

Tennessee Judicial Nominating Commission
Application for Nomination to Judicial Office

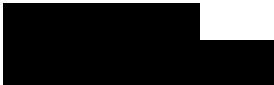
Rev. 14 September 2011



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INTRODUCTION

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

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website <http://www.tncourts.gov>). The Commission requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the word processing document.) Please read the separate instruction sheet prior to completing this document. Please submit the completed form to the Administrative Office of the Courts in paper format (with ink signature) *and* electronic format (either as an image or a word processing file and with electronic or scanned signature). Please submit seventeen (17) paper copies to the Administrative Office of the Courts. Please e-mail a digital copy to debra.hayes@tncourts.gov.

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Special Master/Judicial Clerk
Judge Hamilton Gayden
First Circuit Court
502 Metropolitan Courthouse
Nashville, TN 37201

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

I have been licensed to practice law since 1993. My Board of Professional Responsibility number is 16179.

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

I am licensed to practice in the State of Tennessee. My license was issued in 1993 and is active. My BPR is 16179.

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).

Special Master/Judicial Clerk – Judge Hamilton Gayden
First Circuit Court Davidson County
June of 2000 – 2002 - part-time
July 2004 – November 2010 – part-time
November 2010 to present – full time

Law Office of Marian L. Kohl
February of 2000 to 2002

Attorney
Schulman, LeRoy and Bennett
Nashville, TN
1995 – 2000

Judicial Clerk – Judge Barbara Haynes
Third Circuit Court – Davidson County, Nashville, TN
1993-1995

Property Manager
Renewal Properties
Buffalo, NY
1998 to 1990

As the property manager, I was responsible for all aspects of the property such as marketing and rental of units, collection of rents, managing a staff of four, qualification of tenants under HUD guidelines, addressing any tenant issues and payment of all invoices.

Leasing Director
Lincoln Property Company
Nashville, TN
1988-1989

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 had my second child in June of 2002. I was on bed rest during part of my pregnancy and was not able to continue with my private practice. I went back to work for Judge Gayden in September of 2002, but decided that I wanted to spend as much time as possible with my young children. I did not actively practice from November 2002 to July 2004. I continued to accept a few contract jobs that involved research or drafting summary judgment motions. I also was appointed as a guardian ad litem on occasion.

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 currently serve as a Special Master/Judicial Clerk for Judge Hamilton Gayden. Judge Gayden will appoint me as a Special Master as needed on the weekly motion docket. I am responsible for preparing the motion docket and prepare a summary of the motions and conduct any additional research. I assist in drafting memorandum opinions. I also summarize any pre-trial motions and pre-trial briefs and assist as needed with pre-trial conferences. I assist as needed with voir dire and help prepare the jury instructions. I also interact with attorneys, pro se litigants and court personnel regarding any questions or issues that might arise regarding a motion or trial. I am also Rule 31 certified and conduct settlement conferences as needed.

First Circuit Court hears jury and non-jury civil cases. First Circuit may also hear a probate or domestic matter if another Judge has a conflict with the case.

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.

The main concentration of my practice with Schulman, LeRoy and Bennett was insurance defense which included automobile, property, policy defenses, and worker's compensation (defense and plaintiff). My other practice areas included construction, real estate, business organizations, personal injury (plaintiff), and domestic. The law firm was small and I was the only Associate for part of my time there – so on any given day, I might be asked to go appear in General Sessions Court on detainer warrants, help an existing client with a domestic matter, or even conduct a title search.

After, I worked at the firm for a couple of years; I was responsible for all aspects of my client's case. In addition, I have first chair bench and jury trial experience. I also argued at least two cases before the Tennessee Court of Appeals. Not all of my experience was in Davidson County, I practiced quite extensively among many counties surrounding Davidson County. I participated in mediation and Judicial settlement conferences with many of my cases. In addition as part of

my worker's compensation practice, I participated in benefit review conferences.

When I opened my own office, my case load was primarily personal injury cases, plaintiff's worker's compensation and contract defense worker's compensation cases. I also was a guardian ad litem and took appointments in Juvenile Court and Probate Court.

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

While I was in private practice, I had the pleasure of working on an unpublished Court of Appeals case, *GRE v. Reed*, 1999 WL 548498 (Tenn.Ct.App.) This was a case of first impression in Tennessee involving liability insurance coverage and an intentional act.

While working in First Circuit Court, I worked extensively on *Flax v. Daimlerchrysler Corporation*, 272 S.W.3d 521 (2007) which addressed punitive damages in Tennessee. In addition, I worked extensively with Judge Gayden on *Davis v. McGuigan*, 325 S.W.3d 149 (2010).

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

I am a Rule 31 listed Mediator. I am often appointed as a Special Master by Judge Gayden to hear motions. Typically I will hear motions involving discovery disputes, scheduling order disputes, motions for default or to dismiss for failure to prosecute and slow pay motions.

One case of significance that I was involved in as a Special Master was the *In Re:NHC Nashville Fire Litigation* in Third Circuit Court for Davidson County bearing Case No. 03-MD1. I was appointed as a Special Master to review documents from an insurance file to determine if any of the documents should be disclosed to the Plaintiff. I was appointed in September of 2006. The case was significant as it involved the litigation surrounding a fire and the resulting injuries and deaths at a Nashville nursing home.

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

I have been appointed as a guardian ad litem on numerous occasions to determine if a settlement

was in the best interest of a minor child or to determine if a request for a disbursement from a minor's fund was in the best interest of the minor child. In addition, I have served as a guardian ad litem in Probate Court to determine if a Conservator should be appointed to make decisions in the case of diminished mental capacity. Also, I was appointed as a guardian ad litem in cases involving child custody issues.

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

N/A

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

I applied in February of 2008 for the vacancy in Fifth Circuit Court for Davidson County, Nashville, TN. The meeting of the Judicial Selection Commission was March 12, 2008. My name was not submitted to Governor Bredesen for consideration.

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.

University of Alabama at Tuscaloosa – 1983 to 1984

University of Tennessee at Knoxville – 1984 to 1987 – BA in Public Administration

University of Akron School of Law – 1990 to 1992 - JD 1993

- *Akron Law Review*
- Top 10% of first year class
- Class rank – 31 out of 155 students
- Research assistant – Associate Dean Aynes

Vanderbilt School of Law – Visiting Student – 1992 to 1993.

PERSONAL INFORMATION

15. State your age and date of birth.

46 years old - March 23, 1965

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

I was born in Nashville, TN and except for my first year of college at the University of Alabama, I lived in Tennessee until I married in 1989. We moved back to Nashville in 1992 and I have resided continuously in Nashville, Tennessee since 1992.

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

I have resided continuously in Davidson County since 1992.

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

Davidson County

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

N/A

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

No

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

No

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

No

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

No

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

No

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

No

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

Sequoia Swim Club – Board Member – 2008 to 2011

Belle Meade Highlands Neighborhood Association – President 2005 to 2008

Sustainer Junior League of Nashville

Girl Scouts of Middle Tennessee – Brownie Troop Leader

Member Cathedral of the Incarnation

Volunteer at Overbrook School

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

N/A

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.

Nashville Bar Association

Lawyers' Association for Women

I would also like to point out that I have in the past been a member of the Tennessee Bar Association and Tennessee Lawyers' Association for Women. I was also very involved in LAW and Nashville Bar Association and served as a chair of the program committee for LAW. While my children were young, I dedicated myself to their activities and let the memberships lapse. I plan in the future to be much more actively involved in these bar associations.

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.

N/A

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

N/A

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.

While I have been involved in teaching CLE seminars, I have not been involved in any in the last five years.

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.

I applied for the Clerk and Master position for Davidson County, Tennessee in 2003. The position is appointed by the Davidson County Chancellors.

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

N/A

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.

Pre-trial Brief and Supplemental Pre-trial Brief – *GRE Insurance Company v. Reed*; Chancery Court for Coffee County. This is 100% my own work product.

Report from Special Master – *Flippen v. Calvin*, Third Circuit Court Davidson County. This is 100% my own work product.

Memorandum Opinion – *Sree v. Champaneria* – First Circuit Court Davidson County.

Memorandum Opinion – *Sanders v. Mt. Juliet Health Care Center* – First Circuit Court Davidson County

The Memorandum Opinions reflect my work that has been reviewed by Judge Gayden.

ESSAYS/PERSONAL STATEMENTS

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

I am seeking this position because I find it very challenging to hear each side or position, research the law if needed and render a decision. First Circuit Court recently had the privilege of hearing two long jury cases back to back. The jury verdict came back on a two week medical malpractice case as we were hearing motions in limine for the 7 day slip and fall that was to start that Monday. I can truly say that I have not felt that challenged and energetic in a long time. I was heavily involved in researching, and summarizing the motions in limine, voir dire, and jury instructions. I sat in Court during the trials and I silently ruled in my mind to every motion and objection. I am ready now to step up and actually be the one to make the decisions.

I feel that I also have the experience, personality and common sense necessary to be a successful Judge. You might not always make everyone happy, but I truly believe that you can disagree with someone's position and at the same time be respectful to that party.

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)*

While a practicing attorney with Schulman, LeRoy and Bennett, I accepted pro bono assignments. Also, in serving as a guardian ad litem, I have chosen a couple of times to not charge a fee when the circumstances warranted or charge a nominal fee. Now, that I work for the State Trial Courts, I am limited in my ability to accept pro bono assignments. We do encounter pro se litigants frequently and while always being careful not to give legal advice to them, I try to be as courteous and helpful as possible to them to make their experience with the judicial office as positive as possible.

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

I am very familiar with Third Circuit Court as I served as a Judicial Clerk in that Court from 1993 to 1995. Third Circuit Court is in Davidson County and is currently 1 out of 5 Circuit Courts that are assigned the same types of civil cases. First, Second, Third, Fifth and Sixth Circuit currently rotate weeks out of the month in which they hear non-jury and jury cases from General Session's appeals, personal injury cases such as those involving an auto accident or slip and fall, medical malpractice, contract disputes, worker's compensation and product's liability. The judges currently have a central assignment docket in which cases from all Circuits are placed on the non-jury or jury docket and heard on a rotating system. In addition, a weekly motion docket is heard on Friday. Davidson County also has two Courts which hear domestic matters – Fourth Circuit and Eight Circuit. Seventh Circuit hears all Probate matters and there

are six Criminal Judges. Davidson County Chancery Court has four Chancellors.

My selection would enable Third Circuit Court to continue with no disruption. With my experience in First Circuit Court, I would be able to immediately take over hearing cases on the non-jury and jury dockets and also rule confidently on any type of motion on the motion weekly motion docket. I am familiar with the types of issues and motions that typically appear on the weekly motion docket and have also been actively involved in the non-jury and jury cases.

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)*

I have been very involved in community activities. I am very involved in all of my children's activities. I have been a frequent room mother at Overbrook School, a member of the Annual Fund Committee for Overbrook School and also volunteered at various athletic events such as cross-country. I also got involved in Girl Scouts with my oldest daughter and was an active volunteer with her troop. I helped start a Girl Scout Troop for my youngest daughter and am currently the Brownie Troop Leader for Troop 3106 of Middle Tennessee.

I have also been actively involved in Sequoia Swim Club. I was a Board Member from 2008 to 2011. I also have been an active volunteer for the swim team.

I have also been actively involved in my neighborhood association, serving as president from 2005 to 2008 and was instrumental in working with our council person to downsize the zoning for our neighborhood.

My husband and I also financially support various community organizations.

Now that my girls are older and I work full time, I do not volunteer at their schools and activities as much as I did in the past, but I will continue to volunteer as my work schedule allows. I also plan to be involved in other community activities to the extent it would not be a conflict with the Code of Judicial Conduct.

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

I am a Nashville native and started working at my father's law office doing filing in the legal library and making the courthouse run to file documents before I could drive. I always wanted to be an attorney. I was very fortunate to be hired by Judge Barbara Haynes upon graduation from law school as the Judicial Clerk for Third Circuit Court. Judge Haynes became a special mentor

to me – always believing I could achieve goals that I might not initially have pursued. Judge Haynes calls all of her Judicial Clerks “Junior Judges” and that is truly how she treated me. She sat down with me and we discussed the motion docket, legal issues of interest on the motion docket and issues in trials. I always felt as if she valued my research and opinions.

After watching the attorneys in Court, I could not wait to get into private practice, but my time with Judge Haynes made me want to potentially pursue a judicial position in the future. My experience in First Circuit Court as a Special Master has only increased my interest and desire to pursue a judicial position.

I am a hard worker, pick up easily on difficult legal issues, can think quickly on my feet and am pretty much a level headed, calm and patient individual. I am the friend and colleague that people call to get an honest, well thought out opinion on an issue or problem.

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)*

I will agree to uphold the law even if I disagree with the substance of the law. I believe it is the job of the Trial Judge to rule based upon the existing statutes, rules and case law.

An example I might give from private practice would be in my practice with insurance defense and while the insured is your client, the insurance company is the one that is paying your bill. I had to many times keep this in perspective and make the decision that was best for my true client, the insured.

One example I could give in my experience as a Special Master would be working with pro se litigants and the difficulty in the expectation that they be aware of the rules and law. It is difficult to dismiss a pro se litigant’s case for failure to prosecute or failing to comply with a procedural requirement. In these situations, while having compassion, you must follow the law and be fair to both sides and not let your emotions make your decision for you.

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.

<p>A. Judge Hamilton Gayden First Circuit Court 502 Metropolitan Courthouse Nashville, TN 37201 615-862-5901</p>
<p>B. Tony L. Grande Executive Vice President and Chief Development Officer Corrections Corporation of America Nashville, TN 37215 615-263-3000</p>
<p>C. Robert Mendes MGLAW PLLC 2525 West End Avenue, Suite 1475 Nashville, TN 37203 615-846-8000</p>
<p>D. Barbara Perutelli Schulman, LeRoy & Bennett 501 Union Street, Suite 701 Nashville, TN 37219</p>
<p>E. Sharon Huber Director of Development – Overbrook School 4210 Harding Road Nashville, TN 37205 615-383-3230 Ext. 529</p>

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 Third Circuit Court for Davidson County 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: October 30, 2011.



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

WAIVER OF CONFIDENTIALITY

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

Marian L. Kohl

Type or Printed Name

Marian L. Kohl

Signature

October 30, 2011

Date

16179

BPR #

IN THE CHANCERY COURT FOR COFFEE COUNTY, TENNESSEE
AT MANCHESTER

GRE INSURANCE COMPANY,)	
)	
Plaintiff,)	
)	
v.)	NO. 96-284
)	
DOUGLAS KEITH "RON JON" REED,)	
CHRISTOPHER LORANCE, WILLIE)	
LORANCE, and JERRY A. JONES,)	
)	
Defendants.)	

PLAINTIFF'S PRE-TRIAL BRIEF

INTRODUCTION

This case involves a declaratory action filed by GRE Insurance Group in regard to a policy of insurance. GRE Insurance Group has denied coverage on the basis that the actions of the permissive driver, Douglas Keith "Ron Jon" Reed, were intentional and therefore coverage is excluded in this case under the intentional acts exclusion.

FACTS

The policy of insurance at issue in this case provides, under Part I of Liability Coverage on page 3, under Exclusion: "We do not provide liability coverage for any person: (1) who intentionally causes bodily injury or property damage." Defendants Christopher Lorange and Willie Jean Lorange were the owners of a 1987 Hyundai Excel which was involved in an accident at issue in a civil case, being number 27-781 in the Circuit Court for Coffee County. On June 11, 1995, Jerry Jones was sitting on a bridge (Complaint of Jerry Jones, Case No. 27-781). Ron Jon Reed deliberately ran right into Mr. Jones with his vehicle (Complaint of Jerry Jones). On the evening of the incident, Ron Jon Reed told Christopher Lorange that he had someone he wanted to talk to down the road (Christopher Lorange depo., p. 9). Ron Jon Reed, as they approached Jerry Jones, got out of the vehicle to talk to Jerry Jones (Christopher Lorange depo., p. 12). They talked for approximately 15 minutes. The car, during this time, was facing Jerry Jones with the headlights on (Christopher Lorange depo., p. 13). After they finished talking, Ron Jon Reed got back into the vehicle (Christopher Lorange depo., p. 13). Ron Jon Reed put the

vehicle in reverse and he backed up a little ways (Christopher Lorange depo., p. 13). Ron Jon Reed then put the car in drive and ran over Mr. Jones (Christopher Lorange depo., p. 13). Ron Jon Reed did not stop after he ran over Jerry Jones (Christopher Lorange depo., p. 14). As the Court is well aware, attempts have been made to depose Jerry Jones, who is currently incarcerated at the Southeastern Tennessee State Regional Correctional Facility in Pikeville, Tennessee.¹ Requests to Admit were propounded to Douglas Keith "Ron Jon" Reed by certified mail, return receipt requested. The return receipt demonstrates that Ron Jon Reed received the Requests to Admit on August 27, 1997. Therefore, pursuant to Tennessee Rule of Civil Procedure 36.01, these Requests to Admit are deemed admitted against the defendant, Douglas Keith "Ron Jon" Reed. In the Requests to Admit Ron Jon Reed admits that he and Jerry Jones argued over money which Jerry Jones owed to Ron John Reed. Additionally, Ron Jon Reed admits that he intentionally ran into Jerry Jones with the vehicle causing injury to Jerry Jones. Ron Jon Reed also admits that he realized that his actions would cause serious bodily injury to Jerry Jones. (Requests to Admit with a copy of the certified mail return receipt are attached hereto.) Douglas Keith "Ron Jon" Reed pled guilty to aggravated assault as a result of the incident of June 11, 1995. (Certified copy of judgment attached to memorandum in support of motion for summary judgment previously filed in this suit.)

ARGUMENT

Pursuant to the insurance policy at issue, liability coverage is not provided for one who intentionally causes bodily injury or property damage. Pursuant to Tennessee law, in order for a court to find that an intended or expected acts exclusion applies in an insurance policy it must be established that the insured intended to act and also intended or expected that injury would result. Tennessee Farmer's Mut. Ins. Co. v. Evans, 814 S.W.2d 49 (Tenn. 1991). The intent may be actual or inferred from the nature of the act and the accompanying reasonable foreseeability of harm. Evans, at 55. In the case of Allstate Ins. Co. v. Merritt, 772 S.W.2d 911, 912 (Tenn.App. 1989), the Court of Appeals

¹Attorneys of record traveled to Wartburg, Tennessee, to depose Mr. Reed and he refused to respond to any questions.

stated that the main issue in an intentional acts exclusion is not whether the insured intentionally fired a weapon but whether the insured reasonably expected or intended the actual injury inflicted to result from the intentional act. In the case at hand, Douglas Reed has admitted that his actions were intentional. (See Requests to Admit propounded to Douglas Keith "Ron Jon" Reed). Also, Douglas Reed pled guilty to aggravated assault as a result of this automobile accident. A person commits a criminal assault under Tennessee law "when a person (1) intentionally, knowingly or recklessly causes bodily injury to another." T.C.A. § 39-13-101. A person commits an aggravated assault when a person "commits an assault as defined in T.C.A. § 39-14-101 and (a) causes serious bodily injury to another." Ron Jon Reed has admitted that his actions were intentional. (See Request to Admit). Pursuant to Tennessee Rule of Evidence 803(22), evidence of a final judgment adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year to prove any fact essential to sustain the judgment is not excluded by the hearsay rule. This rule permits criminal judgments to be admissible as evidence in a civil case. (See State of Tennessee v Eldridge, 1997 Tenn. Crim. App. Lexis 441). Aggravated assault is a crime which would be punishable by more than one year. Therefore, pursuant to Tennessee Rule of Evidence 803(22), the guilty plea to aggravated assault would be admissible in this civil case in order to prove any fact essential to sustain the judgment.

If the intentional acts exclusion applies, it would apply to any liability of any insured under the policy. The purpose of intentional acts exclusions is to prohibit the use of insurance to provide indemnity for civil tort liability that results from uninsureds intentional wrongdoing. Tennessee Farmer's Mut. Ins. Co. v. Evans, 814 S.W.2d 49, 54 (Tenn. 1991). If you did not have such exclusionary language in a policy, then an insurance company could face high risk and unknown liability for intentional acts of insureds. As the court quotes in the Evans case "otherwise a liability policy could be used as a license to wreck havoc at will." Id. In the civil complaint bearing case number 27781 styled Jerry A. Jones v. Douglas Keith "Ron Jon" Reed, Christopher Lorange and Willie Lorange, ¶11 provides as follows:

"Plaintiff, Jerry A. Jones, alleges that the defendants, Christopher Lorange and Willie Lorange, are liable for the

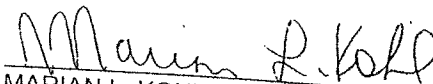
negligent acts and/or admissions of defendant Douglas Keith "Ron Jon" Reed pursuant to the following statute of the State of Tennessee: Section 55-10-311(a) - prima facie evidence of ownership of automobile in use in owner's business. (A) In all actions for injury to persons and/or to property caused by the negligent operation or use of any automobile, auto truck, motorcycle or other motor propelled vehicle within this state, proof of ownership of such vehicle shall be prima facie evidence that the vehicle at the time of the cause of action sued on was being operated and used with authority, consent and knowledge of the owner in the very transaction out of which the injury or cause of action arose, and such proof of ownership likewise shall be prima facie evidence that the vehicle was then and there being operated by the owner, or by the owner's servant, for the owner's use and benefit and within the course and scope of the servant's employment."

The plaintiff would submit that the coverage issue in this questions cannot be split among the insureds. The liability of Christopher Lorange and Willie Lorange is premised upon T.C.A. § 55-10-311(a). Therefore, if there is no coverage for Douglas Keith "Ron Jon" Reed for intentional acts, then there would be no coverage for Christopher Lorange and Willie Lorange. The plaintiff would submit that it is clear from the policy provision that intentional acts are excluded. The plaintiff would further submit that it is clear just from the nature of Ron Jon Reed's act itself that he intended to cause bodily injury or expected that injury would result in his actions to Jerry Jones. In addition, Ron Jon Reed admits in the Requests to Admit that his actions were intentional. Plaintiff also submits a certified copy of the judgment in which Ron Jon Reed pled guilty to aggravated assault.

The plaintiff would respectfully request that the Court find that there is no coverage in this case and find in favor of the plaintiff, GRE Insurance Group.

Respectfully submitted,

SCHULMAN, LeROY & BENNETT, P.C.



MARIAN L. KOHL, BPRN 16179
Attorney for Plaintiff
Suite 701, Five Hundred One Union Building
P. O. Box 190676
Nashville, TN 37219-0676
(615) 244-6670

IN THE CHANCERY COURT FOR COFFEE COUNTY, TENNESSEE
AT MANCHESTER

GRE INSURANCE COMPANY,)
)
 Plaintiff,)
)
v.) NO. 96-284
)
DOUGLAS KEITH "RON JON" REED,)
CHRISTOPHER LORANCE, WILLIE)
LORANCE, and JERRY A. JONES,)
)
)
 Defendants.)

PLAINTIFF'S SUPPLEMENTAL TRIAL BRIEF

INTRODUCTION

The declaratory action in this case was heard on October 1, 1997. At that time the Court granted permission for parties to submit supplemental briefs in this case.

ISSUE

Is the duty of GRE Insurance Group to defend Christopher and Willie Lorange a separate and distinct duty, or is that duty derivative of the duty to defend Ron Jon Reed under the policy?

ARGUMENT

Jerry Jones, as plaintiff, filed a complaint in the Circuit Court for Coffee County, Tennessee, on September 29, 1997, alleging, among other things, negligent entrustment on the part of Christopher and Willie Lorange and also liability under T.C.A. § 55-10-311(a) for the acts and/or omissions of Ron Jon Reed. GRE Insurance Group would argue that the intentional acts exclusion contained in the policy would exclude any coverage to the Lorange defendants for imputed negligence under T.C.A. § 55-10-311(a). Pursuant to T.C.A. § 55-10-311(a), the negligence of the Lorances rests upon the negligence of defendant Ron Jon Reed. Therefore, if the intentional actions of Ron Jon Reed exclude coverage, there would also not be coverage to the Lorances for liability pursuant to T.C.A. § 55-10-311(a).

The elements of negligent entrustment are (1) entrustment of a chattel, (2) to a person incompetent to use it, (3) with knowledge that the person is incompetent, and (4) that it is the proximate cause of injury or damage to another. Nichols v. Atnip, 844 S.W.2d 655 (Tenn.App. 1992). The plaintiff, GRE Insurance Group, would also argue that under the test for negligent entrustment the claim against Christopher and Willie Lorange would not occur but for the intentional act of Ron Jon Reed. Negligent entrustment is based upon injury or damage to another which is proximately caused by the incompetence of another person. The triggering element would be the misuse of the personal property. Whether or not the entrustment was negligent is not the deciding factor because no cause of action could arise without an injury caused by the reckless use of the instrumentality. GRE Insurance Group would argue that you must look to the underlying cause of the injury to determine coverage and not to the specific theory of liability alleged in the complaint. Counsel for GRE Insurance Group has not found case law in Tennessee on point on this particular issue.

In researching the issue of coverage of other insureds for negligent entrustment, counsel for the plaintiff found the case of Allstate Ins. Co. v. Freeman, 443 N.W.2d 734, (MI. 1989). In the Freeman case the Court found that "an insured" unambiguously refers to all or any insureds under the policy at issue. In the Freeman case, suit was brought against Marshall and Alondo Freeman for a shooting incident in which Alondo shot Mary Helen Kelly. Allstate v. Freeman, 443 S.W.2d 734, 746 (MI. 1989). Kelly brought suit against Marshall and Alondo Freeman, most specifically filing a claim against Marshall Freeman for negligent entrustment of the firearm. The exclusion in the case provided as follows:

"Exclusions - Losses We Do Not Cover.

1. We do not cover any bodily injury or property damage which may reasonably be expected to result from the intentional or criminal acts of an insured person or which is in fact intended by an insured person."

Freeman at 748.

In the Freeman case, Marshall Freeman argued that under the policy Allstate has a separate and distinct duty to cover each insured under the policy and its duty to defend depends solely upon his conduct. The Supreme Court of Michigan held that Allstate did

not have a duty to defend Marshall Freeman. Freeman at 755. The Court determined that any duty to defend Marshall Freeman was solely derivative of the duty to defend Alondo Freeman under the policy. Freeman, 443 N.W.2d 734, 750 (Mich. 1989). The Court determined that you must look to the underlying cause of the injury to determine coverage and not to the specific theory of liability. Id. GRE Insurance Group would state to the Court that policy considerations also require a decision similar to that reached in the Freeman case to be reached in the case at hand. In Tennessee Farmer's Mutual Ins. Co. v. Evans, 814 S.W.2d 49, 54 (Tenn. 1991) the Court stated that:

"There is agreement however that the purpose of such exclusionary language is to prohibit the use of insurance to provide indemnity for civil tort liability that results from an insured's intentional wrongdoing. Otherwise, a liability policy could be used as a license to wreak havoc at will."

GRE Insurance Group would submit that there is no reason to have an intentional acts exclusion if you are going to allow other insureds under the policy to have coverage. GRE Insurance Group would assert that in the case at hand the policy provision is not ambiguous. It specifically provides that liability coverage will not be applied to any person who commits an intentional act. GRE Insurance Group would argue that it is clear under the policy that there will not be any coverage for any intentional act. Therefore, there is no coverage per se for any insured under the policy.

This issue has also been addressed in the case of Catholic Diocese of Dodge City v. Raymer, 840 P.2d 456 (Kan. 1992). In that case the Court determined that there was coverage to the parents against whom was alleged negligent entrustment. The Court made this finding, though, only under the specific facts of that case. The policy in that case had a specific provision that provided as follows:

"Conditions.

2. Separate Insurance. This insurance applies separately to each insured. This condition does not increase our limit of liability for any one occurrence." Raymer at 462.

In Raymer, the Court analyzed in its decision the Allstate Ins. Co. v. Freeman case. However, the Court found that because of that specific provision in the policy at issue there was separate coverage because of the severability of interest clause. Raymer at 462. However, in the case at hand there is no such clause.

Additionally, in State Farm Fire and Cas. Co. v. Davis, 612 So.2d 458 (Ala. 1993), the Court addressed the issue of coverage by a co-insured under an intentional acts exclusion. In Davis, Jerry and Delores Davis were sued based upon allegations of sexual abuse and molestation by Jerry Davis. Davis at 459. The complaint further alleged that such abuse took place in the Davis' home with the knowledge of Delores Davis. Id. Delores Davis argued that she should be offered coverage because she did not commit the intentional act, but rather was accused of negligence. The Court found that "an insured" in the exclusion referred to "all insureds" and excluded coverage. Davis at 466.

The usage of "any person" in the intentional acts exclusion clearly refers to all insureds. Several cases from other jurisdictions have analyzed the usage of articles. In Allstate Ins. Co. v. Foster, 693 F.Supp. 886, 889 (D. Nev. 1988), the Court addresses the usage of indefinite articles. The use of "any" insured unambiguously excludes coverage of other insureds. Id. See, also, State Farm Fire and Cas. Co. v. Davis, 612 So.2d 458 (Ala. 1993) (use of "an insured" refers to all insureds under the policy); Johnson v. Allstate Ins. Co., 687 A.2d 642, 645 (ME. 1997) ("an insured" or "any insured" in an exclusionary clause bars coverage for each insured under the policy). Public policy considerations require a finding in this case that "any person" excludes coverage for all insureds under the policy.

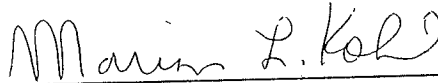
CONCLUSION

GRE Insurance Group would ask the Court to follow the Court's decision in the Michigan case of Allstate Ins. Co. v. Freeman and find that there is no coverage for any insureds under the intentional acts exclusion. GRE would further argue that under Tennessee law negligent entrustment is based upon the recklessness of the person permitted to use the vehicle. The incompetence of the person using the vehicle is the proximate cause of the injury or damage to another. In the case at hand, Ron Jon Reed's recklessness was the proximate cause of the injury or damage to Jerry Jones. Therefore, any liability of the Lorances is based upon the actions of Ron Jon Reed. Therefore, even though under Tennessee law the negligence of the entruster is not based upon the negligence of the driver, it still is derivative of the driver's actions. Therefore, GRE

Insurance Group would request the Court to find that there is no coverage per se for any intentional acts of any insured and that there is no coverage in the case at hand.

Respectfully submitted,

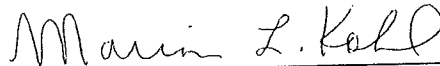
SCHULMAN, LeROY & BENNETT, P.C.



MARIAN L. KOHL, BPRN 16179
Attorney for Plaintiff
Suite 701, Five Hundred One Union Building
P. O. Box 190676
Nashville, TN 37219-0676
(615) 244-6670

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been via facsimile and by U.S. Mail, postage prepaid, to Christina Henly Duncan, Esq., attorney for defendant Jerry Jones, 100 North Spring Street, Manchester, TN 37355, and to John R. Colvin, Esq., attorney for defendants Christopher Lorange and Willie Lorange, 201 First Avenue N.W., First Avenue and High Street, Winchester, TN 37398, and by U.S. Mail, postage prepaid, to Mr. Douglas Keith "Ron Jon" Reed, defendant, at his last known address, Prison No. 136046, Southeastern Tennessee State Regional Correctional Facility, Route 4, Box 600, Pikeville, TN 37367, on this 10th day of October, 1997.



MARIAN L. KOHL

IN THE THIRD CIRCUIT COURT FOR DAVIDSON COUNTY,
TENNESSEE

NEENA WALKER FLIPPEN)	
)	
)	
)	
VS.)	NO. 90D-1244
)	93D-817
)	94D-1802
)	
CHRISTOPHER F. CALVIN)	

REPORT OF THE SPECIAL MASTER

This matter is before the Court upon a petition by Neena Beth Walker Flippen for contempt, to modify visitation, for temporary restraining order and for a drug screen test.

I.

OUTSTANDING MEDICAL AND HOME REPAIR BILLS

The first issue to be addressed is the outstanding medical and home repair bills. After carefully reviewing all of the bills submitted by the parties, the Special Master recommends that all such bills should be paid by Christopher Calvin for the following reasons:

The Defendant, Christopher Calvin, argues that the prescription drugs are

not included as medical bills. The divorce decree states that the defendant shall pay one-half (1/2) of any deductible or uncovered medical and or dental bills. The Special Master finds that the ordinary and usual meaning of medical bills includes prescription drugs. The Special Master also finds that medical bills includes bills for psychological expenses. The Defendant also requests an offset against the medical bills for overpayment of child support. Although it is conceded by the parties that the Defendant did overpay, he did so voluntarily and is not entitled to an offset. The Defendant also asserts that he has paid \$220.54 of the minor childrens' medical bills and is entitled to a credit for one-half (1/2) of this amount pursuant to the divorce decree. The Special Master has not been provided sufficient documentation to express an opinion on this claim. The Defendant also asserts that he should not be required to pay \$33.97 of the dental bills as this amount constitutes service charges on returned checks. The special master finds that the \$33.97 consists of interest charges for payment on account and that the defendant may not subtract \$33.97 from the amount he owes.

The Special Master expresses no opinion as to the past method of Neena Beth Flippen's submitting bills to Mr. Calvin. The Special Master recommends to the Court that any future bills be submitted within in fourteen (14) days of receipt of the bills.

The last bills to be considered are the home repair bills. The Special Master finds that none of the home repair bills submitted to the Court are over \$500.00.

Therefore, pursuant to the divorce decree the Defendant is not entitled to approve any of these home repair bills. The Defendant asserts that he has paid the Carter's Hardware, but the Special Master found no documentation of this in the materials submitted for consideration. The Special Master finds after a careful review of all receipts, that all are proper and recommends that the Defendant pay all outstanding home repair bills.

The total amount of outstanding bills due after a deduction of 3 payments of \$101.37 each is \$1628.40.

In conclusion, it is recommended that the Defendant, pursuant to the divorce decree, is responsible for paying this sum to the Plaintiff.

In order to facilitate the payment of these outstanding bills, the Special Master recommends that the Defendant make monthly payments of \$125.00 until the total amount is paid. It is also recommended that in the event payment is not received by the Plaintiff, the Defendant should be held in Contempt of Court.

II.

VISITATION

The next issue before the Court is visitation. The Plaintiff has questioned the capability of the Defendant to have visitation with the five (5) minor children. The Special Master recommends that the Defendant temporarily be allowed supervised visitation while the following conditions are met:

Mr. Calvin is to continue his treatment for depression; and

He is to undergo random drug testing.

Mr. Calvin was under the care of Dr. Daniel L. Friedman from January 13, 1994 to February 14, 1994. Dr. Friedman, in all candor, informed the Special Master that he had no knowledge of Mr. Calvin's mental state at the present, but that Mr. Calvin was to undergo follow-up treatment at Nashville Health Care Group - Mental Health Services. I spoke with a John Gerdes at the Nashville Health Care Group - Mental Health Services and Mr. Calvin had not been back there since a January 12, 1994 visit, the purpose of which was to refer him to Dr. Friedman. Therefore, the Special Master finds it necessary, and recommends, that Mr. Calvin continue his depression treatment before being awarded unsupervised visitation.

In addition, Dr. Friedman could not address any possible substance abuse problem. This issue simply was not addressed in his depression treatment. However, the Special Master is concerned about the positive result found in the July, 1993 drug test. The Special Master recommends to the Court that Mr. Calvin undergo random drug testing at times to be provided to Mr. Calvin's attorney. This random testing will most probably consist of no more than two (2) drug screenings. It is recommended that, as done previously, the drug testing occur at a Centra Care Clinic.

In the interim, while Mr. Calvin is completing the two (2) conditions set forth above, he should be allowed supervised visitation. It is hoped that the

attorneys will be able to choose a neutral zone for the visitation to occur and a neutral party to supervise the visitation. In the event an agreement cannot be reached - each party shall submit two (2) locations and two (2) neutral parties and the Court will choose a location and a neutral party. The Special Master recommends to the Court that Mr. Calvin be granted supervised visitation from 1:00 to 5:00 one afternoon every other weekend in accordance with his work schedule. In addition, Mr. Calvin shall be granted supervised visitation one weekday evening every other week in accordance with his work schedule. It is recommended that the attorneys work out the visitation schedule ahead of time in accordance with Mr. Calvin's work schedule.

III.

ATTORNEY'S FEES

Lastly, the Plaintiff has requested the payment of attorney's fees. The Special Master recommends that, in consideration of Mr. Calvin's overpayment of child support, each side should pay it's own attorney's fees.

The parties shall also split any outstanding court costs.

RESPECTFULLY SUBMITTED:

Marian L. Kohl
MARIAN L. KOHL
SPECIAL MASTER

CERTIFICATE OF SERVICE

I, hereby, certify that a copy of the foregoing was mailed to Mary Arline Evans, Attorney, 214 Third Avenue, North, Nashville, TN 37219; and to Carol L. Soloman, Attorney, 214 Second Avenue, North, Suite 400, Nashville, TN 37201 this 9th day of August, 1994.

Marian L. Kohl
MARIAN L. KOHL
SPECIAL MASTER

IN THE FIRST CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE AT
NASHVILLE

SREE, a Tennessee General)
)

Partnership, KRISHNALAL PATEL,)
)

SASHAN NATARAJAN, VIJAYCHANDRA)
)

M. PATEL, CHILAKAMMARI)
)

YESHWANT, MOHAMMAD GHANI,)
)

SUSHIL BAGRI and PRADEEP)
)

KAKKAD, Individually,)
)

Plaintiff,)
)

Vs.)
)

JACQUBHAI K. CHAMPANERIA,)
)

Defendant)
)

Case No.: 96C-3493

MEMORANDUM

This case is before this Court upon the Defendant's Motion to Dismiss based upon the affirmative defense of res judicata. The Motion to Dismiss presents the issue of waiver of the right to assert this affirmative defense. This case was filed in Circuit Court on September 25, 1996. The present Motion to Dismiss was filed on May 31, 2000 asserting the defense of res judicata for the first time. The case relied upon by the defendant in his Motion was filed on April 28, 1994 in Chancery Court, bearing case No. 94-

1270-I. The Chancery case was dismissed for failure to prosecute on September 24, 1996.

T.R.C.P. 12.08 provides as follows: "A party waives all defenses and objections which the party does not present either by motion as hereinabove provided, or, if the party has made no motion, in the party's answer or reply, or any amendments thereto," In addition, pursuant to T.R.C.P. 8.03, res judicata is specifically listed as an affirmative defense which shall be set forth affirmatively.

In the unpublished opinion, Chadwell v. White, 1996 WL 555228 (Tenn.Ct.App.), the Court of Appeals addresses this issue. In this case, the husband first raised the issue of res judicata upon appeal. The wife argued that because the husband failed to affirmatively plead this defense, it was waived. The court found that pursuant to T.R.C.P. 8.03 and T.R.C.P. 12.08, the failure to raise the defense of res judicata in a responsive pleading will act as a waiver of a party's ability to raise that defense. However, pursuant to T.R.C.P. 15.02, an issue may be tried by implied consent. In this case, the issue of res judicata came up through testimony at the trial and there was no objection made.

Also, in the unpublished opinion of Brooks v. Quam, 1996 WL 99794 (Tenn.Ct.App.), Judge Koch in a concurring opinion provides a complete analysis of T.R.C.P. 8.03. Koch states that Tennessee courts have consistently held that affirmative defenses not properly raised are waived. See Thompson, Breeding, Dunn, Creswell & Sparks v. Bowlin, 765 S.W.2d 743, 744 (Tenn.Ct.App.1987); Barton Scientific, Inc. v. Moss, 542 S.W.2d 375, 379 (Tenn.Ct.App.1975). However, Koch notes that the Tennessee Supreme Court has pointed out that the "failure to specifically plead an affirmative defense does not result in a waiver of the defense if the opposing party is given fair notice of the defense and an opportunity to rebut it". Sands v. State, 903 S.W.2d 297, 299 (Tenn.1995) (statute of limitations case). In the Brooks case, fair notice of the defense came from deposition testimony. Koch notes that trial courts have broad discretion over amendments to pleadings. Trial Courts should permit parties to amend their pleadings in the absence of undue delay, bad faith or prejudice to the nonmoving party. The mere possibility that the defense included in the amended answer might succeed is not the type of prejudice that requires the denial of the motion to amend. Brooks, at 7.

However, the case of Thompson, Breeding, Dunn, Creswell & Sparks v. Bowlin, 765 S.W.2d 743 (Tenn.Ct.App. 1988), seems to indicate that

the requirement is mandatory. The Court in that case held that, "If an affirmative defense is not set forth in an original pleading, it is waived". Thompson at 744. In that case, the defendant failed to raise any affirmative defenses in his answer. At the trial, the Chancellor allowed testimony relating to an affirmative defense over the objection of the plaintiff. The Court of Appeals found that since the defendant failed to raise these defenses in his answer, he waived them. See Also, Barrton Scientific, Inc. v. Moss, 542 S.W.2d 375 (Tenn.Ct.App. 1975) (In this case, Motion to Amend to assert Statute of Frauds filed after proof concluded and case taken under advisement. Court found trial judge correct in refusing to allow amendment. Court not clear on whether defense had to be raised in first responsive pleading or waived.).

After much research, there does not appear to be a definitive answer. The rule itself and the Thompson, Breeding case seems to indicate a mandatory assertion of all affirmative defenses in the first responsive pleading. However, other unpublished case law seems to indicate that under certain circumstances, an amendment would be allowed prior to trial. In addition, the fairly recent Tennessee Supreme Court opinion of Sands v. State, indicates that in Tennessee it is well settled that the failure to specifically plead an affirmative defense does not result in a waiver if the opposing party

is given fair notice of the defense and an opportunity to rebut it. The Court found that the purpose of specific pleading is to prevent a party from raising a defense at the last moment possible and thereby prejudicing the opposing party's opportunity to rebut the defense. See Also, American Air Filter v. Industrial Decking and Roofing, 82 F.R.D. 681 (E.D. Tenn. 1979), which contains a nice description of Tn state law in relation to T.R.C.P. 8.03. The case notes that precisely when an affirmative defense must be pled is unclear. The Court discusses the fairly liberal view of the Tennessee courts in committing the matter to the discretion of the trial judge. The Court notes that Tennessee has found that a delay of 3 years was too long to assert a defense of statute of limitations defense. Wilson v. Wilson, 70 Tenn. 17 (1878). Therefore, it seems that while the language in the rule is mandatory, the Trial Court has discretion to allow an amendment after the first responsive pleading is filed.

The defendant in its response to plaintiff's Memorandum in Opposition to Defendant's Motion to dismiss pursuant to Rule 12.02(6) has alternatively asked to be allowed to amend the pleadings to assert as an affirmative defense the doctrine of res judicata. The defendant concedes that the factual basis for supporting the defense of res judicata requires a consideration of matters outside the

record and suggests that the Motion to dismiss be treated as a motion for Summary Judgment pursuant to T.R.C.P. 56.

The Court rules that the defendant be allowed to amend his answer to assert the affirmative defense of res judicata. The Court will take the issue of res judicata under advisement pending factual determinations and legal conclusions upon the trial of the cause.

Dated this 21st day of July, 2000

Hamilton V. Gayden, Jr., Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been sent to Phillip L. Davidson, Esq., 2400 Crestmoor Road, Suite 107, Nashville, TN 37215 and to Mike Morgan, Esq. 200 Fourth Avenue North, Third Floor, Noel Place, P.O. Box 198985, Nashville, TN 37219.

**IN THE FIRST CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE
AT NASHVILLE**

**JAY SANDERS, by next friend MARY)
SANDERS AND MARY SANDERS)**

Plaintiffs,)

v.)

Case No.: 03C-1236

**MT. JULIET HEALTH CARE)
CENTER, INC. and JOHN A.)
WILLIAMS, M. D.,)**

Defendants)

MEMORANDUM OPINION

Dr. John William's motion for summary judgment came before this Court on March 4, 2005. This is a medical malpractice action. Dr. Williams is a medical consultant at Mt. Juliet Health Care. The Plaintiff alleges that Dr. Williams failed to evaluate the Plaintiff's condition and monitor his potassium level. The second time the plaintiff was readmitted to Mt. Juliet Health Care, the transfer order from Summit required a basic metabolic panel and a complete blood count to be taken every week and continuing for the next 3 weeks. In addition, Dr. Ebenshade ordered the nursing staff on April 17 to draw blood for a complete metabolic panel and fax the results to Dr. Ebenshade. Dr. Williams signed off on the order, but the nursing staff at Mt. Juliet failed to perform the complete metabolic panel.

The plaintiff in the response to the motion for summary judgment relies upon the affidavit of Dr. Ebenshade. Dr. Ebenshade is the pulmonary specialist who ordered the complete metabolic panel be taken at Mt. Juliet Health Care.

The defendant, John Williams, M.D. argues that Dr. Ebenshade's affidavit fails to meet the legal standard for expert testimony. Specifically, Dr. Williams argues that Dr. Ebenshade fails to set forth how he is familiar with the standard of care of a medical director of a nursing home in Nashville, Tennessee. Next, Dr. Williams argues that the affidavit fails to set forth how the alleged negligence of Williams caused an injury to Plaintiff. Last, Dr. Williams argues that the Dr. Ebenshade's affidavit is untrustworthy pursuant to T.R.E. 703.

In Tennessee, expert testimony is required to establish the standard of care, a deviation from that standard of care and proximate causation in all medical malpractice actions except where the alleged negligence is within common knowledge of laymen. *Kennedy v. Holder*, 1 S.W.2d 670 (Tenn. Ct. App. 1999). Where the moving party has made a properly supported motion for summary judgment, the burden is upon the Plaintiffs to demonstrate by expert proof that genuine issues of material fact exist, or summary judgment will be granted. *Byrd v. Hall*, 847 S.W.2d 208 (Tenn. 1993).

After reviewing the briefs filed by both parties and an examination of Dr. Ebenshade's affidavit and deposition, the Court is of the opinion that the Plaintiff has not met their burden of proof in demonstrating that there is a genuine issue of fact warranting a trial. The Plaintiff's expert by his own deposition testimony admits that there was probably nothing different from how Dr. Williams and his office treated the elevated potassium levels. (Ebenshade dep. P. 80-81).

Dr. Ebenshade admits in his deposition that his only experience in providing actual care in a nursing home was only for 6 months in a nursing home in Wilson County 8 to 10 years ago. Dr. Ebenshade also admits in his deposition that the standard of care

for a nursing home might be different than that of an internist. (Ebensshade dep. P. 84). Thus, it appears to the Court that Dr. Ebensshade fails to set forth how he is familiar with the standard of care of a medical director for a nursing home.

Dr. Ebensshade also admits in his deposition that he is not saying Dr. Williams is directly responsible. "Maybe it was the nursing home's fault for not ordering the appropriate lab for him to review." (Ebensshade dep. P. 71) He also testifies in his deposition, "There were lapses in the medical care at the facility and he{Dr. Williams} was the attending physician. As to whether that constitutes personal malpractice versus error in the nursing home, that's debatable." (Ebensshade dep. P. 73). He further admits that there was probably nothing different from how Dr. Williams and his office treated the elevated potassium levels. Based upon the deposition testimony of Dr. Ebensshade, the Court cannot find a causal link between Dr. William's actions and the alleged injury to Plaintiff.

Last, the defendant argues that the affidavit is untrustworthy pursuant to T.R.E. 703. Dr. Ebensshade states in his affidavit that he saw the Plaintiff extensively between March and June 2002. However, in his deposition he admits the only time he personally saw him was in the hospital during his admissions. Dr. Ebensshade's PA saw him on the other occasions. In addition, Dr. Ebensshade admits in his deposition that when he did his affidavit, he was not aware that Dr. Williams had ordered the lab test and the nursing home staff failed to carry out the order.

Based upon the above analysis of Dr. Ebensshade's affidavit and deposition, the Court grants the defendant, Dr. Williams' motion for summary judgment. The Plaintiff has failed to meet the burden of proof in demonstrating there is a genuine issue of fact

warranting a trial. The defendant, Dr. Williams will prepare an Order granting his motion for summary judgment.

ENTERED this _____ day of April, 2005.

JUDGE HAMILTON GAYDEN

CERTIFICATE OF SERVICE

I hereby certify that a true and correct exact copy of the foregoing has been mailed to:

Kent M. Weeks
Weeks, Anderson & Baker
2021 Richard Jones Road, Suite 350
Nashville, TN 37215

Thomas A. Wiseman
Amy D. Hampton
Gideon & Wiseman
1100 Noel Place
200 Fourth Avenue, North
Nashville, TN 37219-2144

DEPUTY CLERK