Tennessee Judicial Nominating Commission

Application for Nomination to Judicial Office

Rev. 26 November 2012

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INTRODUCTION

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

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

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

I am a Circuit Court Judge for the 3d Judicial District, State of Tennessee

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

1984, BOPR #010695

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

Tennessee

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

No

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

9/06-present Circuit Court Judge, 3d Judicial District, State of Tennessee

9/98-9/06 General Sessions Court & Juvenile Court Judge for Greene County

4/92-9/98 Assistant Federal Defender, Federal Defender Services of Eastern Tennessee, Inc.

9/86-4/92 Private Practice of Law

Thomas J. Wright, P.C. practicing in an association of attorneys: Dietzen, Atchley & Wright;

Summers, McCrea & Wyatt, P.C.;

Stophel & Stophel, P.C.

7/85-9/86	Federal Judicial Law Clerk The Honorable Thomas G. Hull, Chief U.S. District Judge, Eastern District of Tennessee
8/83-6/85	Coordinator of Ministry to the Legal Profession, Josh McDowell Ministry, Campus Crusade for Christ
1993-1998	Adjunct Faculty, Walters State Community College teaching various classes in the Legal Assistant Program and at the Basic Police Recruit School
1991-1992	Adjunct Faculty, Chattanooga State Community College teaching Business Law
1994-2005	Partner, T-N-T Explosive Growth Poultry Production. Contract broiler production operation. It was a family farm partnership, in which I was a general partner.

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

Not applicable

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

As Circuit Court Judge I preside over a variety of civil and criminal cases. Approximately 90% of the cases I am currently assigned are civil and approximately 10% are criminal. In the Third Judicial District we have one judge who handles only criminal matters. I am assigned cases in which he has recused himself and occasionally preside over other criminal cases to assist with the caseload.

The civil cases consist of approximately 50% domestic relations, 30% torts, and 20% other. I conduct jury and bench trials as well as rule on all related pretrial matters. I also regularly consider, and rule upon, often outside the regular workday, search warrants, judicial subpoenas, and asset forfeiture warrants. The Third Judicial District Attorney's office and its Drug Task Force are headquartered in Greeneville and are very active.

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters

where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Commission needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Commission. Please provide detailed information that will allow the Commission to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

Almost all of my legal career has been devoted to litigation in both trial and appellate courts. I have been involved in numerous criminal, civil, and administrative trials as an attorney, judge, and a federal judicial law clerk. My current judicial responsibilities are discussed above.

As the General Sessions Court and Juvenile Court Judge for Greene County, I presided over almost every type of criminal and civil matter imaginable. Approximately 70% of that work was criminal; 20% was civil juvenile work involving abuse, dependency and neglect, and paternity/custody; and 10% was civil work in General Sessions court.

Greene County was the most populous county in the state of Tennessee with only one judge handling all General Sessions and Juvenile Court cases. As a result, I held court every day of the week, morning, afternoon and sometimes late into the night, to keep up with the caseload. I implemented innovative docket control measures to streamline the process and initiated a bad check program, with the assistance of the District Attorney and the Sheriff, that has kept hundreds of bad check cases out of court and put thousands of dollars back in the pockets of victims.

Prior to my first election, I worked for six years as the Assistant Federal Defender for the U.S. District Court in Greeneville, Tennessee, exclusively handling federal criminal cases from arraignment through exhaustion of the appellate process. During this time I litigated approximately 50 criminal appeals in the Sixth U.S. Circuit Court of Appeals and filed several petitions for certiorari with the U.S. Supreme Court.

While a majority of the charges involved drugs and/or guns, I was exposed to a wide array of criminal behavior as Federal Defender, including rape, robbery, carjacking, child pornography, and a variety of complicated embezzlements and frauds. Because federal charges often involve a conspiracy, and because these conspiracies typically extend outside East Tennessee, I represented people from many different cultures, locations and ethnicities. By way of example, I represented crack dealers from New York, marijuana growers from the East Tennessee hills, a native of China selling knock-off designer bags, and an accountant and CFO of a large automobile dealership. A large percentage of my clients were African-American or Hispanic.

My private practice overwhelmingly involved litigation. During that time approximately 80% was civil litigation, 10% criminal litigation, and 10% non-litigation such as writing wills, incorporating businesses, or drafting documents for transactional matters.

It may not be apparent just from the biographical information, but during the last thirty years my legal career has involved a tremendous breadth and diversity of experience. I believe this experience is a strength for a judge. I have interacted with all kinds of people in and out of the courtroom. I have had the opportunity to work with, interact with, and represent people from all

walks of life, from the wealthy president of a large regional manufacturer to the almost penniless undocumented immigrant making minimum wage and sending most of it home to Mexico.

I have practiced in a large firm doing primarily civil defense work and business-related litigation, a small firm doing primarily plaintiff's personal injury and criminal defense work, and as a sole practitioner handling a variety of cases. I have handled everything from a city code violation to a complicated medical malpractice or criminal conspiracy case.

I have seen the viewpoint of the accused and have experienced the viewpoint of the trial judge who must balance all the competing interests while making life-changing decisions. I have sentenced people to prison, but I will never become immune to the significance of such a deprivation of liberty. I have received victim's statements, but no matter how often I do, I will always seek to understand the devastating impact crime has on these individuals and their families. I have learned what it is like for a police officer to conduct a traffic stop, investigate a rape, or respond to a domestic violence call and how important judicial decisions can be in the effectiveness of law enforcement and in keeping the public and the police safe.

In each role I have learned more about myself, more about others, and more about our judicial system. I believe the breadth of my experience as an attorney and as a judge provides perspective and, in turn, facilitates understanding. Understanding is essential to the administration of justice. We must understand the legal and the practical issues presented by each case. We must understand the viewpoints of the individuals and the lawyers involved in each case. Also we must understand the consequences and implications of our decisions. Without such understanding we can create well-intentioned injustice.

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

Treatment Court.

This does not involve a specific case but rather a program I instituted to try to address the cause of so much heartache and so much crime--substance abuse. With a federal grant and training, as well as the assistance of a treatment provider and a host of other team members, I started the DUI Treatment Court to provide an option for people with addiction problems that had been charged with a multiple offense DUI. Without going into great detail, we held the offenders responsible for their crimes but provided them an opportunity to free themselves from their addictions through treatment, support, supervision, and judicial oversight and cheerleading. The program is an astounding success thanks to the team and the hard work of the participants. The program cost the County nothing and we held our Treatment Court meetings after the normal workday had concluded. My successor in Greene County has expanded the program to a Drug Court encompassing all offenses, such as meth and opiate abuse, which have reached epidemic proportions in Greene County.

As Judge Hull's law clerk I was involved in many cases that could be considered "of special note," but two stand out to me as exceptional cases. I worked with him on the Hawkins County Textbook case, aka "Scopes II," providing the draft opinion for him. The final decision is found at *Mozert v. Hawkins County Public Schools,* 647 F.Supp. 1194 (E.D. TN 1986). The case received national publicity and was the subject of a book, Battleground, by Stephen Bates. The

decision juxtaposed two essential constitutional liberties: the right to free exercise of religion and the right to be free from a religion established by the state. It also involved the state's interest in public education and the parental privacy interest in raising a child without interference of the state.

The other case from my clerkship that stands out is *State Industries v. Mor-Flo Industries*. It was a complex patent infringement case involving multi-million dollar damages in which I provided Judge Hull with the draft opinion, which was upheld by the U.S. Court of Appeals for the Federal Circuit. The District Court decision is found at 639 F.Supp. 937(E.D. TN 1986). Because of the complexity and specialty of patent litigation, all appeals go to the Federal Circuit rather than the regional circuit where the dispute arose. No new legal principle was established in the case, but our analysis withstood the scrutiny of the federal appellate process and Judge Hull and I were gratified by the result.

As an attorney I handled the following cases that entailed significant legal issues:

United States Pipe and Foundry v. Johnson, 927 F.2d 296 (6th Cir. 1991). This case involved whether Tennessee's Second Injury Fund, which is funded by private employer contributions, is entitled to the State's sovereign immunity under the 11th Amendment to the U. S. Constitution, and therefore immune from suit in Federal Court.

United States v. Christian, 942 F.2d 363 (6th Cir. 1991), was a drug conspiracy case which addressed whether the *Pinkerton* doctrine applied to a co-conspirator's crimes which are not specifically enumerated under the drug conspiracy statute, 21 U.S.C. Sec. 846.

United States v. Wilson, 9 F.3d 111 (table) (6th Cir. 1993), addressed whether one can "launder" proceeds from an unlawful transaction before he/she is in receipt of the proceeds. The court reversed the defendant's money laundering conviction because a wire transfer of funds from the bank of a defrauded company to the defrauding defendant's bank account was not a "monetary transaction in criminally derived property" under 18 U.S.C. Sec. 1957.

United States v. Washington, 60 F.3d 829 (table) (6th Cir. 1995), involved whether the Fifth Amendment protection of *Doyle v. Ohio,* that a defendant cannot be impeached at trial by post-*Miranda* silence, should extend to post-arrest but pre-*Miranda* silence when it is shown that the defendant was aware of his right to remain silent before being administered his *Miranda* warnings.

United States v. Freshour, 64 F.3d 664 (table) (6th Cir. 1995), was significant as the first major Medicaid fraud case tried in the Eastern District of Tennessee. It called into question the payment and approval systems of the Tennessee Medicaid office and highlighted the complexity and difficulty of the Medicaid regulations regarding reimbursement codes, descriptions and rates. My client was acquitted of 53 counts at trial; the two remaining counts of conviction were overturned by the Sixth Circuit.

As a judge I presided over the following cases involving significant rulings:

In re: Shiann Marie Horner, 2003 Tenn. App. LEXIS 228 (Tenn. App. 2003) was a case involving a child custodial placement decision involving the issue of whether the priority list of prospective guardians for a child found at Tenn. Code Ann. Sec. 34-2-103 overrides the best interest analysis required by Tenn. Code Ann. Sec. 36-6-106. In affirming my decision the Court of Appeals said the best interest "of a child whose custody is being decided is the alpha and

omega of the determination." Slip op. p.7.

State of Tennessee v. Hensley, 2006 Tenn. Crim. App. LEXIS 647 (Tenn. Crim. App. 2006), perm. app. denied 2006 Tenn. LEXIS 1055 (Tenn.). I conducted the transfer hearing for a juvenile defendant charged, with others, of murdering his sister. It was a vicious murder in which the victim received 151 stab wounds. I ruled that the defendant should be transferred to Criminal Court to stand trial as an adult. My decision was affirmed by the Criminal Court and Court of Criminal Appeals. The noteworthy issue from my part in the case was whether the defendant should have been appointed a guardian *ad litem* during the juvenile proceedings because his Mother had a conflict of interest in that she was also the Mother of the victim. In affirming my treatment of the transfer hearing the Court of Criminal Appeals held that the defendant "failed to establish that he was entitled to the appointment of a guardian *ad litem*… ." Slip op p.7.

Lawing v. Greene County EMS, 2012 Tenn. App. LEXIS 921 (Tenn. App. 2012), perm. app. pending, was a case involving whether the medical malpractice act's tolling provision, found at Tenn. Code Ann. Sec. 29-26-121, applies to a med mal claim against a governmental entity under the Governmental Tort Liability Act so as to extend the applicable statute of limitations.

Fountain v. Tennessee Department of Children's Services, Docket No. 10-9-150, Jefferson County Chancery Court (2013), raised the issue of whether the administrative procedures involved in DCS designating a person as an "indicated" perpetrator of child sexual abuse, and publishing such designation, violate Due Process.

Combs v. Horton, Maddox & Anderson, PLLC, Docket No. 06C1464, Hamilton County Circuit Court (20) was a complicated legal malpractice case involving an underlying products liability claim that could have been pursued under Tennessee law or maritime law as the accident occurred on the Tennessee River, a navigable waterway. Prior to the two week trial of the case I ruled that one law firm's failure to pursue the maritime claim could not have been the legal cause of the plaintiff's loss because the potential to pursue the maritime claim still existed at the time the plaintiff retained the second law firm. Thus, even if the first firm was negligent in failing to pursue the maritime claim, their negligence could not have been the legal cause of plaintiff's loss since the claim was viable at the time plaintiff employed the second firm. The situation had not been previously addressed by the appellate courts of Tennessee.

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

Not applicable

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

Not applicable

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

I have completed the following educational courses that may be relevant to this application:

-U.S. Department of Justice, National Drug Court Institute: Adult Drug Court Planning Initiative: Basic Drug Court Training.

-Tennessee Administrative Office of the Courts: Leadership Institute in Judicial Education; Judicial Academy (completed twice)

-Federal Judicial Center: Appellate Workshop; Sentencing Guideline Appeals—Art and Mechanics; Appellate Writing Workshop

-National Criminal Defense College: Trial Practice Institute

-The National Judicial College: Caseflow Management Technical Assistance

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

August 30, 1996, application for Court of Criminal Appeals. Uncertain of the date of the meeting at which the application was considered. My name was submitted to the Governor as a nominee.

January, 1995, application for Court of Criminal Appeals. Public hearing was January 30, 1995. My name was submitted to the Governor as a nominee.

I also applied, and was nominated, for Chancery and Circuit Court positions around this same time but cannot locate any documentation.

EDUCATION

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

University of Tennessee, College of Law, 1980-83, Doctor of Jurisprudence with High Honors

Order of the Coif

Moot Court Board

Jessup International Law Moot Court Team: 3rd Place Brief in Regional Competition

Advocate's Prize Moot Court Competition: Best Brief Award, Semi-Finalist

American Jurisprudence Award: Decedent's Estates

Dean's List

Worked every Summer and part-time during school to pay for Law School

University of Arkansas, College of Business, 1977-80, Bachelor of Science with Honors in Business Administration. Major in Finance and Real Estate.

Beta Gamma Sigma Honor Society

Honors Finance Program-Portfolio Management

Dean's List

Maintained honors academic standing while playing on the Arkansas Rugby Team and holding several leadership positions in my social fraternity and a student ministry.

University of Kansas, 1976-77. Transferred to Arkansas

PERSONAL INFORMATION

15. State your age and date of birth.

55 years old. DOB: May 27, 1958

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

Since 1985

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

Since 1992

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

Greene County

19. Describe your military Service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state

whether you received an honorable discharge and, if not, describe why not.

Not applicable

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

Only traffic citations in which I paid a fine. So long ago I do not have information on them.

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

No

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

Not applicable

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

No

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

No

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

No

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

Asbury United Methodist Church: Sunday School Teacher, Bible Study Leader, Certified Lay Speaker, Youth Leader, Confirmation Mentor (various dates as needed)

Holston United Methodist Home for Children: Board of Trustees, 2006-13, Program Services Committee Chair, 2012-13

West Point Parent's Club of Eastern Tennessee, 2010-present

Army A Club, 2010, 2013

Walters State Community College: Advisory Committee for the Legal Assistant Program

Tusculum College: Criminal Justice Feasibility Analysis Steering Committee, 2011

Greeneville City Schools: Diversity Team, 2010

Greeneville/Greene County Center for Technology: Criminal Justice Program Advisory Committee, 1998-2009

Boy Scouts of America, Sequoyah Council: Advisory Board

Boys & Girls Club of Greeneville/Greene County: Volunteer, Supporter

YMCA of Greeneville/Greene County: Soccer Coach (currently 3-4th grade boys)

Fellowship of Christian Athletes (Greene County): President, 2012-13, Board Member, 2008-present

Greene County's Community of Promise: Honorary Chair, 2000-2008

Greene County Tennis Association: President (approx. 5 years ago), 2008-present

Olde Towne Tennis Club, 2008-present

Greeneville High School Football Booster Club: President, 2009-10

Greeneville Arts Council, 2008-present

Main Street Greeneville, 2008-present

Republican Women of Greene County, Hawkins County, Hamblen County, 2008-present

Loyal Order of the Moose, 2008-present

27. Have you ever belonged to any organization, association, club or society which limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.

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

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

No

ACHIEVEMENTS

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

Tennessee Judicial Conference, 2006-present

Pattern Jury Instruction Committee-Civil, 2007-present

Judicial Family Institute, 2008-present

Bench-Bar Committee, 2012-present

GAVELS Program Judicial Speakers Bureau, 2011-present

Public Trust and Confidence in the Courts, 2010-2012

Tennessee Judicial Foundation, 2006-present

Founded the Thomas G. Hull Scholarship, 2012

Tennessee Trial Judges Association, 2006-present

Tennessee Bar Foundation, 2009-present

Tennessee General Sessions Judges Conference, 1998-06

Eastern Division Vice-President, 2001-02

Executive Committee, 2001-02

Education Committee, 1998-2006

Tennessee Association of Juvenile and Family Court Judges, 1998-06

National Association of Drug Court Professionals, 2003-07

Court Historical Society (U.S. District Court for the Eastern District of Tennessee)

Vice-President, Northeast Division, 2009-present

Greene County Bar Association

Hamblen County Bar Association

Hawkins County Bar Association

Although I no longer pay dues to the Tennessee Bar Association or the American Bar Association, I am active in bar activities, taking on judicial interns, speaking, and sitting as judge for the high school mock trial competition. Though more than 10 years ago, I believe my work on an ABA YLD Ethics Committee, in which we drafted a Model Code of Professionalism, was significant.

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

Elected Fellow of the Tennessee Bar Foundation

State of Tennessee ADAT Award of Excellence

TAADAS Voice of Recovery Award Finalist

Doak-Balch Civic Responsibility and Outstanding Character Award from Tusculum College and First Tennessee Human Resource Agency

Award Plaque from Greene County DUI Treatment Court Team for establishing Treatment Court

Award Clock from Walters State Community College for support of the Basic Police Training Academy

Award Certificate from CASA of Northeast Tennessee for implementing program in Greene County Juvenile Court

Award Certificate from Greene County Health Council for leadership in implementing America's Promise and the Reality Program as Juvenile Judge.

Award Plaque from Greeneville City School System for cooperative efforts in addressing truancy, school violence, and other areas affecting education and juvenile justice.

Who's Who in the World

Appointed to the Civil Justice Advisory Group for the Eastern District of Tennessee by Chief U.S. District Judge James H. Jarvis

Who's Who in American Law

Selected as one of The Business Journal's "40 under Forty" recognizing professional achievement and leadership in Upper East Tennessee and Southwest Virginia

Award Plaque from Inner-City Ministries for volunteer efforts at Legal Aid Clinic

J. C. Penney Golden Rule Award Nominee for *Pro Bono* activities

Who's Who in the South and Southwest

Who's Who in Practicing Attorneys

Who's Who Among Young American Professionals

Outstanding Young Men of America

Rated "Excellent" as a Law Clerk with the Federal Administrative Office of the Courts

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

"Oral Advocacy--Some Reminders," The Champion, June 1995, with Perry Piper

"Oral Advocacy--Some Reminders," Tennessee Bar Journal, November 1994, with Perry Piper

Amicus Defendente, Editor and Primary Contributor, October 1993-August 1998 (this was a quarterly publication distributed to criminal defense attorneys within the Eastern District of Tennessee and to Federal Defender Offices nationally. It contained summaries of recent appellate criminal cases as well as practical information and instruction on effectively representing federal criminal defendants.)

"Look Mom, No Staff!" Christian Legal Society Quarterly, Winter 1992

Advanced Worker's Compensation in Tennessee, National Business Institute, Inc. (1991), author of chapters on "Hearing Process and Practice," "Aggravations of Pre-existing Conditions," and "Recent Legislation."

Worker's Compensation in Tennessee, National Business Institute, Inc. (1991), author of chapters on "Current Medical Issues," and "Legislative Update."

"TV Advertising by Lawyers-What Have You Got to Lose?" *Res Nova*, Vol. III, No.3 June 1990

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

"Jury Trial Innovations," Southeast ABOTA Conference, Judicial Panel Presenter, 2008

"Asking Jurors to do the Impossible," University of Tennessee Center for Advocacy and Dispute Resolution, Summers-Wyatt Jury Symposium, Judicial Panel Presenter, 2009

"Use of Contempt in the Divorce Context," Family Law Conference for Tennessee Practitioners, sponsored by TAM, 2009

"Ethics Questions and Answers," Hawkins County Bar Association, 2009

"Impaired Driving and Drug Courts," National Highway Transportation Safety Association-Regional meeting, 2009

"A Circuit Court Perspective on Child Support and Contempt," Northeast Tennessee Child Support Seminar, 2010

"Domestic Do's and Don'ts," Family Law Conference for Tennessee Practitioners, sponsored by TAM, 2010

"The Hawkins County Textbook Case-A 25 Year Retrospective," Court Historical Society, 2011

"You Can't Make Me--Contempt," Tennessee Child Support Magistrate's Seminar, 2012

"Proving Self-Employment Income," Northeast Tennessee Child Support Seminar, 2012

"The Tennessee Textbook Case," Tennessee Bar Association Leadership Law Program, 2012

"Scoring Points With the Judiciary," Greene County Bar Association, 2012

"Ethics-A View From the Bench," Hawkins County Bar Association, 2012

"Contempt," 6th Annual Law Conference for Tennessee Practitioners, sponsored by TAM, 2012

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.

9/06-present, Circuit Court Judge, 3rd Judicial District, State of Tennessee, elected.

9/98-9/06, General Sessions Court & Juvenile Court Judge, Greene County, Tennessee, elected.

Previous applications listed in answer to Question 13, above.

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

No

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

I have attached three writing samples. I was completely responsible for each.

ESSAYS/PERSONAL STATEMENTS

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

I am committed to serving the public and want to do so in the way that best utilizes my strengths and experience. I believe my strengths lie in the areas important for this position. I have always found analyzing both sides of an issue and deciding on the appropriate resolution to be natural.

Quality research and writing skills, the companions of proper analysis, are assets I possess.

I have the experience, as a trial lawyer, and at every other level of the judiciary, to understand how decisions will play out in "real life." Lawyers and trial judges sometimes scratch their heads and lament the appellate judges who "work in ivory towers" but do not understand the practical implications of their decisions. Because I have been on the "front lines" as an attorney, a juvenile judge, a general sessions judge, and a circuit court judge, I will not lose the realistic and pragmatic perspective I believe is important on an appellate bench.

At 55, having raised a family and experienced all the joys and many of the sorrows life has to offer, I also have the life experience that now seems a necessary prerequisite to serving effectively on the appellate bench. When I applied for this court in 1996, I certainly possessed the required intellectual ability, but I had no idea how much I did not know.

I want to continue my public service by putting my strengths and experience to their best use. I believe that would be on this Court.

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

The struggle to achieve equal justice under the law is significantly affected by the availability of quality legal services for all citizens. My participation in, and organization of, *pro bono* activities reflects my commitment to equal justice. Recognizing the powerless position of many inner-city residents and the inability of Legal Services to completely fill this void, I co-founded an inner-city legal aid clinic in Chattanooga. I served as Director of this project as well as a volunteer lawyer, from 1987 until I left Chattanooga in 1992.

As a member of the Chattanooga Bar Association Pro Bono Committee, I assisted in the development and implementation of the first Bar Association Pro Bono Program since the creation of Legal Services. I also served as a volunteer lawyer in this program.

My work as Federal Defender reflects my commitment to equal justice.

The bar and I are working on development of a "pro se civil day" in Greene County where volunteer lawyers will assist indigent litigants.

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 Court of Criminal Appeals opening in the Eastern Grand Division. The Court hears criminal appeals in three-judge panels throughout the state as assigned by the Chief Judge. There are 12 judges on the Court, 4 from each grand division.

My selection would bring a person from rural Northeast Tennessee who has the academic ability and the common sense to carefully craft an appellate decision; who does not take himself too seriously but who takes his work very seriously. I would bring a diverse experience from outside

the courtroom and a wide-ranging experience from inside the courtroom.

I would bring experience as an attorney and just as importantly as a judge. I have served as a General Sessions Court Judge, where the vast majority of criminal cases are handled, and the implications of appellate opinions are truly manifested. I have served as a Juvenile Court Judge where the quest for an effective judicial response to delinquency can affect the well-being of our State for years to come. I have served as a trial judge, where the stakes are high and the faces are real.

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

My most important participation in community service has been to help provide the resources and opportunities needed by our youth so that every child can become a champion. I have had a front row seat to the devastating consequences of family dysfunction, violence, and addiction. This experience has strengthened my resolve to make our communities and our state a better place.

Perhaps nothing is more important in the successful development of a child than an ongoing relationship with a caring, responsible adult. That is why, three years after our last child left home, I am still coaching 3rd-4th graders at my local Y. That is why I took the lead in implementing America's Promise in Greene County. That is why I gladly gave my time and money to serve on the founding Board of our Boys & Girls Club, the founding Task Force for our Child Advocacy Center, the 3rd Judicial District Child Fatality Review Team, and the Nolachuckey District Council of the Boy Scouts, among other things. These are the type of activities and organizations that help repair the devastation I spoke of earlier.

Every year my wife and I host a group of children at the lake from our Boys & Girls Club. Some have never seen a lake, and are thrilled just riding on a boat. But most quickly jump on a tube and have a ball. Over the years, I have found that I know some of their parents--usually from court. I have the same experience when we have our Angel Tree Christmas party at church for children with an incarcerated parent. Seeing the hope and potential in these kids who have been dealt a difficult hand gives me compassion, and keeps alive a passion to find answers for crime, for addiction, for broken families.

Serving others keeps one's perspective more realistic and humble. As public servants we should take the lead in giving of our time and money. The judiciary has been subjected to criticism in the last few years in East Tennessee in particular. When the public sees us serving, rather than being served, we hopefully garner respect rather than ridicule.

I do not anticipate changing my level of community involvement if appointed to this position.

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

One of the most significant experiences one may have is that of being a parent. Having children gives me a strong desire to leave this world a better place for them than it has been for me. As a judge on the Court of Criminal Appeals I can play a more meaningful part in refining and perpetuating an effective and efficient judicial system which is an essential component in the stability and enhancement of our society.

Children are great for taking what seems complex and making it simple. They also require us to explain complex ideas in a simple and understandable manner. They aren't bound to the status quo or tradition and seek real answers to their "why" questions. These are attributes that are often lost in our judicial system.

Raising children has kept me humble and properly aligned my priorities, keeping my focus on what is truly important.

In addition to my experience as a Dad, I want the Commission to know that I am probably as close to a common man as they will ever consider for an appellate court. I am a product of public schools from kindergarten through law school. Neither my parents nor my in-laws have college degrees. I do not belong to a country club; I work out at the YMCA. We have a vacation home, but it is a doublewide on Douglas Lake.

I have picked up dead chickens for hours in a chicken-house, pounded nails on a Habitat house, and fixed the sink at my house. I fit in on the bench in front of Porter's Store in Baileyton as well as I fit in at a party with Greeneville's leading citizens. My best friends include a factory worker, a surgeon, a teacher, a banker and a farmer.

I have run two contested elections for judicial office, garnering almost 90% of the vote in my home county during the second election.

I was raised to respect others, work hard, and give back.

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)***

There have been many difficult situations in which I have had to honor my oath, as an attorney and as a judge. As a federal defender I represented many people who committed heinous acts because I was duty-bound to do so; and I did, to the best of my ability. Looking back, I am proud of the effort I gave in a very difficult job. I believe justice is more of a process than a result. I helped achieve justice in those instances by fulfilling the adversarial, evidence-testing role of competent defense counsel.

As a judge I have had to suppress evidence obtained as a result of an unlawful search or seizure when I was convinced the officer involved was doing his best to follow the law. Tennessee does not recognize a "good-faith" exception to the exclusionary rule and this sometimes results in the guilty avoiding punishment. However, as long as that is the law in Tennessee, I am bound to follow it, and I will.

I will always follow the law, and would resign my office before I would violate my oath. Judicial office is a sacred public trust. I will safeguard that trust by administering justice with equality,

integrity, and humility.

REFERENCES

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

A. Hon. J. Ronnie Greer, U.S. District Judge for the Eastern District of Tennessee, Northeastern Division, 220 W. Depot St., Suite 405, James H. Quillen U.S. Courthouse, Greeneville, TN 37743; 423-639-0063

B. Rev. Jeannie Higgins, Asbury United Methodist Church, 201 S. Main St., Greeneville, TN 37743; 423-798-1051

C. Hon. C. Berkeley Bell, Jr., District Attorney General, 3rd Judicial District, State of Tennessee, 124 Austin St., Suite 3, Greeneville, Tennessee 37745; 423-787-1450

D. Hon. Elizabeth Ford, Federal Defender for the Eastern District of Tennessee, 800 S. Gay St., Suite 2400, Knoxville, TN 37929; 865-637-7979

E. Hon. W. T. Daniels, Mayor, Town of Greeneville, 200 N. College St., Greeneville, TN 37745; 423-639-7105

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 Criminal Appeals of Tennessee, and if appointed by the Governor, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended questionnaire with the Administrative Office of the Courts for distribution to the Commission members.

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

Dated: June 10, 2013.

THOMAS J. WRIGHT

Signature

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

TENNESSEE JUDICIAL NOMINATING COMMISSION

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

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

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information which concerns me, including public discipline, private discipline, deferred discipline agreements, diversions, dismissed complaints and any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, the Tennessee 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 Tennessee Judicial Nominating Commission to request and receive any such information and distribute it to the membership of the Judicial Nominating Commission and to the office of the Governor.

Thomas J. Wright

THOMAS J. WRIGHT
Signature

June 10, 2013
Date

010695
BPR #

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

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IN THE CHANCERY COURT FOR JEFFERSON COUNTY, TENNESSEE

JOHNNY FOUNTAIN,	§	
Petitioner/Appellant,	§	
	§	
v.	§	**No. 10-9-150**
	§	
	§	
STATE OF TENNESSEE	§	
DEPARTMENT OF CHILDRENS	§	
SERVICES,	§	
Respondent/Appellee.	§	

MEMORANDUM OPINION

This case involves the appeal of a Final Order of the Commissioner of the Tennessee Department of Children's Services entered September 27, 2010. The Commissioner's Final Order adopted the decision and finding of Administrative Judge Marcum set forth in the Initial Order entered September 9, 2010. In that Initial Order Judge Marcum found "sufficient evidence to uphold the classification established by the Special Investigations Unit of the Department of the Children's Services that the Appellant is the indicated perpetrator in validated (sic) case of child sexual abuse involving JDB." (Initial Order, p. 17, Administrative Record).

This judicial review of the administrative decision of DCS was initiated by a Petition for Writ of Certiorari filed September 24, 2010 in this Court. The State filed a Response October 12, 2010. Subsequently, the Chancellor recused himself and the undersigned was designated to hear this matter by Order of the Supreme Court of Tennessee entered January 21, 2011. Thereafter, Petitioner added a constitutional challenge to the appeal. Petitioner contends that the evidentiary/procedural framework of the administrative process for the DCS decision that a person is a indicated perpetrator in a validated case of child sexual abuse violates due process

requirements. The Attorney General of the State was then served with notice and a copy of the pleadings in this matter; and, after several attempts at scheduling a hearing, this matter came on for hearing before the undersigned on November 27, 2012.

At the November 27, 2012 hearing Petitioner's due process challenge was argued in greater detail than anticipated by the State based upon the written arguments of the Petitioner. After discussion with counsel, the Court requested further briefing of the issue by the parties. The State served its Supplemental Brief November 27, 2012. Petitioner served a Response to the State's Supplemental Brief December 20, 2012, but the response was not received by the undersigned until January 4, 2013.

This action involves both the constitutional challenge of the Petitioner as well as the general "appeal" of the agency ruling pursuant to the Tennessee Uniform Administrative Procedures Act. ("UAPA"). T.C.A. §4-5-101, et seq. The "appeal" is referred to in the Act as a "review." T.C.A. §4-5-322. The general evidentiary review is confined to the record as it existed before the agency and is conducted by the court without a jury. T.C.A. §4-5-322(g).

This Memorandum Opinion will address whether Tennessee's administrative process is constitutional in the context of a child sexual abuse indication by DCS; and, whether the agency decision in this case is supported by substantial and material evidence. T.C.A. §4-5-322(h)(1) & (5). For purposes of the statutorily prescribed review, this Memorandum Opinion contains this Court's findings of fact and conclusions of law required by T.C.A. §4-5-322(j).

1. <u>Factual Background</u>

Johnny Fountain served as a youth minister at New Market United Methodist Church. As part of his work in the church, he developed a significant relationship with JDB, the alleged victim of the sexual abuse. At the time of the administrative hearing, JDB was 17 years old. He

was 16 at the time of the alleged abuse. It is undisputed that Mr. Fountain touched the genitals of JDB. Mr. Fountain claims that the touching of JDB's genitals was for the purpose of checking JDB for a hernia. A detailed recitation of all the testimony from the administrative hearing is contained in the Initial Order and will not be separately set forth here.

Under Tennessee Law anyone with knowledge of, or with reasonable cause to suspect, child sexual abuse is required to report the alleged abuse to the Department of Children's Services ("DCS"). T.C.A. §37-1-605. Such reports are then directed immediately to the local DCS office that would be responsible for an investigation. T.C.A. §37-1-605(b)(1). Each county DCS office is required to coordinate a Child Protective Team ("CPT") which is to conduct child protective investigations in reports of child sexual abuse. T.C.A. §37-1-607. The CPT is to determine within 60 days whether the reported abuse is to be classified as "indicated or unfounded." T.C.A. §37-1-406(I). The team is also to report it's finding to the DCS abuse registry. id.

In this case, DCS received a referral of possible inappropriate sexual behavior by Mr. Fountain toward JDB April 6, 2010. An investigation by a child protective services caseworker of DCS followed and the results of the investigation were apparently presented to the Jefferson County Child Protective Investigative Team on May 20, 2010. The Team agreed with the classification of the allegation of sexual abuse against Johnny Fountain as "Allegation Indicated, Perpetrator Indicated." (Appeal Summary Section II, Administrative Record).

DCS has been tasked by the legislature with determining appropriate "administrative and due process procedures for the disclosure of the contents of its files and the results of it's investigations for the purpose of protecting children from child sexual abuse. . . ." T.C.A. §37-1-409(e)(1). Pursuant to that mandate, DCS has adopted both Rules and Regulations as well as

Administrative Policies and Procedures. These rules, regulations, policies and procedures are located primarily in Tenn. Comp. R. & Regs. R. 0250-7-9 (hereafter: "Rule"), and DCS Administrative Policies and Procedures: 14.11 (hereafter: "A.P.&P."). These rules, regulations, policies and procedures provide the process which the State deems to be "due" to an "indicated" perpetrator of child sexual abuse.

Under the DCS rules, a person is to be classified as "indicated" if the "preponderance of the evidence, in light of the entire record, proves that the individual committed . . . child sexual abuse. . . ." Rule 0250-7-9-.05(1). This particular rule goes on to list eight separate factors which "may constitute a preponderance of the evidence" when they link the abusive act to the alleged perpetrator. id.

Once the alleged perpetrator has been deemed "indicated" the department is required to notify the individual in writing within 10 business days and inform the individual that a "formal file review by the Commissioner's designee may be requested." Rule 0250-7-9-.06. In cases of an emergency when an "indicated" individual poses an immediate threat to a child or children to whom the alleged perpetrator has access, DCS conducts an emergency file review as soon as reasonably possible. A.P. & P. 14.11 C.1; Rule 0250-7-9-.07(2). This emergency file review is to be conducted by the Special Investigations Unit ("SIU") of DCS. A.P.&P. 14.11 C. 2-3.

Pursuant to DCS procedure an "emergency file review" was requested by SIU on May 26, 2010 in this case. The review was completed by a Case File Reviewer on May 28, 2010. (Appeal Summary, Sec. II, Administrative Record). The formal file review requires the reviewer to determine if the preponderance of the evidence proves that the individual committed child sexual abuse. Rule 0250-7-9-.06(8). If the reviewer determines that the standard has been met,

the report is upheld and classified as "indicated." id. at (11). DCS then sends a notice to the alleged perpetrator within 10 business days regarding the results of the formal file review and advising the individual of his right to request a hearing to contest his designation as an indicated perpetrator before an administrative law judge. id.

The result of the emergency file review in this case was to uphold the validity of the identification of Mr. Fountain as the perpetrator of child abuse involving JDB. Mr. Fountain was advised of this finding by certified letter dated May 28, 2010. (Letter from Colette Crawley-Martin, Ex. 1, Administrative Record). The May 28 letter advised Mr. Fountain that, not only had he been identified as the perpetrator of child abuse, but that DCS was notifying the organization with which Mr. Fountain was associated about the child abuse; and, that he had a right to an administrative hearing if he disputed the finding. Instructions for how to request a hearing are also contained in that letter.

If the alleged perpetrator requests an administrative hearing, the rules require that the hearing be held, and an initial order entered within 90 business days of the notice sent after the formal file review. Rule 0250-7-9-.08(4)(a).

On June 4, 2010 Mr. Fountain made a written request for an administrative hearing to contest the child abuse allegation. (Ex. 1, P. 3 Administrative Record). By letter dated June 10, 2010 Administrative Judge Marcum notified Mr. Fountain that the requested hearing would be held August 2, 2010. This letter also provided basic information regarding the procedural and evidentiary framework for the hearing. (Scheduling Letter, Administrative Record). In addition, DCS Commissioner Miller also sent a letter dated June 10, 2010 providing further information about the hearing process and the Department's procedures for release of child abuse records. (Acknowledgment Letter, Administrative Record).

At an administrative hearing, Rule 0250-7-9-.11 requires that the State's case for "indication" be proven by a preponderance of the evidence, thus placing the burden of proof on the State. The administrative judge is charged with the "sole issue" of determining "whether the preponderance of the evidence, in light of the entire record, proves that the individual . . . committed child sexual abuse. . . ." Rule 0250-7-9-.10(2).

The administrative hearing in this case was held on August 2, 2010 and a 145 page Transcript of Proceedings from that hearing has been prepared for this Appeal. Administrative Judge Marcum entered her Initial Order September 9, 2010 finding that there was a preponderance of the evidence "which established that the Appellant committed child sexual abuse involving JDB." (Initial Order, P. 16, Administrative Record).

Following an administrative hearing the Commissioner of DCS reviews the Hearing Record and Initial Order and issues a Final Order. See, T.C.A. §4-5-315. If the alleged perpetrator is dissatisfied, an appeal to the Chancery Court may be filed within 60 days of the date of the Final Order. Rule 0250-7-9-.10(5); T.C.A. §4-5-322. Commissioner Miller adopted Administrative Judge Marcum's findings of fact and conclusions of law in entering a Final Order September 27, 2010. (Final Order, Administrative Record). This Appeal followed.

2. Discussion

Mr. Fountain has raised, for the first time in this appeal, a constitutional challenge to the process involved in labeling a person as a "indicated" perpetrator of child sexual abuse. Although an aggrieved party may pursue constitutional issues in administrative proceedings, Richardson v. Tennessee Board of Dentistry, 913 F2d, 446, 455(Tenn. 1995), such claims may also be raised initially in a Chancery Court review of an administrative decision. id. at 457-458.

Mr. Fountain's constitutional "challenge is to the appeals process set up by

Department of Children's Services for a person identified as a sex offender." (Petitioner's Response to the Supplemental Brief of the State). Mr. Fountain goes on to say in his Response to the Supplemental Brief of the State that because judicial review of an administrative decision utilizes a "substantial and material" evidence standard rather than a preponderance of the evidence standard, "[t]hat simply cannot be fair when you are labeling someone as a sexual abuser of children." (id.).

Under UAPA Tennessee Courts are directed to review agency decisions to determine if they are supported by substantial and material evidence in light of the entire record. T.C.A. §4-5 322(h)(5). Fact findings are not reviewed de novo and the reviewing court is prohibited from substituting "their judgment for that of the agency as to the weight of the evidence, even when the evidence could support a different result." Wayne County v. Tennessee Solid Waste Disposal Control Board, (citations omitted) 756 S.W.2d 274, 279 (Tenn. App. 1988). The "substantial and material evidence" standard is "something less than a preponderance of the evidence, but more than a scintilla or glimmer." (citations omitted) id. at 280. In determining whether the record contains substantial evidence to support the agency decision, a reviewing court may consider direct evidence, "circumstantial evidence or the inferences reasonably drawn from direct evidence." id. Also, UAPA requires reviewing courts to "take into account whatever in the record fairly detracts" from the weight of the evidence before the administrative fact finder. T.C.A. §4-5-322(h)(5).

A. Due Process Generally

As a starting point, it is noted that our Supreme Court has determined that the State Due Process provision found in Article 1, Section 8 of the Tennessee Constitution provides identical due process protection to that found in the 14th Amendment to the United States

Constitution. Riggs v. Burson, 941 S.W.2d 44,51 (Tenn. 1997); Martin v. Sizemore, 78 S.W.3d 249, 262 (Tenn. App. 2001). Thus, decisions relating to the application of the federal due process provision are relevant to any analysis of Tennessee's due process provision.

Due Process does not apply to every decision made by the State but only to those decisions or actions which result in a deprivation of a constitutionally protected property or liberty interest. Rowe v. Board of Education, 938 S.W.2d 351,354 (Tenn.), cert. denied 520 U. S. 1128 (1997). So the first step is to determine whether the State has taken action which deprives an individual of a liberty or property interest. If so, due process is required. If due process is implicated by State action the next step is to determine what process is due in that particular situation. Matthews v. Eldridge, 424 U.S. 319 (1976).

In this case, we will first determine whether Mr. Fountain had a liberty or property interest which was interfered with by the State; and second, "whether the procedures attendant upon that deprivation were constitutionally sufficient, Hewitt v. Helms, 459 U.S., at 472." Kentucky Department of Corrections v. Thompson, 490 U.S. 454, 460 (1989).

B. Did the State deprive Fountain of a liberty or property interest?

As an initial matter, the Court notes that the State has not disputed Mr. Fountain's entitlement to due process in this case. Neither party has briefed the issue of whether due process is implicated in cases related to the release of information regarding individuals "indicated" as perpetrators of abuse.

This Court's research indicates that in almost every instance in which a state's action of listing an individual as a child abuser on a state registry has been considered, the courts have found a sufficient liberty or property interest to justify the application of Due Process. Humphries v. County of L. A., 547 F.3d 1117(9th Cir. 2008), amended 554 F.3d 1170 (2009),

reversed on other grounds, 131 S.Ct. 447 (2010); Dupuy v. Samuels, 397 F.3d 493 (7th Cir. 2005); Doyle v. Camelot Care Centers., Inc., 305 F.3d 603 (7th Cir. 2002); Valmonte v. Bane, 18 F.3d 992 (2nd Cir. 1994); Burns v. Alexander, 776 F.Supp.2d 57 (W.D. Penn. 2011); Jamison v. State Dept. of Soc. Srvcs., 218 S.W.3d 399 (Mo. 2007); Lyon v. Dept. of Children and Family Srvcs., 807 N.E.2d 423 (Ill. 2004); Covell v. Dept. of Soc. Servs., 791 N.E.2d 877 (Mass. 2003); Petiton of Preisendorfer, 719 A.2d 590 (N.H. 1998); Lee T. T. v. Dowling, 664 N. E.2d 1243 (N.Y. 1996); G. V. v. DPT. of Public Welfare, 52 A.3d 434 (Pa. Commw. 2012), appeal granted 2013 Pa. LEXIS 494 (3/21/13); W. B. v. Kentucky, 2011 Ky. App. LEXIS 47, Slip Op. No. 2010-CA-000361-MR (Ky. App. 3/11/2011), vacated on other grounds and remanded 388 S.W.3d 108(KY. 2013); Whiteside v. Department of Soc. and Rehab. Servs., 2002 Kan. App. Unpub. LEXIS 415 (Ks. App. 2002); Matter of allegations of sexual abuse at East Park High School, 714 A.2d 339, (N.J. Super. Ct. App. Div. 1998); Marold v. Fendetti, 1997 R. I. Super. LEXIS 84 (8/28/97); Cavarretto v. Department of Childrens and Family Srvcs., 660 N.E.2d 250 (Ill. App. 1996); S. W. v. Dept. of Children and Family Srvcs., 658 N.E.2d 1301 (Ill. App. 1995). Contra, Smith v. Siegelman, 322 F.3d 1290 (11th Cir. 2003); L. C. v. Tex. Dept. of Family and Protective Srvcs., 2009 Tex. App. LEXIS 8778 (11/13/2009).

More importantly, the Tennessee Court of Appeals has recognized a legally protected liberty interest in the factual context at issue in this case. Kelley v. Tennessee DCS, 2008 Tenn. App. LEXIS 211(4/3/2008). Because the State has not disputed Mr. Fountain's protected liberty interest in this case, and because Tennessee has recognized such interest in Kelley as well as through the promulgation of rules and regulations to provide Due Process to individuals in this situation, the Court will not engage in an extensive analysis of whether Mr. Fountain meets the "stigma-plus test" of Paul v. Davis, 424 U.S. 693 (1976).

Since Fountain has a protectable liberty interest implicated by his listing as an indicated child sexual abuser, we turn to the second step in the due process analysis: determining what process is due in this situation. To answer this question, the Court must undertake the three part analysis set out in Matthews v. Eldridge, 424 U.S. 319, 335 (1976). The court must examine the interest of the individual, the interest of the State, and the risk of an erroneous deprivation of individual liberty. Id.

C. Application of Due Process to this Case

Due process is a flexible concept that calls for different procedural safeguards in different situations. Seals v. State, 23 S.W.3d 272 (Tenn. 2000). Procedural due process, the aspect of due process implicated in Fountain's challenge, involves the right to a fair procedure or set of procedures before one can be deprived of a protected interest by the State. Seal v. Morgan, 229 F.3d 567 (6th Cir. 2000). At its essence, procedural due process encompasses notice and an opportunity to be heard at a meaningful time and in a meaningful manner. Matthews v. Eldridge, 424 U.S. 319 (1976). The nature of the interests involved and the nature of any procedural safeguards, as well as the manner in which the safeguards are employed, and the timing of their employment, all figure in to determining whether a hearing is "meaningful."

In determining what process is due in each particular situation, a Court must consider three factors:

> (1) The private interest at stake:
>
> (2) The risk of erroneous deprivation of the interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally
>
> (3) The government's interest including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Wilson v. Wilson, 984 S.W.2d 898, 902 (Tenn. 1998), cert. denied 528 U.S. 822 (1999); accord, Matthews v. Eldridge, 424 U.S. 319, 335 (1976). The more serious the potential deprivation, the more extensive the procedural safeguards must be. Saville v. Treadway, 404 F. Supp. 430 (W.D. Tenn. 1974).

In this particular case the deprivation an individual experiences when listed on the "indicated" child sexual abuse registry is significant. A person in Mr. Fountain's position, working with or around children, is stigmatized and suffers tremendous damage to his reputation when the designation of "child sex abuser" is disclosed to employers and/or entities with whom the alleged abuser works. In addition, the listing places significant limits on a person's liberty to engage in certain occupations or professions.[1] In this case, Fountain has alleged that he lost his job after twenty years at Carson-Newman College, and almost certainly is prohibited from continuing his activities as a youth pastor at his Church. There is no chance he will be able to work in a job where children would be accessible to him.

On the other hand, the State's interest is also significant: protection of children in this State and prevention of child sexual abuse. Presumably, the State also has an interest in "not stigmatizing the innocent and foreclosing them from employment and other opportunities." Matter of allegations, etc., supra at p. 348. Because there are significant interests involved for the alleged abuser, the child, and the State, the determination essentially hinges on determining whether the process provided by the State is adequate to minimize the risk of erroneous determinations while at the same time adequately protecting the State's interest in safeguarding

[1]Being listed as a child sexual abuser can also impact family privacy, solidarity, and associations. See, Tingle v. Tennessee DHS, 863 F.2d 50, 1988 U. S. App LEXIS 16533 (6th Cir. 12/6/1988); Benitez v. Rasmussen, 626 N.W.2d 209, 218 (Neb. 2001); Watso v. Colo. Dept. of Soc. Srvcs., 841 P.2d 299 (Colo. 1992); Bohn v. County of Dakota, 772 F.2d 1433 (8th Cir. 1985), cert. denied 475 U.S. 1014 (1986).

children.

Tennessee's procedural scheme to provide an individual in Mr. Fountain's position with due process was outlined in detail in the Factual Background section, above. Undoubtedly as a result of Kelley, supra, and another unpublished Court of Appeals decision, Brown v. Tennessee

DCS, 2004 Tenn. App. LEXIS 815 (11/30/2004),[2] Tennessee enhanced its administrative procedural safeguards sometime between 2008 and the present.

Previously, an individual could be listed as a child sex abuser "based solely upon a showing of only substantial and material evidence." id., slip op. at p. 7. Now, DCS rules require a finding by a "preponderance of the evidence, in light of the entire record," which proves that the individual committed child sexual abuse. Rule 0250-7-9-.05(1). In addition, while the current rule provides eight separate factors which "may constitute a preponderance of the evidence," the previous version of the rule contained five of the same factors, any one of which would **require** a finding of substantial and material evidence that the abuse occurred. Kelley, slip op. at p. 4. The previous version of the rule did not allow an investigator to consider all of the evidence relating to the alleged abuse when one of the five mandatory factors was met. Now, the rule affirmatively tasks the investigator with determining the preponderance of the evidence "in light of the entire record." Rule 0250-7-9-.05(1). Similarly, the administrative judge hearing an appeal of such a determination is required to utilize the preponderance of the evidence standard, with the burden of proof on the State, Rule 0250-7-9-.11(2) and to make that

[2]Both of these decisions involve analysis that is directly applicable to the instant case yet none of the three attorneys involved here referred this Court to these helpful decisions. And, the Attorney General's Office participated in both of these appellate decisions. Reference to these decisions would have assisted the undersigned in more quickly reaching the necessary conclusions of law.

determination "in light of the entire record." Rule 0250-7-9-.10(2). Finally, the appeal to Chancery Court for review of the administrative decision, though deferential (substantial and material evidence), requires the court, in determining the substantiality of the evidence, to "take into account whatever in the record fairly detracts from its weight." T.C.A. §4-5-322(h)(5)(B).

Mr. Fountain has complained, as this Court understands the complaint, about the standard of review in the Chancery Court. This standard of review is supplied by UAPA, T.C.A. §4-5-322, and therefore Fountain has questioned the constitutionality of a statute. In evaluating such a challenge, the Court must "begin with the presumption that an act of the General Assembly is constitutional." Gallaher v. Elam, 104 S.W.3d 455 (Tenn. 2003).

Fountain asserts due process requires application of a less deferential standard of review in Chancery Court. However, the standard of review in the Chancery Court cannot be analyzed without the context of the procedural safeguards applied during the administrative process. In Kelley, supra, the administrative judge conducting the hearing made a determination that the alleged abuser "committed the acts by a preponderance of the evidence." id., slip op. at p. 9. Because the administrative judge applied the preponderance of the evidence standard the Court of Appeals concluded that the alleged abuser "received adequate process protection under Matthews." id. And, in Brown, supra, the Court of Appeals noted that

> [o]ur concern about the use of the substantial and material standard centers around that standard being the one used when making the initial determination. We have no such concerns about that standard being the one used on appellate review.

Id. slip op. at p. 8.

It appears then that the Court of Appeals would approve of the current procedural safeguards as satisfying due process even though the chancery court review is a deferential one. Under Tennessee's statutory and administrative process Mr. Fountain received

timely and effective notice of DCS actions and his rights; he was provided with an investigation, emergency file review, and administrative hearing, all of which required a finding by a preponderance of the evidence that the abuse had occurred. He had the right to be present at the administrative hearing, to subpoena witnesses and produce evidence, to be represented by counsel, to confront the witnesses testifying against him, and to have the burden of proof placed upon the State; he received a detailed written decision within a reasonably short time after the hearing; and, he thereafter had the right to a review by the chancery court and subsequently the Court of Appeals. Similar process has been found to satisfy due process in the context of a state listing a person on a child sex abuse registry. See, Matter of allegations, etc., supra at p. 348; Whiteside v. Dept of Soc. & Rehab. Srvcs., supra.

It is difficult to imagine any additional procedure the State could provide before a person is listed as a "indicated" child sex abuser. The State could require a more stringent standard of proof such as "clear and convincing evidence." It could also provide for a *de novo* trial in the Chancery Court or simply a non-deferential review by the Chancery Court to determine if the State proved its case by a preponderance of the evidence. However, given the significant interest of preventing child sex abuse it seems fair to draw the line at "preponderance of the evidence" rather than potentially allowing child predators to maintain access to vulnerable children even when the State can prove that it is more probable than not that they committed child sex abuse. The preponderance standard requires the State and the individual to share the risk of error, Santosky v. Kramer, 455 U.S. 745, 755 (1982), which seems fair in light of the significant interests involved on both sides. Burns v. Alexander, supra. Most courts that have considered the evidentiary standard in the context of a listing on a child abuse registry concur that due process requires application of the preponderance of the evidence standard at some stage

of the process. See, e.g., Preisendorfer; Doyle; Lyon; Marold; Valmonte; W.B. v. Kentucky; Cavarretto, supra; see also, Covell, supra (substantial evidence standard approved). Contra, G. V. v. Dept. of Public Welfare, 52 A.3d 434 (Pa. Commw. 2012), appeal granted 2013 Pa. LEXIS 494 (3/21/13) (clear and convincing evidence required to maintain listing of individual on registry).

In addition, a *de novo* trial in Chancery would present an additional fiscal and administrative burden on the State which seems unnecessary in light of the significance of the State's interest in this situation and the procedural protections provided by the administrative "trial." The risk of erroneous inclusion on the abuse registry appears minimal so long as the State provides qualified and independent administrative judges to make the preponderance of the evidence determination.

Thus, this Court HOLDS that a more stringent standard of proof is not required and that the deferential standard of review in the Chancery Court does not violate Due Process where, as here, the "indicated" individual is receiving a fair trial with a decision based upon the preponderance of the evidence.

In light of the significant procedural safeguards employed during the administrative process, this Court HOLDS that Tennessee has complied with the requirements of due process even though the review of the administrative decision is conducted on the deferential "substantial and material evidence" standard.

Having concluded that Mr. Fountain received due process through the administrative and statutory procedure surrounding his listing on the abuse registry, this Court now turns to the evidentiary review required by T.C.A. §4-5-322(h)(5).

D. Whether the administrative decision was supported by substantial and

material evidence in light of the entire record.

Because this Court's review is limited to the record before the administrative judge, no additional testimony or documentary evidence has been presented. The undersigned has reviewed the Administrative Record and read the 144 page transcript of the evidence presented at the administrative hearing.

There is no question that Mr. Fountain directly touched the genitals of JDB, either unclothed or under his clothes. (Tr. p. 31, 35, 71, 80-82). Mr. Fountain claims that he was checking the child for a possible hernia. The child confirms that as his understanding of what Mr. Fountain was doing, (Tr. p. 75), but stated that the touching of his genitals and in that area made him uncomfortable. (Tr. p. 68, 79-82). The child did not perceive the touching to be sexual in nature. (Tr. p. 75, 83-84).

Despite Mr. Fountain's claims that the touching of the child's private areas was legitimate and not sexual, he did not disclose the fact of his touching to the child's father (Tr. p. 34, 37, 55) nor the minister at the church when he advised her that he would no longer be working with that family. (Tr. p. 92-93). When asked why he did not disclose the touching to the child's father, Mr. Fountain stated "well, if I had of, he would have said right then to me, 'well, what are you doing messing with my child?'" (Tr. p. 37, 60). In addition, the child testified that Mr. Fountain instructed him not to tell his father about the touching. (Tr. p. 71, 118).

Mr. Fountain did not have any expertise in diagnosing medical conditions, even though he had suffered a hernia as a teenager himself. (Tr. p. 32-33). He did not seek or request medical attention for the child nor telephone the child's parents regarding a possible injury, (Tr. p. 34, 55), he just took it upon himself to run his hands on and around the lower abdomen and private parts of a teenage boy who said "oh" while lifting some cases of canned drinks sometime

earlier in the day. (Tr. p. 28, 52). According to Mr. Fountain's own testimony, he asked the child, "you didn't pull yourself, did you, when I heard you?" (Tr. p. 59). To which Mr. Fountain says the child stated, "no, I don't think so." Without any complaint of pain (Tr. p. 33, 79) or any indication from the child that he was injured, (Tr. p. 30, 33, 58) Mr. Fountain placed his hands on and around the genitals of a teenage boy in a private setting then told the boy not to tell anyone. (Tr. p. 71, 118).

Under the direction of his attorney, Mr. Fountain admits that he "certainly made an error in judgment in what happened with this young man." (Tr. p. 54). And, he obviously recognized that the child's father would view it as absolutely inappropriate when he acknowledged that if he had spoken to the father about the "exam" the father would have said "well, what are you doing messing with my child?" (Tr. p. 37).

Even Mr. Fountain's character witness, Mr. Loy, with whom he has worked in the church for years, stated that if he found out that Mr. Fountain had performed a hernia exam on one of his sons he "would be shocked," (Tr. p. 129), and would find such action "inappropriate." (Tr. p. 130). That reaction sums up the only conceivable reaction to this factual scenario. Under these circumstances, there is probably no evidence which can sufficiently detract from the weight of the evidence supporting the finding of the administrative judge to the extent that substantial and material evidence would not exist for the administrative judge's finding. However, the evidence which fairly detracts from the weight of the evidence supporting the administrative judge must be analyzed by this Court.

The main evidence which fairly detracts from the weight of the evidence supporting the conclusion that Fountain is a child sexual abuser, is the lack of any other indication that he is a pedophile. Mr. Fountain has worked with and around children for some twenty years in his job

at Carson-Newman College and his ministry in the United Methodist Church without ever so much as a suggestion of impropriety in his actions. (Tr. p. 95, 114, 123-124, 128-129, 135). According to the victim in this case, the incident at issue was the only time Mr. Fountain acted inappropriately toward him. (Tr. p. 75). Fountain presented impressive character witnesses who were convinced that he was not a child sex abuser. (Tr. p. 124, 130, 135). Fountain was very close to JDB and his family, acting as a father figure to JDB. (Tr. p. 84, 100-101).

However, after considering the evidence which detracts from the administrative ruling, the undisputed evidence of touching the genitals of a teenage boy, while alone with the boy, without a complaint of pain and in the face of a denial of injury, for the alleged purpose of checking for a hernia, without checking with either of the child's parents or seeking to access actual medical care, in a non-emergency situation, leaves inescapably to one conclusion: there is substantial and material evidence in the administrative record to support the decision of the administrative judge and the commissioner of the department of children's services.

Accordingly, the decision of the Department of Children's Services is AFFIRMED. Costs are taxed to the Petitioner, for which execution may issue, if necessary.

Enter:

_____

Tom Wright

Circuit Court Judge

IN THE CRIMINAL COURT FOR THIRD JUDICIAL DISTRICT OF TENNESSEE, AT MORRISTOWN, TENNESSEE

JAMES PERRY HYDE,	**§**	
Petitioner,	**§**	
	§	
vs.	**§**	**No. 11CR390**
	§	
	§	
STATE OF TENNESSEE	**§**	
Respondent,	**§**	

ORDER

This case involves a Post-Conviction Petition for Forensic DNA Analysis Pursuant to T.C.A. §40-30-301 *et. seq*. The case came before the court again on April 26, 2012 for hearing with the presence of the Petitioner and his counsel from the U. T. Innocence Project Legal Clinic, including attorney, Steve Johnson, and with Assistant District Attorney, Victor Vaughn and DA investigator Teddy Collingsworth. The purpose of this hearing was to determine whether the court would order the requested DNA testing on the enema bag at issue in this case. The court heard arguments on this issue and, after carefully considering the arguments of counsel, the written documents submitted in support of and opposition to Mr. Hyde's Petition, which included two affidavits from Mr. Hyde's proposed expert as well as the trial transcript and virtually the entire court file of proceedings from indictment through post conviction denial and appellate affirmation, the court makes the following findings of fact and conclusions of law:

Introduction

1. This is a Post-Conviction Petition for Forensic DNA Analysis Pursuant to T.C.A. §40-30-301, *et. seq*. This Code Section, known as the Post-Conviction DNA Analysis Act of 2001 (hereafter "PCDNA Act" or "the Act"), provides, among other things, that a person

convicted of rape of a child may, at any time, file a petition seeking forensic DNA analysis of evidence in the possession of the court and related to the investigation or prosecution that resulted in the judgment of conviction when such evidence "may contain biological evidence." T.C.A. §40-30-303.

2. Petitioner is serving a 25 year sentence for rape of a child, a Class A felony. "The conviction was based upon evidence that the petitioner had inserted an enema device filled with cough syrup into the rectum of his 11-year-old daughter." State v. Hyde, No. E-2000-00806-CCA-R3-PC (Tenn. Crim. App. March 22, 2001) p.1(hereafter referred to as "Post-Conviction Appeal").

3. The PCDNA Act requires the court to order DNA analysis if four factors set forth in T.C.A. §40-30-304 are present. There is no real dispute as to the presence of factors 2-4. In the instant case, the evidence requested for testing, the enema apparatus, is in existence in the custody of the court; and, according to petitioner's expert, is in a condition that would allow a potentially meaningful analysis to be conducted. T.C.A. §40-30-304(2). This satisfies the second factor for mandatory testing under the Act.

4. The State does not contest factors 3 and 4 set forth in T.C.A. §40-30-304(3)&(4). The dispute in this case centers around whether or not there is a reasonable probability "that the petitioner would not have been prosecuted or convicted if exculpatory results" were obtained through the proposed DNA analysis and were available at the time of the charging decision or trial. T.C.A. §40-30-304(1).

5. Petitioner also asserts that if he is unable to satisfy the four factors for the mandatory testing provision of the Act, he still should receive an order for DNA analysis under T.C.A. §40-30-305 because the allegedly potential exculpatory DNA results would have

rendered his verdict or sentence more favorable if they had been available at the time of trial and sentencing.

Factual Background

6. This court has reviewed the entire record in this case including the trial transcript and the post-conviction evidentiary transcript because a "determination of the evidence and surrounding circumstances is necessary to evaluate whether exculpatory results would have prevented prosecution or conviction or would have resulted in a more favorable verdict or sentence." Patterson v. State, 2006 Tenn. Crim. App. LEXIS 844 (October 26, 2006), quoting State v. Tucker, 2004 Tenn. Crim. App. LEXIS 46 (January 23, 2004).

7. An exhaustive review of the evidence presented at trial is contained in the Court of Criminal Appeals decision on the direct appeal of the conviction, State v. Hyde, 03C01-9401-CR-00010 (Tenn. Crim. App. July 31, 1996) pgs. 3-14. The case was affirmed on direct appeal with the Court of Criminal Appeals finding sufficient evidence to establish the elements of the offense beyond a reasonable doubt. "Specifically, the appellant's admissions to various individuals and the medical testimony amply support the verdict." id. at p. 29

8. In the Post-Conviction appeal, the Court of Criminal Appeals opined that petitioner's "conviction was based in great measure upon an admission by the petitioner to an investigator with the district attorney general's office:

> [The petitioner] told me that on September 14, 1992, that he could remember having [the victim] take off her clothes. He said he then remembered giving [the victim] an enema with some cough syrup

> and he placed it in her rectum. He told me he loved [the victim] very much. [He] [s]aid, I can't remember anything else that happened. I remember it happening upstairs in the bathroom. This happened in the morning hours after [my wife] went to work. I don't know why I did this. . . . I am giving the statement to get it off my conscience and to help [the victim].

Post Conviction Appeal at p. 1-2.

9. The child-victim in this case made allegations against the petitioner of both a general and specific nature in several settings. For example, in the presence of police Captain Moore the child stated to Petitioner, "you know what you've done." Trial Transcript p. 203. The victim told Captain Moore, during his transportation of her, "that she had been abused." id. The victim asked the youth services officer that Captain Moore turned her over to if the officer "knew what sex abuse was" and "if we were going to make her go home." Trial Transcript p. 212-13. The specific allegations that were revealed at trial came through two physicians who had examined and treated the child while she was hospitalized. On September 18, 1992 the victim told Dr. Jones, among other things, that her father had poured cough syrup into her vagina. Trial Transcript p. 228, 230. On November 9, 1992 the victim, told Dr. Lynn, among other things, that cough syrup had been placed inside her body by her father. Trial Transcript pgs. 243-44. Dr. Lynn also testified that the child had great difficulty "separating out what would be the vaginal vault and what would be the rectal vault. . . ." Trial Transcript p. 251.

10. After the incident involving Captain Moore coming to the home and temporarily removing the child, she was placed at Children's Hospital; and, after the mother, Linda Hyde, was first able to visit with the child the mother "became terrified of [her] husband," Trial Transcript at p. 299, filed for divorce and ended up contacting an investigator from the district attorney's office and a worker at the department of human services. Trial Transcript at p. 299-300.

11. Following her visit with her daughter, and report to the DA investigator and DHS worker, Linda Hyde found cough syrup under the bathroom sink, a location where she never kept cough syrup. Trial Transcript p. 301. Following an interview of the child-victim, with the consent of Ms. Hyde, the district attorney's investigator retrieved the cough syrup from the Hyde residence and found various other items during a search of the residence, including an enema bag under the bathroom sink where the cough syrup had been found by Ms. Hyde. Trial Transcript pgs. 157-159.

12. After recovering the cough syrup and enema bag from the Hyde residence the investigators interviewed the petitioner. At some point prior to petitioner's booking, while he was in the sheriff's office he telephoned his wife and told her he was "going to jail." Trial Transcript p. 302. His wife asked him "did you do it?" id.

"And he said, well, if it walks like a duck and quacks like a duck, it must be a duck." id.

13. Sheriff Long overheard petitioner speak to someone on the telephone saying that he didn't want to put the child through it, "testifying in court, that he was just going to go ahead and tell about it." Trial Transcript p. 181. Shortly thereafter, petitioner gave the confession to the investigator.

14. During a conversation with a DHS worker, Melissa Thomas, the petitioner admitted that he had given the child an enema. Trial Transcript p. 474.

15. Petitioner's trial counsel interviewed the child-victim prior to trial, during which "she did confirm all three counts in my presence." Post-Conviction hearing Transcript p. 15.

16. In this factual context, along with other circumstantial evidence and statements, this Court FINDS that the most damaging corroborating evidence involved the medical

testimony. In examinations by Dr. Jones and Dr. Lynn, the child's rectum was described as "lax," Trial Transcript p. 240, and "grossly abnormal," Trial Transcript p. 231, consistent with rectal penetration. Trial Transcript p. 232. Quoting from Dr. Jones' trial testimony:

> I did think that her rectal exam was grossly abnormal however. Most of the time when a child is in that position or an adult is in position for that exam, there's a lot of apprehension. And when you try to do a rectal exam, there's usually a pretty significant amount of resistence to that. Nobody wants that done; no matter how much you can override that psychologically, you still don't want that to happen.
>
> And on [the child-victim's] exam, the minute I touched her bottom or her rear end, her anus opened up widely, which is not usually the case. There's usually a constriction of that muscle. And when I further went and did a rectal exam and put my finger in her bottom, there was absolutely no resistence and there never was any.
>
> . . .
>
> [These findings are] consistent with some form of rectal penetration, usually forceful, because the child again or anyone is trying to not have somebody do something to them. And over a long period of time, that results in the muscle becoming loose and lax and not having full rectal tone.

Trial Transcript at pgs. 231-232.

17. Years later, the child-victim recanted her allegations against her father, but under oath in court when called to testify at the petitioner's original post-conviction hearing, the child, then 19 years old, "testified that the statement of recantation that she had made to the petitioner was untrue. The victim stated that what she had told the doctors before the charges were made against the petitioner was the truth." Post-Conviction Appeal at p. 3.

18. Following his conviction at trial the petitioner "attempted suicide in the courtroom. . . ." Post-Conviction Transcript p. 44.

19. Petitioner's expert has opined that if the enema device in the court's possession

was inserted into the rectum of the child-victim then it is more likely than not that there would be "epithelial skin cells or mucous membrane cells of the victim present on the enema." Affidavit of Katherine L. Cross, Para. 2.c. Ms. Cross also opines that "the passage of time alone should not have diminished the presence of any biological evidence on the enema." id. at Para. 2.d.

20. After a previous hearing, at the court's request, Ms. Cross also opined that even if the enema had been washed with water after use, "it is more likely than not that the enema bag would still contain epithelial skin cells or mucous membrane cells of the victim that could be obtained through DNA analysis;" Supplemental Affidavit of Katherine L. Cross, at Para. 4.c. and, that even if the enema had been used on someone else after it was used on the victim it is still "more likely than not that DNA evidence of the victim would be expected to be found on the instrument. . . ." id. at Para. 4.e.

21. The "DNA analysis" proposed by petitioner would merely be "testing for female epithelial skin cells or mucous membrane cells inside the white nozzle of the enema" to "determine whether the enema was actually used on a female." Affidavit of Katherine L. Cross, at Para. 2.d.

Legal Analysis

22. The State has not challenged the credentials of Ms. Cross as an "expert witness." The court accepts Ms. Cross as an expert in the field of forensic DNA analysis and testing. Ms. Cross' experience and education support this finding. Ms. Cross has previously testified as an expert in Tennessee as well as several other states. See, Curriculum Vitae of Katherine L. Cross, attached as Exhibit A to the Affidavit of Katherine L. Cross.

23. The State has submitted no expert opinion regarding this matter, submitting only the Assistant District Attorney's opinion that the absence of the victim's DNA "would only

establish that [the petitioner] cleaned the enema bag and suppository." State's Response at Para. 7.

24. Without any expert opinion to call into question whether the proposed analysis would lead to potentially exculpatory material, the State apparently dismisses the opinion of the petitioner's proposed expert, asserting only their non-expert analysis of the potential tests results that the "absence of such evidence would only serve to corroborate the petitioner's statement to investigators that he always washed the instrumentality whenever he used it." State's Response at p. 3, Argument Para. 1.

25. Since the State has chosen to present no other expert opinion on this subject and the court is unaware of any basis to question Ms. Cross's conclusions, the court will accept the opinions proffered by petitioner's expert and must "assume that the DNA Analysis will reveal exculpatory results" in making the determination as to whether to order testing under the Act. Shuttle v. State, 2004 Tenn. Crim. App. LEXIS 80 at p. 5 (Feb. 3, 2004) perm. app. denied (2004).

26. In the present case the potential exculpatory evidence that could result from DNA testing described by Ms. Cross is that she would find DNA of the petitioner on the enema but would find no female epithelial skin cells or mucous membrane cells on the enema. Since her opinion is that if the enema had been inserted into the victim's rectum she would expect to find female epithelial skin cells or mucous membrane cells in the instrument despite the passage of time, despite subsequent usage and despite it being washed with water after usage. Thus, the absence of the female cells on the enema device would be exculpatory from the standpoint that it could be viewed as lending support to Petitioner's assertion at trial, and subsequently, that the rape did not occur. In other words, based on Ms. Cross's testimony, if the rape had occurred, she

would expect to find female epithelial skin cells or mucous membrane cells in the device.

27. This is not a typical DNA analysis scenario in that the requested testing will not eliminate the petitioner as the perpetrator nor ID anyone else as the perpetrator; and, because it is possible that, under Ms. Cross's opinion, the enema device may have been inserted in the rectum of the victim but not contain any of her DNA, testing will not prove that the crime was not committed.

28. The purposes of the PCDNA Act are "first, to aid in the exoneration of those who are wrongfully convicted and second, to aid in identifying the true perpetrators of the crimes. Powers v. State, 343 S.W.3d 36, 51(Tenn. 2011).

29. The PCDNA statute is thus focused on identifying or ruling out potential perpetrators through "a comparison between the DNA contained in "a human biological specimen" and "another biological specimen,". . . ." Powers at p. 49.

30. The "DNA analysis" that may be petitioned for under the Act "means the process through which deoxyribonucleic acid (DNA) in a human biological specimen is analyzed and compared with DNA from another biological specimen for identification purposes." T.C.A. §40-30-302.

31. The petitioner in this case does not seek to compare one biological specimen with another biological specimen for purposes of identification. He hopes only to show that there are no female epithelial skin cells or mucous membrane cells on the enema device, not to identify the source of any cells on the device. Thus there will be no comparison between biological specimens as authorized by the Act.

32. This Court CONCLUDES that the PCDNA Act does not cover or apply to the requested testing in this case for the purpose of determining whether female epithelial skin cells

or mucous membrane cells are in existence on the enema device. Because the Act does not apply, the Petition is not well taken and will be dismissed.

33. Notwithstanding this Court's legal conclusion regarding the applicability of the PCDNA Act to the requested testing in this case, for the purpose of creating a complete record for appellate review and in the interests of justice and judicial economy, the court will engage in the "reasonable probability" analysis of T.C.A. §40-3-304(1). A reasonable probability that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis exists when exculpatory DNA results "undermine confidence in the outcome of the prosecution." Alley v. State, 2004 Tenn. Crim. App. LEXIS 471 at p. 9(May 26, 2004), perm. app. denied(2004)

34. As stated earlier, the court must begin with the proposition that the DNA analysis "will prove to be exculpatory." Powers at p. 55. The evidence against the petitioner "must be viewed in light of the effect that exculpatory DNA evidence would have had on the fact finder or the State." Powers at p. 55. "[T]he analysis must focus on the strength of the DNA evidence as compared to the evidence presented at trial-that is, the way in which 'the particular evidence of innocence interacts with the evidence of guilt.' (Citation omitted)." Powers at p. 55.

35. In Powers the petitioner was seeking testing of a biological specimen from the underwear of the rape victim by comparison of the DNA on the underwear with the DNA profiles in a DNA databank. The court, assuming the most favorable results for the petitioner, assumed that the DNA from the underwear would "match the profile of a prior offender contained in a DNA database," Powers at p. 58, and not the petitioner's DNA. "Under such circumstances, we must conclude that a reasonable probability exists not only that a jury would not have convicted the petitioner, but also that the State would have chosen not to prosecute

him." Powers at p. 58. Clearly that conclusion is true in Powers because such exculpatory DNA results would essentially exclude the petitioner as the perpetrator in that rape.

36. The instant case is completely different. Hyde does not seek a comparison of a biological specimen with anything. He seeks to show there is no biological specimen on the instrumentality of rape. The potentially exculpatory results of the analysis sought by Mr. Hyde could be construed as supportive of his claim that the rape did not occur, but it would not conclusively exclude that as a possibility, nor eliminate petitioner as the perpetrator nor indicate that someone else could have been the perpetrator as the Powers analysis might have shown. See, Payne v. State, 2007 Tenn. Crim. App. LEXIS 927(Dec. 5, 2007) (Lack of DNA does not support "reasonable probability finding.)"

37. This was not simply a "he said, she said," or "swearing contest" type of case where any evidence supporting the version of one side or the other would be important. The case began with extraordinary behavior of an 11 year old child who wanted to get away from her home and then made general and specific allegations against her father, which were corroborated by her physical exam by two physicians, the confession and other incriminating statements of the petitioner and the retrieval of the instrumentality of rape from the location the petitioner said the rape occurred. Moreover, having reviewed the entire transcript this court FINDS the Petitioner's trial testimony to be unbelievable, even without the aid of personal observation. To believe the Petitioner's testimony, the fact-finder would have to believe Petitioner successfully cheated on numerous employment tests, (Trial Transcript pgs. 426-431) and was able to install sophisticated aviations equipment without the ability to read (id.); and the fact-finder would have to disbelieve the Police Captain, the DHS worker, the petitioner's wife, the petitioner's child, the Sheriff and two investigators from the DA's office, almost all of which testimony Petitioner only disputes as

to the inculpatory portions. For example, Hyde admits at trial that he went to the DHS office and spoke with Melissa Thomas about how he might get to visit with the victim, Trial Transcript p. 483 v. 477, but denies admitting to her that he had given the victim an enema. Trial Transcript p. 484 v. 474. Perhaps more telling is his admission to the truth of nearly every fact in his statements to the police except the inculpatory ones. See, Trial Transcript pgs. 432-463.

38. Although the Court has found the State's opinion regarding the exculpatory nature of the proposed testing to be without support, given the fact that the testing would not conclusively prove that the rape did not occur, and in light of the overwhelming evidence of guilt recited above, the Court takes as true the State's position that "the petitioner would have been prosecuted regardless of DNA testing." State's Response, P. 3, Argument, Para. 1. Thus, this Court CONCLUDES that Mr. Hyde would have been prosecuted even if there were DNA testing done showing no female epithelial skin cells or mucous membrane cells on the enema device.

39. Similarly, in light of petitioner's confession and incriminating statements, the victim's corroborating allegations, the medical proof's corroborating findings and the corroborating physical evidence found in petitioner's home, this Court CONCLUDES that even if DNA testing were done on the enema device and no female epithelial skin cells or mucous membrane cells were detected, confidence in the petitioner's conviction for the crime of rape of a child would not be undermined. The potentially exculpatory DNA evidence is not particularly strong while the evidence presented at trial supporting the petitioner's conviction is very strong. Accordingly, the Court FINDS that there is not a reasonable probability that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis and therefore the petition will be DENIED.

40. Petitioner also contends that the Court should order the requested DNA testing

because favorable results "would have rendered the petitioner's verdict or sentence more favorable" to him. T.C.A. §40-3-305(1). This code section allows the Court to order DNA testing upon such a finding if the three factors other than the "reasonable probability factor" from the mandatory testing provision, T.C.A. §40-30-304(2),(3)&(4), are also present. There is no issue regarding the other three factors, but the Court cannot conceive of how the allegedly exculpatory result petitioner hopes for, no female epithelial skin cells or mucous membrane cells on the enema device, would have resulted in a lesser charge or a lesser sentence. Such evidence does not tend to indicate a basis for a finding of guilt on a lesser included offense, nor provide a mitigating factor on which the sentencing court would have relied in reducing the sentence imposed.

CONCLUSION

For the reasons set forth above, this Court finds that the PCDNA Act does not apply to the testing requested by petitioner; and, that even if the Act applies to the testing requested by the petitioner, there is not a reasonable probability that petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis, nor that he would have received a more favorable verdict or sentence on the basis of the allegedly exculpatory test results. Therefore, the Petition is DENIED and DISMISSED. Costs are taxed to Petitioner.

Enter:

_____

Tom Wright
Circuit Court Judge

IN THE CIRCUIT COURT FOR HAMILTON COUNTY, TENNESSEE, AT CHATTANOOGA

TAMMY O. COMBS, Individually and on behalf of the Estate of Lamar Kenneth Combs and as Mother and Next of Kin of Olivia G. Combs and Julia L. Combs,	§	
Plaintiffs,	§	
vs.	§	**No. 06C1464**
HORTON MADDOX and ANDERSON, PLLC and GEARHISER, PETERS, LOCKABY, CAVETT & ELLIOTT, PLLC,	§	
Defendants.	§	

MEMORANDUM OPINION

This case was before the court on the motion for summary judgment filed on behalf of the defendant Gearhiser firm (hereafter referred to as "Gearhiser" whether referring to the firm or one of its lawyers). The issues have been briefed extensively and oral argument was heard by the court February 12, 2008. After carefully considering the arguments, briefs, authorities and exhibits made and filed on behalf of the parties the court issues the following Memorandum Opinion containing its findings of fact and conclusions of law.

1. Factual Background

On or about October 12, 2003 Lamar Combs drowned in the Tennessee River. Mr. Combs was operating a jon boat with an outboard motor and tiller steering. Witnesses observed Mr. Combs being ejected from the boat when it made a hard turn. Mr. Combs' boat and chest waders were found in the river later in the day on October 12, 2003 but his body was not located until Wednesday October 15, 2003. (TWRA Report, Ex.1 to Defendant's Motion for Summary Judgment hereafter referred to as "MSJ"). Plaintiff is the surviving spouse of Mr. Combs and

Mother of their two children.

Plaintiff contacted Gearhiser in late September, 2004 seeking representation in a wrongful death action to recover damages for the death of her husband. (Gearhiser memo dated 9/20/04, Ex. 12 to Plaintiff's Memorandum of Law in Opposition to MSJ hereafter "Memorandum"). Gearhiser was employed by plaintiff for this purpose in early October 2004 and filed a wrongful death complaint on plaintiff's behalf against the manufacturer of the outboard motor on October 12, 2004 in Hamilton County Circuit Court. Prior to filing the complaint, plaintiff and Gearhiser discussed other potential defendants. Plaintiff specifically mentioned other potential defendants in a voice mail left at Gearhiser October 6, 2004. (Exhibit 5 to MSJ). However, Gearhiser determined that only the motor manufacturer should be sued and confirmed this in a letter to plaintiff dated October 8, 2004. (Ex. 9 to Memorandum). This letter accompanied a Representation Agreement signed by plaintiff on October 12, 2004. (Ex. 1 to Memorandum).

On October 18, 2004 Gearhiser voluntarily dismissed the complaint as they had indicated they would do in the October 8, 2004 letter. In light of the strategy which Gearhiser decided to employ in handling plaintiff's claim they advised her that their actions would "likely only preserve the statute of limitations as to the parties named in the complaint we file, and thus, the decision about which persons or entities are to be made parties takes on a great deal of significance." (October 8, 2004 letter to plaintiff from Gearhiser, Exhibit 2 to MSJ)

In June 2005 Gearhiser terminated its representation of plaintiff and referred her to co-defendant Horton, Maddox and Anderson ("HMA"). (Complaint at Para 5). HMA refiled the wrongful death suit on October 11, 2005 again suing only the motor manufacturer in state court. (Complaint at Para 10). HMA then also voluntarily dismissed the action by order entered

October 21, 2005. (id.). HMA's voluntary dismissal resulted in the loss of the potential claim against the motor manufacturer. (Complaint at Para 11). HMA admits it was negligent in voluntarily dismissing the case.

Plaintiff was concerned about the motor manufacturer being the only defendant and discussed other potential defendants with Gearhiser prior to the first complaint being filed. (Combs depo at p. 28-30, 143-145, Ex. 12 to MSJ; transcribed voice mail from Combs on October 6, 2004, Exhibit 5 to MSJ; transcribed voice mail from Combs to Anderson on Nov. 3, 2005, Ex. 6 to MSJ). Plaintiff also discussed Gearhiser's failure to name additional defendants when she employed HMA, and before they refiled the suit. (Combs depo continuation at p. 45-47, Ex. 13 to MSJ; handwritten memo of HMA attorney Anderson memorializing 9-30-05 telephone conference with Combs, Exhibit 7 to MSJ; Anderson depo at p. 35-36, Ex. 11 to MSJ). Plaintiff knew any potential state tort claims she may have had against anyone other than the motor manufacturer were barred by the statute of limitations prior to the refiling of her lawsuit by HMA on October 11, 2005.[1] (Combs depo continuation at 45-47, 98-100, Ex. 13 to MSJ).

Plaintiff claims that the motor manufacturer as well as all other potential defendants could and should have been sued under admiralty law, which would have provided the advantages of a three year statute of limitations (46 U.S.C.§30106) and a pure comparative fault analysis. (Memorandum at p.5). For purposes of the motion for summary judgment the Court

[1]Despite claiming in her complaint that Gearhiser was negligent because it did not take the steps necessary to pursue her claims against "the unnamed entities who should have been named defendants" (Complaint at Para 9), plaintiff now contends that the original failure to name all potential defendants did not injure her, and thus could not have caused her legal malpractice statute of limitations to begin to run, because her claims under state tort law could still have been pursued in an action brought under admiralty law. (Memorandum at p. 2, 5-7, 9). If that is the case, the discussion in section 2A., below is unnecessary. However, because Plaintiff's complaint alleges that she was injured by Gearhiser's failure to name all potential defendants, (Complaint Para 8,9,27), and she has not amended that complaint, it seems appropriate to address this claim in ruling on the MSJ.

accepts as true that plaintiff had a viable admiralty claim and that Gearhiser and HMA were negligent in failing to recognize this claim and/or failing to assert this claim and/or failing to advise plaintiff of its existence as well as the applicable statute of limitations for such a claim. Plaintiff's potential claim under admiralty law expired October 12, 2006 by operation of the three year statute of limitations, sixteen months after Gearhiser terminated its attorney-client relationship with plaintiff. (Memorandum at p. 2, 7-8). Despite the fact that she is an attorney and that on October 5, 2004 she reviewed an admiralty case provided to her by Gearhiser (Ex 1 to Gearhiser Reply), plaintiff asserts she did not learn of the potential admiralty claim until she engaged her current attorney in this case. (Combs affidavit para. 28) (although the exact date her current attorney was employed is not in evidence, it was apparently some time after 10/12/06 since he has not been sued).

On October 19, 2006 plaintiff filed the present complaint against Gearhiser and HMA for malpractice.

2. Legal Analysis

Defendant Gearhiser has pursued this motion for summary judgment based solely on its arguments concerning the statute of limitations and causation. Defendant deferred pressing its "professional judgment" argument during the hearing on this motion and submitted it to the court strictly upon the other two issues.

A. Statute of Limitations

T.C.A. §28-3-104(a)(2) provides a one year statute of limitations for malpractice claims such as have been made in this case, whether they are based in contract or tort. The limitation period does not begin to run until the injured party has "discovered" that they have been harmed by their attorney's negligence. Carvell v. Bottoms, 900 S.W.2d 23(Tenn.1995).

This "discovery rule" is composed of two elements: 1. Plaintiff has sustained a legally cognizable or actual injury as a result of her attorney's negligence; and 2. Plaintiff either knew, or in the exercise of reasonable diligence, should have known that her injury was caused by her attorney's negligence. id at 28.

With regard to the date a cause of action for malpractice accrues, the defendant is not required to show that plaintiff actually knew her injury constituted " a breach of the appropriate legal standard in order to discover that [she] has a 'right of action'; the plaintiff is deemed to have discovered the right of action if [she] is aware of facts sufficient to put a reasonable person on notice that [she] has suffered an injury as a result of wrongful conduct." Roe v. Jefferson, 875 S.W.2d 653, 657 (Tenn. 1994). In addition, a plaintiff cannot wait until she " knows of all the injurious effects or consequences of an actionable wrong before taking action." Hartman v. Rogers, 174 S.W.3d 170, 173 (Tenn. App.), *perm. app. denied* (2005).

A plaintiff has been injured when "she has suffered the loss of a legal right, remedy or interest." Carmack v. Oliver, 2007 Tenn. App. LEXIS 721, at p. 12 (Tenn. App. 2007). Plaintiff in this case knew on October 12, 2004 that Gearhiser had sued only the motor manufacturer and that the statute of limitations (with regard to state tort claims) had expired. Thus, on October 12, 2004 plaintiff suffered the loss of any state tort claims she may have had against any other parties.[2] The Court finds this alleged loss to be a legally cognizable or actual injury. Arguably, her limitations period in which to sue Gearhiser for its alleged negligence related to not naming other defendants began to run at that time. Certainly it began to run before October 19, 2005.

Plaintiff was unhappy with Gearhiser's decision not to name any other parties and discussed her "injury" from the loss of these potential state tort claims with her successor

[2]See footnote 1, above

attorney at HMA. This occurred before she refiled her complaint against the motor manufacturer October 11, 2005. Plaintiff knew or should have known that she had been injured by the alleged negligence of Gearhiser in failing to name additional parties in the original complaint prior to October 11, 2005 and thus her statute of limitations to sue Gearhiser for that alleged negligence expired prior to the date she filed this lawsuit. Accordingly, plaintiff's negligence claims against Gearhiser relating to the failure to name all appropriate parties in the original wrongful death complaint expired prior to October 19, 2006 when the instant suit was filed.

B. Causation

With respect to plaintiff's loss of the admiralty claim, she asserts that the statute of limitations for her malpractice claim could not have run prior to her filing this lawsuit on October 19, 2006 because her cause of action only accrued the week before, on October 12, 2006 when the statute of limitations for the admiralty claim expired. (Feb. 12, 2008 Transcript of Hearing on MSJ at p. 25, 1. 21-24). While Gearhiser argues that the alleged negligence regarding the admiralty claim is simply a rehash of plaintiff's principal argument that Gearhiser failed to sue all the appropriate parties, which plaintiff knew as early as October 12, 2004, this Court finds the most pertinent inquiry with regard to the admiralty claim to be one of causation. Accordingly, this Court is not addressing the argument in Gearhiser's Reply brief that the plaintiff "is not permitted to wait, and the statute of limitations is not tolled, while she determines all of the harm which she now claims results from her attorneys' alleged malpractice in 2004." (Reply to Response of Tammy Combs to the Gearhiser Firm's MSJ at 9). For purposes of this analysis, the court will assume that the alleged failures of Gearhiser relating to the admiralty claim were not "discovered" until October 2006.

Plaintiff's admiralty claim was alive and well at the time Gearhiser terminated the

attorney-client relationship with plaintiff. It is undisputed that when the attorney-client relationship was terminated, plaintiff still had approximately sixteen months within which an admiralty claim could have been filed. During those sixteen months, plaintiff was represented by co-defendant HMA. We have assumed, for purposes of this Motion, that it was negligence to fail to recognize the admiralty claim and/or fail to assert the claim and/or fail to advise plaintiff of its existence as well as the applicable statute of limitations for such claim. That being the case, if HMA had not been negligent, plaintiff would never have sustained this injury. In other words, if HMA had complied with the alleged standard of care then Gearhiser's breach of that standard would never have resulted in harm to the plaintiff. Restated again, **but for** the negligence of HMA plaintiff would not have been injured. It has been "consistently held," that an attorney cannot be responsible for the loss of a client's claim if the attorney ceased to represent the client and was replaced by successor counsel prior to the running of the statute of limitations on the client's claim. Norton v. Sperling Law Office, 437 F. Supp. 2d 398, 402 (D.Md. 2006).

When HMA received plaintiff's case it became responsible for all remaining viable causes of action. Any viable claims plaintiff had after employing HMA were lost as a result of the negligence of HMA and not as the result of any negligence by Gearhiser. Accordingly, Gearhiser's alleged negligence could not be the actual or proximate cause of plaintiff's injury from the loss of her alleged admiralty claim.

Although this fact pattern does not appear to have been addressed in any reported Tennessee decisions, there have been several decisions in other jurisdictions which support this Court's position. See, e.g. Luttgen v. Fischer, 107 P.3d 1152 (Colo. Ct. App. 2005); Mitchell v. Schain, Fursel & Burney, Ltd., 332 Ill.App.3d 618, 773 N. E.2d 1192 (App. Ct. 2002); Albin v.

Pearson, 734 N.Y.S.2d 564, 289 A.D.2d 272(App. Div. 2001); White v. Rolley, 225 Ga.App. 467, 484 S.E.2d 83 (Ct. App. 1997); Medrano v. Reyes, 902 S.W.2d 176 (Tex. Ct. App. 1995); Knight v. Myers, 12 Kan. App. 2d 469, 748 P.2d 896(Ct. App.1988); Frazier v. Effman, 501 So.2d 114 (Fla.. Dist. Ct. App. 1987); Steketee v. Lintz, Williams & Rothberg, 38 Cal.3d 46, 694 P.2d 1153 (Cal. 1985).

In Plaintiff's Supplemental Memorandum of Law Opposing MSJ, on Issue of Causation, the court is referred to two additional cases addressing the causation issue from foreign jurisdictions which plaintiff claims supports denial of the MSJ: Lopez v. Clifford Law Offices, P. C., 362 Ill.App.3d 969, 841 N.E.2d 465 (App. Ct. 2005); Collins v. Missouri Bar Plan, 157 S.W.3d 726 (Mo. Ct. App) *app. transfer denied* (2005). These cases are not on point.

In Lopez, plaintiff was improperly advised about the applicable statute of limitations for his wrongful death claim; and, like the instant case, Lopez did still have time within which to file his wrongful death suit when the defendant law firm ceased representing him. However, unlike the instant case, "Lopez did not retain a successor counsel until **after** the expiration of the statute of limitations, *i.e.,* when the successor counsel could not have cured the problem created by the incorrect advice." Lopez at 981-982(emphasis added).

Similarly, in the Collins case the plaintiffs received and acted upon bad legal advice, losing custody of their child, before the subsequent attorney was hired. The defendant attorneys alleged that the subsequent lawyer was negligent in her actions attempting to repair the damage caused by the defendants' negligent advice. But unlike the case at bar, the defendants' alleged negligence had already resulted in injury to the plaintiffs before the subsequent attorney became involved. Thus, the Missouri court held that the subsequent attorney's negligence "did not interrupt the chain of events triggered by [defendants'] alleged negligence." Collins at 733.

Plaintiff argues at length that under Tennessee law the negligence of HMA cannot be an "intervening cause" which would relieve Gearhiser of liability for its negligence. (Plaintiff's Supplemental Memorandum etc.). The Court finds it unnecessary to address this issue. This Court rests its decision regarding the loss of the admiralty claim on its conclusion of law that under the circumstances presented in this case Gearhiser's alleged negligence could not be the cause in fact or proximate cause of plaintiff's alleged loss.

Based upon the Court's analysis set forth above, the court finds that Gearhiser's Motion for Summary Judgment is well taken as to plaintiff's claims against it for malpractice, whether couched in terms of negligence, breach of contract or breach of fiduciary duty. However, plaintiff has also claimed that Gearhiser violated the Tennessee Consumer Protection Act, T.C.A. §47-18-101 *et seq.*

C. Tennessee Consumer Protection

First, although the Court finds it unnecessary to reach this issue, this Court doubts the applicability of the TCPA to the attorney-client relationship. See , Newton v. Cox, 1992 WL 220189 (Tenn. App.), *reversed on other grounds* 878 S.W.2d 105 (Tenn.) *cert. denied* 513 U.S. 869 (1994). The attorney-client relationship is not a "consumer transaction" and the practice of law is not a "trade or commerce," although the act defines these terms so broadly that one can argue they do cover this situation.

Plaintiff claims that Gearhiser had some knowledge about the possible existence of an admiralty claim but failed to share that with her and thus tended to deceive her, in violation of TCAP, into believing that her only viable claim after October 12, 2004 was against the motor manufacturer. (Memorandum at p. 25).

However, it is "well settled in this state that the gravamen of an action" determines the

applicable statute of limitations. Pera v. Kroger Co., 674 S.W. 2d 715, 719 (Tenn. 1984). The essence of this suit is that the plaintiff was damaged by the failure of Gearhiser to properly investigate, research and prosecute her claims as well as by Gearhiser's failure to properly advise her as to potential rights of action and statutes of limitations. These are allegations of professional negligence which, however couched in plaintiff's pleading, are subject to the one year statute of limitations for malpractice, Swett v. Binkley, 104 S.W.3d 64, 67 (Tenn. App. 2002), *perm. app. denied* (2003), and, are subject to the same causation analysis[3] set forth in section 2B, above. Thus Gearhiser is entitled to summary judgment on the TCPA claim as well.

For the reasons set forth above, an order will be entered contemporaneously with this Memorandum Opinion granting Gearhiser's MSJ.

Enter:

_____

Tom Wright
Circuit Court Judge

[3]For a "causation" analysis in a malpractice case where the first attorney "deceived" the plaintiff about the applicable statute of limitations on a claim, but the actual statute of limitations did not expire before successor counsel began handling case, see, Ritam, Int'l v. Pattishall, et.al., 2000 U.S. Dist. LEXIS 21636 (S.D.Iowa 2000). Although no consumer protection act was involved in Ritam, the plaintiff claimed injury from detrimental reliance on erroneous legal advice about the viability of a claim.