The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: Keely N. Wilson Nanney

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(including county)

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(including county)

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INTRODUCTION

The State of Tennessee Executive Order No. 54 hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website www.tncourts.gov). The Council requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit your original, hard copy (unbound), completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with your electronic or scanned signature. The digital copy may be submitted on a storage device such as a flash drive that is included with your hard-copy application, or the digital copy may be submitted via email to ceesha.lofton@tncourts.gov.

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

I am presently employed at Rainey, Kizer, Reviere & Bell, PLC in Jackson, Madison County, Tennessee. I have been a partner at the firm since 2009.

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

I was licensed to practice law in October 2000. My Board of Professional Responsibility Number is 021083.

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 and have been licensed since October 2000. My license is currently active.

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

No, I have never been denied admission to, suspended or placed on inactive status.

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).

2000-2008 (Associate) 2009 – Present (Partner), Rainey, Kizer, Reviere & Bell, PLC. Jackson, Madison County Tennessee.

I have been employed continuously with Rainey, Kizer, Reviere & Bell, PLC in Jackson, Tennessee since I graduated law school in 2000. I was originally employed as an associate attorney and assigned to the tort litigation division with an emphasis on insurance defense. I became partner at Rainey, Kizer, Reviere & Bell, PLC in 2009. My practice focuses on insurance defense, primarily fraud, contractual and bad faith claims, representing insureds and companies in property damage claims, personal injury actions and premises liability in state and federal court. I represent insurance companies in first party actions with a focus on insurance

coverage issues. My practice also includes breach of contract issues for realtors, home purchasers as well as issues dealing with construction and workmanship issues.

I presently serve as the Chair of the Marketing Committee and a Member of the HIPAA Compliance Committee at the firm. I am a former member of the 401k Committee.

2014 – Present. University of Tennessee at Martin, Weakley County, Tennessee, Online adjunct professor.

I teach two upper division courses, Judicial Process and Paralegal Studies. The classes include instruction through interactive discussion, text book and research regarding federal and state judicial process, the legal profession and the litigation process from the filing of a lawsuit to the appeals process.

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.

N/A

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.

Presently, I am a partner with Rainey, Kizer, Reviere & Bell, PLC. My practice primarily focuses on all aspects of civil trial litigation in state court with an emphasis on insurance defense. This includes personal injury defense, including wrongful death actions, and property damage stemming from automobile accidents as well as premises liability actions for individuals, homeowners and businesses. My practice area also includes coverage disputes, coverage issues of all types of policies ranging from automobile, homeowners, renters and commercial general liability as well as rendering coverage opinions. My practice also includes representing plaintiffs and defendants regarding breach of contract for realtors, real estate transactions in general as well as construction and workmanship issues. My litigation practice involves all counties in Tennessee along with coverage issues and Examinations under Oath in the surrounding states of Kentucky, Georgia and Mississippi.

The percentage each area of my practice is as follows:

Personal Injury defense – 40 percent

Coverage Issues – 25 percent

Premise Liability defense – 20 percent

Breach of Contract Issues – 10 percent

Landlord/Tenant, Boundary Disputes – 5 percent

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

With regard to my range of experience, throughout my legal career I have practiced in over 40 counties in the State of Tennessee. I have had in excess of 100 general sessions trials and a multitude of bench trials in circuit and chancery court in which I was lead counsel. My jury trial experience has been mainly in West Tennessee, including Weakley, Madison, Obion, Carroll, Fayette, Shelby, Henderson, Henry, Benton and Crockett Counties. I have appeared and argued

in front of the Court of Appeals for the Western Section. These cases have been civil in nature. Due to the nature of my practice areas, my motion practice is significant. I have drafted and argued several Motions for Summary Judgment, primarily in premises liability cases, which were successful. From these cases, many have been appealed and I have drafted the appellate briefs or appropriate motions regarding new trials. I was also co-counsel on a very complex multi-district litigation in federal court involving fraud regarding a national insurance company which tailored its coverage to physicians. I am admitted to the United States District Court of Tennessee (Eastern and Western District) as well as the Sixth Circuit Court of Appeals in Cincinnati Ohio.

With regard to my personal work and work habits, I believe that in order to resolve an issue successfully, one must rely upon their own knowledge, work and research when possible. No matter what case or issue I am dealing with, my personal work ethic and practice follow that general procedure. If an issue is new to me, I research it so that I know the issue and the elements required for the case. If needed, I will ask another attorney or person that is more knowledgeable on the subject for assistance and guidance. I determine what the actual issues are in the case and then research and determine the requirements to either support or disapprove the same through statutes, regulations and precedent. I personally evaluate the file material and meet with my clients to determine the claim and allegations in general. I also personally meet with the witnesses and review all documents, contracts, photos or any aspect that needs to be investigated or evaluated. I then review the current applicable law that relates the issues in the litigation or dispute and propound discovery to determine the opposing counsel's proposed claims, theory and evidence. In my opinion, discovery is a very important part of a case and I personally read all medical records and all documentation provided as another's summary is not a substitute of your own interpretation of the same. After researching the issues and reviewing all documents, I then personally take and defend depositions of the parties, witnesses and experts, if applicable, and evaluate the potential for resolution if possible. I believe this is an integral part of the litigation process as one gains an insight to the deponent and can evaluate what type of witnesses he or she will make to a jury. If resolution is not possible, then I will prepare the case for trial based upon prior testimony, photos, statements, etc.

Mediations are obviously more frequent than when I first began practicing law. Drafting mediation statements allow me to evaluate the case in an objective impartial manner. When analyzing a case for mediation, as in trial, I try to anticipate all possible strengths of the opposing party's case as well as the weaknesses of my client's case.

In addition to state court, I have also sat second chair in three federal jury trials. These were civil in nature and dealt with a false imprisonment case and first party insurance claims.

I have represented a few clients in criminal matters, however, these were misdemeanor cases where I was competent to represent the client. I have also represented a very small number of clients in adoptions, uncontested divorces with no children and small estate matters.

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

Of my trial experience, one trial of special note was a case that I was not lead counsel, however,

significantly assisted lead counsel. I drafted the Motion for Summary Judgment, which was granted. I also drafted the Appellate Brief once the case was appealed. This case stands out to me, as it was an interesting complex litigation matter that dealt with a host of unique issues. The case dealt with a patron who had purchased a ticket to a racing event. During the race, the patron was struck in the head by a portion of a rim that had broken off of one of the race cars involved in the race. There was a host of issues involving the arena, the race car driver and the plaintiff's negligence. In addition, there was a products lability claim with regard to the manufacturer of the rim as well as evidentiary issues of spoliation. The Court of Appeals for the Western Section affirmed and upheld each of the lower court's rulings.

Other trials that stand out to me are where I received a defense verdict despite stipulating to liability; and a matter where the plaintiff brought suit for breach of contract against his insurance company regarding a fire loss claim. I filed a motion for summary judgment due to nuance in the contract that specified an odd statute of limitations. The summary judgment was granted, and the opposing counsel appealed. The trial court decision was upheld.

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

I have not served as a mediator, arbitrator or judicial officer in my career.

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

I have never held such position as an attorney representing a client. However, at my grandmother, Mildred B. Kellogg's request, I was her power of attorney for several years due to her declining health prior to her death in 2014.

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

None that has not already been discussed in my legal experience.

13. List all prior occasions on which you have submitted an application for judgeship to the Governor's Council for Judicial Appointments or any predecessor or similar 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 that you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

Undergraduate:

The University of Tennessee at Martin, Martin TN, 1992-1996, B.S. in Public Administration, - Magna Cum Laude, 3.61/4.0

-Dean's List

Law School:

The University of Memphis Cecil C. Humphrey's School of Law, Memphis TN, 1997-2000. - Top 25% - Rank 34/167

-Moot Court Board 1998-2000

-Law Review -1998-2000

-Graduate Assistant to Memphis Area Legal Services, Donna Harkman 1999-2000

/167PERSONAL INFORMATION

15. State your age and date of birth.

I am 45 years old. My date of birth is [redacted] 1974.

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

I have lived in Tennessee continuously for 45 years.

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

I have lived continuously in Weakley County, Tennessee for 19 years.

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

Weakley 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.

N/A

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

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

N/A

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, I filed a General Sessions lawsuit which I was the Plaintiff in Weakley County, Tennessee in December 2016, for breach of contract against a purchaser of a rental home located in Martin, Tennessee; docket number 2016-CV-751. A judgment of $16,000 was rendered in my favor for lost rent and attorney fees. The defendants appealed the general sessions judgment. I filed an Order of Voluntary Nonsuit due to the matter not being economically feasible in light of the appeal.

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

I am a member of the following:

1. Pilot International, Martin Chapter, Martin, Tennessee. Non-profit civic club that focuses on traumatic brain injury awareness.
   2014-2016 – Member of the Board of Directors.
   2016 to present - Secretary.
2. West Tennessee Hearing and Speech Center, Jackson TN. Non-Profit that treats children and persons with hearing and speech impairments affordable treatment.
   2010-2016. Member of the Board of the Directors.

   2016 - Chairman of the Speaking of Art Fundraiser.
3. Dresden First United Methodist Church – Dresden TN.
   2014-present - Member of the Board of Trustees.
   2015-present - First United Methodist Youth Group Co-Director
4. 2010- Present- Martin Historical Downtown Committee

27. Have you ever belonged to any organization, association, club or society that limits its

membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.

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

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

No.

ACHIEVEMENTS

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

I am a member of the following:

Madison County Bar Association (2000-present)

American Bar Association (2000-present)

Defense Research Institute (2005-present)

Tennessee Defense Lawyers Association (2010-present)

Inns of Court, Madison County Chapter (2013-2016)

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

I was the recipient of the Madison County Pro Bono Award in 2010.

I was honored for initiating and instituting the first Weakley County Legal Clinic in 2013.

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

I have not authored any published legal articles or books.

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.

2014 – Present (fall and spring semesters). I teach two law related courses on-line at the University of Tennessee at Martin. The upper division courses are Judicial Process and Paralegal Studies. College students receive credit for these upper division classes for graduation requirements.

2013- Featured Speaker at NBI CLE on Trial Tactics in Jackson, Madison County TN.

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

None.

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

No.

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

See Attachment A and B. Both attachments are legal writing that I personally researched and drafted.

ESSAYS/PERSONAL STATEMENTS

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

I am seeking this position for a number of reasons. First, I would be a fair, competent and impartial judge. Second, I would be an asset to the court due to my vast civil court trial experience and my ability to analyze and detect issues in a matter, along with my temperament would enable me perform the position successfully. My experience is also a reason I am seeking this position. It enables me to impartially review a case and determine whether there has been compliance with the applicable standards and rules.

In addition, I am seeking this position because I believe I would bring a different dynamic to the court. I am from a rural area where economic opportunities are lacking. I have worked for everything I have in life and I want to represent my community and be an inspiration to every person in a similar situation to achieve every goal they may have and make a difference no matter your social or economic status.

36. State any achievements or activities in which you have been involved that demonstrate your

Commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. (150 words or less)

I am committed for equal access to justice. In law school, I was a graduate assistant to the Memphis Area Legal Clinic, focusing on elder abuse under the supervision of Ms. Donna Harkness. Since practicing law, I have been a volunteer for the West Tennessee Legal Aid Services. I received their Pro Bono Award for 2013.

In addition, I am from Weakley County. Weakley, and its surrounding counties, are rural, mostly agriculture with a generally lower economic population. The closest legal aid is in Jackson which is a hardship for many citizens. In recognizing this need, I initiated a free legal clinic at my church in Dresden, Tennessee and recruited two other attorneys with different practice fields. We were able to assist several types of persons in a wide variety of issues from housing, employment, conservatorships, power of attorneys and deeds.

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 seeking the position of the judicial vacancy from Judge Brandon O. Gibson's appointment by Governor Lee as his senior legal advisor. I am seeking her position as Appellate Judge on the Tennessee Court of Appeals for the Western Section (Civil) located in Jackson, Tennessee. I believe my selection would be beneficial to the court as I would bring diversity to the panel and represent a significantly rural area that constitutes a significant portion of the counties in the Division.

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 participated in community services and organizations for the majority of my life. I am involved in mostly civic minded, religious or non-profit organizations. For example, I am a member of Pilot Club International, Martin Chapter, which is a civic nonprofit organization, for the past five years. The Pilot Club's focus is prevention of traumatic brain injuries. I have co-chaired the past two Galas, 2017 and 2018, with the proceeds designated to update Martin's local park to comply with ADA standards to benefit children with disabilities.

I am very active in my local church and am the co-director of the youth group since its inception in 2016. Our youth group includes middle and high school children. We have been fortunate enough to take two mission trips to Blue Ridge, Georgia. I chaperoned the trips and found it to be a very moving and emotional experience. I also participate in the local Meals on Wheels Program that prepares and delivers meals to the areas shut ins and elderly.

If appointed to the Court of Appeals, I plan to continue my community involvement as long as it is a true benefit to the community. I believe that if at all possible, each citizen needs to give back to the community in need. Obviously, any community involvement would be vetted as I would

never want to bring any potential disrespect or conflict to myself, the Court of Appeals or the State in general.

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

I grew up and have lived in West Tennessee all my life. My father farmed and taught my sister and I to drive a grain truck, tractor and take care of cattle. In the late 1980s, we lost the farm and I was devastated. However, my father and my mother taught us that life goes on, no matter what obstacles you face. You pick yourself up, work hard and then work harder. Most importantly, be honest in everything you do. If you have integrity and are true to yourself, you can accomplish anything regardless of the setbacks.

I have taken this motto to heart throughout my life. I am not ashamed of my family's failures, but instead inspired. I attended public schools. My sister and I were the first of our family to graduate college. I am proud I worked my through college and law school, completing both with honors.

Once a practicing attorney, I faced adversity in the courtroom at times by being directed by court room staff to where the court reporter sat and passive aggressive comments from older senior attorneys. I am never bothered by these comments, as most are not malicious, but rather respond politely, but directly.

My hope is that my experience will show that I am a fierce, competent and worthy adversary in the courtroom, but most importantly, it show that I am a respected and respectful, honest and ethical attorney, not only the courtroom, but in life in general.

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 substance of the law at issue. The law sets precedent, regardless of one's opinion of whether the law is appropriate or not is irrelevant. As an attorney, one takes an oath to uphold the law. In my opinion, a judge's role is to uphold the law and apply it to the facts of the case.

For example, the use of seat belts is a proven fact to save lives in automobile accidents. The use of helmets is proven to save lives in motorcycle accidents. In Tennessee, it is law that one wears a seatbelt while operating a motor vehicle as well wearing a helmet when operating a motorcycle. However, one is prevented from revealing this fact to a jury even though the person's injury may have been prevented or lessened if the injured person was complying with law. Regardless, the law should be applied as written. An example is trying to get his information to the jury through a medical deposition whether a doctor notes that a plaintiff "is an unrestrained driver." Regardless of how one feels about the law, as an attorney, one has to

uphold it regardless if they disagree with it.

REFERENCES

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

A Bradford D. Box, Partner with Rainey, Kizer, Reviere & Bell, PLC. [redacted].

B. Russell E. Reviere, Senior Partner with Rainey, Kizer, Reviere & Bell, PLC. Mr. Reviere's contact information is [redacted]

C. Jerry Potter, Mediator and Senior Partner with Harris Shelton. Mr. Potter's contact information is [redacted]

D. Mr. Wayne McCreight. Founder and Former CEO of Hamilton Ryker Staffing Company, Owner of BenWoody Farms. Mr. McCreight's contact information is [redacted]

E. Dr. John Hale. Physician at Baptist Memorial Group in Union City Tennessee and Past President of the Tennessee Medical Association. His contact information is [redacted]

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 of Appeals for the Western Section of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended application with the Administrative Office of the Courts for distribution to the Council members.

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

Dated: February 11, 2019.

Signature

When completed, return this application to Ceesha Lofton, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

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

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

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

WAIVER OF CONFIDENTIALITY

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

Keely N. Wilson

Keely N. Wilson Nanney
Signature

February 11, 2019
Date

012083
BPR #

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

ATTACHMENT A

2012 WL 12292117 (Tenn.Cir.Ct.) (Trial Motion, Memorandum and Affidavit)
Circuit Court of Tennessee.
Davidson County

Nicole GOESER, et al.,

v.

LIVE HOLDINGS CORPORATION, et al.

No. 10C727.
January 13, 2012.

Memorandum in Support of Motion for Summary Judgment Filed by Defendant Johnny's Bar and Grille

Russell E. Reviere, (BPR 7166), Keely N. Wilson (BPR 012083), Rainey, Kizer, Reviere & Bell, P.L.C., 209 East Main Street, P.O. Box 1147, Jackson, TN 38301-1147, (731) 423-2414, for Live Holdings Corporation, Johnny's Bar & Grille, Jonathon Steinberg and Marathon Properties, LLC.

COMES NOW the Defendant, Johnny's Bar and Grille (incorrectly styled as Jonny's) [1] and moves this Honorable Court for summary judgment in its favor. In support of this motion, Defendant states as follows:

I. FACTS AND BACKGROUND

This is a premises liability case based on the unforeseeable criminal acts of a third party stalker. Benjamin "Ben" Goeser was shot and killed by Defendant Hank Wise at Johnny's Bar and Grille [2] on Thursday, April 2, 2009 at approximately 1.0:30 p.m. *Complaint*, ¶ 8-9; *Goeser Deposition*, p. 82, attached as ***Exhibit 1***). [3]

Description of Incident

Plaintiff Nicole "Nikki" Goeser and Benjamin "Ben" Goeser were karaoke hosts with their own equipment and were working as independently contracting karaoke hosts at Johnny's on the Thursday night in question, like they had been regularly for months before the incident. *King Deposition*, p. 18-20, attached as ***Exhibit 2***; *Steinberg Deposition*, p. 18, 31 attached as ***Exhibit 3***; Goeser *Deposition*, p. 73, 143. Jennifer King, who regularly worked as a manager on Thursday karaoke nights, was working as the manager on duty at Johnny's on the night in question. *Deposition of Jennifer King*, p. 7, 12. Hank Wise, previously a regular karaoke customer of Nikki's, was there for the karaoke show. *Goeser Deposition*, p. 7. Nikki noticed Hank staring at her and then sitting at a table with Ben talking about something "completely normal." *Id.* at p. 83-85. Nikki looked at Ben's face and noticed "no distress at all." *Id.* at p. 85,103. Ben did not appear to be concerned. *Id.* at p. 86.

However, because of an awkward history with Hank which will be further described below, Nikki approached Manager Jennifer King and asked her if she would ask Hank to leave Johnny's because he had been harassing her and her husband and they were uncomfortable. *King Deposition*, p. 28; *Goeser Deposition*, p. 105. Nikki felt "annoyed and slightly concerned." *Goeser Deposition*, p. 87. Manager Jennifer King then got the bartender/ manager, Cary Surginer, and, exactly as Nikki had requested, the two of them asked Hank to leave Johnny's. *Id.* at p. 13, 28-29; *Steinberg Deposition*, p. 84; *Goesser Deposition*, p. 112. Manager Jennifer King was not in fear for her safety as she approached Hank to ask him to leave and she had no indication that Hank might be dangerous. *King Deposition*, p. 35.

Hank was a short man, approximately 5'6 or 5'7, and of average weight. *Deposition of Jennifer King*, p. 30. When Manager Jennifer King and Bartender Cary Surginer asked Hank to leave, he was "extremely calm." *Id.* at p. 30-31. Nikki also testified that Hank did not appear agitated, but that Hank "appeared calm." *Goeser Deposition*, p. 112. Hank did not protest, As Manager Jennifer King testified, "[h]e was the calmest person I had ever seen in my life." *Id.* Hank then backed up, unzipped his tan farmer's jacket, pulled out a gun, held it up, and began to shoot. *Id.* at p. 31-32; *Goeser Deposition*, p. 82, 113, 115. After shooting Ben once in the head, Hank stood over him and continued to fire more shots. *Goeser Deposition*, p. 113. Hank then began to calmly walk out of the bar but was restrained until police arrived. *King Deposition*, p. 32-34; *Goeser Deposition*, p. 113-114. Manager Jennifer King called police. *King Deposition*, p. 34.

On the night of the incident, Hank had been looking for Nikki and Ben. He went to 2-3 downtown bars, eventually learning that Nikki and Ben were at Johnny's and obtaining directions there from a friend of Nikki's. *Goeser Deposition*, p. 97-101.

History Between Hank Wise and Nikki Goeser

Hank Wise was a stalker. *Goeser Deposition*, p.6.[4] However, Nikki Goeser claims not to have known this until the night in question at Johnny's when Hank shot her husband when he appeared at an "out of the way" bar after Ben had asked Hank to leave Nikki alone. *Goeser Deposition*, p. 8, 83, 89, 97. In fact, Nikki Goeser stated that Hank "just blended with the crowd," that he was "just ordinary," and that there "was nothing great or outstanding about him." Goeser *Deposition*, p. 16. Plaintiff Nikki Goeser's knowledge of Hank began in the fall of 2008 with him being a customer, singing songs at her karaoke shows, dedicating a song to her, tipping well, and sending her normal messages on MySpace. *Goeser Deposition*, p. 12, 28, 33, 35, 63. Later on, around the holidays of 2008, Hank "started to get weird." *Id.* at p. 42. Hank sent Nikki an inappropriate message on MySpace relating to her husband, Ben Goeser, and suggesting that Nikki was in the *wrong* relationship. *Id.* at p. 44-45, 47, 66-67. In response, Nikki sent a message back to Hank assuring him that she was happily married to which Hank responded with comments making fun of Nikki's appearance. *Id.* at p. 47, 68. As a result, on or about January 8, 2009, Nikki deleted Hank as a friend on MySpace and blocked his access to her page. *Id.* at p. 68, 70. After Nikki deleted Hank from her MySpace page, Hank continued to appear at her shows at the Wild Beaver Saloon and stared at her, but Nikki would simply ignore him. *Goeser Deposition*, p. 76, 79-82. When Ben Goeser confronted Hank about the MySpace messages he had sent to Nikki, Hank tried to blame them on someone else. *Id.* at. p. 78-79. After the Goesers had not seen Hank for a month, he showed up at Johnny's on the night of the incident. *Id.* at p. 82. Hank had never threatened Nikki. *Id.* at p. 59, 76, 89.

Lack of Notice or Knowledge by Johnny's of Any Problem with Hank Wise

Before the night in question, Manager Jennifer King and Owner Jonathan Steinberg did not know Hank Wise, had never heard his name, and were not aware of any problem between Nikki and Hank. *King Deposition*, p. 27; *Steinberg Deposition*, p. 45; *Defendants' Discovery Responses, No. 16*, attached as ***Exhibit 5.*** Nor had Manager Jennifer King ever visited Nikki's website or social media pages. *King Deposition*, p. 27. Nor had Manager Jennifer King ever visited karaoke shows performed by the Goesers at other locations, such as Wild Beaver Saloon and Buck Wild. *Id.* at p. 27. All that Manager Jennifer King knew was what Nikki Goeser had told her when she asked King to ask Hank to leave the restaurant. *Goeser Deposition*, p. 169. Hank had not otherwise caused any type of disturbance in the bar and Nikki Goeser admits that Manager King acted immediately upon her request. *Id.* at p. 169-170. *See also Defendants' Discovery Responses, No. 9.*

History of Operation of Johnny's and Prior Incidents

At the time of the incident, Jonathan Steinberg had indirectly owned Johnny's since 2007. *Deposition of Jonathan Steinberg*, p. 4, 7-8. Since it was a Thursday, no security personnel were on staff that night. *King Deposition*, p. 14-15.

Johnny's had never had a need for security on weekday nights and had never had a need for a "bouncer." *King Deposition*, p. 47; *Steinberg Deposition*, p. 49-50. The crowd at Johnny's on Thursday karaoke nights was "regulars, people sitting down having some beers, getting up and singing a few songs. Very normal Thursday." *Id.* at p. 52. On weekend nights, Johnny's used the services of a security firm to check IDs and to assist as necessary with any other type of situation, such as when a customer does not need to drive. *Id.* at p. 45-47; *Steinberg Deposition*, p. 22-24.[5] In addition, there is video surveillance. *Deposition of Jennifer King*, p. 40. After the incident, Owner Jonathan Steinberg made no changes to the "security" in place at Johnny's because in talking with police, his security firm, and others about the incident "100 percent everyone, not one person disagreed that this was a stalker. He came in specifically to do what he did, and it had nothing to do with our business." *Steinberg Deposition*, p. 78.

Manager Jennifer King testified that there have never been any burglaries or robberies at Johnny's and she could only recall two fights both of which happened approximately three years earlier. *Id.* at p. 43. Manager Jennifer King lives about a mile away from Johnny's and feels safe in the neighborhood. *Id.* at 43-44. Owner Jonathan Steinberg testified that to his knowledge no crimes had been committed at Johnny's and that there had been no arrests or illegal activities occurring at Johnny's. *Id.* at p. 46. *See also Defendants' Discovery Responses, Nos. 15, 17, 18, 19.*

Before the crime at issue, Nikki Goeser did not feel any greater personal risk while she was doing a karaoke show than anywhere else. *Goeser Deposition*, p. 133, 154 ("No. I mean, crime can happen anywhere.")("horrible things can happen anywhere."). Before deciding to do shows at Johnny's, the Goesers "knew that Johnny's was a really great restaurant" and they "really liked it a lot." *Goeser Deposition*, p. 140, 149. While working at Johnny's, Nikki had never seen anyone get kicked out of Johnny's, *id.* at p. 147. She had never had any incidents other than people becoming impatient or angry about having to wait their turn to sing. *Id.* at p. 150-152. Nikki had never seen or heard about anything occurring at Johnny's that would have prompted the need to have anyone taken out of the bar by a bouncer, *Id.* at p. 158. Despite this, Nikki Goeser testified that she "assumed" that Johnny's had a bouncer. *Goeser Deposition*, p. 157. Before the incident, Nikki Goeser did not have any personal concern for her safety at Johnny's. *Id.* at p. 159.

Description of Claims in Lawsuit

Despite these facts, Plaintiffs have sued Defendant alleging that Defendant is somehow responsible for the death of Ben Goeser. Plaintiffs allege that Johnny's is responsible for Ben's death because it failed to properly supervise activities in Johnny's, failed to protect Ben Goeser, failed to warn the general public of danger at Johnny's, failed to provide sufficient security so as to protect the safety and welfare of Ben Goeser, and failed to properly train its employees. *Complaint*, ¶ 14-23; 31-41. Nikki Goeser claims that Johnny's should have had an armed guard or should have had "a big ol' bouncer" to take Hank Wise down when he started to back away while Manager Jennifer King and the bartender were asking him to leave, even though Hank had not done anything that attracted the attention of restaurant management. *Id.* at p. 161-163, 169. Nikki Goeser also complains about the employees of Johnny's even though they did exactly what she asked them to do on the night in question. *See Plaintiff's Discovery Responses*, No. 4, 8, 10. attached as ***Exhibit 6.***

II. INCORPORATION BY REFERENCE OF STATEMENT OF UNDISPUTED FACTS

Defendant incorporates by reference, as if fully set forth here, its Statement of Undisputed Material Facts, filed contemporaneously with this Motion and Memorandum.

III. LAW AND ARGUMENT

Summary Judgment Standard in Tennessee

The Tennessee Supreme Court clarified its position on the summary judgment standard in *Hannan v. Alltel Publishing Co.*, 270 S.W.3d 1 (Tenn. 2008) and *Martin v. Norfolk Southern Railway Co.*, 271 S.W.3d 76 (Tenn. 2008). In *Hannan*, the Court explained that it had adopted a method that permits the moving party to shift the burden of production by submitting *affirmative evidence* that negatesan essential element of the non-moving party's claim, *Id.* at 6. "[T]o negate an essential element of the claim, the moving party must point to evidence that tends to disprove an essential factual claim made by the nonmoving party." *Martin*, 271 S.W.3d at 84. "If the moving party makes a properly supported motion, the burden of production then shifts to the nonmoving party to show that a genuine issue of material fact exists. *Hannan*, 270 S.W.3d at 5. Thus,

> A moving party who seeks to shift the burden of production to the nonmoving party who bears the burden of proof at trial must either: (1) affirmatively negate an essential element of the nonmoving party's claim; or (2) show that the nonmoving party cannot prove an essential element of the claim at trial.

Id. at 8-9. **Courts may grant a summary judgment when both the facts and the inferences to be drawn from the facts permit a reasonable person to reach only one conclusion.** *See McCall v. Wilder*, 913 S.W.2d 150,153 (Tenn.1995); *Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn.1995).

In this memorandum, Defendant Johnny's Bar and Grille will point to affirmative evidence and testimony which disproves essential factual claims made by the Plaintiffs, thus shifting the burden of production to the Plaintiffs to show that a genuine dispute of material fact exists here that would warrant submitting this case against Johnny's to a jury. The proof and documents produced in discovery in this case, coupled with the law in Tennessee, shows that Plaintiffs can not do so and further shows that Plaintiffs will not be able to prove essential elements of their claim against Johnny's at trial. Therefore, summary judgment is proper and appropriate in this case.

Premises Liability Arising out of Third Party Criminal Acts

To maintain their action for negligence, Plaintiffs must prove (1) a duty of care owed by Johnny's; (2) conduct falling below the applicable standard of care that amounts to a breach of that duty; (3) an injury or loss; (4.) cause in fact; and (5) proximate, or legal, cause. *McClung v. Delta Square Ltd.*, 937 S.W.2d 891, 894 (Tenn. 1996). The Tennessee Supreme Court's decision in *McClung* is controlling in cases involving the duty of care owed by premises owners to protect customers from the criminal acts of third parties committed on the premises and has been cited and analyzed in a number of decisions since 1996 when the case was decided. *See e.g., Staples v. CBL & Assocs, Inc.*, 15 S.W.3d 83, 91 (Tenn. 2000); *Giggers v. Memphis Housing Authority*, 277 S.W.3d 359 (Tenn. 2009).

A business is not to be regarded as the insurer of the safety of its customers, and it has no absolute duty to implement security measures for the protection of its customers. *McClung*, 937 S.W.2d at 902. Although businesses are not insurers of their customers' safety, they do have a duty to take **reasonable** steps to protect persons from foreseeable criminal attacks by third parties. *McClung*, 937 S.W. 2d at 902; *Patterson-Khoury v. Wilson World Hotel-Cherry Road*; 139 S.W.3d 281,286 (Tenn. Ct. App. 2004) (Emphasis added). The standard is not perfect and it is not "adequate." Instead, the standard is "reasonable." *McClung* emphasized that the primary inquiry in determining whether a business owes its customers a duty to protect against a criminal act by a third party is **whether the criminal act was foreseeable.** *McClung*, 937 S.W.2d at 899; *Patterson-Khoury*, 139 S.W.3d at 286. The foreseeability of criminal acts must, in the first instance, be considered by the court to determine, as a matter of law, whether Johnny's owed a duty of care in this case. *Patterson-Khoury*, 139 S.W.3d at 286. Foreseeability is also a consideration for the jury in deciding whether Johnny's breached its duty of care. *Id.*

In 2009, the Tennessee Supreme Court revisited *McClung*, further clarifying the demands it placed on Tennessee businesses. *Giggers v. Memphis Housing Authority*, 277 S.W.3d 359 (Tenn. 2009). There, the Plaintiffs sued a housing complex claiming the housing complex was responsible for the shooting death of their decedent by another tenant with a questionable history of violence. *Id.* Although the trial court granted summary judgment to the defendant, the decision by the Supreme Court in *Giggers* reversed that result, finding after conducting a balancing test that the potential for violence in the public housing project was reasonably foreseeable and the gravity of the harm outweighed the burden on the housing authority to have taken reasonable protective measures. *Id.* at 360.

Traditionally, the question of whether a defendant, like Johnny's, owes a duty of care to a person is a question of law to be determined by the courts. *Giggers*, 277 S.W.3d at 365. In a premises liability case such as this, the duty is simply to take reasonable measures to protect persons from foreseeable criminal attacks. *Id.* When and if the trial court determines that the foreseeability of the harm-and its particular gravity outweigh the burden of taking reasonable protective measures, the question of duty and of whether a defendant has breached that duty is generally one for the jury to determine based upon proof presented at trial. *Id.* Foreseeability must be determined as of the time of the acts or omissions claimed to be negligent. *Id.* (Emphasis added). **When the injury is not foreseeable, a criminal act by a third party constitutes a superseding, intervening cause of the harm, relieving the business of liability.** *Giggers*, at 367. In reversing the trial court's summary judgment, the *Giggers* court concluded that

a special relationship exists between a landlord and a tenant, placing an obligation on a landlord to take **reasonable measures of protection.** Because a reasonable person could foresee the probability of violence in Jefferson Square and because the gravity of the potential harm outweighs, although marginally in this instance, the burden of taking protective measures for the safety of the tenants, we are unable to determine as a matter of law that the Plaintiffs are not entitled to recovery on a claim of negligence under any version of the facts. There are, therefore, genuine issues that preclude a summary judgment favorable to MHA.

Our ruling does not foreclose the possibility that the Plaintiffs will be unable to present sufficient evidence to support the claim or that MHA will successfully defend the propriety of its actions under all circumstances. All landlords—whether public housing authorities or the owners of luxury high-rises—have a duty to use **reasonable care** to protect their tenants from unreasonable risks of physically injurious attacks by third parties, if those risks are foreseeable and public policy considerations do not militate otherwise. However, the question of what steps, if any, are required by the duty of **reasonable care** will inevitably depend on the facts of individual cases and should be left to the finder of fact, not the courts.

Giggers, at 371-72 (Emphasis added). As established by *McClung* and reaffirmed in *Giggers*, in any event, a business only owes a duty to take **reasonable** measures of protection. *Id.* To determine the extent of a business's duty and the foreseeability of a criminal act, courts must consider "the frequency and nature of criminal activities in the ***immediate vicinity of the business, such as the adjacent parking lot.***" *McClung v. Delta Square Ltd. P'ship*, 937 S.W.2d 891, 899 (Tenn. 1996)(Emphasis added). [6]

There is not an abundance of civil case law involving stalking in Tennessee. The cases that do involve some element of stalking can be distinguished. In *Staples v. CBL & Associates, Inc.*, 15 S.W.3d 83,85 (Tenn. 2000), plaintiff was abducted from inside a mall. She sued the mall, its security company, and an anchor store based on negligence for failure to implement and maintain adequate security and to otherwise protect her from being abducted, *Id.* Before being abducted, plaintiff had noticed a man in the lingerie section where she was shopping. *Id.* at 86. She noticed the same man on the way to eat in the mail, and then noticed him in a mall restaurant when he leaned over a partition and stared at her. *Id.* She left the restaurant and began shopping in Profitts where the man appeared again and spoke to her, at which point she became convinced he was following her. *Id.* As she walked through the store, she noticed him again fanning money in his hands as if he were propositioning her. *Id.* She went to the Profitts store makeup counter, noticeably frightened and shaking, and

told two store employees that a man was following her. *Id.* There was a dispute about whether store employees offered to call security and whether plaintiff declined that offer. *Id.* The store employees, who knew plaintiff intended to return to the store later to continue to shop, also said they would watch and not let the man follow plaintiff out of the store, but became busy with other tasks. *Id.* Plaintiff continued to shop in the mall, going to other stores, and encountered the man again in the common area of the mall. *Id.* at 87. Plaintiff then obtained her vehicle, drove to the front of the mall and parked near the front door of Profitts to continue to shop, where she thought she would be safe because the store employees had earlier been notified of her concern about the strange man. *Id*, Immediately upon entering Profitts, the man confronted her pressing a hard object into her back, forcing her out of the store and abducting her. *Id.*

After applying a balancing test to the facts of *Staples*, the Supreme Court disagreed with the intermediate court's conclusion that the defendants did not owe plaintiff a duty of care because she failed to show that her abduction was foreseeable by the defendants. *Staples*, 15 S.W.3d at 90. Reviewing the facts in the light most favorable to plaintiff, the Supreme Court concluded that the exchange between plaintiff and the two Proffitts makeup counter employees, in which plaintiff was visibly shaken, triggered a duty on the part of Proffitts, the malt, and the security company to take reasonable steps to protect plaintiff from the abduction that occurred. *Id.* The court found that the exchange put Proffitts on notice that plaintiff was in danger of being abducted. *Id.* There was also evidence demonstrating that there were numerous incidents of crime on the premises in the months preceding the abduction. *Id.* Accordingly, the court concluded that the harm plaintiff encountered was foreseeable. *Id.* at p. 91. The court also determined that the gravity of the foreseeable harm was great and that alternative conduct on the part of the defendants, which at the least would have included calling security, was readily available and would not have unduly burdened defendants. *Id.* at 91. Based upon these facts, the Supreme Court determined that the intermediate court erred by holding that the defendants had no duty toward plaintiff, but hastened to add that it expressed no opinion on whether the defendants breached their duty of reasonable care to plaintiff. *Id.*

Although not a stalking case, the court in *Wells v. J.C. Penney Co., Inc.*, W2002-00102-COA-R3CV, 2002 WL 31288979 (Tenn. Ct. App. Oct. 9, 2002), analyzed the duty analysis in the *Staples* case in the context of a Christmas shopping dispute between two store customers that resulted in an angry customer grabbing plaintiff's wrist. In that case, before the customer grabbed plaintiffs wrist, plaintiff made two requests that the store employee call security and the manager. *Id.* The stated reason for the request, however, was not plaintiff's fear for her safety, but rather her desire to have the manager or security guard decide which customer would be permitted to purchase the disputed merchandise. *Id.* at *4. Moreover, **plaintiff's actions did not indicate that she feared a physical assault.** *Id.* (Emphasis added). When the angry customer cursed her, plaintiff did not let go of the merchandise or leave the vicinity. *Id.* When the customer walked toward her, plaintiff still did not let go of the merchandise. *Id.* Instead, she explained her view that the manager should determine which customer would be permitted to purchase the merchandise, and asked the unidentified customer her name. *Id.* When the customer responded with yet another expletive, plaintiff's response was cavalier, and she still did not let go of the merchandise and leave the vicinity. *Id.* Plaintiff's actions prior to the customer grabbing her wrist indicated that neither she nor the store employees foresaw that the customer would assault plaintiff over the merchandise. *Id.*

The court held that under the circumstances, the store did not have a duty to protect the plaintiff from the assault by the customer and noted that holding otherwise would make the store "an insurer of the safety of its customers," which is not the law in Tennessee. *Id.* Therefore, the court concluded that the trial court did not err in granting the store's motion for summary judgment based on the unforeseeable nature of the assault and the lack of a duty of care to protect the plaintiff from the assault. *Id.*

There are also a few cases from other jurisdictions which should be persuasive to this Honorable Court. For example, in *Sayles v. SB-92 Ltd. P'ship*, 138 Ohio App. 3d 476, 482, 741 N.E.2d 613, 617 (2000), the plaintiff had a long history with a stalker who firebombed her apartment. Plaintiff claimed she had informed her apartment complex of this fact and that therefore the apartment should be liable for her injuries. *Id.* The court held that the firebombing episode and following events that resulted in the plaintiff's injuries could not have been reasonably foreseen by the landlord or its agents. *Id.*

In *McIntyre v. St. Tammany Parish Sheriff*, the plaintiff sued a probation officer alleging that the officer's failure to supervise her ex-husband allowed him to murder their children. 844 So. 2d 304, 309-10 (La. Ct. App. 2003). The court found that the senseless and tragic murder of plaintiffs children by her ex-husband was a completely unforeseeable occurrence and not the result of any act or failure to act on the part of the probation officer. *Id.* at 309. Plaintiff testified in her deposition that the ex-husband had never before threatened the children and she had no indication that her ex-husband was going to harm her children. *Id. at 307, 309.* The court could not say that any action on the part of the probation officer could have prevented the ex-husband from shooting and killing his children. *Id.* at 310. The record did not reveal any reason for the probation officer to have foreseen the murders. *Id.* Even if the court assumed that the probation officer breached his duty to supervise the ex-husband on probation, the court did not believe that a sufficient connection had been established between the probation officer's alleged breach of duty and the murder of the plaintiff's children, noting that **a plaintiffs case must fail if the evidence shows only a possibility of a causative connection or leaves it to speculation or conjecture.** *Id.* at 310. (Emphasis added).

In *Bray v. La Louisianne, Inc.*, Malinda Bray and her sister-in-law, Monique Bray, went to a restaurant for a drink. 2005 WL 678561 (Cal. Ct. App. Mar. 24, 2005). Malinda went to the restaurant frequently and was on friendly terms with the restaurant staff. *Id.* at *1. The restaurant had a bar area and featured live music. *Id.* That night, Turner, Malinda's ex-husband, appeared at the restaurant for the first time. *Id.* Turner approached the women and offered to buy them a drink, which they allowed. *Id.* Turner insisted that Malinda should come home with him, which she disputed. *Id.* An employee of the restaurant, Alston, came over to talk to the women. *Id.* Alston greeted the women and gave them his customary kiss on the cheek at which point Turner jumped up and grabbed Alston, pushed and shoved him, making a scene. *Id.* Malinda became upset. *Id.* Monique told Alston to get one of the security guards, which he did. *Id.* A security guard approached, tapped Turner on the shoulder, and told Turner that he had to leave. *Id.* Turner asked if he could finish his drink and the guard refused, telling him he needed to leave immediately. *Id.* The interaction between the security guard and Turner was very calm and discreet. *Id.* Turner left peacefully. *Id.*

Later, when the women left the restaurant, a security guard brough their car around and another security guard walked behind them while they were getting ready to leave. *Id.* at *2. While the women were trying to get in the car, without warning, Turner jumped out of nearby bushes and started firing a shotgun. *Id.* Monique was hit and went down but Melinda was able to get back inside the restaurant. *Id.* Turner then shot the glass door to the restaurant, put his hand through the hole, opened the door, and entered the building. *Id.* Turner shot one of the security guards in the leg. *Id.* He then shot Malinda. *Id.* Turner then ran out of shells and left the scene. *Id.* Malinda sustained serious injuries and Monique died. *Id.*

Before the shooting, Malinda had told Alston and the restaurant owner that she was having serious marital problems and was in the process of divorcing her husband. *Id.* She told them that Turner was a violent person and that she was afraid of him. *Id.* She also let them know that Turner might follow her to the restaurant because he was in the habit of stalking her. *Id.* On several nights, Alston allowed Malinda to stay at his home so Turner could not find her. *Id.* Monique had told Alston she feared that Turner was going to seriously harm her and others. *Id.* One night when Malinda was visiting Monique, Turner followed her there, parked his vehicle, and waited for her to leave. *Id.* When Malinda walked outside, Turner threatened her and yelled at her. *Id.* Monique came outside and tried to get Turner to calm down. *Id.* Alston, who had just finished work at the restaurant was on his way home and saw the disturbance. *Id.* Turner drove away as Alston was approaching. *Id.*

Monique's family and Melinda sued the restaurant complaining about the security measures at the restaurant and claiming that the restaurant was negligent and responsible for the injuries. *Id.* at *3. The restaurant filed a motion for summary judgment, arguing it had no duty to prevent the injuries and that, assuming the existence of some kind of duty, the restaurant had acted reasonably under the circumstances. *Id.* The trial court granted summary judgment, concluding

that the restaurant did not have a duty to prevent the attack and, even assuming it did breach a duty, the breach was not a proximate cause of plaintiffs' injuries. *Id.*

The *Bray* court began by observing the principle **that "if a criminal decides on a particular goal or victim, it is extremely difficult to remove his every means for achieving that goal."** *Bray*, 2005 WL 678561, at *6 (citation omitted)(Emphasis added). The court held that Monique's murder and the injuries to Melinda at the restaurant were not reasonably foreseeable. *Id.* Although, earlier in the night, Turner had upset Malinda and threatened Alston, he was very calm and cooperative when the security guard told him he had to leave. *Id.* Nothing Turner said or did suggested he would return three hours later with a shotgun and go on a shooting spree. *Id.* Tellingly, Malinda, who knew Turner better than anyone, did not call the police when Turner was told to leave the restaurant. *Id.* Nor did she call the police when she and Monique left the restaurant. *Id.*

The plaintiffs argued that long before the night of the attack, the restaurant's owner and employees knew about Malinda's marital problems, Turner's violent tendency, the possibility he might follow her to the restaurant, and Monique's fear that Turner would seriously hurt someone. *Id.* However, the court found that this information did not make it reasonably foreseeable that Turner would attempt to *kill* Malinda or anyone else *at the restaurant. Id.* (Emphasis in original). On the night of the shooting, a security guard told Turner to leave the restaurant immediately after Turner had upset Malinda and threatened Alston. *Id.*

Hours later, when Malinda and Monique were leaving, a security guard got their car and drove it to the carport while another security guard escorted them out of the building. *Id.* at 7. Eventually, all four were standing near the car. *Id.* In these circumstances, it would not be reasonably foreseeable that a third party would choose that time and place to commence an armed attack. *Id.* Accordingly, the court concluded that Turner's criminal conduct was not reasonably foreseeable, and the restaurant did not have a duty to prevent the attack. *Id.*

The *Bray* court did not stop there, however. It also held that any negligence on the part of the restaurant was not a proximate cause of the plaintiffs' injuries. *Id.* at 7. The court asked, as in previous cases,

> "[W]here do we draw the line? How many guards are enough? Ten? Twenty? Two hundred? How much light is sufficient? Are klieg lights necessary? Are plants of any kind permissible or is [the property owner] to chop down every tree and pull out each bush? Does it matter if the [building] looks like a prison? Should everyone entering the [building] be searched for weapons? Does every shop, every store, every manufacturing plant, have to be patrolled by private guards hired by the owner? Does a landowner have to effectively close his property and prevent its use altogether?"

Id. at *8. The court decided that, assuming the restaurant was somehow negligent, the plaintiffs failed to dispute any material fact with respect to causation. *Id.* Notwithstanding Turner's calm and cooperative behavior when the security guard asked him to leave the premises, Turner decided to seek vengeance. *Id.* He returned with a shotgun, jumped out, and surprised everyone, killing Monique and wounding Malinda and the security guard. *Id.* In affirming the grant of summary judgment to the restaurant, the court stated, **"[h]ow the restaurant might have prevented this tragedy is purely speculative."** *id.* at *8 (Emphasis added).

In *Newell v. S. Jitney Jungle Co.*, the plaintiff was at her workplace, a grocery store, when her estranged husband entered the store and shot her four times. 830 So. 2d 621, 622-23 (Miss. 2002). Several times before the shooting incident, the husband appeared at the store stalking, harassing, and threatening plaintiff in front of managers and other employees. *Id.* The day before the shooting the husband caused a disturbance at the store. *Id.* The plaintiff's supervisor helped her file

charges against the husband. *Id.* After the shooting, plaintiff sued her employer for not providing her with a safe place to work and in failing to provide security for her. *Id.* at 622-623. At the time of the attack, plaintiff was in a separately enclosed office behind a door that her husband had to "force" his way through. *Id.* at 623. Thus, the door was either locked, or there was warning in advance of the husband's presence provided by co-workers such that countermeasures were taken. *Id.*

The *Newell* court found that the employer did nothing wrong, and to the contrary, it attempted to help and had placed plaintiff in a secure location under lock and key. *Id.* The court stated that while the plaintiff also did nothing wrong, the employer was not and should not become the guarantor of its employees' safety at all times. *Id.* Further, the court held that the employer's actions did not impel the assault by plaintiff's husband. *Id.* at 624. Instead, the court stated that
Clearly the intentional acts of [plaintiff's] estranged husband in entering the [store] armed with a gun, forcing entry into [plaintiff's] office, and shooting her are acts by a third party which are sufficient to terminate any liability [the store] might otherwise have. If not, this Court would impose a duty approaching strict liability on landowners of the type we specifically denounced in *Crain v. Cleveland Lodge 1532, Order of Moose, Inc.*, 641 So.2d 1186, 1191 (Miss.1994): "We refuse to place upon a business a burden approaching strict liability for all injuries occurring on its premises as a result of criminal acts by third parties."

Newell, 830 So. 2d at 624. As later stated by the court, "[t]he liability of landowners must end somewhere. *Id.* at 625. All of these cases support a grant of summary judgment in favor of Johnny's in this case.

A. AS A MATTER OF LAW, PLAINTIFFS ARE BARRED FROM RECOVERING AGAINST DEFENDANT BECAUSE HANK WISE'S ACTIONS WERE UNKNOWN AND UNFORESEEABLE TO DEFENDANT, THEREFORE, JOHNNY'S OWED NO DUTY OF CARE TO PLAINTIFFS OR BENJAMIN GOESER

In this case, like in *McIntyre* and *Bray*, Johnny's owed no duty of care because Johnny's could not have reasonably forseen that a stalker would come into its premises and murder Ben Goeser. Unlike in *Staples*, after Johnny's Manager Jennifer King was asked by Plaintiff Nikki Goeser to ask Hank Wise to leave the premises, Manager King immediately got a second male employee to accompany her and the two employees confronted Hank and asked him to leave. This is undisputed. Like in *McIntyre*, there was no notice that Hank was armed or dangerous. The undisputed evidence suggested the contrary. Hank had previously attended Nikki and Ben's karaoke shows as a customer without incident and, like in *Bray*, there was no indication that he was a danger to either Nikki or Ben on the night in question. Additionally, there was no "gap" in time, as in *Staples*. After being confronted by Johnny's employees, Hank immediately and without notice, pulled a gun and shot Ben Goeser.

The question of whether a defendant, like Johnny's, owes a duty of care is a question of law to be determined by the court. *Giggers*, 277 S.W.3d at 365. The foreseeability of criminal acts must be considered by the court to determine, as a matter of law, whether Johnny's owed a duty of care in this instance. *Patterson-Khoury*, 139 S.W.3d at 286.[7] In addition, as in *Newell* and *Bray*, because it was not foreseeable in this case that Hank Wise would come into Johnny's and murder Ben Goeser, Hank Wise's intentional criminal act constitutes a superseding, intervening cause of the harm, relieving Johnny's of liability. *Giggers*, at 367. Because the criminal act in this case was unforeseeable to Johnny's, this Honorable Court should find that Johnny's did not owe a duty of care.

B. AS A MATTER OF LAW, PLAINTIFFS ARE BARRED FROM RECOVERING AGAINST DEFENDANT BECAUSE THE REMAINING ELEMENTS OF NEGLIGENCE FAIL IN THIS CASE

Even if this Honorable Court finds that a duty of care existed under the facts of this case, Plaintiffs must still prove (2) conduct falling below the applicable standard of care that amounts to a breach of that duty; (3) an injury or loss;[8] (4)

cause in fact; and (5) proximate/legal, cause. *McClung v. Delta Square Ltd.*, 937 S.W.2d 891,894 (Tenn. 1996). A court may grant a summary judgment when both the facts and the inferences to be drawn from the facts permit a reasonable person to reach only one conclusion. *See McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn.1995); *Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn. 1995).

1. *Conduct Falling Below Standard of Care*

No reasonable juror could find that Johnny's conduct fell below the applicable standard of care in this case. In a premises liability case such as this, the duty of the business is simply to take reasonable measures to protect persons from foreseeable criminal attacks. In this case, as in *Newell*, Johnny's took reasonable measures to protect persons for foreseeable criminal attacks, and it took reasonable measures in responding to the request made by Nikki Goeser on the night of the incident. Johnny's employees did exactly what Nikki Goeser asked them to do: they immediately confronted Hank and asked him to leave, as the security guard in *Bray* had done. The Johnny's employees did not delay or question Nikki's request in any way, even though Hank did not display-any signs of danger, had not done anything disruptive, and simply appeared to be a normal customer. Hank's reaction was a complete surprise, as was the assailant's in *Bray*, and there was no time or reasonable way that the Johnny's employees could have taken any additional steps to prevent it.

Plaintiff Nikki Goeser argues that Johnny's should have employed a bouncer. As Owner Steinberg and Manager King testified, however, there had never been a need for security personnel at Johnny's on weeknights. The restaurant simply did not experience events or crime that indicated such a need. Specifically, the crowd on Thursday karaoke nights consisted of regular customers and people sitting down having beers and singing songs. As in *Bray* and *McIntyre*, how Johnny's might have prevented this tragedy is purely speculative.

2. *Causation*

As in *Bray* and *Newell*, the causation element of this negligence action fails. The mere occurrence of an injury does not prove negligence, and an admittedly negligent act does not necessarily entail liability. *Kilpatrick v. Bryant*, 868 S.W.2d 594,599 (Tenn. 1993). Even when it is shown that the defendant breached a duty of care owed to the plaintiff, the plaintiff must still establish the requisite causal connection between the defendant's conduct and the plaintiffs injury. *Id.* Proof of negligence without proof of causation is nothing. *Id.*

Causation in fact and legal cause are very different concepts. *Waste Mgmt, Inc. of Tennessee v. S. Cent. Bell Tel. Co.*, 15 S.W.3d 425, 430 (Tenn. Ct. App. 1997). Causation in fact refers to the cause and effect relationship that must be established between the defendant's conduct and the plaintiffs loss before liability for that particular loss will be imposed. *Id.* On the other hand, legal cause connotes a policy decision by the judiciary to deny liability for otherwise actionable conduct. *Id.* It requires the courts to establish the boundary of legal liability using mixed considerations of logic, common sense, justice, policy, and precedent. *Id.*

a. *Cause in Fact*

The defendant's conduct must be a cause in fact of the plaintiffs loss before there can be liability under negligence or any other theory of liability. *Id.* Thus, no negligence claim can succeed unless the plaintiff can first prove that the defendant's conduct was the cause in fact of the plaintiffs loss. *Id.* (citing *Lancaster v. Montesi*, 216 Tenn. at 55, 390 S.W.2d at 220 (stating that "[i]f... defendant's conduct ... was not a factor in causing plaintiffs damage, that ends the matter."); *Drewry v. County of Obion*, 619 S.W.2d 397, 398 (Tenn.Ct.App. 1981)(stating that "[p]roof of negligence without proof of causation is nothing."). The inquiry is not a metaphysical one, but rather a common sense analysis of the facts that lay persons can undertake as competently as the most experienced judges. *Id.*

Thus, causation-in-fact issues should generally be resolved before taking up legal cause issues or allocating fault. *Waste Mgmt.*, 15 S.W.3d at 433. Tennessee courts have consistently recognized that conduct cannot be a cause in fact of an injury when the injury would have occurred even if the conduct had not taken place. *Id.* at 430. This principle has come to be known as the "but for" test, which states that

> [t]he defendant's conduct is a cause in fact of the event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event, if the event would have occurred without it.

Id. at 431. Causation in fact is an all-or-nothing proposition. *Id.* at 433. While there may be different degrees of liability or fault, specific conduct is either a cause in fact, or it is not. Accordingly, Plaintiffs have the burden of introducing evidence that affords a reasonable basis for concluding that it is more likely than not that Johnny's conduct was a cause in fact of the death of Ben Goeser. *Id.* Plaintiffs have failed in this manner. Moreover, under the facts of this case, no reasonable juror could find that Johnny's conduct was the cause in fact of the death of Ben Goeser. As horrible as the facts in this case are, Ben Goeser's death was not Johnny's fault.

b. *Proximate Cause*

Once it is established that the defendant's negligent conduct was an actual cause of the plaintiff's injury or harm, the focus then becomes whether the policy of the law will extend responsibility for that negligent conduct to the consequences that have occurred. *Kilpatrick*, 868 S.W.2d at 598. Legal responsibility must be limited to those causes which are so closely connected with the result and are of such significance that the law is justified in imposing liability. Some boundary must be set. *Id.* Fixing this boundary of liability is the purpose underlying the element of proximate cause. Proximate cause

> is merely the limitation which the courts have placed upon the actor's responsibility for the consequences of the actor's conduct.... [T]he consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond. Any attempt to impose responsibility upon such a basis would result in infinite liability...

Kilpatrick, 868 S.W.2d at 598. Proximate cause puts a limit on the causal chain, such that a defendant will not be held liable for injuries that were not substantially caused by its conduct or were not reasonably foreseeable results of its conduct. *Hale v. Ostrow*, 166 S.W.3d 713, 719 (Tenn. 2005). Proximate cause has been addressed with a three-pronged test:

> (1) the tortfeasor's conduct must have been a "substantial factor" in bringing about the harm being complained of; and (2) there is no rule or policy that should relieve the wrongdoer from liability because of the manner in which the negligence has resulted in the harm; and (3) the harm giving rise to the action could have reasonably been foreseen or anticipated by a person of ordinary intelligence and prudence.

Id.

This Honorable Court should set a boundary in this case and find that the conduct of Johnny's was not the proximate cause of Ben Goeser's death. Johnny's conduct, which was exactly what Plaintiff Nikki Goeser asked to be done, was not a substantial factor in bringing about the death of Ben Goeser. In addition, having a policy that business owners should be financially liable for the harm caused by targeted and unforeseeable actions of stalkers such as Hank Wise simply because a business does not have a male security guard on the premises [9] is unreasonable. Lastly, the attack by Hank Wise in this case could not have been reasonably foreseen or anticipated by anyone. If the shooting was not reasonably foreseeable by Plaintiff Nikki Goeser, who had a history with Hank Wise, it most certainly was not foreseeable by Johnny's, who did not have a history with Hank Wise. [10] Even viewing the facts in the light most favorable to Plaintiffs, no reasonable juror could find that Johnny's conduct was the proximate case of the death of Ben Goeser. As horrible as the facts in this case are, Ben Goeser's death was not Johnny's fault.

3. *Hank Wise's Actions Constituted an Intervening and Superseding Cause*

The intervening cause doctrine is a common-law liability shifting device. It provides that a negligent actor will be relieved from liability when a new, independent and unforseen cause intervenes to produce a result that could not have been foreseen. *Waste Mgmt.*, 15 S.W.3d at 432. The doctrine only applies when (1) the intervening act was sufficient by itself to cause the injury, (2) the intervening act was not reasonably foreseeable by the negligent actor, and (3) the intervening act was not a normal response to the original negligent actor's conduct. *Id*, The customary explanation of the doctrine is that an independent, intervening cause breaks the chain of legal causation between the original actor's conduct and the eventual injury. *Id.*

In this case, like in *Newell* and *Bray*, Hank Wise's action was sufficient by itself to cause Ben Goeser's death. No amount of male security guards patrolling the premises at Johnny's would have prevented the shooting, as it occurred immediately after Hank Wise was asked to leave. There was no time and there was nothing anyone could have done to prevent it. As noted in *Bray*, what Johnny's could have done to prevent Hank Wise from murdering Ben Goeser would be pure speculation. Next, as in *McIntyre, Bray*, and *Newell*, Hank Wise's acts were not reasonably foreseeable by Johnny's. For the sake of argument, Johnny's may have reasonably forseen that Hank Wise might have become upset and protested about having been asked to leave the premises when he had not caused any disturbance there, but it was not reasonably foreseeable that Hank Wise would immediately pull out a gun and shoot and kill Ben Goeser in the middle of a restaurant in front of many witnesses. [11] Along these same lines, Hank Wise's actions of pulling out a gun and shooting and killing Ben Goeser in the middle of a restaurant in front of many witnesses was not a normal response to being asked to leave Johnny's. [12]

CONCLUSION

This Honorable Court should grant Defendant's summary judgment motion in full. Under the facts of this case, Johnny's owed no duty of care. In the alternative, even if the Court finds that a duty of care did exist, Plaintiffs can not prove the remaining elements of negligence under the facts of this case. Lastly, no reasonable juror could find that Johnny's breached the "reasonable person" standard or that Johnny's acts or omissions were the cause in fact or proximate cause of Ben Goeser's death.

Respectfully submitted,

RAINEY, KIZER, REVIERE & BELL, P.L.C.

By: <<signature>>

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Footnotes

1 The Plaintiffs improperly sued Live Holdings Corporation, Jonny's, Jonathon Steinberg, and Marathon Properties, LLC. A *Consent Order to Dismiss Jonathon Steinberg, Marathon Properties, LLC and Live Holdings Corporation* was entered in May or June of 2011, leaving Jonny's and Hank Wise as Defendants.

2 Johnny's is marketed as a sports bar. *Steinberg Deposition*, p. 12.

3 Plaintiff Nikki Goeser is an advocate for the right to carry firearms in bars and restaurants by legal permit holders. *Goeser Deposition*, p. 24-26. It is her position that legal permit carriers should be allowed to carry guns into bars because criminals are going to carry guns regardless of the law and the law-abiding citizens are left unprotected. *Goeser Deposition*, p. 26. On the night of the shooting, Plaintiff Goeser's handgun was locked in her vehicle outside. *Id.* at p. 26-27.

4 Tia Winford, who is Decedent's daughter, testified that she had talked with Plaintiff Nikki Goeser and that in her (Tia Winford's) opinion, Hank Wise was stalking Nikki Goeser. *Deposition of Tia Winford*, p. 43, attached as ***Exhibit 4.***

5 Even if a security officer had been on duty on the Thursday night in question, Manager Jennifer King would not have asked the officer to approach Hank. Rather, she would have approached him just as she did because she did not feel threatened and it was not a situation that she thought required any sort of security. *Id.* at p. 48. Even in hindsight, Manager Jennifer King could not think of anything she would have done differently in confronting Hank. *King Deposition*, p. 50. Owner Jonathan Steinberg was satisfied with Manager Jennifer King's handling of the situation and testified that he had given instruction to his employees about how to handle asking a customer to leave and responding to such issues. *Steinberg Deposition*, p. 74-75. Steinberg testified he probably would have done the same thing. *Id.* at p. 76.

6 The *McClung* court considered evidence of prior crimes on the storeys premises and in or near the store's parking lot to determine the foreseeability of the crime at issue. *Id.* at 903; *see also Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83, 90 n.3 (Tenn. 2000) (looking to evidence of prior crimes on the premises and in the mall's parking lot to determine foreseeability).
Following the guidelines from *McClung* and *Staples*, the court in *Patterson-Khoury v. Wilson World Hotel-Cherry Road, Inc.*, 139 S.W.3d 281 (Tenn. Ct. App. 2004) limited evidence of prior crimes only to crimes that occurred **on the hotel's property and the properties adjacent to the hotel.** (Emphasis added). In *Wilson World*, a third party criminal attacked: the plaintiff inside the defendant's hotel. *Id.* at 284. The plaintiff attempted to introduce evidence of prior crimes in the surrounding area, including a nearby mall and its parking lot. *Id.* at 288. The trial court limited the evidence of prior crimes to crimes that occurred on the defendant's premises and on the adjacent properties. *Id.* The court of appeals affirmed, noting that both the *McClung* and *Staples* courts only considered crimes on the defendant's property when determining foreseeability, and that *McClung* specifically stated, "the requisite degree of foreseeability essential to establish a duty to protect against criminal acts will almost always require that prior instances of crime have occurred ***on or in the immediate vicinity of defendant's premises.***" *Id.* at 286. Following the Supreme Court of Tennessee's analysis, the *Wilson World* court specifically excluded evidence of prior crimes that did not occur on the defendant's premises or on the premises of adjacent properties because **crimes in the general area were not relevant to the foreseeability of the crime at issue.** *Id.* at 288-89 (Emphasis added); see *alsoZ Gem Co. v. Dollar Rent-A-Car*, 406 F. Supp. 2d 867, 872-74 (W.D. Tenn. 2005) (finding that a criminal attack on the defendant's premises was not

foreseeable because the plaintiff only introduced evidence of two minor crimes on the defendant's premises and the plaintiff's reliance on the GAP index score of the area was not relevant under *McClung* and *Staples*); *Keaton v. Wal-Mart Stores East, LP.*, No. E2008-00118-COA-R3-CV, 2009 WL 17853 (Tenn. Ct. App. Jan. 2, 2009) (excluding evidence of prior crimes from a nearby trailer park because it was not visible from the defendant's parking lot and therefore was not in the immediate vicinity of the premises where the crime occurred).

7 When *and if* the trial court determines that the foreseeability of the harm and its particular gravity outweigh the burden of taking reasonable protective measures, the question of duty and of whether a defendant has breached that duty is generally one for the jury to determine based upon proof presented at trial. *Giggers*, 277 S.W.3d at 365

8 For purposes of this motion, Defendant concedes the "injury or loss" element of negligence.

9 This appears to be the only other complaint Plaintiff Nikki Goeser has against Johnny's according to her deposition testimony.

10 Compare this case with the facts in *Bray*.

11 Compare with Bray where the Court found it unforeseeable that the assailant would shoot the plaintiffs in front of two security guards.

12 Nor was it a normal response to Johnny's failure to have a male security guard patrolling the restaurant or participating in the request of Hank Wise to leave the premises.

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ATTACHMENT B

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON

JAY and ELAINE DANIEL,

Plaintiffs/Appellants,

v. **No. W2014-01965-COA-R3-CV**

ALLSTATE INSURANCE COMPANY,

Defendant/Appellee.

Rule 3 Appeal from the Final Judgment of the Tipton County Circuit Court, Case No. 7087

BRIEF OF APPELLEE ALLSTATE INSURANCE COMPANY

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ORAL ARGUMENT REQUESTED

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STATEMENT OF THE ISSUE PRESENTED

The sole is presented for review is whether Plaintiffs' suit against Allstate was time-barred by the one year contractual limitations period contained in the policy of insurance.

STATEMENT OF THE CASE

This is an insurance coverage case arising out of a fire that occurred on December 15, 2011 at Plaintiffs' property. (Vol. 3, p. 222). At the time of the fire, Plaintiffs' property was insured under a homeowner's insurance policy issued by Allstate. (Vol. 1, pp. 2–3; vol. 2, pp. 172–204; vol. 3, p. 222). On April 2, 2012, less than four months after Plaintiffs made a claim to Allstate for the damage to their property, Allstate tendered a check to Plaintiffs for the actual cash value of the damages to their home which was negotiated by Plaintiffs. (Vol. 1, p. 95). Thereafter, Allstate made additional payments to Plaintiffs under other coverages of the policy of insurance, including payments for additional living expenses, and for personal property items that were damaged by the fire. (Vol. 1, p. 96; vol. 5, Exhibit C).

On October 3, 2013, approximately eighteen months after Allstate paid the claim, Plaintiffs filed suit against Allstate in the Circuit Court of Tipton County, alleging, *inter alia*, that Allstate breached the contract of insurance by failing to pay additional amounts under the policy. (Vol. 1, pp. 1-12). Subsequently, on May 12, 2014, Allstate filed a motion for summary judgment arguing that Plaintiffs' suit was barred by the one year contractual limitations period contained in the policy of insurance. (Vol. 1, p. 128 to vol. 2, p. 139). Specifically, Allstate argued that Plaintiffs' cause of action accrued once Allstate paid the claim on April 2, 2012, and as such, Plaintiffs had to file suit on or before April 2, 2013. (Vol. 1, p. 128 to vol. 2, p. 139). In response, Plaintiffs argued that the one year contractual limitations period did not begin to run until Allstate made its last payment to Plaintiffs in May 2013. (Vol. 2, p. 209 to vol. 3, p. 255). On August 26, 2014, after conducting a hearing on the motion, the trial court entered an order granting summary judgment in favor of Allstate. (Vol. 3, pp. 291–96). In its final order, after thoroughly analyzing the law on this issue, the trial court concluded:

> In this case the defendant accepted the claim and never denied the claim. The settlement check was tendered and accepted in April 2012. Suit was not filed until October 2013, well over a year from the settlement check. The fact that further discussion of claims related to the fire took place, does not extend the one year limitations period.

(Vol. 3, pp. 294–95). Thereafter, on September 8, 2014, Plaintiffs filed a notice of appeal to this Court. (Vol. 3, p. 297).

STATEMENT OF THE FACTS

On December 15, 2011, a fire occurred at Plaintiffs' property located at 85 Park Street, Munford, Tipton County, Tennessee 38058. (Vol. 3, p. 222). At the time of the fire, Plaintiffs' property was insured under a homeowner's insurance policy, Policy No. 9-55-337835, issued by Allstate with effective dates of June 28, 2011 to June 28, 2012. (Vol. 1, pp. 2–3; vol. 2, pp. 172–204; vol. 3, p. 222). The policy of insurance contains the following provisions:

> **Section I Conditions**
> * * *
>
> **3. What You Must Do After A Loss**
> In the event of a loss to any property that may be covered by this policy, **you** must:
> * * *
>
> **(g)** within 60 days after the loss, give **us** a signed, sworn proof of the loss . . . .
> * * *
>
> **6. Our Settlement Of Loss**
> **We** will settle any covered loss with **you** unless another payee is named in the policy. **We** will settle within 60 days after the amount of loss is finally determined. This amount may be determined by an agreement between **you** and **us**, an appraisal award or a court judgment.
> * * *
>
> **12. Suit Against Us**
> No suit or action may be brought against **us** unless there has been full compliance with all policy terms. Any suit or action must be brought within one year after the inception of the loss or damage.

(Vol. 2, pp. 187–90). Shortly after the fire, Plaintiffs submitted a claim to Allstate for the damage to their property, and Allstate began investigating Plaintiffs' claim. (Vol. 2, pp. 208, 212). After meeting with Plaintiffs and inspecting the damages to their home, Allstate prepared an estimate of the cost to repair or replace Plaintiffs' home in the amount of $199,212.00, and

submitted the estimate to Plaintiffs for their review and approval. (Vol. 5, Ex. C, p. 116; vol. 6, Exhibit F).

Instead of repairing the damaged home, Plaintiffs opted to purchase a replacement home situated on ten acres of land for approximately $165,000.00. (Vol. 1, pp. 3–4). Under the policy of insurance, payment for damages to the home are made initially on an actual cash value basis, however, upon actual repair or replacement of the damaged structure, an insured may obtain the difference between the actual cash value and the repair or replacement estimate. (Vol. 2, pp. 188–89; vol. 5, Ex. C, p. 116). Further, the policy of insurance provides that if an insured decides to replace the damaged structure at a new address, the replacement will not increase the amount payable under the policy, and the value of any land associated with the replacement structure will not increase the amount payable under the policy. (Vol. 2, pp.187–89). As such, on April 2, 2012, after explaining these policy provisions to Plaintiffs, Allstate tendered a check to Plaintiffs for the actual cash value of the damages to their home in the amount of $170,017.14, which was later negotiated by Plaintiffs. (Vol. 1, p. 95; vol. 5, Exhibit C, p. 116). No other payments were made by Allstate to Plaintiffs under the policy of insurance regarding coverage for the dwelling and other structures.

On July 16, 2013, approximately fifteen months after Allstate paid Plaintiffs' claim, Plaintiffs' attorney sent a demand letter to Allstate alleging that Plaintiffs were owed $75,000.00. (Vol. 6, Exhibit E). On July 29, 2013, Allstate sent a letter to Plaintiffs' attorney explaining that it had settled Plaintiffs' personal property claims in accordance with the policy of insurance and issued actual cash value settlements to Plaintiffs. (Vol. 6, Exhibit F). On August 2, 2013, Allstate sent a second letter to Plaintiffs' attorney quoting the policy provisions regarding the

amount payable to an insured that purchases a replacement structure, and further explained as follows:

> The dwelling settlement was based on an estimate of repair of the insured's home in the amount of $199,212.00, with an actual cash value of $170,017.14. Payment was made to our insured's [sic] totaling $170,017.14.
>
> . . . .
>
> The customer opted to purchase a replacement house with ten acres of land in the amount of $165,000.00, rather than rebuild. The appraisal provided by the insured indicated a land value of $5,500.00 per acre. The insured disagreed with the land valuation and in an effort to come up with a compromise adjustment I took the cost approach from the sales approach, giving our insured's [sic] benefit of doubt assuming all the difference was the land, the value of the land is $36,536.00, or $3,653.60 per acre. This gave our insured's [sic] the benefit of a lower assessment. We have advised the insured that should he obtain prof that the value of the land is less that [sic] the compromised amount we will reconsider the settlement amount.
>
> We have already made an actual cash value settlement totaling paid $170,017.14. The expense the insured has incurred to purchase the replacement home (less the value of the land) and make improvements does not exceed the $170,017.14 actual cash value payment.
>
> The insured can collect an additional $29,194.86, which is the difference between the actual cash value settlement and the total repair estimate. We will need documentation indicating what has been spent or a contract indicating a commitment to spend an amount that exceeds our actual cash value settlement amount. Once we received we will issue payment for the amount over the actual cash value settlement but not to exceed the repair estimate amount.

(Vol. 6, Exhibit F). Subsequently, on October 3, 2013, Plaintiffs filed suit against Allstate. As explained herein below, since Plaintiffs filed suit approximately eighteen months after Allstate paid their claim, the Plaintiffs' suit is time-barred by the one year contractual limitations period contained in the policy of insurance. (Vol. 1, pp.1–12; vol. 2, pp. 187–90).

STANDARD OF REVIEW

This appeal follows the trial court's grant of Allstate's motion for summary judgment based on its conclusion that Plaintiffs' suit was time-barred by the one year contractual limitations period contained in the policy of insurance. Since Plaintiffs' filed suit on October 3, 2013, the standard codified at Tennessee Code Annotated section 20-16-101 applies:

> In motions for summary judgment in any civil action in Tennessee, the moving party who does not bear the burden of proof at trial shall prevail on its motion for summary judgment if it:
>
> (1) Submits affirmative evidence that negates an essential element of the nonmoving party's claim; or
>
> (2) Demonstrates to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim.

Tenn. Code Ann. § 20–16–101 (applying to all cases filed on or after July 1, 2011).

A trial court's decision on a motion for summary judgment presents a question of law which this Court reviews *de novo* with no presumption of correctness. ***Parker v. Holiday Hospitality Franchising, Inc.***, 446 S.W.3d 341, 346 (Tenn. 2014) (citing ***Thompson v. Memphis City Sch. Bd. of Educ.***, 395 S.W.3d 616, 622–23 (Tenn. 2012)). This Court's *de novo* review requires a fresh determination that the requirements of Rule 56 of the Tennessee Rules of Civil Procedure have been satisfied. ***Id.*** (citing ***Hughes v. New Life Dev. Corp.***, 387 S.W.3d 453, 471 (Tenn. 2012)). Rule 56 provides that summary judgment is appropriate when a court determines that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04. Likewise, the scope of insurance coverage presents a question of law which this Court reviews *de novo* with no presumption of correctness. ***Clark v. Sputniks, LLC***, 368 S.W.3d 431, 436–37 (Tenn. 2012) (citing ***U.S. Bank, N.A. v. Tenn. Farmers Mut. Ins. Co.***, 277 S.W.3d 381, 386 (Tenn. 2009);

Harman v. Univ. of Tenn., 353 S.W.3d 734, 736–37 (Tenn. 2011)). Accordingly, since summary judgment is a preferred vehicle in Tennessee for disposing of purely legal issues, the construction of the policy of insurance at issue is particularly suited for disposition by summary judgment. ***Campora v. Ford***, 124 S.W.3d 624, 628 (Tenn. Ct. App. 2003) (citations omitted).

ARGUMENT

This Court should affirm the judgment of the trial court because Plaintiffs' suit against Allstate, filed approximately eighteen months after Allstate paid the claim, was time-barred by the one year contractual limitations period contained in the policy of insurance. Plaintiffs do not dispute the existence and application of the one year contractual limitations period contained in the policy of insurance, nor do they dispute that their suit was filed more than one year after Allstate settled the claim and issued them a check which they later negotiated. Instead, Plaintiffs argue that the discovery rule should toll the application of the one year contractual limitations period. According to Plaintiffs, they did not discover that they were "injured" until after May 2013 when they no longer received payments from Allstate. Respectfully, Plaintiffs' argument is misplaced and without merit.

I. Plaintiffs' suit was time-barred by the contractual limitations period contained in the policy of insurance.

This Court recently addressed a similar issue in ***Meyers v. Farmers Aid Ass'n of Loudon Cnty.***, 2014 WL 6889643 (Tenn. Ct. App. Dec. 9, 2014):

> Tennessee has long held that an insurance policy provision establishing an agreed limitations period within which suit may be filed against the company is valid and enforceable. ***Guthrie v. Conn. Indem. Ass'n***, 101 Tenn. 643, 49 S.W. 829, 830 (Tenn. 1899); ***Hill v. Home Ins. Co.***, 22 Tenn. App. 635, 125 S.W.2d 189, 192 (Tenn. Ct. App. 1938). Our courts have generally held that a contractual limitations period begins to run upon accrual of the cause of action. ***Phoenix Ins. Co. v. Fidelity & Deposit Co.***, 162 Tenn. 427, 37 S.W.2d 119 (1931). "We have interpreted insurance policies containing language requiring a claim to be brought within so many days after a property loss, but which protect the insurer from suit until after a settlement period, as meaning that suit must be brought within so many days after the cause of action accrues." ***Certain Underwriter's at Lloyd's of London v. Transcarriers Inc.***, 107 S.W.3d 496, 499 (Tenn. Ct. App. 2002) (citing ***Boston Marine Ins. Co. v. Scales***, 101 Tenn. 628, 49 S.W. 743, 747 (Tenn. 1898)). Because the settlement period provides a period of immunity, during which the insured may not bring suit, the cause of action has been construed as accruing once the immunity period has expired, rather than on the date of the actual loss. ***Id.*** Denial of the claim by the insurer before expiration of the

> settlement of loss period, however, is an effective waiver of the immunity period. ***Home Ins. Co. v. Hancock***, 106 Tenn. 513, 62 S.W. 145 (Tenn. 1900). Thus, an insurer cannot raise the immunity period as a defense to a suit brought within that period once it has denied the claim. ***Hill***, 125 S.W.2d at 192. Therefore, an insured's cause of action accrues upon denial of liability by the insurance company when that denial comes within the immunity period. ***Id.*** "It follows that if the insured's claim is not denied within the settlement of loss period, during which the insurer is immune from suit, [the] cause of action accrues upon expiration of the settlement of loss period, when the insurer is no longer immune from suit." ***Certain Underwriter's***, 107 S.W.3d at 499.

Id. at *3.

Generally speaking, Tennessee courts utilize one of two approaches in determining when an insured's cause of action accrues for purposes of commencing a contractual limitations period contained in a policy of insurance. Under the first approach, the insured's cause of action accrues, and the contractual limitations period commences to run, once the insurer denies the claim. ***See Das v. State Farm Fire and Cas. Co.***, 713 S.W.2d 318 (Tenn. Ct. App. 1986); ***Phoenix Ins. Co. v. Brown***, 381 S.W.2d 573 (Tenn. Ct. App. 1964). Under the second approach:

> If an insurer neither pays nor denies a claim brought by its insured, a suit against the insurer may be sustained upon expiration of the settlement of loss/immunity period. Accordingly, the contractual statute of limitations begins to run upon denial of liability or upon expiration of the immunity period, whichever comes first.

Certain Underwriter's at Lloyd's of London v. Transcarriers Inc., 107 S.W.3d 496, 500 (Tenn. Ct. App. 2002).

In this case, the accrual of Plaintiffs' cause of action does not involve the application of the settlement immunity period, because Allstate never received Plaintiffs' signed, sworn proof of loss. The accrual of Plaintiffs' cause of action also does not depend on the denial date because Allstate never denied Plaintiffs' claim. However, Allstate's payment of the claim has the same effect as a denial in triggering the contractual limitations period, because once an insurer accepts liability and pays an insured's claim, the loss has been settled and an insured's

cause of action, if any, would accrue at that time. Specifically, after meeting with Plaintiffs and inspecting the damages to their home, Allstate accepted liability for the claim and settled the loss based upon the parties agreement that the amount of the loss was $199,212.00. (Vol. 5, Exhibit C, p. 116; Vol. 6, Exhibit F). Thereafter, Allstate paid the claim when, on April 2, 2012, it issued a settlement check to Plaintiffs for the actual cash value of the damages to their home in the amount of $170,017.14, and Plaintiffs later negotiated the check. (Vol. 1, p. 95; vol. 5, Exhibit C, p. 116). Accordingly, Plaintiffs' cause of action accrued, and the contractual limitations period was triggered, on April 2, 2012.

Even assuming for the sake of argument that Plaintiffs had submitted a signed, sworn proof of loss, their cause of action would still have been time-barred by the contractual limitations period. For example, in ***Bush v. Exchange Mutual Ins. Co.***, 866 S.W.2d 575 (Tenn. Ct. App. 1993), the policy at issue contained a one year contractual limitations period and a provision requiring the insured to submit a signed, sworn proof of loss within sixty days of the date of loss which was December 11–12, 1989. ***Id.*** at 576–78. After an investigation was conducted, the insurer sent a letter to the insured denying some of the coverage on March 8, 1990. ***Id.*** Then, the insurer sent the insured a proof of loss statement that was already filled out, however, the insured did not agree to what the statement contained so she did not sign or return the statement. ***Id.*** The insured never filed a signed, sworn proof of loss with the company, and instead filed suit on December 14, 1990. ***Id.*** On appeal, this Court first concluded that the insurer waived the requirement that the insured file a sworn proof of loss within sixty days. ***Id.*** at 577. The ***Bush*** court explained that the insured's suit was timely filed even though the lawsuit was filed over a year after the date of loss, since it was filed before the expiration of one year plus sixty days. ***Id.*** at 578.

The policy of insurance contains the standard requirement that the insured submit a signed, sworn proof of loss within 60 days of the loss, and that payment will be made, if any, within 60 days of receipt of the signed, sworn proof of loss. (Vol. 2, pp. 172–204). The fire loss at issue occurred on December 15, 2011, thus, the policy required Plaintiffs to submit a signed, sworn proof of loss on or before February 15, 2011. As in ***Bush***, Allstate never received Plaintiffs' signed, sworn proof of loss. However, Allstate did receive the Plaintiffs' signed non-waiver agreement dated December 19, 2011. (Vol. 2, p. 208). Giving Plaintiffs the benefit of the doubt by utilizing the date that the non-waiver agreement was signed, the policy required Plaintiffs to submit their signed sworn proof of loss within 60 days, or February 19, 2012, and thereafter Allstate would have until April 19, 2012 to settle the loss pursuant to the 60 day settlement immunity period. Defendant settled the loss and paid the claim on April 2, 2012. As such, Defendant's payment of the claim settled the loss and ended the 60 day settlement immunity period. Therefore, the one year contractual limitations period commenced to run on Plaintiffs' action on April 2, 2012. Since Plaintiffs filed suit on October 3, 2013, approximately eighteen months after Allstate paid the claim, the Plaintiffs' action was time-barred by the one year contractual limitations period contained in the policy of insurance.

II. The "discovery rule" does not apply to toll the contractual limitations period.

Finally, Plaintiffs' "discovery rule" argument is without merit. As then-Judge William C. Koch, Jr. explained before he was appointed to the Tennessee Supreme Court, "the discovery rule cannot supersede a contractually agreed upon limitations period as along as the agreed upon period affords a reasonable time within which to file suit." ***Goot v. Metro. Gov't of Nashville & Davidson Cnty.***, 2005 WL 3031638, at *12 (Tenn. Ct. App. Nov. 9, 2005) (citing ***New Welton Homes v. Eckman***, 830 N.E.2d 32, 35 (Ind.2005); Eric Mills Holmes, ***Corbin on Contracts*** §

9.9, at 278 (Joseph M. Perillo ed., rev. ed.1996)). Moreover, Plaintiffs' argument ignores the fact that Allstate never denied the claim; rather it settled and paid the claim. (Vol. 1, p. 95). Plaintiffs' argument also ignores one of the most fundamental principles of contract law— a party to a contract is deemed to have read and know the contents of the contract. ***Beasley v. Metropolitan Life Ins. Co.***, 190 Tenn. 227 (1950); ***Poole v. Union Planters Bank, N.A.***, 337 S.W.3d 771 (Tenn. Ct. App. 2010). Thus, Plaintiffs cannot depend on the date they incorrectly state that Allstate allegedly denied the claim in July or August 2013 to save their lawsuit. As aptly stated by the trial court, "[t]he fact that further discussion of claims related to the fire took place, does not extend the one year limitations period." (Vol. 3, pp. 295).

> If limitations periods were to toll merely because further negotiation, inspections, and adjustments occur, it would defeat the purpose of the limitations period. Lengthening the period for suit in such a way would only serve to discourage the insurer from trying to work with the insured to arrive at a fair payment.

Murphy v. Allstate Indem. Co., 2014 WL 1024165, at *3 (E.D. Tenn. Mar. 17, 2014). Therefore, Plaintiffs' cause of action accrued, and the contractual limitations period began to run, on the date Allstate paid the claim on April 2, 2012. In other words, if this matter were to be timely filed, Plaintiffs must have filed suit no later than April 2, 2013. Plaintiffs did not file suit until approximately eighteen months later on October 3, 2013, and as such, Plaintiffs' suit was time-barred by the one year contractual limitations period contained in the policy of insurance. Accordingly, this Court should affirm the trial court's judgment granting Allstate's motion for summary judgment.

CONCLUSION

For the foregoing reasons, Allstate respectfully requests that this Court affirm the trial court's order granting its motion for summary judgment.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of this pleading or document was served upon the party listed below or the office of such counsel:

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This the 12th day of January, 2015.