, and results of such election were certified, then such territory upon filing a petition as provided in § 6-1-102, may conduct another incorporation election.
>
> (B) If such territory votes to incorporate, the new municipality shall have priority over any prior or pending annexation ordinance of an existing municipality which encroaches upon any territory of the new municipality. Such new municipality shall comply with

the requirements of Section 13(c) of this act.

(Record at 16).

The general law of the State, with regard to the right to incorporate, is found at TCA § 6-1-201, which provides in relevant part:

> 6-1-201. Right to adopt chapter – Incorporation within specified distances from existing cities.
>
> (a) (1) The residents of any incorporated municipality or of any territory wanting to incorporate under this charter may adopt the provisions of this chapter and chapters 2-4 of this title in the manner provided in this chapter. Thereupon, the municipality of territory shall be and become incorporated and be governed as herein set forth. No unincorporated territory shall be incorporated under the provisions of this chapter unless such territory contains not fewer than one thousand five hundred (1,500) persons, who shall be actual residents of the territory.
>
> . . . .
>
> (b) (1) Except as provided in subdivision (b)(2), no unincorporated territory shall be incorporated within three (3) miles of an existing municipality or within five (5) miles of an existing municipality of one hundred thousand (100,000) or more in population according to the latest census certified by the state planning office. "Existing municipality" and "existing municipality of one hundred thousand (100,000) or more in population" do not include any county with a metropolitan form of government with a population of one hundred thousand or more according to the 1990 federal census or any subsequent census.

Helenwood held its second successful incorporation election on August 8, 1998. (Record at 4, 103). The election was later certified. (Id.) The newly incorporated town of Helenwood consists of far less than the fifteen hundred

(1,500) persons contemplated by the general incorporation statute[1]. (Rec. at 4, 103). Also, since Helenwood abuts directly against Huntsville, and, in fact, purports to retroactively de-annex parts of Huntsville, Helenwood also violates the three mile buffer provided by general law. (Record at 4, 103).

Portions of the legislative history of Chapter 1101, which started out as senate bill 3278, are instructive:

> **Davis:** Last year we, amendment number 19 would allow four areas that voted to incorporate before the court struck down Title, or Chapter 98, would allow them to go ahead and have another election to determine whether or not they wanted to be a city, or a town. Now, what I want you to think about for just a moment, these folks followed exactly what the law stated that they must follow. They voted, they paid their 6, 7, 8, 10 thousand dollars to hold the election. We gave them that authority by the Tennessee state law that we passed, and because of a provision in the caption of the bill, it was ruled unconstitutional by a court, eventually by the Supreme Court. But these folks I believe have been disenfranchised, and this will help those individuals continue the process that we authorized them to do. It will, it will give back to them the hope that we had given them with Chapter, with Title 98. Now, this bill only applies to two counties. It applies to Scott County and it applies to Roane County. No one should have a problem voting for this amendment. It applies to two counties and two counties only. Now listen to what I'm saying. Two counties only. It don't apply to Shelby, it doesn't apply to Davidson, doesn't apply to Roane, I mean, it does apply to Roane, doesn't apply to Wilson, tell me it applies to Roane, don't apply to Wilson, doesn't apply to Knox County. It gives hope to two counties that I represent and the towns inside those that decided to incorporate. And I humbly ask your support of this bill.
>
> . . . .
>
> **Rochelle:** Mr. Speaker and members of the Senate, I wanted you all to get the amendment in the form that you wanted to vote on it. So now that we know what it does, what this does now is, well, this takes us back some. I realize these people have voted. . . . There's a problem

[1] After its initial incorporation, Helenwood purported to annex a huge additional area. (Record at 107, 110, Supplemental Exhibits).

when tiny towns are created. A lot of problems. When tiny towns are created, they take a, they suck a little bit of money out of every city in this state. . . . I think this moves us back. This bill is an attempt to do a comprehensive growth plan for Tennessee. I hope that we don't start out that effort for comprehensive growth plan for Tennessee by exempting out three counties. . . .

. . . .

Gilbert: Thank you, Mr. speaker, members of the Senate. Deja vu. Read your title, caption to the bill. This violates the Supreme Court holding that struck Public Chapter 98 down. The caption isn't broad enough to cover this amendment, and I certainly understand Sen. Davis's and Sen. Leatherwood's desire to solve their problem through this bill, but this caption does not handle this amendment.

. . . .

Davis: I promise this is the last time that I will rise before you on this bill. . . . . I resent five or six people in a subcommittee determining the, the destiny of 2 million people in the state, and certainly the destiny of these individuals who voted and paid their hard earned money. Their story, one fellow who goes to the bank and borrows $1,000 in Helenwood, Tennessee, to help fund holding the election in Helenwood. And he didn't have the money. If he had, he would have probably borrowed more. He borrowed $1,000, a 70 some old man, paying for that $1,000 with his Social Security check. . . .

. . . .

Gilbert: Mr. Speaker and members of the Senate, let me extend an apology to Sen. Davis and Sen. Leatherwood. The summary has the caption in it is different from the caption that's printed on the bill. I don't know why, but it is. . . . But let me just suggest this as you make your decision on this. You may have a caption problem even with growth, because growth implies the extension for new boundaries. And it may be that incorporating a new city is outside, but I do admit the caption on the bill is considerably different than the caption printed in the summary, and I apologize.

. . . .

Davis: This one won't kill the amendment. This only makes the bill applicable to Scott County and Roane County, and I beg of you, please vote for this, if it's unconstitutional, that's fine. I've got to put it on this bill. Which I don't think it is unconstitutional. I ask for you to please vote on this amendment that applicable to two counties, Midtown and Helenwood. I need your help.

. . . .

> **Davis**: No, there's actually four counties, one in West Tennessee, on in Middle Tennessee, and two East Tennessee counties. The ones I'm interested in are the ones in the 12th Senatorial District, and what I must explain to you and express to you is that the area of Helenwood, 400 and some odd people voted, 390 some voted in favor of, and 30 some voted against. In the area of midtown . . . . Those folks have rung my phone off the wall saying I cannot, we we we certainly hope that the legislature will allow us to do what you allowed us to do and that the courts took away from us. And that's all I'm asking you to do. This doesn't get anyone else in trouble. . . .

(Record at 55-69)

After the bill came out of the conference committee, the following exchange took place:

> **Chumney**: I just want to get some, a couple of questions on the record so we will know. You know, it was, it was pretty traumatic last year what happened to, to some of us in Memphis, when we woke up and read the paper and I think that it's very important for me to ask as we vote on this today, there's nothing in this conference committee report that's going to create a tiny town situation like we had last summer, that this, this bill that we're about to vote on today, this conference committee report does not allow communities to incorporate on the edge of Memphis? Could you answer that on the record for us?
>
> **Kisber**: Yes, I, will be glad to. And let me say, every member of the conference committee from both the House and Senate worked to the best of their ability to insure that that does not happen. . . . So I think the fear of incorporations that could have occurred under Public Chapter 98, before it was struck, have been addressed in this bill.

(Record at 74-75).

ARGUMENT

1. The Tiny Town Provision is Unconstitutional Under Article XI, Section 9 of the Tennessee Constitution (the Municipal Boundaries Clause).

Section 9(f)(3) of Chapter 1101 should be stricken under the Municipal Boundaries Clause of the Tennessee Constitution as has every previous attempt to enact class legislation applicable to annexation. See Hart v. City of Johnson City, 801 S.W.2d 512, 515 (Tenn. 1990). The Municipal Boundaries Clause of the Tennessee Constitution provides as follows: "The General Assembly shall by general law provide the exclusive methods by which municipalities may be created, merged, consolidated and dissolved and by which municipal boundaries may be altered." Tenn. Const. Article XI, Section 9.

"The Municipal Boundaries Clause is couched in 'unambiguous mandatory language,' and was adopted to remedy 'the great evils that had arisen in regard to the legislature enacting legislation affecting only one county or municipality.'" Hart, 801 S.W.2d at 515 (quoting Frost v. City of Chattanooga, 488 S.W.2d 370, 373 (Tenn. 1972)). The Tennessee Supreme Court has "never upheld class legislation in annexation statutes" due to the prohibitory language contained in the Municipal Boundaries Clause of the Tennessee Constitution. Hart, 801 S.W.2d at 515 (emphasis in original).

Section 9(f)(3) is the epitome of class legislation. It applies only to a limited class "notwithstanding" general law to the contrary. The Attorney General took the position in Chancery Court that Section 9(f)(3) was a general law as opposed to class litigation because "it applies to all territories statewide that fall within the criteria it contains." The same can be said for every population "classification" stricken down by Hart; Frost; Vollmer v. City of Memphis, 730 S.W.2d 619 (Tenn. 1987); and Pirtle v. City of Jackson, 560 S.W.2d 400 (Tenn. 1977). In fact, the same can be said for any "classification" imaginable. For example legislation pertaining to counties spelled "S-C-O-T-T" would apply to a class of only one county, but, would, "appl[y] to all territories statewide that fall within the criteria." But for Opinion No. 81-45, the A.G. could attempt to limit Hart, Frost and the other cases to population classification, but in Attorney General Opinion No. 81-45 the A.G. applied the Municipal boundaries clause to the subject of elections. (Tenn. Op. Atty. Gen. No. 81-45 (January 22, 1981) attached as App. 4).

A defining characteristic of general as opposed to class legislation is that it applies to "all who are in, or may come into, like situations and circumstances." Pack v. Southern Bell Telephone and Telegraph, 215 Tenn. 503, 387 S.W.2d 784, (Tenn. 1965). By drawing Section 9(f)(3) carefully such that only those already in (by previous election) were all that could possibly ever come in, the legislature eliminated any possibility of passing this off as a "general" law. See, e.g., Hall v. State, 124 Tenn. 235, 137 S.W.2d 500, 501 (Tenn 1911). ("If the act had applied only to counties having the named and

designated population according to the federal census of 1900, there is no doubt but that it would be capricious and arbitrary as no other county could at any time come within its provisions."). Interestingly, the Attorney General's own choice of words recognized in opinion 98-052 that there is a "classification" made.

The Attorney General also may attempt to persuade this court, contrary to the holding of Frost v. City of Chattanooga, that legislation is to be tested under the Municipal Boundaries clause for a rational basis. The Attorney General has previously conceded "that a somewhat stronger showing is required to support an exemption from Article XI § 9, than is required under Article XI § 8." Tenn. Op. Atty. Gen. No. 81-45 (Jan. 22, 1981) (copy attached as Appendix 5). This follows from Frost, which specifically held that Article XI § 9 applies even if a city is differently situated to the point of being "unique." "The Constitution in very clear language prohibits the Legislature from prescribing any method of altering municipal boundaries except by general law. ... Even if it be determined [that a city] has a unique situation, it would avail nothing as this constitutional provision has invalidated such uniqueness justifications." Frost, 488 S.W.2d at 372 (emphasis supplied). Indeed, the court in Frost notes that "we are not able to conceive of any circumstances where [classification under the municipal boundaries clause] would be valid." Id. at 373.

2. The Tiny Town Provision is Unconstitutional Under Article XI, Section 8 of the Tennessee State Constitution.

A. Section 9(f)3 ("the Tiny Town Provision") of Chapter 1101 violates Article XI, Section 8 of the Tennessee Constitution because it is not a general law, but rather was promulgated specifically to benefit certain specified communities in contravention of general law of statewide application.

The tiny town provision of Chapter 1101 violates Article XI, Section 8 of the Tennessee constitution since it bestows a benefit on Helenwood at the expenses of Stanlodge and Huntsville in contravention of a general law of statewide application.

> The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunity [sic], [immunities] or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law.

Tenn. Const. Article XI, Section 8. "Article XI, section 8 is implicated when a statute 'contravene[s] some general law which has mandatory statewide application.'" Riggs v. Burson, 941 S.W.2d 44, 53 (Tenn. 1997) (quoting Civil Service Merit Board v. Burson, 816 S.W.2d 725, 727 (Tenn. 1991)). The prohibition against passing laws for the benefit of individuals applies as well to laws intended to benefit or burden specific counties or cities or individuals. Town of Arlington v. Shelby County Election Comm'n , 209 Tenn. 289, 352 S.W.2d 809, 813 (Tenn. 1961).

> "It is true that municipalities are the creatures of the legislature . . . yet, if the legislature elected to create municipalities throughout the state and permits their respective existence to continue, and elects to enact some general law mandatorily applicable alike to them all, then, Article XI, Section 8 of the Constitution prohibits the legislature from extending a special privilege or imposing a special burden upon one contrary to the general law to which all the others must conform." Id.

Prior to and through the effective date of Chapter 1101, the law of general statewide application was contained in T.C.A. § 6-1-201, and set forth the mandatory requirements for population and distance for those communities wishing to incorporate, as well as a priority for large over small cities. The general law maintains a three (3) mile buffer and prohibits a new town with less than 1500 residents. In fact, Chapter 1101 continues the general population and distance requirements in Section 9(f)(1). The Tiny Town Exception grants immunity from the general law only to five territories. The Attorney General has previously outlined in Opinion 98-052 how a provision like Section 9(f)(3) contravenes general law:

> "As noted above, both Senate Bills 2145 and 2146 would allow territories with not less than 225 inhabitants that held elections under the Small Cities Act to hold a new incorporation election or to elect municipal officers notwithstanding the provisions of Tenn. Code. Ann. § 6-1-201 (a) and (b). These two subsections provide that a territory incorporating under the statute must have at least 1,500 residents, and generally prohibit new incorporations within three miles of an existing municipality . . . . With respect to the territories that held incorporation elections under the Small Cities Acts, the proposed bills would, therefore, contravene laws of mandatory statewide application."

The Tiny Town Provision was passed by the Legislature in direct violation of the prohibition of Article XI, Section 8. The law was passed for the benefit

of certain individuals and deliberately contravenes a mandatory law of general statewide application, i.e., T.C.A. § 6-1-201. On its face, the Tiny Town Provision states, "Notwithstanding any provision of law to the contrary," these few tiny towns are to be allowed to incorporate with utter disregard for the population, distance, and priority requirements set forth in the general statewide statute and in Section 1101.

The legislative history and the transcript of the debate of lawmakers in enacting the Tiny Town Provision reveals that it was expressly intended to benefit a few specified groups, that it was never intended to be a law of general statewide application, and that its constitutionality was of less concern to its proponents than was the pressure they were getting from their constituents to include this provision in the pending legislation. In other words, the goal of Section 9(f)(3) was to allow five tiny towns to avoid the general law.

B. The classification of territories intended to benefit from the Tiny Town provision does not rest on any rational basis.

Having determined that Section 9(f)(3) contravenes the general population and distance laws, the question under Article XI, Section 8 becomes whether the classification bears a reasonable relation to the subject matter or was adopted "for the sole purpose of confining laws inherently general to a particular locality." New Pulaski Cemetery v. Ballentine, 151 Tenn. 622, 271 S.W.38, 39 (Tenn. 1925). "The fundamental rule is that all classifications must be based upon substantial distinctions which make one class really different from

another; and the characteristics which form the basis of the classification must be germane to the purpose of the laws." State v. Tester, 879 S.W.2d 823, 829 (Tenn. 1994) (quoting State v. Nashville, Chattanooga and St. Louis Railway Company, 124 Tenn. 1, 135 S.W. 773, 775-76 (1910)). The classification must "have some basis which bears a natural and reasonable relation to the object sought to be accomplished . . . ." Id.

The legislative history shows that the tiny town provision was written solely to benefit targeted communities without regard to its constitutionality.

> Sen. Davis: "Now, this bill only applies to two counties. It applies to Scott County and it applies to Roane County. No one should have a problem voting for this amendment. It applies to two counties and two counties only. Now, listen to what I am saying. Two counties only."
>
> . . . .
>
> Sen. Davis: "This one [amendment] won't kill the amendment. This one only makes the bill applicable to Scott County and Roane County, and I beg of you, please vote for this, **if it's unconstitutional, that's fine. I've got to put it on this bill.** Which I don't think it is unconstitutional. I ask for you to please vote on this amendment on this amendment [sic] that [sic] applicable to two counties, Midtown and Helenwood. I need your help." Id. (emphasis supplied).

(Record at 63 and 69, Senate Bill 3278, Tapes S-62, S-63, & S-64).

Far from serving "the object sought to be accomplished" by Chapter 1101, Section 9(f)(3) is actually counterproductive to the goals of Chapter 1101 as pointed out by Senator Rochelle: "This bill is an attempt to do a comprehensive growth plan for Tennessee. I hope that we don't start out that effort for a comprehensive growth plan for Tennessee by exempting out three

counties." (Record at 64). Even a cursory examination of Chapter 1101 and Section 9(f)(3) confirms Senator Rochelle's arguments. The whole thrust of Chapter 1101 is to create an orderly scheme wherein each county and the various municipalities in that county will operate to plan the growth of each municipality so as to best serve the county. The municipalities are rewarded for acting pursuant to that plan and penalized for actions taken outside that plan. In general, new municipalities are discouraged and must be birthed only in accordance with growth plans. See, e.g., Section 13 of Chapter 1101. Then, out of nowhere, comes Section 9(f)(3) which allows only five communities in the State of Tennessee to preempt the actions of other established municipalities notwithstanding any other provision of law[2]. Clearly, Section 9(f)(3) serves the purposes behind Chapter 1101 about as well as water serves a fire.

The Attorney General can be expected to argue that the rational basis behind Section 9(f)(3) is the need to reward those people in communities who have gone to the trouble and expense of holding a prior election. Counsel is aware of no authority for the proposition that acting upon an unconstitutional law justifies an expectation of reward. In fact, the law generally exacts a penalty upon one who, acting under color of some law, abuses the constitutional rights of another. See, Lugar v. Edmondson Oil Co., 457 U.S. 922 (1981) (1983 action based upon actions taken under a Virginia statute). This argument borders on the absurd by suggesting that a constitutional defect

[2] Interestingly, having gotten its foot in the door by the tiny town resurrection, Helenwood has started to annex a much larger area of the county, cutting off any planned growth potential for Hunsville. (Record at 107-110, Supplemental Exhibits).

can be cured by a simple majority vote in a local election. But See Tenn. Op. Atty. Gen. No. 81-45. (law that would allow opting out by local election is unconstitutional).

Even if the Court were inclined to reward those people within the community of Helenwood, it must not forget that the reward provided under Section 9(f)(3) to the people of Helenwood comes at a price to Huntsville and those that have been annexed into Huntsville by Ordinance 97-98-03. Plaintiff Stanlodge, LLC, was comfortably situated as a member of Huntsville, Tennessee, subject to a low tax rate, and unimposing ordinance structure. Now, if Section 9(f)(3) is allowed to stand, Stanlodge can expect a much higher tax rate under Section 13(c) which requires that any "municipality incorporated after the effective date of this act . . . impose a property tax that raises an amount of revenue not less than the amount of the annual revenues derived by the municipality from state-shared taxes." Id. Moreover, Stanlodge will lose the protection of the Huntsville Fire Department and be subject to the whim of an entirely new government. In other words, the rewards that are being passed out by Section 9(f)(3) come at cost to others. Our courts have long been willing to strike down legislation that confers privileges on one group of individuals, such as the would be incorporators of Helenwood, at the expense of others, such as Stanlodge. State v. Trotter, 153 Tenn. 30, 281 S.W.925 (Tenn. 1926).

Any rational basis which the defendants attempt to set forth is necessarily defeated by the arbitrary and capricious nature of the classification in its application to only a few select small towns. The fact that no other

community outside of these few intended beneficiaries will ever be able to meet the requirements imposed by the Small Cities Provision renders the classification arbitrary and capricious, as the Supreme Court of this state has unequivocally held. See, e.g., Hall v. State, 137 S.W. 500, 501 (Tenn. 1911) (citing Woodard v. Brien, 14 Lea, 523; Sutton v. State, 96 Tenn. 696, 36 S.W. 697, 33 L.R.A. 589)):

> It will be seen by an examination of this Act that it in express terms applies to counties having a certain designated population, not only according to the federal census of 1900, but according to any subsequent federal census, and the principle upon which such acts have been sustained is that the classification is not arbitrarily based upon or applied to a population determined or determinable by any one census, but that it is so arranged that it is possible thereunder to receive into the classification every county in the state. ... **If the Act had applied only to counties having the named and designated population according to the federal census of 1900, there is no doubt but that it would be capricious and arbitrary, as no other county could at any time come within its provisions.**

See also Tennessee Small Schools Systems v. McWherter, 851 S.W.2d at 153 ("And if the classification is made under Article XI, Section 8, every one who is in, or may come into, the situation and circumstances which constitute the reasons for and basis of the classification, must be entitled to the rights, privileges, immunities, and exemptions conferred by the statute, or it will be partial and void.") It takes no more than common sense to see that only the five communities that held elections under prior void law can ever possibly bring themselves within the classification created.

The "rational basis" articulated for the Small Cities Provision is, therefore, self-defeating. It has been written in such a way as to apply only to

those few cities that, depending upon a statute subsequently declared unconstitutional, held and certified an incorporation election, thereby demonstrating community support for the incorporation. However, any small town which subsequently demonstrates such community support for incorporation and wishes to hold an incorporation election will not be entitled to the same rights, privileges, immunities, and exemptions conferred by the Tiny Town Provision upon its chosen small towns, but instead will be forced to comply with the provisions set forth in T.C.A. § 6-1-201, the existing law of general statewide application. Thus, any rational basis articulated by the defendants is demonstrably arbitrary and capricious as those terms have been defined by the Supreme Court of this state.

3. Section 9(f)3 of the Act violates the separation of powers doctrine by encroaching upon the judiciary's functions in attempting to give retroactive effect to a second tiny town election.

Section 9(f)3 of Chapter 1101 is an attempted legislative nullification of Tennessee Municipal League v. Thompson, in violation of the separation of powers doctrine. The new Tiny Town law proports to resurrect Chapter 98 of the Public Acts of 1997. In Tennessee Municipal League v. Thompson, the Tennessee Supreme Court struck down as unconstitutional Chapter 98 of the 1997 Tennessee Public Acts, the prior Tiny Town Law. Now, under Section 9(f)3 of Chapter 1101, a proposed municipality which conducted an election under void Chapter 98 of Public Acts of 1997 can hold a second incorporation election as if no supreme court ruling had intervened.

In effect, Chapter 98 lives on through Section 9(f)3. Every tiny town that was successful under the prior null and void law, may now try again under Section 9(f)3. A successful second election takes priority over any annexation that transpired between the first and second election. But see, Section 16. Tiny towns that did not act under the null and void law may not act under Section 9(f)3. Section 9(f)(3) was added to address Senator Davis' constituents' demands to restore "what the court took away from us."

It could not be clearer that the legislative nullification of a court decision violates Article II, Section 2, the Tennessee Constitution.

> The powers of government, divided into the legislative, executive, and judicial branches, are separate and divisible. The legislative branch has the authority to make, alter, and repeal the law; the executive branch administers and enforces the law; and the judicial branch has the authority to interpret and apply the law. Since the United States Supreme Court decision in Marbury v. Madison, 1 Cranch (5 U.S.) 137, 2 L.Ed. 60 (1803), it has been the sole obligation of the judiciary to interpret the law and determine the constitutionality of actions taken by the other two branches of government. The Tennessee Constitution forbids an encroachment by one department upon the powers or functions of another.

Richardson v. Tennessee Board of Dentistry, 913 S.W.2d 446, 453 (Tenn. 1995) (citations omitted). The legislature may not retroactively nullify a litigant's right to proceed to a judgment, nor to a judgment once secured. Fisher's Negros v. Dabbs, 14 Tenn. 119, (6 Yeag) 135-139 (1834). Accord, 13 C. Wright, A. Miller and E. Cooper, Federal Practice and Procedure § 3529.1 (Supp. 1998) (quoting Placet v. Spend Thrift Farm, Inc. 514 U.S. 211, 227, 115 S.Ct. 1447, 131 L.Ed.2d. 238 (1995) "'Having achieved finality . . . a judicial decision becomes the last word of the judicial department with regard to a

particular case or controversy, and congress may not declare by retroactive legislation that the law applicable to that very case was something other than what the courts said it was.' The fact that [the retroactive legislation] applies to a whole class of cases, not to a single specifically-chosen case, does not alter the character of the statue. It remains judicial interference with judicial judgments.").

4. Chapter 1101 of the Public Acts of 1998 is constitutionally defective in that the subject of incorporation of tiny towns found in Section 9(f)(3) is outside the restrictive caption of Chapter 1101.

As Senator Lincoln Davis was warned while trying to introduce an amendment to interject the subject of tiny town legislation into Senate Bill 3278, tiny town incorporation is not germane to the caption of Chapter 1101. See Record at 58-60. The caption of Chapter 1101 reads: "AN ACT to amend Tennessee Code Annotated, Title 4; Title 5; Title 6; Title 7; Title 13; Title 49; Title 67; and Title 68, relative to growth." Tucked neatly away in the body of the Chapter, almost smack in the middle, is Section 9(f)3 which sticks out like a sore thumb when compared to the remainder of the body and caption of the Act:

> (3)(A) Notwithstanding any other provision of law to the contrary, if any territory with not less than two hundred twenty-five (225) residents acted pursuant to Chapter 98 of the Public Acts of 1997 or Chapter 666 of the Public Acts of 1996 from January 1, 1996, through November 25, 1997, and held an incorporation election, and a majority of the persons voting supported the incorporation, and results of such election were certified, then such territory upon filing a petition as provided in § 6-1-202, may conduct another incorporation election.

(B) If such territory votes to incorporate, the new municipality shall have priority over any prior or pending annexation ordinance of an existing municipality which encroaches upon any territory of the new municipality. Such new municipality shall comply with the requirements of Section 13(c) of this act.

In Tennessee Municipal League v. Thompson, the Tennessee Supreme Court set forth the dispositive law on the subject. Article II, § 17 of the Tennessee Constitution provides:

> **Sec. 17. Origin and frame of bills.** – Bills may originate in either House; but may be amended, altered or rejected by the other. No bill shall become a law which embraces more than one subject, that subject to be expressed in the title. All acts which repeal, revive or amend former laws, shall recite in their caption, or otherwise, the title or substance of the law repealed, revived or amended.

The language of Article II, Section 17 is mandatory and if a title does not express the subject matter of the Act, the Act is unconstitutional and invalid. Tennessee Municipal League, 958 S.W.2d at 336. The constitutional language was specifically intended to prohibit "bills containing hidden provisions which legislators and other interested persons might not have appropriate or fair notice." Id. (quoting State ex rel Blanton v. Durham, 526 S.W.2d 109, 111 (Tenn. 1975)). The title must give fair warning of what is in the Act so that hidden provisions will not be "overlooked and carelessly and unintentionally adopted." Id. (quoting Cannon v. Mathes, 55 Tenn. 504, 518 (1872)). The connection between the captive and the body should be "natural" rather than "foreign". Chattanooga – Hamilton County Hosp. Auth. v. City of Chattanooga, 580 S.W.2d 322, 326 (Tenn. 1979). Moreover, the caption should "direct the

mind to the object of the proposed legislation." Hunter v. Connor, 152 Tenn. 258, 269, 277 S.W.71 (1925). Where a law purports to amend previous law but narrows the nature of the amendment by restrictive language, the legislature is limited to the restricted subject. Id at 337. Finally, the phrase "relative to" has the effect of restricting amendments to a particular subject matter. Id.

The legislative record indicates that Section 9(f)(3) remained hidden despite pointed questions from at least one legislator.

> Chumney: I just want to get some, a couple of questions on the record so we will know. You know, it was, it was pretty traumatic last year what happened to, to some of us in Memphis, when we woke up and read the paper and I think that it's very important for me to ask as we vote on this today, there's nothing in this conference committee report that's going to create a tiny town situation like we had last summer, that is, this bill that we're about to vote on today, this conference committee report does not allow communities to incorporate on the edge of Memphis? Could you answer that on the record for us?
>
> Kisber: Yes, I, I will be glad to. And let me say, every member of the conference committee from both the House and Senate worked to the best of their ability to insure that that does not happen. . . . During, during the interim period until the growth plans are established, the three year interim period, the provisions that exist in the law today would continue to apply, the three mile, five mile, and population requirements. From that point forward, when the growth plans are established, newly incorporated cities could only be created in planned growth areas. That would mean that the city and the existing, and the counties, the existing municipalities and the counties have designated in their planning that this is a planned growth area that someday in the future might develop into an incorporated city. Now, if they ever did incorporate, they'd have the financial responsibilities that are outlined in the bill that I just mentioned. So I think the fear of incorporations that could have occurred under Public Chapter 98, before it was struck, have been addressed in this bill.

(Record at 74-75). Nowhere in Kisber's reply is it apparent that the tiny town situation is alive and well for a handful of communities.

Certainly nothing in the caption gave warning that hidden within the body of the Act was a resurrection of the tiny town law. By limiting the scope of amendments of the various titles to those "relative to growth" the caption suggested that all amendments pertained to the narrower subject of "growth." Tennessee Municipal League, 958 S.W.2d at 337.

In fact, Section 9(f)3 is, on its face, broader than the caption. Section 9(f)3 proports to suspend the operation of not only Titles 4, 5, 6, 7, 13, 49, 67 and 68 of T.C.A., but also "any other provision of the law to the contrary." In other words, Section 9(f)3 is on its face broader than the amendment of the itemized sections much less the amendment of those sections "relative to growth." Furthermore, Section 9(f)3 has no "natural connection" to growth, but is "foreign" to the caption and remainder of the body of Chapter 1101. Chattanooga, Hamilton County Hospital Auth. v. City of Chattanooga, 580 S.W.2d 322, 326 (Tenn. 1979). There is nothing in the caption which "directs the mind" to tiny town incorporation "notwithstanding any other provision of law to the contrary."

The Attorney General is on record in writing, that subject matter such as found in Section 9(f)3 relates, not to growth, but to the subject of new municipal incorporations. Tenn. Op. Atty. Gen. No. 98-052 (March 2, 1998) (copy attached as App. 5). The question before the Attorney General for opinion

was whether Senate Bills 2145 and 2146 passed constitutional muster. One of the specific questions was whether the language of Senate Bill 2145, (which is nearly identical to Section 9(f)3)) fit within the following caption: "AN ACT to amend Tennessee Code Annotated, Section 6-1-201, relative to the incorporation of certain municipalities." The Attorney General opined:

> "The subject of the caption is new municipal incorporations. The body of each bill clearly relates to this general subject. Further, each bill amends the statutory provision recited in its caption. Both these bills address the incorporation of new municipalities." (emphasis supplied)

Since a bill cannot embrace more than one subject, and the A.G. has previously identified the subject of Section 9(f)(3), any new-found interpretation should be given little credence.

Moreover, it is a stretch of the imagination to say that Section 9(f)3 relates to population growth because it frustrates growth. It is telling that the best argument the A.G. could construct below was that Section 9(f)3 relates to growth because it frustrates the actions of neighboring municipalities which are subject to "growth plans" by exempting tiny towns from all legal constraints. Moreover, this construction does not explain how legislators were supposed to know from the caption that buried in the body was the subject of tiny town incorporation. In reality, Section 9(f)(3) is germane only to legislative favors to those communities that acted pursuant to prior unconstitutional laws. Accordingly, Section 9(f)3 is unconstitutional in that its subject matter is outside the scope of the caption of Chapter 1101.

5. The Chancellor erred in holding that, as to the General Assembly, the Public Meeting Act is merely an unenforceable rule of procedure.

The Chancellor erred in holding that the conference committee's closed door meeting did not invalidate Chapter 1101. For the purpose of ruling on the alleged Open Meetings Act violation, the Chancellor accepted as true the allegations in Plaintiff's Complaint that "Section 9(f)(3) was added to Senate Bill 3278 during meetings which were held in secrecy and private, at which meetings the general public and news media representatives were not allowed to attend, although said committee definitely held a meeting and deliberated towards a decision in regards to the legislation herein challenged." (Record at 6, Complaint paragraph 29). Nevertheless, the Chancellor ruled that the Open Meetings Act, TCA §§ 8-44-101 to 105, as to the general assembly, was only a rule of procedure that did not carry the force of law. (Record at 126).

The Open Meetings Act, 1, is to be broadly implemented because it finds its origin, not with the legislature, but in Article 1, Section 19 of the Tennessee Constitution. Dorrier v. Dark, 537 S.W.2d 888, 892 (Tenn. 1976). "[I]n the first two sentences of [Article 1, Section 19] the constitution provides freedom of the press, open government and freedom of speech. Clearly, the Open Meetings Act implements the constitutional requirement of open government." Id. at 892.

While the violation of an internal rule may not be grounds for court intervention into legislation, the violation of the Constitution clearly is grounds. The courts not only have the right, but the duty, to examine legislation for

constitutional violations. See, e.g., State v. Cumberland, 136 Tenn. 84, 188 S.W. 583 (1916). Moreover, it is beyond dispute that a legislature is without power to make and enforce internal rules in violation of constitutional constraints. See, e.g., United States v. Smith, 286 U.S. 6, 52 S. Ct. 475, 477-78 (1932).

Thus, the General Assembly, and its conference committee, was bound to hold its meetings in the public in full view of the press. Similarly this court is constrained to strike down Chapter 1101 passed in violation of T.C.A. § 8-44-102 and Article 1, Section 19 of the Tennessee Constitution.

CONCLUSION

Thus court should reverse the Chancery court's judgment and remand for entry of an order holding that Chapter 1101 of the Public Acts of 1998 is unconstitutional.

Respectfully submitted this 28th day of April, 1999.

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Brief of Plaintiffs/Appellants, Town of Huntsville and Stanlodge, LLC has been served upon the following by placing the same in the U.S. Mail, postage prepaid, this the 28th day of April, 1999.

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ATTACHMENT 2

IN THE COURT OF APPEALS FOR THE STATE OF TENNESSEE
EASTERN DIVISION

NORTHEAST KNOX UTILITY DISTRICT, Plaintiff/Appellee, vs. STANFORT CONSTRUCTION COMPANY, SOUTHERN CONSTRUCTORS, INC., and AMERICAN ARBITRATION ASSOCIATION, INC., Defendants/Appellants, --- STANFORT CONSTRUCTION COMPANY, Counter-Plaintiff/Appellant, vs. NORTHEAST KNOX UTILITY DISTRICT, ROBERT G. CAMPBELL & ASSOCIATES, LP and RICHARD PHILLIPS, Counter-Defendants/Appellees.	COURT OF APPEALS NO.: E2005-01284-COA-R3-CV Appeal from the Knox County Circuit Court – No. 03-93-03

BRIEF OF COUNTER-PLAINTIFF/APPELLANT STANFORT CONSTRUCTION COMPANY

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ORAL ARGUMENT REQUESTED

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether Phillips and Campbell waived the defense of the statute of limitations when they failed to include it in their Answers.

II. Whether there was a genuine issue of material fact as to when Stanfort's cause of action against Phillips and Campbell accrued.

A. Whether subcontractor Stanfort had a legally cognizable injury until Southern, the general contractor, was paid in a job closeout settlement that negated Stanfort's claims for extra work.

B. Whether a reasonable jury could conclude that Stanfort could not have discovered the injury and the tortious nature of the conduct of Phillips and Campbell until sometime after the job was secretly closed out.

III. Whether the Second Amended Complaint adding Phillips and Campbell related back to earlier filings given their relation to Northeast Knox Utility District.

STATEMENT OF THE CASE

This is Stanfort Construction Company, Inc.'s ("Stanfort") appeal from summary judgments granted in favor of Richard Phillips, the general manager of Northeast Knox Utility District ("NEKUD") and Robert G. Campbell and Associates, the job engineer. The suit is based on numerous misrepresentations contained in bid documents and permit applications for a new raw water intake from the Holston River into NEKUD's facility. Some discussion of the parties is in order in light of a fairly complicated procedural history.

Southern was the general contractor awarded a contract by NEKUD to construct a raw water intake facility on the bank of the Holston River described as follows in NEKUD's TVA permit application. (T.R. at 111, Contract documents and Technical Specifications made Exhibit to T.R. [hereinafter "Contract"].)[1]

> The project includes a new raw water intake to be located within 15 feet downstream of the existing intake for the Northeast Knox Utility District in Knox County, Tennessee. The intake is located at mile 9.55 of the Holston River. **The structure shall be built along the bank of the river with excavation of a silty material as evidenced by soil borings taken in the area.** Sheet piles and tie back anchors will be used to construct the facility behind a temporary diversion sandbag dam as shown on the accompanying details. Excavation or cut on the bank of the river for the intake will total 1285 cubic yards. There will be 8 cubic yards of fill on the intake site which will occur around the perimeter of the structure to feather in the contours to natural grade. **There will be 3.5 cubic yards of cut and no fill in the river itself due to cutting or dredging the area in front of the intake.**

[1] References to the Technical Record are abbreviated T.R. followed by the page number, and, if appropriate, an identification of the paper. Citations to portions of the Technical Record included in the Record Appendix shall be "R.A. at _____." Citations to unpublished cases in the Case Appendix shall be "C.A. at _____."

Excerpted from Contract, Record Appendix (R.A. at 23). (Emphasis added). Stanfort was Southern's excavation subcontractor. (T.R. at 143).

Richard Phillips was the general manager of NEKUD. (Phillips Affidavit, T.R. at 466). Phillips signed the contract documents and the applications for permits filed with various governmental authorities. (Contract (excerpts at R.A. 18-24, 44-51)). Phillips also signed the sworn Complaint on behalf of NEKUD in the Knox County Chancery Court and signed NEKUD's responses to Interrogatories. (Affidavit of Phillips, T.R. at 466; Complaint, T.R. at 5). Phillips was also a party to all the closeout meetings and signed all the closeout documents. (T.R. at 560 (R.A. at 39) and 189 (R.A. at 10)).[2]

Robert G. Campbell & Associates, L.P. was the engineering firm selected and hired by Richard Phillips to oversee the job. (Affidavit of Richard Phillips, T.R. at 120-D). Campbell was NEKUD's representative during the construction period. (Contract general conditions pp. 19-21). Campbell served as the initial interpreter of the contract documents. (Id.). Campbell was also responsible for reviewing physical conditions of the land to determine whether additional explorations or tests were necessary and was responsible for concluding whether there was a material error in the contract documents due to newly discovered conditions that would require a work directive change or a change order to be issued. (Contract general conditions Article 4, §§ 4.2.4 and 4.2.5 (R.A. at 26), page 11; Deposition of Robert G. Campbell; T.R. at 417). Campbell prepared these contract documents and permits. (Contract (R.A. at 44); Deposition of

[2] Additionally, Phillips was present at the October 4, 2000 meeting memorialized by memorandum in which Phillips is quoted as saying that he can talk about the rock claim but cannot help with the time claim. (T.R. at 562 (R.A. at 41)). Phillips took the position early that additional time was out of the question. (T.R. at 229 (R.A. at 29)). As shown in the October 30, 2000 change order signed by Phillips, (T.R. at 189 (R.A. at 10)), and the closeout of the job on November 6, 2000 which awarded Southern's time claim while denying Stanfort's rock claim, (T.R. at 560 (R.A. at 39)), Phillips participated fully in the closeout process.

Robert G. Campbell, T.R. at 426). Campbell corresponded and attended all meetings regarding the closeout process and signed all closeout documents. (T.R. at 422, 560 (R.A. at 39), 562 (R.A. at 41), 563 (R.A. at 42), 776, 778, 780, and 189 (R.A. at 10)).[3]

The first pleading filed in this matter was a Complaint by NEKUD against Stanfort and Southern Constructors, Inc. ("Southern"). (T.R. at 2) Stanfort had demanded arbitration with both Southern and NEKUD to secure compensation for extra work and expense as well as extra time on the project that Stanfort contended were due because of "differing conditions"[4] under the Contract. (T.R. at 3, ¶ 7 of Complaint). NEKUD successfully argued that even though it had agreed to arbitrate any claim made by Southern, and had required Southern to secure arbitration clauses in all subcontracts, subcontractors could not force NEKUD to participate in arbitration because of lack of contractual privity. In the meantime, Stanfort had filed a counterclaim sounding in contract against NEKUD. (T.R. at 71).

Stanfort reached an agreement with Southern in arbitration, but was by no means made whole. Stanfort's agreement with Southern allowed Stanfort to proceed

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[3] When functioning as the interpreter or judge, Campbell was required not to show partiality to the owner or contractor. (Contract at pp. 19-21). Despite Campbell's obligations under the Contract to be impartial, Campbell testified by deposition that he could not worry about the subcontractor because it was Campbell's job to look out for the owner, NEKUD. (Deposition of Robert G. Campbell; T.R. at 425). Campbell was present at the October 4, 2000 meeting at which Richard Phillips stated that he could discuss the rock claim but could not help with the time claim. (Memorandum of meeting; T.R. at 562 (R.A. at 41)). Campbell engaged in correspondence with Southern regarding the closeout of the job on multiple occasions. (T.R. at 776, 778, and 780). Campbell generated a facsimile to NEKUD on October 9, 2000 in which Campbell proposed that he was prepared, with Richard Phillips' permission, to propose a settlement giving allowance for extra time but not for extra work. (T.R. at 563 (R.A. at 42)); deposition of Robert G. Campbell, T.R. at 422). Finally, both the change order of October 30, 2000 and the closeout of November 6, 2000 (R.A. at 39), both of which traded Stanfort's rock claim for Southern's time claim, were signed by Campbell. (T.R. at 189 (R.A. at 10) and 560 (R.A. at 39)).

[4] The term is not expressly defined in the Contract, but usage in the Contract requires that it be interpreted to mean the "technical data . . . is inaccurate" or "any physical condition . . . at the site differs materially from that indicated, reflected or referred to in the Contract Documents." Contract, p. 10, § 4.2.3, R.A. at 25.

against NEKUD only in tort. Stanfort amended its Complaint to state that NEKUD had made numerous material misrepresentations in the bid documents, including representations made to permitting agencies under penalty of perjury, which NEKUD either knew were false or made only with a reckless hope that they were true. (See T.R. at 102, Motion to File Second Amended Counter-Complaint). The misrepresentations grossly misstated the elevation of bedrock, understated the nature and extent of excavation in the river, and misrepresented that adjustments would be made for differing conditions. The case was transferred to Circuit Court because of venue restrictions on governmental tort suits. (T.R. at 1).

On April 8, 2003, less than three years from the date of the project closeout between Southern and NEKUD (which was the earliest payment became due to Stanfort), Stanfort moved to amend the Complaint a second time to add Phillips and Campbell. (T.R. at 102). The amendment was allowed, and soon NEKUD and Phillips moved for summary judgment. (T.R. at 126). NEKUD's theory was governmental immunity granted to governmental entities, including utility districts, and Phillips' theory was, primarily, that he relied on others in making the statements he made. Stanfort successfully defended the Motion as to Phillips but NEKUD was granted summary judgment. (T.R. at 451).

After several days of depositions of the principals, Phillips again moved for summary judgment, this time based on the three-year statute of limitations for property torts found at T.C.A. § 28-3-105. (T.R. at 544). Phillips argued that a letter written by Stanfort in January 2000 showed Stanfort knew it had been injured by the subject misrepresentations. (T.R. at 534). Stanfort submitted considerable documentation in

opposition, including Interrogatory answers, deposition testimony excerpts, and authenticated documents. (T.R. at 549 to 612). Stanfort vigorously opposed the Motion arguing that Stanfort only learned by the later course of conduct of the parties and documents it discovered during the course of arbitration with Southern that the misrepresentations were not simply innocent mistakes as previously argued by Phillips.[5] (T.R. at 613). Stanfort also argued that the defendants waived the affirmative defense of statute of limitations by not including it in their answers and that the amendment related back under Rule 15 of the Rules of Civil Procedure.[6] Until after the project closeout, Stanfort thought a change order would be issued for extra work and extra time. (T.R. at 772, Affidavit ¶ 3). The Court granted Phillips' Motion in an Order entered March 24, 2005. (T.R. at 746). Campbell then filed his Motion for Summary Judgment. (T.R. at 740). Stanfort opposed Campbell's Motion with, among other things, the Affidavit of Stanfort's president, Terry Fortner, and asked the Court to reconsider its ruling in favor of Phillips. (T.R. at 748; 765). The Court granted Campbell's' Motion and denied the reconsideration in an Order filed May 20, 2005. (T.R. at 786). This timely appeal followed. (T.R. at 789).

[5] In support of the first Motion for Summary Judgment, Phillips argued, "He had no reason to believe, and in fact does not believe, that the information in the Contract was incorrect at the time it was reported." (T.R. at 137; R.A. at 5).

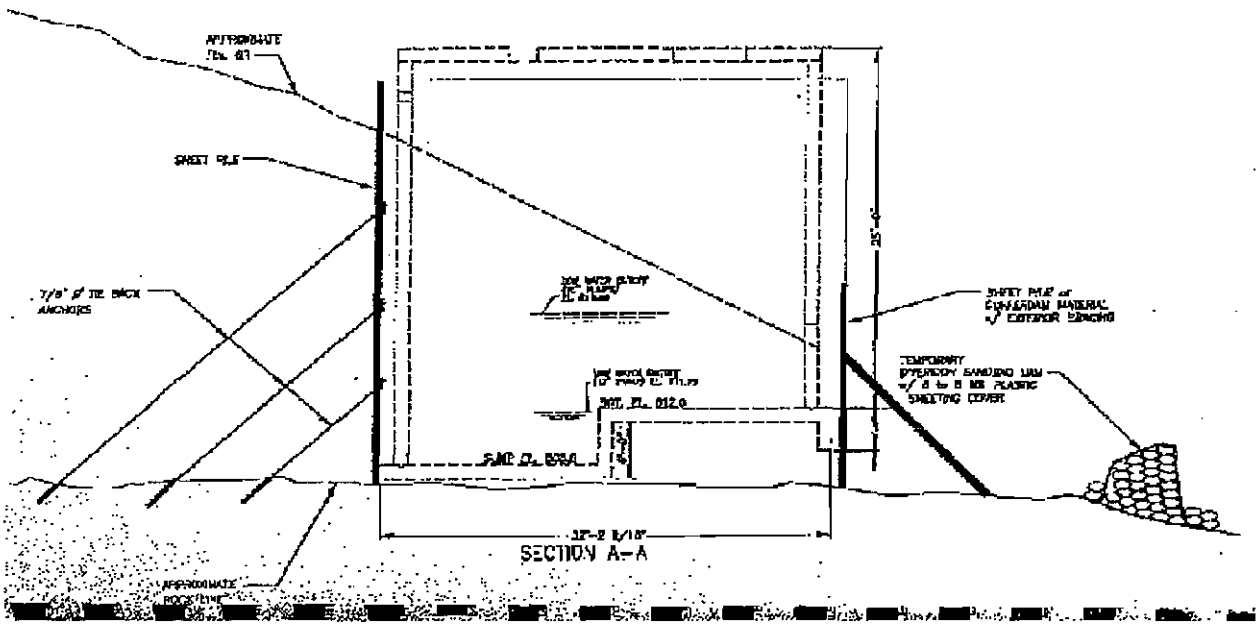
[6] Phillips filed his Motion to Amend his Answer to include the defense of statute of limitations on March 1, 2005, and Campbell filed his Motion to Amend his Answer to include the defense of statute of limitations on March 15, 2005. (T.R. at 637 and 737). Both the Amendments were made long after the discovery on which Phillips and Campbell relied in their Motion for Summary Judgment had been completed, giving Stanfort no notice at the time discovery took place that the statute of limitations was even an issue to be considered.

STATEMENT OF THE FACTS

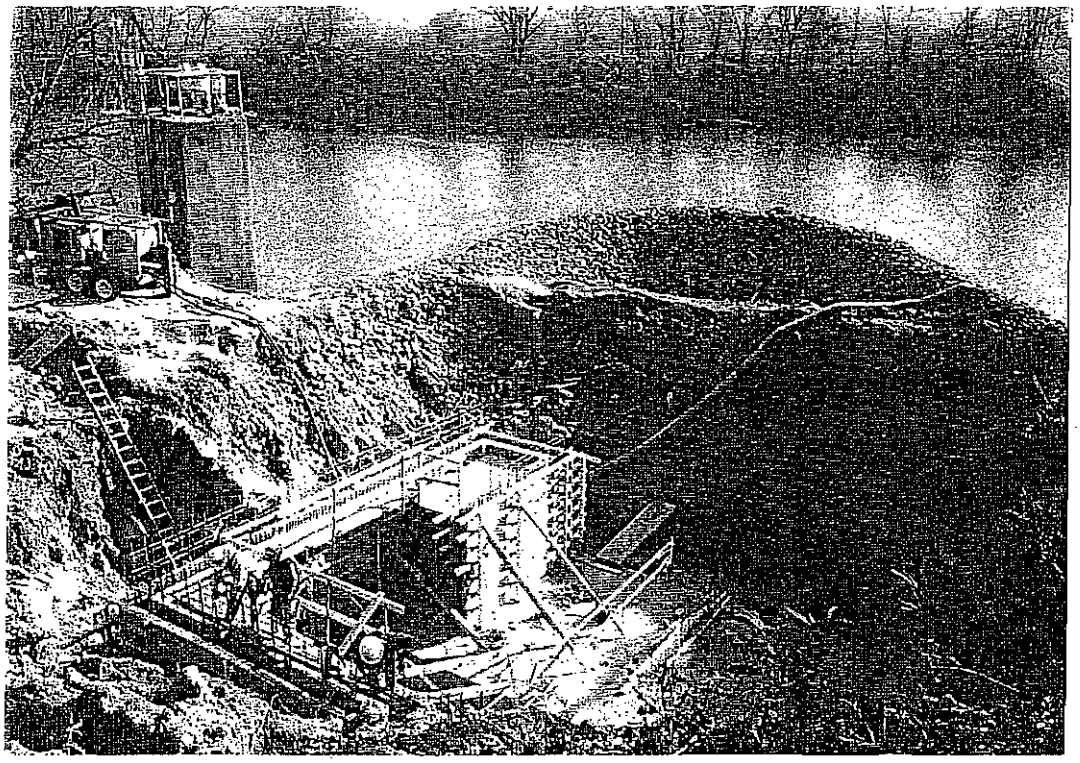
A. Introduction.

Since this case was disposed of on the grounds that the claims were barred by the three-year statute of limitations for property torts, the key facts will necessarily relate to timing. However, timing in this case cannot be understood in a vacuum. Stanfort expects that the Court will best understand the case if it is given first, a brief overview of the facts relating to the claim, a brief overview of facts relating to the timing, and then a more detailed explanation of what happened when and Stanfort's role in it.

The nature and extent of the harm that Stanfort seeks to remedy in this case is illustrated somewhat by comparison of the diversion dam specified in the Contract (Contract, Section A.A; Reproduced in R.A. at 38).



with the massive dam actually constructed by Stanfort to hold out the flooding Holston River. (T.R. at 246; R.A. at 37).



The former was a three-foot earthen berm covered with six mil plastic (something like a light drop cloth). (Contract, Section A.A.) The latter was a massive riprap and clay structure that took 84 tandem loads of riprap and multiple tandem loads of clay hauled in from offsite. (T.R. 235, Fortner Affidavit). The difference between the imaginary dam drawn in the contract documents and the one actually constructed was made necessary by high rock and high water. The bedrock underlying the project was six-feet higher than shown in the boring reports and permit applications included in the Contract

Technical Data, (T.R. at 233, Fortner Affidavit at ¶ 10; Exhibit 11 to Stanfort Response to Motion for Summary Judgment dated June 4, 2004) and, contrary to what the permitting agencies were told, extended out into the riverbed. (T.R. at 234; Fortner Affidavit at ¶ 11). The presence of the extra rock forced forbidden blasting in the riverbed, which in turn forced a bigger and higher diversion dam. (Id.) Record rainfalls and an early draw down of upstream reservoirs made matters even worse. (Id.)

Stanfort pulled off the project to wait for a change order, until assured indirectly by Campbell and Phillips through Southern that its requested change orders were being given due consideration, and ordered directly by the general contractor to either complete the job or face dire consequences. (Id. at 15; T.R. at 236-238). By November 1999, Stanfort had removed the rock from the riverbed and the riverbank to the point that the general contractor could pour the concrete foundation and start up out of the water with the project. (T.R. at 235; Fortner Affidavit at ¶ 21). In January 2000, Stanfort wrote a letter to the general contractor outlining the problems encountered and suggesting again that the general contractor pursue a change order for extra work and extra time. (T.R. 239). It was upon the basis of this letter that Phillips and Campbell filed their Motions and, presumably, that the trial court granted summary judgment.

Stanfort readily admits that by January 2000 it knew the boring reports and permit applications, treated as technical data within the contract documents, were horribly wrong in that they showed bedrock six-foot lower than it really was. Stanfort also knew, however, that there were contract provisions which allowed and in fact required additional time and compensation be awarded upon a finding that the actual project presented "differing conditions" from those represented in the bid documents

and permit applications.[7] (T.R. at 173; Contract section 12.2 and 4.2). Reams of correspondence between Campbell, Phillips and Southern indicate that up until October 2000, Southern continued to demand extra pay and extra time and Defendants purported to give those demands consideration. (T.R. at 771-790). Stanfort did not learn until later, and can only allege now through the benefit of hindsight and discovery, that Phillips and Campbell engaged in some deceptive maneuvering to avoid admitting "differing conditions" of high rock and high water existed.[8] (T.R. at 771-73; Affidavit #2 of Fortner). Stanfort discovered a memorandum in the files of the engineer which shows that Stanfort's claims based on differing conditions were simply traded away to the general contractor for a reduction of the delay penalties ultimately charged against the general contractor. (T.R. at 315). It is Stanfort's position that if ever differing conditions existed, they existed on this job and that the determination as to "differing conditions" was never actually made because Phillips and Campbell had determined from the outset that there would not be differing conditions. Ironically, through the maneuverings of Phillips and Campbell, the misrepresentations which ultimately cost the contractors thousands of dollars through increased difficulties and job delays were turned into a net savings to NEKUD on the project through penalties that were actually assessed and charged against the general contractor. (T.R. at 560).

[7] "If Engineer concludes that there is a material error in the Contract Documents or that because of newly discovered conditions a change in the Contract Documents is required as work directive change or a change order will be issued as provided in Article 10 to reflect and document the consequences of the inaccuracy or difference." Contract, p. 11, § 4.2.5, R.A. at 26.

[8] Even now Phillips wavers between denying that the rock was anything different than the contract documents portrayed, and arguing that everyone has known for more than three (3) years that the rock was higher than shown.

B. The Details.

The remainder of the detailed facts necessary for the Court to understand this matter are succinctly set out in three of the Trial Court pleadings and are reproduced herein in their entirety, verbatim, with record citations added in brackets.[9] At the risk of some overkill, Stanfort has included numerous facts which in isolation may be meaningless but in totality are intended to demonstrate issues of material fact as to when Stanfort was injured and when Stanfort should have discovered the injury and the tortious nature of the representations.

1. Stanfort's Additional Facts for Consideration (in Opposition to First Motion for Summary Judgment). [T.R. at 169].

"As additional response to the Statement of Material Facts submitted by NEKUD and Richard Phillips, Stanfort sets forth the following material facts which refute or explain material facts set forth by NEKUD and Phillips and demonstrate that there is a genuine issue for trial. Stanfort's position is substantially set forth in Stanfort's Answers to NEKUD'S Interrogatories and the Attachments thereto, all attached as Exhibit 16 hereto.) [T.R. at 250-339]."

"As stated in a permit application to the Tennessee Valley Authority, NEKUD needed this intake structure and had no viable alternative to the proposed structure. (Exhibit 3 to TVA Permit, Answer to Question 3; Exhibit 1 hereto, excerpted from contract documents submitted as Exhibit to Response to Motion to Amend). [T.R. at 179]."

"Accurate soil borings cannot be made absent reference to a known benchmark elevation. (Deposition of Bob Campbell at pp. 60, 68, excerpt attached as Exhibit 2.) [T.R. at 186]."

"By the time S&ME, the boring subcontractor, performed its subsurface borings for the subject site, the engineer had set a benchmark reference. (Deposition of Bob Campbell at pp. 62-63, see Exhibit 2.) [T.R. at 184-85]."

"S&ME performed the borings without reference to the benchmark, and obtained their elevations by reference to a topographic map. (Affidavit of Neuhaus, Exhibit 3.) [T.R. at 193]."

"Both NEKUD and Campbell knew that the drilling was by reference to a topographic map rather than a benchmark. (Soils Report, 2.1 Field Exploration, excerpt attached as Exhibit 4.) [T.R. at 200]."

"The test boring records as represented in the Bid Documents used different starting elevations from the starting elevations recorded in the field notes. (Compare Appendix A to soils report (Exhibit 5 hereto) to Exhibit 4a, 4b, and 4c to Neuhaus Affidavit (Exhibit 3).) [T.R. at 197-99 and 202-204]."

"The original topography was disturbed prior to the drilling. (See Affidavit of Fortner and inferences therefrom.) [T.R. at 232, ¶ 6]."

"Phillips and NEKUD knew the topography was disturbed prior to the drilling. (Inference from their presence and direction.)"

"Despite knowledge that the subsurface core drilling could not be accurately performed absent reference to an established elevation benchmark, knowledge that this

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[9] Stanfort notes that this was the Second Motion for Summary Judgment filed by Phillips and, rather than completely rehash and refile everything with the trial court, Stanfort incorporated into its Response to the

actual core drilling was not done by reference to such a benchmark, knowledge that the elevation for the subject subsurface core drilling was done by reference to a general topographic map, knowledge that the original topography had been disturbed, and knowledge that the boring field notes did not match the boring reports used in the soils report, NEKUD and Phillips made numerous representations in governmental permits, which representations were repeated for the benefit of bidders and contractors, including but not limited to:"

(a) "Track hoes will be used for excavation and the materials to be encountered will be a silty soil in nature. (Answer E to Attachment A to ARAP Permit, Exhibit 6) [T.R. at 205; R.A. at 17];"

(b) "There will be 3.5 cubic yards of cut and no fill in the river itself due to cutting or dredging the area in front of the intake. (Id., Answer C); [T.R. at 205; R.A. at 17];"

(c) "The area to be cut or dredged into the intake structure will be approximately 5' – 6' wide leading from elevation 812 to the intake. The center channel of the stream is found to be at elevation 807-808. (Id., Answer B); [T.R. at 205; R.A. at 17];"

(d) "Approximately 3.5 cubic yards of material below ordinary high water will be excavated in front of the intake structure. Sheet piles and tie-back anchors will be used in the construction of the facility behind a temporary sandbag cofferdam. (Department of Army Permit, Project Description, Collective Exhibit 7); [T.R. 206; R.A. at 17];"

Second Motion the materials filed in Response to the first Motion.

(e) "Plan drawings submitted with the permit application showed a sandbag dam of approximately 3 feet covered by "6-8 mil plastic. (Id.); [T.R. at 211; R.A. at 22];"

(f) "All work in the water will take place during low water conditions. (Id., Special Condition Number 7); [T.R. at 210; R.A. at 21];"

(g) "The structure shall be built along the bank of the river with excavation of a silty material as evidenced by soil borings taken in the area. (Application for TVA Permit, description of activity, Exhibit 8.) [T.R. at 212; R.A. at 23];"

(h) "NEKUD and Phillips knew the governments' determination that the various permits were not contrary to the public interest was made in reliance on the information originally provided. (General permit condition 4, Department of Army Permit, Exhibit 7.) [T.R. at 208; R.A. at 19];"

(i) "NEKUD and Phillips knew that a change in circumstances was a basis for re-evaluation of the permit. (Id., General permit conditions 5, Exhibit 7.); [T.R. at 208; R.A. at 19];"

(j) "Phillips and NEKUD represented to the various agencies that the work being performed would be in accordance with the plans they submitted to the permitting agency, including the plan that showed the ability to work in the dry behind a 3 foot sandbag diversion dam covered with thin plastic. (Special Condition Number 1 to the Department of Army Permit, Exhibit 7.); [T.R. at 206; R.A. at 18];"

(k) "NEKUD and Phillips misrepresented in the various permits that no previous TVA permit had been obtained. (Application for TVA Permit dated

June 24, 1998, Exhibit 8 ["List of previous DA/TVA permits/approvals-NONE."]; See Exhibit 12.); [T.R. at 213; R.A. at 24];"

"Other representations made to bidders in the contract documents include:" -

(a) "Contractor may rely on the accuracy of the technical data contained in [reports of explorations and tests of subsurface conditions at the site . . .]. (Answer to Interrogatory Number 2, General Conditions, Physical Conditions, § 4.2.1 of contract documents, Exhibit 9.); [T.R. at 214; R.A. at 25];"

(b) "The Contract Time will be extended in an amount equal to time lost due to delays beyond the control of contractor . . . [including but not limited to] . . . fires, floods, labor disputes, epidemics, abnormal weather conditions, or acts of God. (Answer to Interrogatory Number 2, §12.2 Change of Contract Time, Exhibit 9 hereto.); [T.R. at 216; R.A. at 27];"

(c) "If any physical condition uncovered or revealed at the site differs materially from that indicated, reflected, or referred to in the Contract Documents, a Work Directive Change or Change Order will be issued . . . to reflect and document the consequences of the inaccuracy or difference. (Answer to Interrogatory Number 2, Differing Conditions, 4.2.3.2 to 4.2.5., Exhibit 9); [T.R. at 214-15; R.A. at 25-26];"

(d) "Drill logs were among the technical data supplied and represented that three test holes identified as B1, B2 and B3 were drilled at the following elevations and to the following boring depths: B1, 826, 16.5; B2, 832, 17; B3, 828, 16.2. (See Exhibit 5.); [T.R. at 201-204; R.A. at 14, 15, 16];"

"The actual elevation for the top of bedrock at location B1 was 819, 9.5 feet above the elevation shown by boring B1. (Rock profile at boring B1 supplied as Attachment 9 to Stanfort's Answers to Interrogatories, Exhibits 10 and 11, hereto.); [T.R. at 106; R.A. at 1];"

"The actual elevation for the top of bedrock at location B2 was 818.5, or 3.5 feet above the elevation shown by boring B2. (Id., Rock profile for B2.); [T.R. at 107; R.A. at 2];"

"The actual top of bedrock at location B3 was 818, or 6.2 feet above the elevation shown by boring B3. (Id., Rock profile for B3.); [T.R. at 108; R.A. at 3];"

"Contrary to the representations in the TVA permit application, NEKUD had obtained an earlier permit from TVA to build its original pumping station. (Attachment 6 to Stanfort's Answers to Interrogatories, Exhibit 12 hereto.); [T.R. at 221];"

"The prior permit was either in NEKUD's files or available through a simple FOIA (Freedom of Information Act) request."

"The original intake was constructed to elevation 814 and , according to the Engineer's survey of exposed rock elevations, would have passed through 5 feet of solid rock. (Id.); [T.R. at 225];"

"These facts were known or should have been known to both Phillips and NEKUD."

"Before bidding on this project, Stanfort received and relied on a full set of contract documents. (Affidavit of Terry Fortner.) [T.R. at 233, ¶ 8]."

"Stanfort visited the site prior to submitting a bid. (Affidavit of Terry Fortner.) [T.R. at 232, ¶ 5]."

"Excavation subcontractors routinely rely on soils reports supplied in bid documents as it is cost prohibitive to conduct independent borings of sites where the only excavation at risk is in the magnitude of 3.5 yards. (Affidavit of Terry Fortner.) [T.R. at 233, ¶ 9]."

"Early in to the project, Stanfort hit rock much higher than the elevation supplied by the borings reports. (Affidavit of Terry Fortner.) [T.R. at 233, ¶ 10]."

"Stanfort immediately put the general contractor and NEKUD on notice of discovery of rock. (Affidavit of Terry Fortner.) [T.R. at 234, ¶ 11]."

"In Stanfort's opinion, the rock constituted differing conditions and needed to be evaluated. (Affidavit of Terry Fortner.) [T.R. at 234, ¶ 11]."

"When the engineer delayed coming to the site to evaluate the conditions, Stanfort was forced to pull from the project. (Affidavit of Terry Fortner.) [T.R. at 234, ¶ 12]."

"On or about July 26th, the engineers surveyed the actual top of the rock, which Stanfort had been ordered to excavate to solid rock. (Affidavit of Terry Fortner.) [T.R. at 234, ¶ 13]."

"The engineer was indifferent to Stanfort's position and ordered Stanfort, through Southern's letter of July 23, 1999, to proceed with excavation. (See Fortner Affidavit and Exhibits.) [T.R. at 234, 236]."

"Stanfort was provided a map of the actual top of rock as surveyed and was told to use this survey in its further excavation and its claim for work order. (Exhibit 12 and Fortner Affidavit.) [T.R. at 234, ¶ 14 and Sealed Envelope]."

"Stanfort was told by both the Engineer and NEKUD that the rock claim was being evaluated and relied on that statement. (Affidavit of Terry Fortner.) [T.R. at 234, ¶ 15, 236, 238]."

"Stanfort would not have continued to excavate if it had been told that it would not be paid any more for excavating the rock. (Affidavit of Terry Fortner.) [T.R. at 234, ¶ 16]."

"About the same time Stanfort returned to work, record rainfalls began. (Attachment 2 to Stanfort's Answers to Interrogatories, Exhibit 13, hereto.) [T.R. at 228 and 234, ¶ 18; R.A. at 28]."

"It was Stanfort's interpretation of the contract documents that it could not work during high water conditions and while the site was flooding. (Affidavit of Terry Fortner.) [T.R. at 232-33]."

"Nevertheless, Stanfort could not get change orders for extension of time or for the extra work. (Affidavit of Terry Fortner.) [T.R. at 234, ¶ 19]."

"In a letter dated January 13, 2000, Stanfort reiterated its position, including its claim for extra work and expenses. (Attachment 1 to Stanfort's Answers to Interrogatories, Exhibit B to Fortner Affidavit.) [T.R. at 239]."

"Included in the extras were 84 loads of 8" riprap ($23,487.12); dirt berm to cover blast ($2,652.00); drilling and blasting ($15,000.00); and water pumping ($8,662.26) (Attachment 1 to Stanfort's Answers to Interrogatories, Exhibit C to Fortner Affidavit). [T.R. at 240 and 243-45]."

"Stanfort's claims were ignored until long after Stanfort completed the project. (Affidavit of Terry Fortner.) [T.R. at 235, ¶ 21]."

"Initially, Stanfort, through Southern, was penalized for over $100;000 in liquidated damages. (Contract Modification, Exhibits 9 and 14, to Campbell Deposition, Exhibit 2, hereto.) [T.R. at 189]."

"Despite representing in the contract documents that extra time would be allowed for abnormal weather and for differing conditions, Phillips and NEKUD had determined that extra time was "out of the question", regardless of the site and weather conditions. (See Attachment 5 to Stanfort's Answers to Interrogatories, Exhibit 14, hereto.) [T.R. at 229; R.A. at 29]."

"Stanfort's claim for changed conditions was never given consideration. The Engineer and Phillips and NEKUD denied the rock claim on the theory that this was a lump sum contract not subject to compensation for differing conditions. (Deposition of Campbell at 13, 63; Exhibit 2 hereto.) [T.R. at 181, 185; R.A. at 8-9]."

"As of August 2002, long after the date of substantial completion, NEKUD was not using the intake structure at issue. (Affidavit of Terry Fortner.) [T.R. at 235, ¶ 23]."

"The final resolution between NEKUD and the general contractor was reflected in a contract modification dated October 30, 2002, adding 149 days, but maintaining $50,200 in liquidated damages. (Exhibit 14 to Campbell Deposition.) [T.R. at 189]."

"NEKUD arrived at the figure by adding enough days to offset Stanfort's rock claim. (See Exhibit 18 to Campbell Deposition ("I am prepared ... to proposed [sic] the settlement giving allowance for time, not work which seems to me to better serve their purpose with the sub."); See also Exhibit B to Fortner Affidavit, reflecting rock claim.) [T.R. at 315, 240; R.A. at 42]."

"The net result is that NEKUD obtained a project that was much harder to build because of the extra rock and water for over $50,000 less than the contract price through the liquidated damages clause of the contract."

"Neither NEKUD, Phillips, nor Campbell was willing to jeopardize the permits and project by recognizing the inaccuracy of the borings and site plan and reporting the same to the governmental agencies that granted the various permits. (Permissible inference from other supported facts.)"

"The project Engineer acknowledged that at least some engineers might feel compelled to report the inaccuracy to various governmental agencies. (Deposition of Campbell at 118; Exhibit 2, hereto.) [T.R. at 188]."

AFFIDAVIT OF TERRY FORTNER

[In opposition to NEKUD and Phillips' First Motion for Summary Judgment]

"I, Terry Fortner, am 59 years of age, and having first being duly sworn, make oath according to law and based on my personal knowledge state as follows:

1. "I am a principal in Stanfort Construction Company, and I manage the day-to-day affairs of Stanfort Construction Company."

2. "I have been involved in the construction industry since 1965. I started with Harrison Construction Company as a Rodman in a surveying crew. Within two months I was promoted to Crew Chief. I worked in the same or similar capacities until I started Stanfort Construction Company in 1986. I am thoroughly familiar with surveying instruments and techniques, including elevation determination."

3. "I have read "Stanfort's Response to Statement of Material Facts in support of Motion for Summary Judgment," and I find the statements made therein to be true and adopt them as my own statements."

4. "I was personally involved in all aspects of preparing the bid and completing the project at issue."

5. "I got involved in this project when John Waldrop of Southern Constructors, Inc. contacted me and asked if I would do a bid for the earthwork. Before preparing a bid, I visited the site with John Waldrop, and we discussed the scope of the project and how it could be done."

6. "When I first visited this site, I noticed that there had already been disturbance of the soils in the area. I did not understand the significance at that time. It is now my belief that the disturbance of the soils in the area had a connection with the inaccurate borings. It is my present belief that the boring logs were made by reference to a topographical map, but that the elevation of the drill must have been as determined by disturbed soil, rather than the natural topography."

7. "It was my understanding, from my inspection of the site, and review of the bid documents, that there was not to be any rock excavation in the riverbed and that the permit documents in fact did not allow rock to be excavated in the riverbed. It was my understanding that I would be able to do all the excavation, which was to be a silty soil with a track hoe It was further my understanding that the only material to be cut between the river channel and the intake structure was approximately 3.5 cubic yards of the silty soil with the track hoe. I could have made such excavation easily with my machine reaching from the riverbank. It was also my understanding that there was no

rock in the riverbed above the elevation of the bottom of the intake which was to be at elevation 812. It was further my understanding that I could do this work by constructing a small, temporary diversion dam made of sand bags, or earthern material, approximately three to four feet high and covered with a very thin plastic. This is what was portrayed in the bid documents."

8. "I, acting on behalf of Stanfort, relied on the bid documents for this project. I was supplied a complete copy of the bid documents, including the boring logs and the various permits submitted to the agencies. It was my belief and understanding when preparing Stanfort's bid that NEKUD would not misrepresent the true state of affairs to state and federal governmental agencies, and it was also my belief that, if NEKUD found that the statements made in the permit applications were grossly inaccurate, it would promptly report the inaccuracies to the governmental agencies. I was wrong."

9. "It would be cost prohibitive for an excavation subcontractor on a job where the excavation at risk is only in the magnitude of 3.5 yards to conduct independent borings. In most situations independent borings are cost prohibitive. The practice in the industry is to rely on soils reports in the bid documents to the full extent allowed by those documents. My understanding on this project is that the documents allowed reliance on the actual borings made, but purported to restrict reliance on extrapolations from the data."

10. "Early in the project, in June of 1999, I hit rock six feet higher than shown in the boring reports."

11. "I immediately put the general contractor, Southern, and NEKUD on notice of the rock. It was my opinion, and is still my opinion, that the rock constituted differing

conditions as described in the contract documents, and the conditions needed to be re-evaluated and additional time and work orders issued. The rock, which extended into the river, completely changed the scope of the project. The high water conditions caused by flooding also changed the scope of the project and justified time extensions."

12. "The engineer delayed coming to the site until July 23, 1999, and I was forced to suspend excavation."

13. "On or about July 23, 1999, the engineers surveyed the actual top of the rock."

14. "I was provided with a map of the actual top of the rock and told to use it in my further excavation and in my claim for work order. (See Exhibit 12 to Stanfort's Response to Statement of Material Facts). [T.R. sealed Exhibit Envelope]."

15. "I was told repeatedly, through the engineer and NEKUD, that the rock claim was being evaluated. (See Collective Exhibit A to Fortner Affidavit)."

16. "I knew that completion of the project would be a losing proposition unless additional work and time orders were issued. I relied on the assurance in both the letters and the terms of the contract in making the determination to proceed with the project."

17. "Had I been told at the time that I would not be provided change orders for extra work or extra time, I would not have continued to excavate."

18. "About the time I started back to work on the project, record rainfalls began."

19. "By letter of July 23, 1999, I was ordered to proceed despite the high water. (See Exhibit B)."

20. "Because of the extra rock and high water condition, I incurred extra work and expense, including: 84 loads of 8" riprap costing $23,487.12; a dirt berm to cover blasting in the river which should not have been required by the permit documents costing $2,652.00; drilling and blasting, including drilling and blasting in the river bed, costing $15,000; dewatering costing $8,662.26. (See Collective Exhibit C.)"

21. "I completed the project without work orders or time orders being issued."

22. "Southern Constructors stopped paying me short of the contract price, claiming that I owed them over a $100,000 in liquidated damages. I later learned, through arbitration with Southern Constructors, that NEKUD had forced the general contractor to accept a modification in the contract documents that substituted extra time to offset liquidated damages in exchange for my rock claim. (See Exhibits to Campbell Deposition.)"

23. "During the course of the arbitration with Southern Constructors, as of August 2002, I learned upon visiting the site that NEKUD was not even using the intake structure, even though they offset the contract price by over $50,000 in liquidated damages for the alleged delay."

24. "Attached as Exhibit D is a photograph that truly and accurately portrays the massive dam that I was forced to construct to hold the flooding river out of the rock excavation."

(Affidavit and Exhibits at T.R. 234 to 246); (See R.A. at 30-32 for Campbell and Phillips letter).

AFFIDAVIT OF TERRY FORTNER

[In opposition to Campbell Statute of Limitations Summary Judgment Motion and in Support of Motion to Reconsider as to Phillips]

1. "My name is Terry Fortner. I am the President of Stanfort Construction Company ("Stanfort"). I am over the age of 18 and the matters stated herein are based on my personal knowledge."

2. "I did not finish work under the contract until late spring of 2000. Specifically, in that timeframe, I removed the riprap and clay from which I constructed the dam to hold the flooding river out of the excavation."

3. "Upon completing my work, I talked numerous times to John Waldrop of Southern Constructors, Inc. ("Southern") concerning when I could expect payment under my subcontract. I was specifically aware of the subcontract provision which did not require that I be paid until the general contractor received final payment from the owner. I was repeatedly told by John Waldrop that Southern was pursuing my rock claim and an appropriate extension of time as a differing condition under the contract."

4. "I first became aware that Southern had received final payment sometime in early November 2000 when I inquired of Bob Campbell what was happening on the Northeast Knox Utility District job. Bob Campbell informed me that the project had been closed out."

5. "It was at this time that I initiated arbitration proceedings against Southern and attempted to initiate arbitration proceedings against Northeast Knox Utility District."

6. "In the litigation and arbitration proceedings that followed, I acquired correspondence on the job between Richard Phillips, Bob Campbell, and Southern, including Exhibits A-G."

7. "It was only then, sometime after early November 2000, that I learned: (a) that Richard Phillips had, throughout the course of the job, insisted that additional time was out of the question, only to change his tune in October of 2000 at the suggestion of Bob Campbell that time be traded for my rock claim; and (b) that Southern, after having supported my rock claim and claim for additional time until the eve of the contract closeout, and having received monetary consideration in the closeout essentially equal to my rock claim, suddenly adopted the position that all problems on the job were of my own making and that I deserved nothing because this was a lump-sum contract. (See Exhibit H, letter I received from Southern dated same date as their settlement with Northeast Knox Utility District)."

8. "It was only upon learning of these facts that I was able to logically infer that Richard Phillips and Bob Campbell had not been acting in good faith under the contract but had been continuing to conceal, from the numerous permitting agencies, the original misrepresentation as to the elevation of the rock, which additional rock constituted a differing condition under the contract, and which, had they accepted as a differing condition, they would have been compelled by the permits to disclose to the permitting agencies."

T.R. at 771 to 790.

SCOPE OF REVIEW

Appellate review of a trial court's ruling on a summary judgment Motion is de novo with no presumption of correctness. Mooney v. Sneed, 30 S.W.3d 304, 306 (Tenn. 2000). The Appellate Court views the evidence in the light most favorable to the non-moving party and draws all reasonable inferences in favor of the non-moving party. See Staples v. CBL & Associates, Inc., 15 S.W.3d 83, 89 (Tenn. 2000). Summary Judgment is a valuable tool in its place, but its sole purpose "is to resolve controlling issues of law rather than to find facts or resolve disputed factual issues." XI Props., Inc. v. Race Trac Petroleum, Inc., 151 S.W.3d 443, 446 (Tenn. 2004).

As a general rule, summary judgment is not appropriate in cases involving misrepresentations. See Long v. State Farm Fire & Cas. Co., 510 S.W.2d 517, 519 (Ct. App. 1974); Spence v. Spence, 1990 WL 112361 (Tenn. Ct. App. Aug. 1990) (C.A. at 104). Stanfort also notes that such issues as the degree of error in representations, scienter in the making of statements, and reasonable or justifiable reliance are questions to be answered by the trier of fact. Trinity Industries v. McKinnon Bridge, 77 S.W.3d 159, 183 (Tenn. Ct. App. 2001). "[W]hen a court is considering a Motion for Summary Judgment, it must take the strongest legitimate view of the evidence in favor of the non-moving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence." Id. at 820. "[I]f there is a dispute as to any material fact or any doubt as to the conclusions to be drawn from that fact, the Motion must be denied . . . [, and] [t]he court is simply to overrule the Motion where a genuine dispute exists as to any material fact." Byrd v. Hall, 847 S.W.2d 208, 211 (Tenn. 1993).

Regarding the statute of limitations, "The question of whether a plaintiff knew or should have known that a cause of action existed is [ordinarily] a question of fact, inappropriate for summary judgment." City State Bank v. Dean Witter Reynolds, Inc., 948 S.W.2d 729, 735 (Tenn. Ct. App. 1996). See also Caledonia Leasing & Equipment Co. v. Armstrong Allen Braden Goodman McBride & Pruitt, 865 S.W.2d 10, 18 (Tenn. Ct. App. 1992) (there is ample authority for the proposition that whether a plaintiff discovered, or in the exercise of reasonable diligence, should have discovered an injury resulting from a defendant's act creates a genuine issue of fact, precluding disposition by summary judgment.); National Mortgage Co. v. Washington, 744 S.W.2d 574, 580 (Tenn. Ct. App. 1987) (whether any kind of behavior conforms to a legal standard of reasonable conduct is a mere fact question for the jury, and not a question of law.); Hathaway v. Middle Tennessee Anesthesiology, P.C., 724 S.W.2d 355, 360 (Tenn. Ct. App. 1986) (the question of whether due diligence under the circumstances required . . . any other particular form of investigation is properly a question for the trier of fact after hearing all of the evidence, rather than a question of law and to be determined by summary judgment based upon the . . . record.).

ARGUMENT

I. Phillips and Campbell waived the defense of the statute of limitations when they failed to include it in their Answers.

Phillips and Campbell filed Answers to Stanfort's Second Amended Complaint respectively on November 5, 2003 and February 2, 2004. (T.R. at 121-160). These Answers did not raise the statute of limitations as affirmative defenses as required by T.R.C.P. 8.03. Discovery continued without any such notice, and Phillips and Campbell respectively filed Motions for Summary Judgment based upon the statute of limitations

on January 13, 2005 and March 15, 2005. Defendants only sought to amend their Answers to include the defense of statute of limitations as a reply measure after Stanfort pointed out Defendants' pleading flaw. Because Plaintiff was not on notice of the defense, Defendants should not have been allowed to secure dismissal on an unpleaded, unnoticed defense.

Although T.R.C.P. 8 only requires notice pleading, notice is the key word. "Pleadings give notice to the parties and the trial court of the issues to be tried." Castelli v. Lien, 910 S.W.2d 420, 429 (Tenn. Ct. App. 1995). "The failure to assert a claim or defense in a timely manner is generally deemed to amount to a waiver of the right to rely on the claim or defense at trial." Id. "In pleading to a preceding pleading, a party shall set forth affirmatively facts in short and plain terms relied upon to constitute . . . statute of limitations . . . ." T.R.C.P. 8.03. *See also* George v. Alexander, 931 S.W.2d 517, 522 (Tenn. 1996) ("Rule 8.03 is a prophylactic rule of procedure that must be strictly adhered to if it is to achieve its purposes.") At a minimum, this prophylactic rule of notice pleading requires that a party give notice of a defense so that the claim can be developed through discovery and opposed upon motion. Because Defendants gave Plaintiff no notice that Defendants were relying upon the statute of limitations until filing a second Motion for Summary Judgment after extensive discovery had been completed, Defendants should not have been allowed to proceed on such an unpleaded, unnoticed defense.

II. There were genuine issues of material fact, as to when Stanfort's cause of action against Phillips and Campbell accrued.

Simply put, Stanfort contended to the Trial Court and still contends that "the question of whether [Stanfort] knew or should have known that a cause of action existed is a question of fact, inappropriate for summary judgment." City State Bank v. Dean Witter Reynolds, Inc., 948 S.W. 2d 729, 735 (Tenn. Ct. App. 1996); Caledonia Leasing and Equipment Co. v. Armstrong, Allen, Braden, Goodman, McBride and Pruitt, 865 S.W.2d 10, 18 (Tenn. Ct. App. 1992). Stanfort specifically contends that the facts of this case pertaining to the statute of limitations raise several disputed issues of material fact and must be submitted to the jury.

Stanfort agrees that the three-year statute of limitations contained in Tenn. Code Ann. § 28-3-105 is the correct statute. However, that statute is not triggered by the mere discovery of a representation that is false. "A cause of action accrues under the statute when a plaintiff discovers, or in the exercise of reasonable care and diligence, should have discovered, his injury and the cause thereof." City State Bank, 948 S.W.2d at 735. Moreover, in some cases, the Court must determine as a threshold matter whether and when there was an actual injury. John Kohl & Company, P.C. v. Dearborn & Ewing, 977 S.W.2d 528, 532 (Tenn. 1998). Finally, in deceit cases, "Tennessee law has long recognized that the statute of limitations does begin to run until the plaintiff, exercising reasonable diligence, discovers the fraud which the defendant wrongfully concealed." Fahrner v. SW Manufacturing, Inc., 48 S.W.3d 141, 145 (Tenn. 2001). In short, before a cause of action can accrue, facts must exist which would provide a judicial remedy and the plaintiff must have a reasonable opportunity to discover those facts. See Wyatt v. A-Best, Company, 910 S.W.2d 851, 855 (Tenn. Ct. App. 1995).

A. Stanfort did not have a legally cognizable injury until Southern was paid in a settlement that negated Stanfort's claims.

Stanfort's cause of action could not have accrued earlier than November 2000 when Southern closed out the job with NEKUD. Under the terms of its subcontract with Southern, Stanfort had no legal injury until the job was closed out in settlement by Southern and Stanfort was denied payment for its claims. "Progress payments, less retainage of ten percent shall be made to subcontractor for work satisfactorily performed no later than seven (7) days after by contractor of payment from owner for subcontractor's work. Final payment of the balance due shall be made to subcontractor no later than seven (7) days after receipt by contractor of said payment from the owner for subcontractor's work." (T.R. at 769, Subcontract). By definition, extra work necessitated by differing conditions would not have been subject to progress payments, but would have been covered under the final payment portion of the subcontract pursuant to a contract modification or change order. It was Stanfort's position throughout the project, and continues to be Stanfort's position, that a change order needed to be issued authorizing extra payment for extra work done and extra time for extra work and abnormal weather conditions such that the final settlement with the general contractor should have included pay for the extra work and a corresponding time extension. Stanfort, in turn, would have been paid within seven (7) days.

In Tennessee, a statute of limitations cannot accrue and expire before an injury. McCroskey v. Bryant Air Conditioning Co., 524 S.W.2d 487, 489 (Tenn. 1975). Actual injury is a necessary element to a cause of action. See John Kohl & Co., P.C. v. Dearborne and Ewing, 977 S.W.2d 528, 532 (Tenn. 1998). The "injury element" is not

met "if it is contingent upon a third party's actions or amounts to a mere possibility." Id. at 532.

The Defendants in this case might be expected to argue that the injury was in the blasting and moving of the rock. That would be a misapplication of the case law. Prior to the actual job closeout, any injury to Stanfort was "speculative, uncertain and contingent on" the result of the continuing negotiations toward closing out the job.[10] Caledonia Leasing , 865 S.W.2d at 17. "The plaintiff suffered injury in Americount Club [Inc. v. Hill, 617 S.W.2d 876 (Tenn 1981)] when the United States Patent Office rejected the plaintiff's application, and Security Bank & Trust [v. Fabrications, Inc., 673 S.W.2d 860 (Tenn. 1983)] when the bonds defaulted and in National Mortgage [v. Washington, 144 S.W.2d 574 (Tenn. Ct. App. 1987)] when the V.A. refused to pay the deficiency claim and in [Caledonia Leasing] when the Trustee filed suit challenging the Trust Deeds." Caledonia Leasing, 865 S.W.2d at 17. "The Tennessee cases . . . instruct that the mere possibility or probability of an injury such as in this case, is not enough for a cause of action . . . to accrue." Id. Accordingly, this Court should hold that Stanfort could not have been injured until the job closeout.

[10] Terry Fortner, the day-to-day manager of Stanfort, testified that he was not aware of negotiations to close out the job until after the fact and first learned in November of 2000 that he was not going to be paid and that his rock claim had been traded out for time. (T.R. at 612). His Affidavit was entirely consistent and provided more detail showing that as late as October 2000 the general contractor, Phillips and Campbell were in ongoing discussions for a "congenial closure." (T.R. at 771 to 785).

B. Assuming *arguendo* that Stanfort was injured at an earlier time, Stanfort could not have and did not discover the injury or the tortious nature of the conduct until sometime after it discovered the job was secretly closed out.

The claim for extra work and extra time was handled in such a way that Stanfort could not possibly have discovered until sometime after the job closeout that it was going to be left injured. In fact, the representations that brought Stanfort back to the job to remove the rock and the subsequent conduct had the effect of misleading Stanfort and then cloaking the whole job closeout in secrecy such that the actual tortious conduct was concealed.

Part of Stanfort's argument in the trial court was that even though it knew the rock was higher than the contract documents actually showed, it was not aware at that time that the misrepresentations were the result of conscious or reckless deceit. Stanfort reasonably believed, even up to the time of the job closeout, that the misrepresentations were innocent and they would be dealt with through the differing conditions provision of the contract. (T.R. at 771-773). Phillips continues to maintain that the contract documents are correct and that any misrepresentation was purely innocent. (T.R. at 137). Stanfort was lead to continue the job by representations from Campbell and Phillips that the claims of differing conditions were being given due consideration. (T.R. at 236 ("Your claim for compensation for extra rock excavation is acknowledged and is being evaluated."); 238 ("You are to use this drawing as a basis for proceeding with the required rock excavations for this project. We understand that you reserve the right to file a claim for additional rock excavation, **as provided in the contract documents**.") (emphasis added)). Stanfort was not a party to the job closeout

negotiations. (T.R. at 612). Stanfort did not know that the job was closed out until after the fact. (T.R. at 772, ¶ 5). It was long after the closeout that Stanfort learned that the determination to deny any type of change order was allegedly made on the basis that this was a lump sum contract. (T.R. at 772, ¶¶ 6 and 7).[11] Were it not for the discovery and investigation done in preparation of the arbitration proceedings with Southern, Stanfort might never have learned what all had gone on. Among other things, it learned of the secret Memo in the engineer's file wherein its rock claim was traded off for time. (T.R. at 772-73, ¶¶ 6-9). Only then did Stanfort learn the true magnitude of the penalty invoked on the general contractor and that the extra time allowed was the practical equivalent of its rock claim. Id. Stanfort learned that the general contractor submitted an Affidavit dated November 8, 2000 after the fact of the October 30, 2000 closeout saying that all of the subcontractors had been paid and Campbell, Phillips, and NEKUD accepted that Affidavit at face value even though everyone involved knew that Stanfort claimed that it was owed extra money and extra time for its subcontract work. It was only on November 8, 2000 that Southern did an about face and sent Stanfort a letter to the effect that it assumed the risk of extra rock and that all the delays were Stanfort's fault. (T.R. at 783; T.R. at 773, ¶ 7).

The facts of this case fall squarely within the teaching of the Tennessee Supreme Court in Fahrner v. S. W. Manufacturing, Inc. 48 S.W.3d 141, 145 (Tenn. 2001).

> While fraudulent concealment usually denotes a common law tort . . . it also has relevance in the statute of limitations context. By definition, a

[11] It is a poor answer to Stanfort's claims to say that this is a lump sum contract. Most all contracts are for some sort of lump sum. This contract specifically provided that Stanfort could rely on data and specifications. The contract specifically included "reports of explorations and tests of subsurface conditions as part of the technical data." Contract at 10 ¶ 4.2.1.) (Id.) Finally, the contract documents specifically provided for change orders for differing conditions and abnormal weather. (Contract at 11 ¶ 4.2.5. and 4.2.6.) (Compare T.R. at 21 with T.R. at 781).

fraud entails some misrepresentation or deception that makes its victim believe he has been treated fairly when in fact he has been deceived. If successful, therefore, a defendant's fraudulent act, depending on the particular facts of the case, may prevent a plaintiff from knowing he has been injured until well after the statute of limitations period has expired. To prevent this from occurring, Tennessee law has long recognized that the statute of limitations does not begin to run until the plaintiff, exercising reasonable diligence, discovers the fraud which the defendant wrongfully concealed.

Fraudulent concealment often arises in fraud cases, perhaps because the defendant having deceived the plaintiff once thinks nothing of deceiving him further, but it is not so confined. We have also applied the doctrine in a negligent building construction case . . . and more recently, in medical malpractice cases . . . a statute of repose containing a fraudulent concealment exception. The underlying cause of action is not the critical issue; what matters is that the defendant has taken steps to prevent the plaintiff from discovering he was injured.

Id. This Court had previously discussed the badges of fraud as follows:

Fraud is seldom established by direct and positive proof, and such proof is not necessary. Generally, the first effort of a person who intends to commit a fraud, is to throw a veil over the transaction, to conceal it from discovery, to baffle all attempts at detection, and to shield it against attack. A person seldom furnishes the proof of his own turpitude. Fraud is, for this reason, rarely perpetrated openly and in broad daylight. It is committed in secret, and is usually hedged about by every guard that can be devised to prevent its discovery and exposure. Its path is crooked and circuitous, its footprints are carefully covered up, the signs of its operations are diligently removed, or attempted to be removed, and the mask of honesty and good faith is put over the face of the real transaction. For these reasons, fraud is usually proved by circumstantial evidence.

In consequence of the abhorrence with which fraud is regarded by Courts of Conscience, in consequence of the heinousness of the offense, and of the artifices, devises and coverings used to conceal it, and to baffle detection, a wide range of evidence is allowed in proving its existence; and Courts of Equity do not restrict themselves by the same rigid rules that Courts of Law do, in the investigation of fraud, and in the evidence and proofs required to establish it.

Fraud assumes many shapes, disguises and subterfuges, and is generally so secretly hatched that it can only be detected by a consideration of facts and circumstances, which are frequently trivial, remote and disconnected, and which cannot be interpreted without bringing them together, and

> contemplating them all in one view. In order to do this it is necessary to consider one fact or circumstance here, another there, and a third yonder, until the collection is complete. Each detached piece of evidence is not therefore, to be rejected when offered, because apparently trivial. A wide latitude of evidence is allowed; and if a fact or circumstance relates directly, or indirectly, to the transaction, it is admissible, however, weak or slight it may be, its relevance depending not upon its weight or force, but upon its bearing or tendency.

Waller v. Hodges, 321 S.W.2d 265, 270-71 (Tenn. Ct. App. 1958); (quoting Gibson's Suits in Chancery, §195 (Inman, 6th ed.)).

Defendant presented and prevailed in the trial court on the same type of argument attempted by the Defendant in Allied Sound, 909 S.W.2d 815. The Allied Sound defendant argued that plaintiff was suing on a claim for fraudulent inducement to contract, and any inducing representation must have predated the contract, and that therefore the cause of action would have accrued either before or at the signing of the contract. Id. at 821. The Allied Sound Complaint, like Stanfort's Complaint, alleged a number of fraudulent misrepresentations made at different times, some before work began and some after. Id. More importantly, the plaintiff testified by the Affidavit of its president that no one at that firm was aware of any fraudulent misrepresentations until sometime after the equipment at issue in that case was fully installed. Id. The Allied Sound court found, based upon the Affidavit of plaintiff's president, that the plaintiff raised an issue of fact as to whether and when it knew or reasonably should have known that a cause of action existed. Id. at 821-22.

Stanfort has provided, not one, but two Affidavits plus answers to Interrogatories and three (3) days of depositions. They all show that Stanfort had good reason and acted reasonably in waiting to file suit against Campbell and Phillips. Stanfort was not aware that it had suffered an injury, nor had it suffered an injury at the time of Terry

Fortner's January 13, 2000 letter. At that time, Stanfort was continuing to work on the NEKUD construction site and was expecting the claim for extra work to be evaluated under the "differing conditions" provision contained in the contract documents. Stanfort was induced to continue by defendant's letter stating that the "claim for additional rock excavation, as provided in the contract documents, was being considered." (T.R. at 238, 236, 234). Stanfort's President, Terry Fortner, has testified by deposition that he was not aware that Stanfort would not be paid for this extra work pursuant to the contract until November 2000. Most of Stanfort's knowledge as to how the defendants covered their tracks came after the closeout during preparation for arbitration with Southern. It is telling, in hindsight, that Phillips, in his previous Motion for Summary Judgment, argued that he could not be liable because any misrepresentations by him were innocent and that in fact the contract documents were accurate. (T.R. at 137). Now, he hopes to prevail by arguing that Stanfort should have known in January 2000 that the representations were both tortious and injurious.

The following is by no means an exhaustive list of all facts that were hidden from Stanfort or all facts that are relevant to accrual of the statute of limitations, but it should give the Court at least some idea of what Stanfort is now able to see in hindsight, by piecing together multiple facts, but could not see in January of 2000 when it was still writing letters in a good faith attempt to secure a change order under the contract. More importantly, it should demonstrate that a reasonable juror could conclude that the Defendants threw a veil of good faith over what they were doing to make Stanfort believe its claims were being evaluated when it was being set up to finance the very project it was building. See Fahrner, 48 S.W.3d at 145.

1. NEKUD had no viable alternative to this intake.

2. The soil had been disturbed prior to commencement of work under the contract.

3. The borings were off exactly enough to allow Phillips and Campbell to present permit applications stating under penalty of perjury that the only material to be removed from the riverbed itself was 3.5 cubic yards of sandy silt using a trackhoe and that the rock line was low enough that the job could be done without blasting in the river.

4. Phillips and Campbell were confident enough in the borings to submit permit applications under penalty of perjury to various governmental agencies but seek to disclaim any right of Stanfort to rely on the contract documents even though the contract documents specifically provide that contractors are entitled to "rely on the technical data" and include the boring reports and permit applications as technical data. There is no legitimate reason why the borings should be reliable enough for the permits but unreliable to contractors.

5. Record rainfalls, higher than anything since 1917, do not constitute abnormal weather conditions per Campbell and Phillips.

6. Six feet of bedrock extending into the river requiring blasting when the permits forbid blasting in the river do not constitute differing conditions per Phillips and Campbell.

7. Stanfort withdrew but was forced back to the job with representations from both Phillips and Campbell that the claims were being evaluated per the contract but, after the fact, the explanation given was that the contract was a lump sum contract. If

that were so, Stanfort could have been told from the outset that there would be no adjustment to the contract.

8. Even though there was a benchmark elevation set on the project prior to the borings being done, at least per Campbell (T.R. at 415), borings were done by reference to elevations taken off a topographic map. The boring contractor was not aware of the benchmark. Campbell has admitted that the borings could not have been accurate without an accurate starting elevation and he knew that when the permit applications were prepared and submitted.

9. The field notes for the boring elevations do not match the recorded boring elevations in the contract documents.

10. The contract closeout negotiations concerned, primarily, Stanfort's claim that extra pay and extra time should be allowed because of the rock and because of the record rainfalls, but Stanfort was not even notified or invited to participate in the closeout negotiations.

11. The monetary worth of the extra time allowed was the substantial equivalent of Stanfort's rock claim. Early in negotiations, Phillips had taken the position that there would not be extra time allowed. Numerous times during the negotiations, Phillips took the position that extra rock was a valid talking point. Yet, at the last, Phillips allowed extra time instead of extra rock. This was all done in the context of a discussion wherein Campbell stated, for the file, that this approach would "better serve the general contractor's purpose with the sub." Campbell later observed in a deposition taken for arbitration, "That was a chicken shit way to do the sub." T.R. at 423.

12. The job closeout and payment to the general contractor (11/6/00) predated the general contractor's Affidavit that all subcontractors had been paid (11/8/00). Both Campbell and Phillips knew that the subcontractor had not been paid.

13. Immediately upon reaching an agreement with NEKUD, signed by Phillips and Campbell, the general contractor did a complete about-face and wrote Stanfort a letter dated November 8, 2000, stating in essence that Stanfort had assumed the risk of rock and that all project delays and problems were Stanfort's fault.

As in Allied Sound there are genuine issues of material fact as to when Stanfort knew or should have known that it was injured by tortious conduct. This Court should allow a jury to decide whether these and other facts, which are possibly meaningless in isolation, reveal a crooked circuitous path of carefully covered tracks leading to the victimization of Stanfort. See Waller, 321 S.W.2d at 270-71.

III. If the Court finds that Stanfort's Complaint against Defendants was filed outside the statute of limitations, Plaintiff's Complaint relates back to its original filing pursuant to T.R.C.P. 15.03.

Tennessee Rule of Civil Procedure 15.03 allows an amendment filed outside the statute of limitations to relate back to an earlier filing if certain conditions are met:

> An amendment changing the party, or the naming of the party, by or against whom a claim is asserted relates back if the foregoing provision is satisfied and if, within the period provided by law commencing an action or within 120 days after commencement of the action, the party to be brought in by amendment (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

T.R.C.P. 15.03. Both Defendants, in their trial court filings, admitted that all requirements for T.R.C.P. 15.03 were satisfied except Defendants disputed that they

knew or should have known that, but for a mistake concerning their identity, the action would have been brought against them. (T.R. at 538-39 and 662). A brief review of the relationship of the Defendants will show that each had a strong identity of interest with NEKUD and were so intertwined in its dealings that their status as parties was clearly foreseeable to them.

The proper question for purposes of summary judgment is not what Defendants claim to believe, but rather whether "the facts and conclusions to be drawn from the facts in this case would permit a reasonable person to reach more than one conclusion." Deal v. Hastings, No. W2003-00912-COA-R3-CV, 2003 WL 23100341 at *4 (Tenn. Ct. App. December 22, 2003) (C.A. at 5-8). Defendants' tortious conduct, while only discoverable by Plaintiff via discovery and hindsight, was evident to Defendants from the beginning. Phillips was the general manager of NEKUD who signed all the contract documents and technical specifications, signed all permit applications, and hired Campbell to oversee the project as engineer and monitor the various contractors on the job. Phillips also signed NEKUD's pleadings and discovery responses in this litigation. Campbell, as the project engineer, was NEKUD's representative on the job who made inspections to determine whether additional explorations or tests were necessary and whether material errors existed in the contract documents that required a work directive change or change order to reflect the inaccuracy. In making these determinations, Campbell was required by the contract documents to be impartial, but he has testified that he could not worry about the subcontractor because it was Campbell's job to look out for the owner, NEKUD. Once the secret closeout began, both Phillips and Campbell were parties to the meetings and

communications where NEKUD's position that it could consider the rock claim but not the time claim was discussed and reversed, and both Phillips and Campbell signed the change order and closeout documents memorializing this reversal. Phillips and Campbell acted as NEKUD's brain, making the decisions that led to Plaintiff's injuries, and Defendants knew what they were doing when they were making these decisions.

Tennessee Courts have specifically applied relation back to preserve a claim against an individual that was improperly filed against an entity. Vincent v. CNA Insurance Co., No. M2001-02213-COA-R9-CV, 2002 WL 31863290 at *8 (Tenn. Ct. App. December 23, 2002) (C.A. at 9-16). In Vincent, the Plaintiff mistakenly named the real defendant's insurance company, but the Court allowed a relation back to name the real Defendant in order to preserve a legitimate suit despite a pleading mistake. Id. Under the rationale of Vincent, Stanfort's legitimate suit against Defendants should relate back to its filing against NEKUD so that suit against the proper parties is preserved.

One of the primary considerations to determine whether an amendment should relate back is identity of interest. Id. at *7. "This identity of interest inquiry is relevant to both the sufficiency of notice, and particularly the prejudice therefrom, and the knowledge that the added party was omitted due to a mistake." Id. "[I]f a sufficient identity of interest exists between the new defendant and the original one so that relation back would not be prejudicial, then relation back is proper." Id. "The original defendant and the defendant sought to be added have an identity of interest when they are so closely related in business or other activities that it is fair to presume that the added parties learned of the institution of the action shortly after it was commenced."

Id. Phillips and Campbell were the controlling forces behind the raw water intake improvements project who made decisions as to how the project would proceed from its inception to its completion. It was only they who could have made the misrepresentations attributed earlier to NEKUD. They generated and signed the documents that controlled the project and they made the decision to trade Plaintiff's rock claim for Southern's claim for extra time, signing the change order and closeout memorializing this decision. Plaintiff submits that it is hard to imagine two individuals with a greater identity of interest with an entity than Phillips and Campbell had with NEKUD.[12]

"With regard to the requirement that the party to be added knew or should have known that, but for a mistake, the action would have been brought against him . . . [r]elation back will be refused only if the court finds that there is no reason why the party to be added should have understood that he was not named due to a mistake." Id. "The test has been described as whether the omitted defendants, viewed as reasonably prudent people, ought to have been able to anticipate or should have expected that the character of the originally pleaded claim might be called into question." Id. In light of Defendants' close knit relationship and strong identity of interest with NEKUD, the best Defendants can hope for is a question of fact as to whether a reasonable person could reach more than one conclusion as to Defendants' knowledge that they were proper parties. This certainly does not equate to Phillips and Campbell claiming that there was no reason why they should have understood they were not named due to a mistake.

[12] It is important to note that Campbell did not dispute Stanfort's additional fact filed in response to Campbell's Motion for Summary Judgment that Campbell offered no proof that he did not expect or know that he was a proper party defendant to Stanfort's cause of action. (T.R. at 753 and 667-74). Accordingly, this fact should be established for purposes of this appeal.

Once Phillips and Campbell's involvement and thought processes in the secret closeout deal are revealed, it is amply clear that they should have anticipated or expected that they would be proper parties to Plaintiff's lawsuit. Accordingly, if the Court finds that the second Amended Complaint was not filed within the statute of limitations, relation back pursuant to Rule 15.03 is proper and summary judgment should be reversed.

CONCLUSION

Accordingly, the summary judgment granted Defendants should be reversed and the case should be remanded for trial.

Respectfully submitted this 23d day of November, 2005.

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing **BRIEF OF COUNTER-PLAINTIFF/APPELLANT STANFORT CONSTRUCTION COMPANY** and **APPENDIX TO BRIEF** has been served on counsel of record via U.S. Mail as follows:

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