The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

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INTRODUCTION

The State of Tennessee Executive Order No. 87 (September 17, 2021) hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

The Council requests that applicants use the Microsoft Word form and respond directly on the form using the boxes provided below each question. (The boxes will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit your original hard copy (unbound) completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts as detailed in the application instructions. Additionally, you must submit a digital copy with your electronic or scanned signature. The digital copy may be submitted on a storage device such as a flash drive that is included with your original application, or the digital copy may be submitted via email to laura.blount@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 partner at Arnett, Baker, Draper, & Hagood, LLP ("Arnett | Baker").

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

I was licensed in 2007. My Board of Professional Responsibility number is 026515.

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

I have been licensed to practice law in the State of Tennessee since 2007. My license is active and has never been suspended or revoked.

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).

2007-2009: Judicial Law Clerk for Justice Cornelia A. Clark, Tennessee Supreme Court.

2009 – present: Attorney, Arnett, Baker, Draper & Hagood, LLP (formerly Arnett, Draper & Hagood, LLP).

2013-2016: Adjunct Professor – University of Tennessee College of Law.

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.

My current practice encompasses all aspects of insurance defense. While my primary clients are in the field of health care, my representation covers a wide range of matters for these healthcare facilities/providers, including health care liability claims, fleet vehicle accidents, premises liability, breach of contract, construction defects, employment-related matters, state regulatory requirements/reporting/investigations, federal regulatory claims, and various other statutory and common law torts. In addition to the "reactionary" role of defending my clients after a complaint has been filed, I also provide "proactive" counsel in the form of educational presentations, training seminars, and policy drafting, all performed with a goal of improving health care services and preventing litigation. My health care liability work has even, recently, resulted in being retained as co-counsel in a divorce proceeding.

The remaining focus of my practice is general civil litigation/insurance defense for small business owners, religious organizations, individuals, and Fortune 500 companies in a wide variety of claims, including premises liability, personal/trucking/fleet accidents, libel/slander, breach of contract, environmental toxic exposure, products liability, construction law, and other various general negligence/tort claims. My current general litigation caseload includes a wide breadth of legal issues including claims for premises liability, sexual assault of an authority figure, wrongful burial of a body, building code violations, toxic exposure to mold, amusement ride injury, construction defect, fraudulent concealment, and various vehicular accidents.

As percentages are requested, 100% of my practice is in civil litigation. Approximately 45% of my open files are health care liability causes of action.

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

Appellate Courts: Upon graduation from law school, I clerked for Justice Cornelia A. Clark, Tennessee Supreme Court, for two years. During my time clerking, I prepared approximately twenty (20) preliminary draft opinions on a variety of civil law matters including contract interpretation/enforcement, arbitration enforceability, board of professional responsibility matters, summary judgment standard, equitable division of marital assets, and punitive damages.

I also collaborated with numerous staff clerks and Senior Judges in drafting approximately forty (40) Workers Compensation Panel opinions. Additionally, I was responsible for reviewing draft opinions prepared and circulated by other Justices for two purposes: (1) editing; and (2) discussing the strengths and weaknesses of those draft opinions with Justice Clark. I also assisted Justice Clark in preparing for her many and various CLE presentations and speaking engagements, including drafting speeches and preparing presentation materials.

With my clerking experience, I obtained firsthand knowledge of the inner workings of the Court, the pre- and post- argument discussions within the Court, and the day-to-day expectations of being an appellate court judge. I gained confidence in my research and writing ability. In one of the last opinions that I prepared for Justice Clark, after the opinion was circulated to the other members of the Court, another Justice on the Court sent me an email that simply stated, "I agree with every jot and tittle." As this Justice was known for his detailed and precise writing style, this was, in my mind, the highest praise. I still have the email as a reminder that skillful writing requires attention to all aspects of the argument, including the "jots and tittles."

Following my clerkship, I returned to Knoxville, where I accepted a position at Arnett, Draper & Hagood, LLP. Throughout my entire time at the firm (now Arnett | Baker), I have been blessed with excellent clients who have allowed me to be a litigator and not simply a handler of cases.

The Tennessee Medical Malpractice Act, as enacted in 2009, came into effect the same month that I began private practice. Within a few months of being at the firm, I was given my own cases. Soon thereafter, I successfully argued my first Motion to Dismiss in a medical malpractice matter and then successfully had the case dismissed on appeal.

Numerous dispositive motions have followed. Litigating the interpretation and application of that statute has provided me with the opportunity to brief and argue nearly two-dozen times in Tennessee's appellate courts. Each of these appellate experiences has afforded me the opportunity to engage in rigorous review of hundreds of appellate decisions, prepare for healthy discourse with the members of Tennessee's appellate courts, and establish credibility with those judges through demonstrated preparation and well-reasoned analysis.

Trial Courts: I practice primarily in Knox, Anderson, Hamblen, Loudon, Roane, Cumberland, Claiborne, Blount, and Sevier Counties. I have also handled matters in Davidson, Jefferson, Greene, Campbell, Morgan, Montgomery, Shelby, Sullivan, Union, Hawkins, Cocke, Johnson, and Washington Counties. I have handled cases primarily in Circuit Court, but I have also appeared in Chancery and General Sessions on a few occasions.

Health care liability actions usually afford attorneys the opportunity to file numerous pleadings within each case (primarily as related to the specific enumerations of the Tennessee Health Care Liability Act, Tenn. Code Ann. § 29-26-101, *et seq.*), and subsequently, appear and argue before judges several times during the pendency of a lawsuit. My practice has certainly been this way.

In all the counties that I primarily practice, the trial court judges for whom I first appeared have all retired or passed away. I have, therefore, experienced the judicial temperament, courtroom presence, and judicial philosophy of approximately 45 trial judges over my 17 years of practice. I have argued hundreds of pre-trial motions and a few post-trial motions. I have decerned the impact that judicial philosophy can have on both the outcome of the pleading and on the lawyers. Statutory interpretation should not vary from courtroom to courtroom and county to county.

Personally, and professionally, I know the negative impact that inconsistent rulings have on lawyers and their clients.

Regulatory/Administrative matters: I have handled matters before the Tennessee Department of Health and related boards (Health Care Facilities, Board of Nursing, etc.) on numerous occasions, primarily assisting my clients in responding to board complaints and investigative inquiries. I have handled matters before the Department of Health and Human Services, Office of Inspector General and the Department of Justice.

Work Habits: Regarding my personal work habits, I take considerable pride in two attributes: humility and hard work. While I think my clients and colleagues would be in a better position to discuss my work habits and effort, I always have and always will give my absolute best to anything associated with my name. To that end, I have never lost the work of the claims representatives and insurance companies who have assigned me cases. Once entrusted to represent a client, I have never lost that representation or trust. I am incredibly proud of this fact. My caseload has not diminished in 17 years; only growing through my own successes and pursuit of additional clients and practice areas.

It is my core belief that hard work overcomes any problem, challenge, or task. As demonstrated evidence of my hard work, in college, law school, and the practice of law, I have always done "extra". I have done so not just out of requirement or expected gain, but because I wanted to push myself physically, mentally, and, even at times, emotionally.

While at Syracuse University, I played Division I softball, and I was in the Air Force R.O.T.C. program, Detachment #535. While these activities provided the necessary financial aid that I needed to pay for my undergraduate and master's degrees, they also demonstrate my willingness to work hard.

While in law school, I worked my way onto the Tennessee Law Review (serving as Articles Editor in my Third Year), the Tennessee Journal of Business Transactions, and the Constitutional Law Moot Court team. Again, needing financial assistance, I earned an NCAA Postgraduate Scholarship, worked as a graduate assistant for the University of Tennessee softball team, and held a financial aid, work/study position.

As a practicing attorney, I have made specific effort to contribute to the Knoxville Bar Association, serving in various roles including Barristers President and, as of December 12, 2025, KBA President. I serve on community boards. I have served or serve on several boards/commissions that fall under the purview of the Tennessee Supreme Court (Board of Professional Responsibility, Board of Law Examiners, and Commission on Continuing Legal Education).

Trial practice: While trials are exceedingly rare these days, I have served as Co-Chair in five (5) birth injury cases, each lasting at least nine (9) trial days. Defense verdicts were obtained each time. I have served as first chair in four (4) non-jury trials; again, each resulting in a favorable verdict for my client. I have had a handful of General Sessions trials over my career.

As first chair, I have prepared more than 300 motions in limine. I have taken several matters to the brink of trial, but, through favorable pre-trial rulings, I have settled numerous matters in the days and/or hours before trial was to commence. I have also prevailed in a handful of partial motions for summary judgment that have resulted in favorable settlements on the eve of trial. These successes have limited my total number of trials but demonstrate my writing and analysis

capabilities, which have resulted in favorable client results, including reduced litigation costs.

I have always had a heavy pleading practice and appear primarily in circuit courts throughout East Tennessee on a frequent basis. My clients have afforded me the opportunity to work my cases with the goal of obtaining summary judgment. Despite the complexity of my cases, I have obtained summary judgment nearly two dozen times. I am most proud of these victories and consider them to be my best accomplishments as an attorney. Successful summary judgment motions require strategic planning, purposeful preparation, an in-depth understanding of applicable rules and laws, and a substantial time commitment to drafting a persuasive written and oral argument. My most recent successful motion for summary judgment was appealed, and the trial court was affirmed by the Court of Appeals in August 2025.

Scope of Practice: Although I have primarily represented hospitals, nursing homes, doctors, and nurses, I have also had the very good fortune of obtaining new clients, including insurance companies that insure and defend churches and related ministries, sports, leisure and entertainment industries, the airline industry, various commercial trucking/fleet companies, and a wide range of Tennessee business owners. This new and diverse book of business has come through hard work, proven results, and a commitment to providing the best legal services to each client, every day. The growth of my practice has come through connections with lawyers (both plaintiff and defense), engagement in bar activities, and through presentations/writing. I have been able to engage new clients and broaden my scope of practice, committing to the challenges that come with a demanding caseload and expanded areas of practice.

In addition to my litigation practice, I have also assumed some additional responsibilities for my clients beyond being retained by insurance carriers, including policy drafting, internal system operations improvement, education/training, assisting in state/federal investigations, and transactional contract-drafting matters.

During my entire time with my firm, I have primarily drafted all dispositive motions, pre-trial motions, complex motions and responses, appellate briefs, and any other lengthy pleading on the cases in which I have entered an appearance.

Administrative Roles: Outside of the courtroom, I served on the Tennessee Commission on Continuing Legal Education. During my time on the commission, I assisted with, and was assigned to draft, what became significant changes to Tenn. Sup. Ct, Rule 21.

At the conclusion of my time on the Commission, Justice Kirby, the Supreme Court liaison for the Tennessee Board of Law Examiners ("BLE"), asked if I would serve as an interviewer for District 2. I remain in that role at present.

Earlier this year, I was asked to serve as a Board of Professional Responsibility Hearing Panel member for Knox County. Again, yes was the only answer that I could give. In the short few months I have been on the Panel, I have served as the presiding judge in a petition for disciplinary action, and I have entered a handful of orders on various matters.

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

For all who know and work (or have worked) with me, I think they would tell you that I am genuinely passionate about the law, and this passion comes through in my preparation for all aspects of litigation. Being presented with a unique and new legal issue, digging into Lexis and reviewing the case law, preparing an argument (written or oral) …this is why I became a lawyer. There is nothing better than putting the pieces together and then taking a complex issue and formatting the argument in such a way to lead the court simply and clearly to the correct result.

While I could elaborate on one of my more challenging motions for summary judgment or my numerous appellate pleadings, and the time, effort, and preparation that goes into these successful pleadings, I, instead, will specifically mention two Motions to Dismiss that are more personal.

Firstly, four days after my mother unexpectedly passed away, I attended the hearing on a Motion to Dismiss filed several months earlier. While overwhelmed with grief, I attended to support a new associate in my office who was arguing in my place and arguing for the first time. While she did very well, I just felt that she had not precisely conveyed the winning argument. The very gracious judge, who knew of my grief, allowed me to stand up and argue the merits of the issue. And for those ten (10) minutes or so, a calm just came over me. My sadness and the pain in my heart stopped. I will never forget that argument. While I do not necessarily remember the exact words I spoke, I do remember the feeling I had being present in that courtroom, surrounded by colleagues who supported me, who genuinely cared for me, and who gave me the lectern to express my thoughts on the matter. The discourse with the Judge was respectful, challenging, and engaging. Despite the subject matter – the alleged wrongful death of a mother – being incredibly challenging for me to speak about, I wanted to have that analysis/discussion with the Court to make sure that the right result occurred. And, following the argument, the Court granted our Motion.

Secondly, I defended a matter where a *pro se* plaintiff attempted to file a health care liability cause of action on behalf of her deceased mother. She did not comply with the pre-suit notice requirements as enumerated in the Tennessee Health Care Liability Act, and a Motion to Dismiss followed. I met with this *pro se* plaintiff on a few occasions, I allowed her to talk while I listened, and I went through her mother's medical record in detail to help her understand the proper care that was given. I wanted my client to prevail, not just because the law allowed it. I wanted this daughter to understand that she was being heard, her concerns would be addressed, and I wanted her to know that my client was not at fault.

My Motion did prevail, and after the Court made its ruling, the *pro se* plaintiff hugged me and thanked me for improving her impression of lawyers. She did not leave the courtroom mad at my client, the judge, the Legislature, or even me. Instead, she appreciated her experience, felt that she was heard, and felt that she had her day in court with dignity.

Both cases were personally challenging for me as they related to the devastating loss of a mother, and I was personally experiencing that loss while these cases were being litigated. But, these cases demonstrate who I am as a person and how I practice law.

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

I have just recently served as the presiding judge in a Board of Professional Responsibility Hearing Panel matter, In re: Darren Vincent Berg, Docket No. 2025-3471-2-EF (Knox County). I was assigned to the Panel in April, and we concluded the matter in September. The Petition filed by the Board asserted that Mr. Berg violated the Rules of Professional Responsibility numerous times while engaged in the practice of law. The Panel concluded that disbarment was the appropriate disciplinary action based upon the repeated and numerous Rules violations, failure to acknowledge culpability or show remorse, and the serious harm caused by the actions committed.

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

Not Applicable.

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

I served as a judicial extern for Chancellor John Weaver, Knox Chancery, while in law school.

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

Not Applicable.

EDUCATION

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

University of Tennessee College of Law

Juris Doctor, May 2007

Member, **Tennessee Law Review**. Articles Editor 2006-2007. Awarded Best Third Year Editor.

Member, **Constitutional Law Moot Court Team** & Moot Court Board (2005 – 2006; 2006 – 2007).

Member, Tennessee Journal of Business Transactions (2006, 2007).

Highest Academic Achievement: Legal Process II (brief writing) and Supreme Court Decision-Making.

After graduation from law school, I received the **University of Tennessee Alumni Promise Award** in 2018.

Maxwell School of Citizenship & Public Affairs, Syracuse University

Master's in Public Administration – June 2004

Syracuse University

Bachelor of Arts – May 2003, *cum laude*

Dean's List (1999 - 2003).

Athletic Director's Honor Roll (1999 - 2004).

The National Society of Collegiate Scholars, Inducted Fall 2000.

Who's Who Among Students in American Universities & Colleges.

NCAA Postgraduate Scholarship (2003 – 2004).

Extra-Curricular: Starting 2nd Baseman, Syracuse softball team; Captain (2003 – 2004); NCAA Student-Athlete Leadership Conference Representative (2001); various athletic awards earned, including of note:

The **Lucille Verhulst Sportswoman of the Year (Softball) Award** (2000) – awarded to a female athlete who demonstrates high standards of sportsmanship, academic achievement, and achievement on the playing field.

The **Abbie Bigelow Award for Courage** (2003) – awarded for demonstrating resilience and determination in the face of adversity.

Captain (2004). I was elected captain by my teammates in my senior year.

PERSONAL INFORMATION

15. State your age and date of birth.

Age: 45. Born: [redacted] 1980.

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

Other than my time in Syracuse, New York, while earning my B.A. and M.P.A, I have lived in Tennessee for nearly 45 years.

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

16.5 years. I returned to Knoxville in 2009 after completing my two (2) year clerkship in Nashville.

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

Knox.

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.

I was in Air Force R.O.T.C., Detachment #535, while an undergraduate student at Syracuse University. My honors and awards include:

- An **Air Force ROTC Scholarship** (4yr Type 7 Scholarship offer), awarded to candidates who satisfy academic (high school GPA, ACT/SAT score minimums) and physical fitness requirements, demonstrate leadership potential, and perform well in the personal interview;
- The **Sons of the American Revolution Award**, for distinguished service, leadership, and high ethical standards;
- The **Silver ROTC Medal** for "recognition of outstanding leadership qualities, military bearing and excellence, thus exemplifying the high ideals and principles which motivated and sustained our patriot ancestors"; and
- flight leader (2021).

I received what I have always understood to be the equivalent to a medical discharge after I tore my second ACL while in college. Specifically, the Department of Defense Medical Examination Review Board (DoDMERB) did not give me medical clearance to become an officer in the United States Air Force after my second ACL repair, which left me with surgical hardware in both of my knees.

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

No.

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

No.

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

Zero.

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

No.

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

No.

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question

does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

No.

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

Member, Church Street United Methodist Church (I transferred membership to Church Street, from St. Paul's United Methodist Church in Mt. Juliet, Tennessee, after I permanently moved to Knoxville).

Board Member, Medic Regional Blood Center (2013 – July 2022), Secretary (2021).

Sacred Heart Cathedral School (2020 – present) (various roles including volunteer coach, chaperone, guest speaker, committee member).

Fort Sanders Foundation (2022 – present).

University of Tennessee - Chancellor's Associates (2024 – present).

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

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

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

I was a four-year letterwinner on the Syracuse University softball team (1999 – 2004), which only allowed female athletes. Additionally, while in law school, I was a graduate assistant for the University of Tennessee softball team (2004-2005), which was again female only athletes.

I am no longer a member of the Syracuse softball team, but I am a proud alumna. I am also a proud supporter of the University of Tennessee softball team. I will not withdraw from participation in and support of these excellent softball programs as I do not believe that appointment to the Court of Appeals should require such a limitation.

ACHIEVEMENTS

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

Knoxville Bar Association (2009 – present)

- Board of Governors (2015-2017, 2019-2021, 2023-2027);
- President (2026);
- President-Elect (2025);
- Treasurer (2024);
- Secretary (2023);
- Barrister's President (2016);
- Barrister's Vice-President (2015);
- Barristers' Hunger & Poverty Relief Committee – Chairperson (2013);
- Functions Committee (2012, 2013);
- Nominating Committee (2012, 2025);
- Barrister's Athletics Committee – Chairperson (2011, 2012).

Tennessee Bar Association (2009 – present)

- Tennessee Bar Association Law Leadership graduate (2015).

American Bar Association (2009 – approx. 2016).

American Inns of Court, Hamilton Burnett Chapter (2012 – present).

Defense Research Institute (DRI) (2016-present).

East Tennessee Lawyers Association for Women (2011- present)

- CLE Committee Chair.

Federation of Defense and Corporate Counsel (2020-Present).

Knoxville Bar Foundation (named Fellow 2020).

Commissioner – Tenn. Comm. on Continuing Legal Education and Specialization (2013-2019).

Interviewer – Tennessee Board of Law Examiners (2018 – present).

Hearing Panel Member – Tennessee Board of Professional Responsibility (2025, ongoing).

Significant Service

When reflecting on significant roles and responsibilities, I would be remiss not to highlight the importance of active participation in the Knoxville Bar Association (KBA), both generally and through my personal involvement. My engagement with the KBA has enriched my life in many ways, both professionally and personally. Through this organization, I have built lasting

friendships, found meaningful connection within the Knoxville legal community, and deepened my commitment to service.

My initial involvement began as a volunteer with the Hunger and Poverty Relief Committee, where I discovered a shared sense of purpose with colleagues who also understood the challenges and frustrations that often accompany the practice of law. Through the Barristers, and then serving on various committees, colleagues became friends and relationships with "opposing" counsel became less adversarial. I have benefited from high-quality continuing legal education offered through the KBA. I was encouraged to contribute to our monthly bar journal, DICTA, and have authored several articles over the years. I also serve as an annual CLE presenter and host the well-attended Ethics Bowl, which brings together lawyers and law students for thoughtful discussion and learning.

Through these experiences, I have had the honor of earning the trust of my fellow bar members to serve in two leadership roles. First, I was elected President of the Barristers, the young lawyer division of the KBA. This role allowed me to mentor new attorneys, foster professional development, and create opportunities for meaningful engagement. More recently, I was elected to serve as KBA President, a position I will assume on December 12, 2025. These roles have previously been held by some of the most respected attorneys in our community, and I am deeply humbled by the trust placed in me to carry that legacy forward.

Supporting the bar and mentoring the next generation of lawyers is not just a professional responsibility; it is a personal calling. Strong bar associations are essential to a healthy legal system. Experienced attorneys have a duty to guide, encourage, and uplift those who are just beginning their journey. My work with the KBA reflects that belief, and I would bring the same spirit of service and mentorship to the appellate bench.

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

While I have never been interested in acquiring awards to hang on my wall (and for this reason finding the dates for several of these awards has been challenging), below are the awards and recognition that I have received related to my practice of law:

University of Tennessee:

Alumni Promise Award - highest alumni award given to alumni under age 40 (2018).

National Organizations:

Best Lawyers in America (2020, 2021, 2022, 2023, 2024, 2025), awarded in the areas of Health Care law, Litigation – Health Care, Medical Malpractice Law – Defendants, and Personal Injury Litigation - Defendants.

Best Lawyers – Lawyer of the Year: (2021, 2022, 2023, 2024, 2025), awarded in the areas of Health Care Law and Health Care - Litigation.

Best Lawyers – Women in the Law (Top Peer-Nominated Lawyer) (2020, 2022).

Martindale Hubbell AV Preeminent® Rating (judicial edition) (2013 – present).

Super Lawyers (2022, 2023, 2024, 2025).

Super Lawyers – Top Attorneys in the Mid-South (2023, 2025).

Super Lawyers Rising Stars (2013-2020).

Super Lawyers – Top Attorneys in the Mid-South Rising Stars (2019).

The awards and dates listed above from national organizations were identified through a review of archived email correspondence acknowledging each recognition. While it is possible that additional honors may have been received, these reflect the awards I was able to confirm through that search.

State:

Tennessee Bar Association Leadership Law (2015).

Knoxville:

Cityview Magazine: Top Attorney -- medical malpractice (various years, including 2021, 2022, 2023, 2024, 2025).

Knoxville Bar Association – President (2026).

Knoxville Bar Association Fellow (2020).

Knoxville Bar Association – Board of Governors (2015-2017, 2019-2021, 2023-2027).

Knoxville Bar Association – Barristers' President (2016).

Knoxville Bar Association – Barrister's President Award (2013).

Legal Aid of East Tennessee Pro Bono Project - Pro Bono Advocacy Award (2014).

Legal Aid of East Tennessee Pro Bono Project - Donald F. Paine Volunteer Lawyer of the Year award (2012).

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

I authored two articles in law school:

1. *The Business Judgment Rule Expanded in Disney*, 8.2 Tenn. J. Bus. Trans. 458.
2. *"At Will" the De Facto Standard for Oral Agreements of Indefinite Duration*, 8.1 Tenn. J. Bus. Trans. 208.

I have also authored eight articles for the Knoxville Bar Association publication, DICTA, including:

1. *Competing Interests: Punish v. Passing Constitutional Muster, A Discussion of*

Punitive Damages in Tennessee, DICTA, Oct. 2010;
2. *I Object to Your Objection*, DICTA, Sept. 2011;
3. *Being a Mentor Can Change Two Careers*, DICTA, Nov. 2013;
4. *Understanding HIPAA & Why You Should* – 2014; CLE Update, DICTA, Jan. 2015;
5. *Dates, Deadlines, and To-Dos - 10 Practice Tips for Calendaring,* DICTA;
6. *Damn Zoom Depositions*, DICTA, 2020;
7. *"I love being a lawyer!"*, DICTA – June 2024;
8. *"Call, Don't Click!"*, DICTA – July 2024.

I have authored two articles for the Knoxville Business Journal:

1. *There's a Reason We Are the Volunteer State*, Knoxville Business Journal, December 2013;
2. *Winter Weather Advisory: The Premises Liability Hazards Caused by Snow, Sleet, and Ice,* Knoxville Business Journal.

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.

My primary teaching activities in the last five (5) years have been numerous presentations and lectures to a variety of non-lawyer individuals (doctors, nurses, managers, restaurant employees) on various legal issues, including premises liability, workplace discrimination, EMTALA, HIPAA, Controlled Substance Statutes, the Tennessee Health Care Liability Act, and various other health care law related topics. I have given more than 60 presentations on these topics to my clients over the last 6-7 years.

I also speak, when asked, at the University of Tennessee Winston College of Law and the Lincoln Memorial University Duncan School of Law. I do not recall these specific dates, but I estimate that I have spoken approximately a dozen times over the years. My two most recent speaking engagements were in September 2025 and October 2025, both at the Winston College of Law.

I have also participated in the following law-related seminars/presentations in the last five years:

1/30/2020 – New Lawyers Welcome Reception – remarks for new attorneys

9/16/2020 – A Refresher on Depositions

10/20/2020 – Dear Partner, A view from an Associates' Desk

2/26/2021 - Sharpen Your Skills: Tips and Techniques from Seasoned Trial Lawyers – Session Title: Setting the Record for Appeal

2/18/2022 – 2nd Annual Sharpen Your Skills: Tips and Techniques from Seasoned Trial Lawyers – Session Moderator for panel: Judge Kristi Davis, Brooklyn Sawyer, Heidi Barcus

12/1/2023 - Ethics Bowl XVII Moderator

4/17/2024 - "Getting it 'In the Box'": Setting the Record for Appeal – Presentation at Tennessee

Health Care Law Forum

5/29/2024 - You Can Have It All! (But do you want it)

8/16/2024 - Everything you ever wanted to know about Health Care Law

12/6/2024 – Ethics Bowl XVIII Moderator

12/5/2025 – Ethics Bowl XIX Moderator

2025* – Understanding EMTALA

*Because this presentation has been given numerous times this year, only the year is listed.

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

Not Applicable.

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

No.

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

Attached are three writing samples: two Motions for Summary Judgment and an Appellee Brief filed in the Tennessee Court of Appeals. These three pleadings, filed in complex cases, address the following statutory and common law claims/issues: agency, employment and the doctrine of respondeat superior; ordinary negligence; lack of causation; exclusion of an expert (Tenn. R. Evid. 701, 703 analysis); Tennessee Code Annotated section 29-26-101 et seq., the Tennessee Health Care Liability statute; fraud; punitive damages; limitations on discovery; construction defect; and the applicable statute of limitations. The substance of these submissions (specifically including the drafting of all three pleadings) reflects my personal work product. All three motions resulted in a favorable outcome for my client, specifically both Motions for Summary Judgment were granted, and the Court of Appeals affirmed the trial court's dismissal of another Motion for Summary Judgment.

ESSAYS/PERSONAL STATEMENTS

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

After my mother unexpectedly passed away, in writing her eulogy, I reflected on her life – one dedicated to God, putting others before herself, and finding joy in all things. Concurrently, I reflected on my life and career, particularly in the areas of joy, satisfaction, and purpose.

I love being an attorney. The complexities of my cases and the excellent attorneys and judges that I have had the good fortune to work with and appear before have made most days rewarding. I found joy and satisfaction. But, in obtaining financial and law practice success, my desire to serve has remained unfulfilled; there has been a missing purpose.

I thought that my service would be, like several generations of my family before me, in the military. My knees did not cooperate. And so, now in seeking this appointment, I am pursuing purpose through service to my community and the State of Tennessee.

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

In 2012, I received the Legal Aid of East Tennessee Pro Bono Project - Volunteer Lawyer of the Year award. Two years later I received the Pro Bono Project - Pro Bono Advocacy Award. These awards were a culmination of a variety of successful and rewarding pro bono cases, including assisting with estate matters, property disputes, fallen trees, Lemon law issues with a local used car dealership, expungements, and employment discrimination, to name but a few.

As my practice and family responsibilities increased, I found a way to continue my pro bono activities through local organizations that relate to health care. I have also continued volunteering with the KBA when possible.

And, while personal, I assisted a family member in obtaining a pardon through the State of Tennessee pardon process. Without my assistance, this family member would not have been able to afford legal representation.

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 appointment to the Tennessee Court of Appeals. The Court of Appeals hears appeals in civil cases from trial courts and certain state boards and commissions.

Being a litigator for the past sixteen (16) years, practicing in the trial courts of more than half of the counties of the Eastern Division, gives me perspective and appreciation for each of the lawyers that would appear before me and for the rulings of the judges for which I would be

asked to review.

If appointed to the Court of Appeals, my contributions to the Court would be: experience as a law clerk for the Tennessee Supreme Court and litigator in numerous counties throughout Tennessee for the last 16+ years; confidence built upon numerous successes at every level; commitment to working hard to improve Tennessee's jurisprudence; perspective as a litigator, wife, mother, daughter, and sister; humor when possible; and humility always.

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)***

During my early career, I was active in pro bono activities and the many KBA Barristers volunteer opportunities. I quickly became chair of the KBA Hunger and Poverty Relief Committee, organizing numerous "drives" and raising money for various organizations.

As the practice of law became more demanding (and my family grew), I began serving on medical-related boards. I have given my time to these organizations because of my specific interest in health care and an appreciation for the impact that good health care can have on a community.

If appointed, I fully understand that I would need to resign from any boards or organizations that engage in fundraising activities. At the same time, I believe it is essential for judges to remain visible and engaged in the community. Judges should be ambassadors of the justice system. Building trust between the courts and the public requires meaningful outreach, and I am committed to fostering that connection. The law should not be confined to the understanding of lawyers alone. It should be accessible, approachable, and relevant to the broader community.

I would like to return to the classroom, teaching at the law school level but also enhancing civics education where possible. I would also expect to continue giving CLE presentations when opportunities arise.

While my type of community involvement might change, my commitment to community service will not.

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

In addition to responses previously provided, I believe that I possess three characteristics that best demonstrate who I am as a lawyer and who I will be as a judge.

Humor: Being a litigator demands strong time management skills and an understanding spouse. Opposing counsel, deadlines, clients, partners, associates, and the business of law can be mentally demanding on good days. Humor, however, is what has fueled me through long hours, stress, and self-inflicted, high expectations. Humor is fuel that allows me to accomplish every task with purpose and conviction. And, hopefully, my humor has been fuel to others around me

walking this same path.

Humility: Some view humility as lacking in confidence or belief in one's self worth. I strongly disagree. Humility is simply the belief of valuing others above oneself. My incredible parents instilled in me a belief that, in lifting others, serving others, and putting others before myself, I will have a life of fulfillment, grace, and an internal confidence that gives me unwavering faith in my daily pursuits. Humility is perhaps the greatest gift my parents gave me.

Hard Work: I believe hard work comes from within, and it is a flame that, if valued, never burns out. Hard work, more than anything else, has allowed me to succeed in the classroom, the courtroom, and the softball field.

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

Yes. There is no other viable option.

As a health care liability defense attorney, I have vigorously argued an often punishing and "draconian" (Foster v. Chiles, 2013 Tenn. App. LEXIS 422, *20 (Tenn. Ct. App. 2013), *reversed on other grounds*) Tennessee statute. I have done so as an advocate for my clients. I have also done so because fundamental to the rule of law is the acceptance that legislatures pass laws with the support of their constituents, and judges must enforce those laws as written.

I have found that giving words their obvious meaning, applying reason and logic, and understanding the words at the time they were written has made me an effective and successful advocate. As a judge, while no longer an advocate, my approach will be unchanged. I am not a politician; drafting law is not my interest. It is not my role nor my desire to make law. Instead, as a Court of Appeals judge, I will uphold the rulings of the trial court when appropriate, interpret regulations and statutes as written, and give practical guidance to trial courts and practitioners – without injecting personal opinion.

Given the word count, I will simply say that our democracy is strongest when the rule of law is strong. Judges, as guardians of the rule of law, instill confidence in the judiciary and establish credibility with lawyers and litigants by letting the record and the statute (or common law precedent) determine the outcome, not the personal opinion of the judge.

REFERENCES

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

A. M. Douglas Campbell, Jr. Esq. EVP/General Counsel, Covenant Health [redacted]

Mr. Campbell can speak about my work ethic, my handling of complex matters on behalf of the largest health system in East Tennessee, and my litigation/regulatory/educational/transactional work for Covenant Health.

B. Chad Clabough, Chief Development Officer, Covenant Health. [redacted]

Mr. Clabough can speak about my character, work ethic, and the totality of my legal counsel for Covenant Health.

C. Cindy Winters, Firm Administrator Arnett Draper & Hagood, LLP (ret.). [redacted]
While Ms. Winters knows me professionally, she also knows me personally. If asked, she can speak about my faith, my family, my character, and my community service activities.

D. Dave Miller, EVP Bank Strategy and Performance First Horizon Bank [redacted]

Mr. Miller knows me professionally and personally. If asked, he can speak about my character and my reputation within the community.

E. Marsha Watson, Executive Director, Knoxville Bar Association (Ret.). [redacted]
Ms. Watson knows me personally and professionally. If asked, Ms. Watson can speak about my pro bono and community service work, my Knoxville Bar Association activities, our time on the Commission on Continuing Legal Education, and my reputation within the Bar.

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

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

Dated: November 21, 2025.

Signature

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

IN THE CIRCUIT COURT FOR ANDERSON COUNTY, TENNESSEE

VICTORIA S. BOWERS, Administrator of THE ESTATE OF VERNICE SUE BOWERS, Plaintiff, v. JOSEPH BONDRANKO, MD; GARY H. HOEFLER, CRNA; MMC ANESTHESIA GROUP, PC; METHODIST MEDICAL CENTER OF OAK RIDGE; Defendants.	)	Case No. B9LA0149 JURY TRIAL DEMANDED

METHODIST MEDICAL CENTER OF OAK RIDGE'S MOTION FOR SUMMARY JUDGMENT

Defendant, Methodist Medical Center of Oak Ridge ("MMC"), by counsel and pursuant to TENN. R. CIV. P. 54 and 56, respectfully moves the Court for the entry of an Order granting summary judgment in its favor.

In support of this Motion, MMC submits that: (1) Plaintiff has failed to set forth any expert medical proof demonstrating that MMC or its employees violated an applicable standard of care, and Plaintiff's time for doing so, pursuant to the Agreed Scheduling Order, has passed, and (2) the co-Defendant medical providers are not employees or agents of MMC, and therefore, Plaintiff's claim under the doctrine of *respondeat superior*, falls as a matter of law.

In further support of this Motion, MMC relies upon the argument set forth herein, applicable Tennessee Code, pertinent case law, the Statements of Undisputed, Material Fact filed with this Motion, and:

Exhibit 1 – Deposition of Dr. Bondranko

Exhibit 2 – Deposition of Plaintiff

Exhibit 3 – Admission Agreement

Exhibit 4 – Important Notice of Independent Contractor Status of Healthcare Practitioners

Exhibit 5 – Consent for Anesthesia

Exhibit 6 – Plaintiff's Rule 26 Expert Disclosures

In compliance with TENN. R. CIV. P. 7.02, see Harris v. Jain, No. E2008-01506-COA-R3-CV, 2009 Tenn. App. LEXIS 598, 2009 WL 2734083 (Tenn. Ct. App. Aug. 31, 2009), MMC states as follows:

INTRODUCTION

This is a health care liability cause of action filed against MMC and several medical providers who provided care and treatment to decedent-patient, Vernice Bowers, while she was a patient at MMC. The allegations within the Complaint relate to and arise out of a scheduled surgical procedure that occurred on January 2, 2019. Compl., ¶ 13. Specifically, Plaintiff alleges Joseph W. Bondranko, M.D., and Gary H. Hoefler, CRNA violated their respective standards of care when attempts at anesthesia induction and intubation failed, resulting on Ms. Bowers being without oxygen for 10-12 minutes. Compl., ¶ 13, 29-32. Plaintiff also asserted a generic liability claim against MMC: "[MMC] is liable for any negligent medical care and treatment by actual or apparent agents and/or employees of [MMC] and is liable for any negligent acts and/or omissions of any actual or apparent agents or employees of [MMC]." See Amended Complaint, ¶ 35. No facts, however, detailing negligence on the part of the MMC or the nursing staff were alleged in the Complaint.

UNDISPUTED FACTS

Relevant to this Motion, and at the times relevant, Dr. Bondranko and Gary H. Hoefler, CRNA were not employees or agents of MMC. MMC's Answer to Amended Complaint, ¶¶ 34, 37, 41-42; Defendants' Bondranko's, Hoefler's, and MMC Anesthesia Group, P.C.'s Answer to Amended Complaint, ¶¶ 3, 5; Dr. Bondranko Deposition, pp. 149:17-19 (attached as **Exhibit 1**). Dr. Bondranko, was not and could not have been an employee of MMC as, by law, hospitals, including MMC, are, and were at the times relevant, prohibited from employing anesthesiologists. TENN. CODE ANN. §§ 63-6-204 and 68-11-205, see also MMC's Answer to Amended Complaint, ¶¶ 41-42.

Moreover, by contractual agreements, signed by Ms. Bowers, Ms. Bowers was made aware that:

(1) "anesthesia providers are independent practitioners and not employees of the hospital";

(2) "[m]edical treatment rendered to the patient at [MMC] is provided by independent physicians and other practitioners who are not employees of [MMC]; and

(3) "The medical treatment rendered to the PATIENT [. . .] will be provided by independent healthcare practitioners. These independent practitioners include, [. . .] anesthesiologists, … certified registered nurse assistants, [. . .] and other healthcare professionals.";

From these documents, Ms. Bowers knew or should have known that anesthesia services were provided by independent contractors of MMC, with airway management at the direction and orders of the decedent's attending physicians. See also Dr. Bondranko's Deposition, p. 149:4-10.

Finally, Plaintiff has not alleged any independent claims of negligence against the hospital nursing staff. See generally Amended Complaint; see also MMC's Statement of Undisputed, Material Facts. And, the time for disclosing Rule 26 experts against MMC has passed. See Order – September 21 Hearing.

STANDARD OF REVIEW

Tennessee Code Annotated section 20-16-101 provides,

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

The standard is explained by the court in Estate of Boote v. Roberts:

> Section 20-16-101 was enacted to abrogate the summary-judgment standard set forth in *Hannan [v. Alltel]*, which permitted a trial court to grant summary judgment only if the moving party could either (1) affirmatively negate an essential element of the nonmoving party's claim or (2) show that the nonmoving party cannot prove an essential element of the claim at trial. The statute is intended "to return the summary judgment burden-shifting analytical framework to that which existed prior to *Hannan*, reinstating the 'put up or shut up' standard."

No. M2012-00865-COA-R3-CV, 2013 Tenn. App. LEXIS 222, at *25, n.6 (Tenn. Ct. App. Mar. 28, 2013) (internal citation omitted). TENN. CODE ANN. § 20-16-101 applies to all actions filed on or after July 1, 2011. Rye v. Women's Care Ctr. of Memphis, MPLLC, 477 S.W.3d 235, 264 (Tenn. 2015); Perdue v. Estate of Jackson, No. W2012-02710-COA-R3-CV, 2013 Tenn. App. LEXIS 386, at *8 n.4 (Tenn. Ct. App. June 12, 2013).

For further context on the application of § 20-16-101, on October 26, 2015, the Tennessee Supreme Court abrogated its holding in Hannan and "returned to a summary judgment standard consistent with Rule 56 of the Federal Rules of Civil Procedure." Rye, 477 S.W.3d at 238. Under the "old" standard, a moving party "may satisfy its burden of production either (1) by affirmatively

negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the nonmoving party's claim or defense." Id. at 264. When a properly supported motion has been made, "to survive summary judgment, the nonmoving party 'may not rest upon the mere allegations or denials of [its] pleading,' but must respond, and by affidavits or one of the other means provided in Tennessee Rule 56, 'set forth specific facts' *at the summary judgment stage* 'showing that there is a genuine issue for trial.'" Id. at 265 (quoting TENN. R. CIV. P. 56).

Facts set forth by affidavit, deposition, or otherwise in support of a party's motion are taken as true unless contradicted by the non-moving party's response to the summary judgment motion. Byrd v. Hall, 847 S.W.2d 208, 210 (Tenn. 1993). "Bare allegations [of a Complaint] will not withstand a motion for summary judgment." Knight v. Hospital Corp. of Am., No. 01A01-9509-CV-00408, 1997 Tenn. App. LEXIS 11, at *15 (Tenn. Ct. App. Jan. 8, 1997). And, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Masushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). While factual disputes may exist, a motion for summary judgment can still be granted when the disputed facts are not material to any claim. Byrd, 847 S.W.2d at 215.

In order to survive MMC's Motion, Plaintiff must demonstrate in some "appropriate fashion"—*now*—facts that demonstrate employment and/or agency of co-Defendant medical providers and the negligence of the hospital's staff. If Plaintiff, as the non-moving party, is unable to carry her burden, MMC's Motion for Summary Judgment must be granted.

LAW AND ANALYSIS

I. Employment

In Tennessee, under a theory of *respondeat superior*, a plaintiff is required to prove "(1) that the person who caused the injury was an employee, (2) that the employee was on the employer's business, and (3) that the employee was acting within the scope of his employment when the injury occurred." Tennessee Farmers Mut. Ins. Co. v. American Mut. Liability Ins. Co., 840 S.W.2d 933, 937 (Tenn. Ct. App. 1992) (citations omitted). Even if this Court were to conclude that Plaintiff has properly pled a claim of *respondeat superior* for the alleged negligent actions of Dr. Bondranko and CRNA Hoefler, the undisputed facts demonstrate that these medical providers were not employees of MMC at the times relevant. MMC's Answer to Amended Complaint, ¶¶ 34, 37, 41-42; Defendants' Bondranko's, Hoefler's, and MMC Anesthesia Group, P.C.'s Answer to Amended Complaint, ¶¶ 3, 5; Dr. Bondranko Deposition, p. 149:17-19.

Additionally, Dr. Bondranko is an anesthesiologist, and, as previously stated, Tennessee Code Annotated sections 63-6-204(f)(1) and 68-11-205(b)(6) preclude hospitals from employing anesthesiologists.

Accordingly, based upon the undisputed facts, Plaintiff has not and cannot demonstrate that Dr. Bondranko or CRNA Hoefler are or were employees of MMC, and, as such, Plaintiff's claim against MMC for the actions of Dr. Bondranko and CRNA Hoefler should be dismissed as a matter of law on the merits and with prejudice.

II. Agency[1]

"The burden of proving an agency relationship is on the person alleging its existence." Sloan v. Hall, 673 S.W.2d 548, 551 (Tenn. Ct. App. 1984). The existence of an agency relationship "is determined by examination of **agreements among the parties or of the parties' actions**. White v. Revco Disc. Drug Ctrs., Inc., 33 S.W.3d 713, 724 (Tenn. 2000) (quoting McCay v. Mitchell, 62 Tenn. App. 424, 463 S.W.2d 710, 715 (1970) (emphasis added)).

The existence of an agency relationship must be traceable to the **principal**, because an agency relationship is created by the actions of the principal, not the actions of the agent. Harben v. Hutton, 739 S.W.2d 602, 606 (Tenn. Ct. App. 1987) (citations omitted). A key factor in determining whether an agency relationship exists **is the principal's right to control the acts of the agent**. Johnson v. LeBonheur Children's Med. Ctr., 74 S.W.3d 338, 343 (Tenn. 2002); Sodexho Mgmt., Inc. v. Johnson, 174 S.W.3d.174, 178 (Tenn. Ct. App. 2004). As stated in 3 Am. Jur. 2d Agency § 2:

> [i]n an agency relationship, whatever an agent does in the lawful prosecution of the transaction the principal has entrusted to him or her is the act of the principal. Thus, a prime element of an agency relationship is the existence of **some degree of control by the principal over the conduct and activities of the agent**. . . Another characteristic of the agency relationship is that the agent has the *power to bring about or alter business and legal relationships* between the principal and third persons and between the principal and agent.

(Emphases added).

"[W]hen one directs, orders, or knowingly authorizes another to perform an act, then the principal is liable for the harm proximately caused by those acts." White v. Revco Disc. Drug Ctrs., Inc., 33 S.W.3d 713, 723 (Tenn. 2000); Kinnard v. Rock City Constr. Co., 39 Tenn. App.

[1] MMC expressly denies that Plaintiff has properly alleged a claim for agency in her Amended Complaint.

547, 551, 286 S.W.2d 352, 354 (1955). The principal's right to control the acts of the agent is the relevant factor when determining the existence of an agency relationship. Id. And, the amount of actual control exercised by the principal over the agent also may be determinative of whether an agency relationship exists. McDonald v. Dunn Const. Co., 182 Tenn. 213, 220, 185 S.W.2d 517 (1945).

Furthermore, Plaintiff also cannot prove the essential elements of an *apparent agency* claim. Such a claim requires "that the person dealing with the agent was aware of the principal's acts from which the apparent authority is deduced, and that he dealt with the agent in reliance thereon, in good faith, and in the exercise of reasonable prudence." Southern R. Co. v. Pickle, 138 Tenn. 238, 247 (Tenn. 1917) (quoting 2 Corpus Juris 574, 575).

In this instance, even if this Court were to conclude that Plaintiff has properly pled a claim of *respondeat superior* for the alleged negligent actions of Dr. Bondranko and/or CRNA Hoefler, the undisputed facts demonstrate that there medical providers were not agents of MMC at the times relevant. MMC did not exercise any control over Dr. Bodranko and/or CRNA Hoefler, and it did not direct, order, or authorize them, in any manner, regarding the care and treatment provided to the decedent during the times relevant. See MMC's Answer to the Amended Complaint, ¶¶ 41-42; Dr. Bondranko's Deposition, pp. 140:3-15 (agreeing that no action, or failure to act, by an MMC employee affected his ability to intubate the decedent), 149:4-10 (no hospital policy dictated Dr. Bondranko's medical judgment).

Additionally, by statute, MMC had no right to control the manner or means of the medical care and treatment being provided by Dr. Bondranko or CRNA Hoefler. See Thomas v. Oldfield, No. M2007-01693-00A-R3-CV, 2008 Tenn. App. LEXIS 335, 2008 WL 2278512, at *10 (Tenn. Ct. App. June 2, 2008) (citing TENN. CODE ANN. §§ 63-6-204(f)(1)(A) and 68-11-205(b)(1)(A)),

affirmed by Thomas v. Oldfield, 279 S.W.3d 259 (Tenn. 2009) (holding that hospitals may not control the "means and methods by which physicians render medical care and treatment to hospital patients").

Finally, Plaintiff has not provided this Court with any admissible evidence that the decedent was aware of any purported action by MMC that clothed Dr. Bondranko or CRNA Hoefler with apparent agency, or that the decedent reasonably relied upon any such action. See Southern R. Co. v. Pickle, 138 Tenn. at 247; Rye, 477 S.W.3d at 238. To the contrary, every action by Methodist made unequivocally clear that Dr. Bondranko and CRNA Hoefler were not agents or employees of the Hospital, but instead were independent contractors.

The undisputed proof demonstrates that Ms. Bowers was aware of the independent contractor status of Dr. Bondranko and CRNA Hoefler, and all actions by MMC established an independent contractor relationship. Ms. Bowers presented to MMC nearly one month before her scheduled procedure to sign MMC admission paperwork. See Plaintiff's Deposition, pp. 200:3-11, 202:22-203:15, 204:20-205:2, 205:8-205:22 (attached as **Exhibit 2**); Admission Agreement, MMC chart pp. 3795-3798 (attached as **Exhibit 3**); Important Notice of Independent Contractor Status of Healthcare Practitioners (Not Hospital Employees or Agents), MMC chart p. 3801 (attached as **Exhibit 4**). During that process, Ms. Bowers was made aware and acknowledged in writing that doctors and other healthcare practitioners providing care and treatment at the hospital were not employees or agents of the hospital. See id. The patient certified, through signature, that she read and understood a notice entitled "IMPORTANT NOTICE OF INDEPENDENT CONTRACTOR STATUS OF HEALTHCARE PRACTITIONERS (NOT HOSPITAL EMPLOYEES OR AGENTS)" (emphasis in original), stating in part:

> The medical treatment rendered to the PATIENT [. . .] will be provided by independent healthcare practitioners. These independent practitioners include, [. . .] anesthesiologists, ... certified registered nurse assistants, [. . .] and other healthcare professionals.
>
> THE PATIENT [. . .] ACKNOWLEDGES THAT INDEPENDENT PRACTITIONERS ARE INDEPENDENT CONTRACTORS AND ARE NOT EMPLOYEES OR AGENTS OF FACILITY, AND THE INDEPENDENT PRACTITIONERS ARE NOT SUBJECT TO THE CONTROL AND SUPERVISION OF THE FACILITY.
>
> PATIENT [. . .] AGREES THAT FACILITY IS NOT LIABLE OR RESPONSIBLE FOR THE ACTS OR OMISSIONS OF HEALTHCARE PROFESSIONALS NOT EMPLOYED BY FACILITY.

Important Notice of Independent Contractor Status of Healthcare Practitioners (Not Hospital Employees or Agents), MMC chart p. 3801 (attached as Exhibit 3). Ms. Bowers also certified, through repeated signature, that she read and understood MMC's Admission Agreement, Section V of which is entitled "CHARGES FOR SERVICES OF INDEPENDENT PRACTITIONERS" (emphasis in original) and states that "[m]edical treatment rendered to the patient at FACILITY is provided by independent physicians and other practitioners who are not employees of FACILITY. The patient will be billed separately for the services of such practitioners or the bill the patient receives will include separate charges for such services." Admission Agreement, MMC chart pp. 3795-3798 (attached as Exhibit 2).

Plaintiff testified that the decedent always signed paperwork on her own behalf, was fully capable of signing such paperwork, and did, in fact, sign both the Admission Agreement and the Important Notice of Independent Contractor Status of Healthcare Practitioners (Not Hospital Employees or Agents) on December 21, 2018, prior to her treatment at MMC in January of 2019. Ex 2. - Plaintiff's Deposition, pp. 200:3-11, 202:22-203:15, 204:20-205:2, 205:8-205:22;

Furthermore, on January 2, 2019, the day of decedent's treatment, the decedent signed additional paperwork that included MMC's "Consent for Anesthesia." Plaintiff's Deposition, p. 121:1-15; Consent for Anesthesia, MMC chart p. 3808 (attached as **Exhibit 5**). The final sentence of the penultimate paragraph reads: "I understand that the anesthesia providers are independent practitioners and not employees of the hospital." Consent for Anesthesia, MMC chart p. 3808 (attached as Exhibit 5).

Accordingly, based upon the undisputed facts, Plaintiff has not and cannot demonstrate that Dr. Bondranko or CRNA Hoefler were agents, real or apparent, of MMC at the times relevant, or that Plaintiff's decedent believed them to be agents of MMC at the times relevant, and, as such, any potential claim against MMC for the actions of Dr. Bondranko or CRNA Hoefler should be dismissed as a matter of law on the merits and with prejudice.

III. Independent Nursing Negligence[2]

Because Plaintiff avers a health care liability claim, Plaintiff is required to prove by expert medical testimony:

> (1) The recognized standard of acceptable professional practice in the **profession and the specialty thereof**, if any, that the defendant practices in the community in which the defendant practices or in a similar community at the time the alleged injury or wrongful action occurred **(standard of care)**;
>
> (2) That the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standard **(breach of the standard of care)**; and

[2] MMC expressly denies that Plaintiff has properly alleged or even attempted to allege in the Complaint a claim for independent health care liability on the part of the MMC.

> (3) As a proximate result of the defendant's negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred (causation & damages).

TENN. CODE ANN. § 29-26-115(a) (Supp. 2013) (emphases added); see also TENN. CODE ANN. § 29-26-115(b) (Supp. 2009). The Tennessee Health Care Liability Act "extends to the 'acts of non-physicians, such as nurses, when they are involved in the medical treatment of a patient.'" Cox v. M.A. Primary & Urgent Care Clinic, 313 S.W.3d 240, 259 (Tenn. Jun. 21, 2010) (quoting Gunter v. Lab. Corp. of America, 121 S.W.3d 636, 640 (Tenn. 2003)). Furthermore, no defendant will be presumed negligent, and "injury alone does not raise a presumption of the defendant's negligence." See TENN. CODE ANN. § 29-26-115(c) & (d) (Supp. 2013).

Plaintiff has not alleged any independent claim of negligence against the hospital nursing staff.[1] See Am. Complaint. Even if she had, the Court's Scheduling Order in this matter required the disclosure of Plaintiff's expert witnesses by July 6, 2020. See Scheduling Order entered February 11, 2020; Order entered October 1, 2020 (stating in Section 2 that "Plaintiff's time for disclosing Rule 26 experts has lapsed, per the Amended Scheduling Order, entered August 13, 2020")[2]; Dykes v. City of Oneida, No. E2009-00717-COA-R3-CV, 2010 Tenn. App. LEXIS 152, at *19 (Tenn. Ct. App. Feb. 26, 2010); McDaniel v. Rustom, No. W2008-00674-COA-R3-CV, 2009 WL 1211335, at *15 & n.6 (Tenn. Ct. App. May 5, 2009) (affirming a trial court's grant of summary judgment to defendant when plaintiff failed to proffer competent medical expert testimony as of the deadline established in the scheduling order for naming experts); Kenyon v.

[1] Moreover, co-Defendant Dr. Bondranko testified that he had "[n]o criticisms" of the MMC staff during the events relevant to this lawsuit. Dr. Bondranko Deposition, p. 149:11-16.

[2] The Amended Scheduling Order entered on August 13, 2020, did not alter Plaintiff's deadline to disclose expert witnesses as this deadline had already passed.

Handal, 122 S.W.3d 743 (Tenn. Ct. App. 2003) (noting that a patient who fails to produce expert medical testimony that would be admissible at trial "face[s] almost certain dismissal of [his] complaint because the [defendant] has effectively negated an essential element of [his] case").

The experts Plaintiff disclosed in this matter include two anesthesiologists, one otolaryngologist, and a neurologist. See Exhibit 6 – Plaintiff's Rule 26 Expert Disclosures. None of these experts was disclosed as being familiar with or expected to testify regarding the standard of care applicable to nurses, or any other employee, at MMC during the relevant timeframe. Because such expert testimony is required by Tennessee law for Plaintiff to prove a health care liability action against MMC, by operation of law and this Court's Scheduling Order, Plaintiff cannot prove her claim.

CONCLUSION

For these reasons, MMC is entitled to summary judgment in its favor as a matter of law. Accordingly, MMC respectfully requests that the Court grant its Motion, dismissing Plaintiff's Complaint against MMC, by operation of law pursuant to Rule 56 of the Tennessee Rules of Civil Procedure, and thereby dismissing the Complaint of Plaintiff against MMC pursuant to Rule 54 of the Tennessee Rules of Civil Procedure.

ARNETT, DRAPER AND HAGOOD, LLP

By: _____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of this pleading or document has been served upon counsel in interest in this case by delivering a true and exact copy of said pleading or document to the office of said counsel or by placing a true and exact copy of said pleading or document in the United States Mail, addressed to said counsel, with sufficient postage thereupon to carry the same to its destination.

This 2nd day of October, 2020.

ARNETT, DRAPER AND HAGOOD, LLP

By _____

IN THE CIRCUIT COURT FOR ANDERSON COUNTY, TENNESSEE

VICTORIA S. BOWERS, Administrator of THE ESTATE OF VERNICE SUE BOWERS, Plaintiff, v. JOSEPH BONDRANKO, MD; GARY H. HOEFLER, CRNA; MMC ANESTHESIA GROUP, PC; METHODIST MEDICAL CENTER OF OAK RIDGE; Defendants.	)	Case No. B9LA0149 JURY TRIAL DEMANDED

METHODIST MEDICAL CENTER OF OAK RIDGE'S STATEMENT OF UNDISPUTED, MATERIAL FACTS IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Pursuant to TENN. R. CIV. P. 56.03, Methodist Medical Center of Oak Ridge ("MMC"), by counsel, files this Statement of Undisputed, Material Facts in support of its Motion for Summary Judgment.

1. Neither Dr. Joseph Bondranko nor CRNA Gary Hoefler were employees or agents of MMC at the times relevant. MMC's Answer to Amended Complaint, ¶¶ 34, 37, 41-42; Defendants' Bondranko's, Hoefler's, and MMC Anesthesia Group, P.C.'s Answer to Amended Complaint, ¶¶ 3, 5; Dr. Bondranko Deposition, p. 149:17-19 (attached to MMC's Motion as **Exhibit 1**).
2. By law, hospitals, including MMC, are, and were at the times relevant, prohibited from employing anesthesiologists. MMC's Answer to Amended Complaint, ¶¶ 41-42; TENN. CODE ANN. §§ 63-6-204 and 68-11-205; see also Dr. Bondranko's Deposition, p. 149:4-10.

3. Plaintiff's decedent signed MMC's Admission Agreement on December 21, 2018, Section V of which is entitled "CHARGES FOR SERVICES OF INDEPENDENT PRACTITIONERS" (emphasis in original) and states that "[m]edical treatment rendered to the patient at FACILITY is provided by independent physicians and other practitioners who are not employees of FACILITY. The patient will be billed separately for the services of such practitioners or the bill the patient receives will include separate charges for such services." Admission Agreement, MMC chart pp. 3795-3798 (attached to MMC's Motion as **Exhibit 3**); see Plaintiff's Deposition, pp. 200:3-11, 202:22-203:15, 204:20-205:2 (attached to MMC's Motion as **Exhibit 2**).

4. Plaintiff's decedent signed MMC's Admission Agreement on December 21, 2018, that states, in part:

> The medical treatment rendered to the PATIENT [. . .] will be provided by independent healthcare practitioners. These independent practitioners include, [. . .] anesthesiologists, … certified registered nurse assistants, [. . .] and other healthcare professionals.
>
> THE PATIENT [. . .] ACKNOWLEDGES THAT INDEPENDENT PRACTITIONERS ARE INDEPENDENT CONTRACTORS AND ARE NOT EMPLOYEES OR AGENTS OF FACILITY, AND THE INDEPENDENT PRACTITIONERS ARE NOT SUBJECT TO THE CONTROL AND SUPERVISION OF THE FACILITY.
>
> PATIENT [. . .] AGREES THAT FACILITY IS NOT LIABLE OR RESPONSIBLE FOR THE ACTS OR OMISSIONS OF HEALTHCARE PROFESSIONALS NOT EMPLOYED BY FACILITY.

Important Notice of Independent Contractor Status of Healthcare Practitioners (Not Hospital Employees or Agents), MMC chart p. 3801 (attached to MMC's Motion as **Exhibit 4**); see Plaintiff's Deposition, pp. 200:3-11, 205:8-205:22.

5. Plaintiff's decedent signed MMC's Consent for Anesthesia on January 2, 2019, that states, in part: "I understand that the anesthesia providers are independent practitioners and not employees of the hospital." Consent for Anesthesia, MMC chart p. 3808 (attached to MMC's Motion as **Exhibit 5**); see Plaintiff's Deposition, p. 121:1-15.

6. Plaintiff has not alleged any independent claims of negligence against MMC's nursing staff. See generally Amended Complaint.

7. The Court's Scheduling Order in this matter required the disclosure of Plaintiff's expert witnesses by July 6, 2020. See Scheduling Order entered February 11, 2020; Order entered October 1, 2020 (stating in Section 2 that "Plaintiff's time for disclosing Rule 26 experts has lapsed, per the Amended Scheduling Order, entered August 13, 2020"). The experts Plaintiff disclosed in this matter include two anesthesiologists, one otolaryngologist, and a neurologist. See **Exhibit 6** – Plaintiff's Rule 26 Expert Disclosures. None of these experts was disclosed as being familiar with or expected to testify regarding the standard of care applicable to nurses, or any other employee, at MMC during the relevant timeframe.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of this pleading or document has been served upon counsel in interest in this case by delivering a true and exact copy of said pleading or document to the office of said counsel or by placing a true and exact copy of said pleading or document in the United States Mail, addressed to said counsel, with sufficient postage thereupon to carry the same to its destination.

This 2nd day of October, 2020.

ARNETT, DRAPER AND HAGOOD, LLP

By _____

IN THE CIRCUIT COURT FOR ANDERSON COUNTY, TENNESSEE

PAMELA BRADEN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. B5LA0017**
	)	
METHODIST MEDICAL CENTER OF OAK RIDGE, SCOTT PETERS, M.D., OBSTETRIC & GYNECOLOGY ASSOCIATES OF OAK RIDGE, P.C., JOSEPH METCALF, IV, M.D. and OAK RIDGE SURGEONS, P.C.	)	**12 PERSON JURY DEMAND**
	)	
Defendants.	)	

METHODIST MEDICAL CENTER'S MOTION FOR SUMMARY JUDGMENT

Defendant, Methodist Medical Center of Oak Ridge ("Methodist"), by counsel and pursuant to Tennessee Rules of Civil Procedure 54 and 56.02, respectfully moves the Court for the entry of an Order granting summary judgment to this Defendant.

In support of this Motion, Methodist submits that there is no genuine issue of material fact in dispute and that summary judgment is appropriate as a matter of law at this stage in this litigation. Plaintiff's claims of medical malpractice, fraud, and punitive damages fail as a matter of law as Plaintiff has not and cannot proffer evidence demonstrating: (a) any of the necessary elements of a medical malpractice cause of action set forth in Tennessee Code Annotated section 29-26-115(a) - the applicable nursing standard of care, that any Methodist nurse violated that standard of care, and/or that any alleged breach caused an injury to Ms. Braden that would not have otherwise occurred; (b) any of the necessary elements of her fraud claims; and (c) by clear and convincing evidence that the alleged actions by Methodist's nursing staff were fraudulent.

Specifically, as relating to the medical malpractice claims regarding nursing care between September 6-13, 2012:

(1) Plaintiff cannot demonstrate that Drs. Swartz, Silverman, and/or Workman are sufficiently familiar with the nursing standard of care for hospital floor nurses practicing in Anderson County, Tennessee (Element 1 - the standard of care);
(2) Plaintiff has included in the anticipated Second Amended Complaint, which has not been filed as of the date of the filing of this Motion for Summary Judgment, numerous "facts" which Plaintiff claims violate the applicable standard of care but Plaintiff has not proffered and cannot proffer any expert medical opinion that the alleged "facts" are violations of the applicable standard of care (Element 2 - Breach of the Applicable Standard of Care); and
(3) Plaintiff cannot demonstrate that any alleged nursing standard of care violation caused an injury to Plaintiff that would not have otherwise occurred. Plaintiff's experts can only speculate as to what Ms. Braden's treating physicians "may", "might", or "could" have done.

As relating to the medical malpractice claims regarding wound care by the nursing staff, which occurred after September 13, 2012,

(1) Plaintiff never disclosed any expert on the issue of wound care;
(2) No expert testified on the issue of the nursing standard of care for wound care;
(3) No expert testified that an alleged violation of the nursing standard of care for wound care caused an injury to Ms. Braden.

As relating to the fraud claims:

(1) Plaintiff cannot demonstrate that any hospital staff intentionally misrepresented a material fact in Ms. Braden's medical record,
(2) Plaintiff cannot demonstrate that any hospital staff had knowledge of any intentional representation's falsity; and
(3) Plaintiff cannot demonstrate that Ms. Braden sustained an injury caused by reasonable reliance on any Hospital staff's representation in the medical chart;

As relating to the punitive damages claim:

(1) Plaintiff cannot demonstrate, by clear and convincing evidence, any fraudulent

action on the part of the Hospital staff.

In further support of this Motion, Methodist relies upon the Memorandum of Law in Support of its Motion for Summary Judgment, a Statement of Undisputed Material Facts, Tennessee appellate case law and the following exhibits attached hereto:

Exhibit 1: The January 2016 disclosures of Plaintiff's experts (on CD)

Exhibit 2: The "supplemental" disclosures of Plaintiff's experts (on CD)

Exhibit 3: The deposition of Plaintiff Expert, Mark Taylor, M.D. (on CD)

Exhibit 4: The deposition of Plaintiff Expert, Robert Aris, M.D. (on CD)

Exhibit 5: Hearing Transcript, March 23, 2018 hearing (on CD)

Exhibit 6: The deposition of Plaintiff Expert, Steven Swartz, M.D. (on CD)

Exhibit 7: The depositions of Plaintiff Expert, Ralph Silverman, M.D. (on CD)

Exhibit 8: The deposition of co-defendant, Joseph Metcalf, M.D. (on CD)

Exhibit 9: The depositions of Plaintiff Expert, Edward Workman, M.D. (on CD)

Exhibit 10: The deposition of co-defendant, Scott Peters, M.D. (on CD)

Exhibit 11: Horizon Expert Documentation Clinical Manual, pp. 31-33

Exhibit 12: September -November 2012 MMC Medical Record (on CD)

Exhibit 13: The deposition of William Dallas, M.D. (on CD)

Exhibit 14: The deposition of Jacqueline Dugger, CNA (on CD)

Exhibit 15: The deposition of Judy Byrum, CNA (on CD)

Exhibit 16: The deposition of David Long, M.D. (on CD)

Exhibit 17: The deposition of Defense Expert, Teresa Jones, RN (on CD)

The specific pages from the exhibits cited in the Memorandum of Law are printed and attached

hereto.

WHEREFORE, Defendant, Methodist Medical Center, respectfully moves the Court for the entry of an Order granting summary judgment to this Defendant, thereby dismissing all claims against Methodist in this litigation in accordance with Rules 54 and 56 of the Tennessee Rules of Civil Procedure.

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By _____
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of this pleading or document has been served upon counsel in interest in this case by delivering a true and exact copy of said pleading or document to the office of said counsel or by placing a true and exact copy of said pleading or document in the United States Mail, addressed to said counsel, with sufficient postage thereupon to carry the same to its destination.

This 23rd day of April, 2018.

ARNETT, DRAPER AND HAGOOD, LLP

By _____

IN THE CIRCUIT COURT FOR ANDERSON COUNTY, TENNESSEE

PAMELA BRADEN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. B5LA0017**
	)	
METHODIST MEDICAL CENTER OF OAK RIDGE, SCOTT PETERS, M.D., OBSTETRIC & GYNECOLOGY ASSOCIATES OF OAK RIDGE, P.C., JOSEPH METCALF, IV, M.D. and OAK RIDGE SURGEONS, P.C.	)	**12 PERSON JURY DEMAND**
	)	
Defendants.	)	

METHODIST MEDICAL CENTER'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

This is a medical malpractice cause of action brought by Pamela Braden against Dr. Scott Peters (and his practice group), Dr. Joseph Metcalf (and his practice group), and Methodist Medical Center. In the Amended Complaint, filed May 15, 2015, Plaintiff averred that in August 2012, Ms. Braden presented to Dr. Peters with "chronic right lower quadrant pelvic pain and pelvic mass and was diagnosed with retained ovarian remnant syndrome." (Am. Complaint, ¶ 7). Following this diagnosis, on September 6, 2012, Defendant, Dr. Scott Peters OBGYN, performed an elective, scheduled gynecological surgery on Plaintiff, Pamela Braden, at Methodist hospital. During the laparscopic[1] procedure, a surgical instrument, a trocar inserted into the abdominal cavity, perforated

[1]Laparoscopy, also known as diagnostic laparoscopy, is a surgical diagnostic procedure that requires only small incisions. Laparoscopy uses an instrument called a laparoscope to look at the abdominal organs. A laparoscope is a long, thin tube with a high-intensity light and a high-resolution camera at the front. The instrument is inserted through an incision in the abdominal wall. As it moves along, the camera sends images to a video monitor.

Ms. Braden's *colon.*

Defendant, Dr. Joseph Metcalf, general surgeon, was consulted. Dr. Metcalf performed an exploratory laparotomy[2], repairing Ms. Braden's colon injury, including the removal of a portion of Ms. Braden's colon, lysis of extensive adhesions within the bowel, and physically examining Ms. Braden's entire bowel, repairing weaknesses in the tissue (serosal tears). (Am. Complaint, ¶ 22). Seven days later, on September 13, 2012, Ms. Braden was diagnosed with peritonitis with *small bowel* perforation. (Am. Complaint, ¶ 20). Dr. David Long, general surgeon, performed an exploratory laparotomy, repairing Ms. Braden's small bowel. (Am. Complaint, ¶ 23, 24).

In addition to claims of negligence against Drs. Peters and Metcalf relating to their respective surgeries on September 6, 2012, Plaintiff alleged that all Defendants failed to timely recognize Ms. Braden's small bowel perforation "in spite of signs of peritonitis and failure of progress post-operatively." (Am. Complaint, ¶ 35). Plaintiff specifically averred that Defendants "[n]egligently did not provide appropriate and reasonable care to [Ms. Braden]" and "[n]egligently did not properly assess, diagnose, and monitor the true physical and medical condition of [Ms. Braden]." (Am. Complaint, ¶ 40). Importantly, the Amended Complaint only referenced Ms. Braden's medical care and treatment between September 6 -13, 2012. See generally, Am. Complaint.

In January 2016, pursuant to the Scheduling Order, Plaintiff disclosed five standard of care/causation experts. In those disclosures, Plaintiff's experts opined that Ms. Braden's small bowel perforation was present at the time of, or shortly after, the surgeries of Dr. Metcalf and Dr. Peters on September 6, 2012.

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[2]A laparotomy is a surgical procedure involving a large incision through the abdominal wall to gain access into the abdominal cavity.

Pursuant to the Scheduling Order, Defendants disclosed their respective experts in February 2016. The Defendant experts that were disclosed to address the cause and timing of Ms. Braden's small bowel perforation all opined that the perforation occurred at or near the time of Ms. Braden's return to surgery on September 13, 2012; the perforation occurring not during Ms. Braden's September 6th surgery, but instead was a delayed perforation that resulted from weaknesses in her bowel wall from numerous prior surgeries.

Since the filing of the Amended Complaint and the disclosure of experts, however, numerous pleadings, depositions, and hearings have occurred. Despite the relatively straight-forward claims made in the Amended Complaint and the opinions expressed by the disclosed experts, Plaintiff has unnecessarily complicated this lawsuit with numerous conspiracy theories, unsubstantiated claims, conjecture, speculation, and the mischaracterization of evidence and testimony. Despite the efforts of Plaintiff, the case remains a simple, medical malpractice cause of action. As such, Plaintiff must establish, by competent, admissible, expert testimony, the applicable standard of care; that Methodist's nursing staff violated an applicable standard of care; and that the alleged violations caused an injury to Plaintiff that would not have otherwise occurred. As set forth herein, Plaintiff has not carried and cannot carry her burden of proof at this "put up or shut up" stage. Although Plaintiff's anticipated Second Amended Complaint (as the previous proposed Amended Complaints have) will contain numerous allegations, presumably in an effort to overload the Court against a finding that summary judgment is appropriate, the actual proof (not allegations) strongly support summary judgment. When the actual testimony is analyzed, it is apparent that the anticipated Second Amended Complaint is Plaintiff's own wish list of the "facts" and applicable standard of care and not a recitation of Plaintiff's admissible expert proof.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when the moving party establishes that there is no genuine issue as to any material fact and that a judgment may be rendered as a matter of law. Tenn. R. Civ. P 56.04. A moving party "may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the nonmoving party's claim or defense." Rye v. Women's Care Center of Memphis, 477 S.W.3d 235, 264 (Tenn. 2015) (emphasis in original). When a properly supported motion has been made, "to survive summary judgment, the nonmoving party 'may not rest upon the mere allegations or denials of [its] pleading.'" Instead, "[t]he nonmoving part must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party." Id. " [S]ummary judgment should be granted if the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the existence of a genuine issue of material fact for trial." Id. (citing Tenn. R. Civ. P. 56.04, 56.06). **"The focus is on the evidence the nonmoving party comes forward with at the summary judgment stage, not on hypothetical evidence that theoretically could be adduced . . ."** Id.

"Bare allegations [of a Complaint] will not withstand a motion for summary judgment." Knight v. Hospital Corp. of Am., 1997 Tenn. App. LEXIS 11, 1997 WL 5161, at *5 (Tenn. Ct. App. Jan. 8, 1997). In order to survive Methodist's Motion, Plaintiff must demonstrate in some "appropriate fashion" *now* facts that demonstrate that the alleged negligence of the nursing staff caused an injury to Plaintiff. Plaintiff has not carried and cannot carry this burden.

LAW & ANALYSIS

In a medical malpractice cause of action, Plaintiff is required to prove by expert medical testimony:

> (1) The recognized standard of acceptable professional practice in the profession and the specialty thereof, if any, that the defendant practices in the community in which the defendant practices or in a similar community at the time the alleged injury or wrongful action occurred (**standard of care**);
> (2) That the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standard (**breach of the standard of care**); and
> (3) As a proximate result of the defendant's negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred (**causation & damages**).

Tenn. Code Ann. § 29-26-115(a) (Supp. 2012) (emphases added); see also Tenn. Code Ann. § 29-26-115(b) (Supp. 2012). "No claim for negligence can succeed in the absence of any one of these elements." Kilpatrick v. Bryant, 868 S.W.2d 594, 598 (Tenn. 1993) (citing Bradshaw v. Daniel, 854, S.W.3d 865, 869 (1993)). Thus, in order to survive Methodist's Motion for Summary Judgment, Plaintiff must demonstrate in some "appropriate fashion" proof of (1) the standard of care applicable to nurses, (2) a violation of that applicable standard of care, and (3) the causal connection between Plaintiff's injuries and the nursing violations. Knight v. Hospital Corp. of Am., 1997 Tenn. App. LEXIS 11, at *13, 1997 WL 5161 (Tenn. Ct. App. Jan. 8, 1997). If Plaintiff, as the nonmoving party, is unable to carry her burden, Methodist's Motion for Summary Judgment should be granted. In this instance, Plaintiff can prove none of the elements against Methodist - the nursing standard of care; breach of that standard; and/or that an alleged breach caused an injury to Ms. Braden that would not have otherwise occurred. And for same, Methodist is entitled to summary judgment as a matter of law.

I. PLAINTIFF'S PROOF REGARDING NURSING STANDARD OF CARE AND CAUSATION

Despite the numerous orations by Plaintiff's counsel that have occurred in past hearings in this cause, an attorney's personal opinions are not a proper subject for argument or consideration by this Court. See Tenn. R. Civ P. 56.04. In fact, at trial attorneys are ethically precluded from "stat[ing] a personal opinion as to the justness of a cause, credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused." Tenn. Sup. Ct. R. 8, RPC 3.4(e)(3). Instead, in this case, admissible proof regarding the applicable nursing standard of care must be found in the depositions of Plaintiff's and Defendants' experts. The admissible proof regarding causation must be found in the depositions of Plaintiff's treating physicians and/or the depositions of Plaintiff's and Defendants' experts. As set forth herein, there is no admissible proof that the nursing staff violated an applicable nursing standard of care or that any alleged violation of the applicable nursing standard of care caused an injury to Ms. Braden that would not have otherwise occurred.

PLAINTIFF'S DISCLOSED EXPERTS:

Pursuant to a Scheduling Order, on January 4, 2016, Plaintiff disclosed her Rule 26 experts. With regard to the standard of care and causation, Plaintiff disclosed: Steven Swartz, MD (general surgeon); Ralph Silverman, MD (general surgeon); Mark Taylor, MD (general surgeon); Robert Aris, MD (Pulmonary/Critical care); and Edward Workman, MD (neuropsychiatrist). See Rule 26 Disclosures, attached as **Exhibit 1**.

Minutes to a few hours before each expert's deposition, Plaintiff provided a "supplemental" disclosure of each expert. The supplemental disclosures were, again, a "wishlist" of opinions that Plaintiff counsel hoped each expert would opine. During each expert's deposition, however, the

opinions were not consistent with the "supplemental disclosures" and, in most cases, were directly contrary to the actual opinions of each expert. For example, despite the nine (9) page disclosure of Dr. Taylor in which numerous nursing standard of care and causation opinions were listed, during his deposition, Dr. Taylor, specifically and unequivocally, testified that nothing the nurses did or failed to do caused an injury to Ms. Braden.[3] The same is true of Dr. Aris and his disclosure.[4] Given the unequivocal testimony of Dr. Aris and Dr. Taylor, as it relates to Methodist, their opinions fail to demonstrate the necessary elements of a medical malpractice claim.

Excluding Dr. Aris and Dr. Taylor, Plaintiff's remaining proffered experts on the nursing standard of care and causation are Dr. Swartz, Dr. Silverman, and Dr. Workman.[5] Their opinions are further addressed herein.

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[3] See Dr. Taylor's untimely and improper "Supplemental" Disclosure, attached as **Collective Exhibit 2**. Dr. Taylor was deposed on September 27, 2016. See attached **Exhibit 3**. During his deposition, he testified,

Q. Now, during the course of giving us this supplemental disclosure regarding nursing care and what you say in this disclosure as being nursing violations of the standard of care, is there anything that you're saying a nurse did or failed to do that caused an injury to Ms. Braden that would not have otherwise occurred?

A. No. I believe the injuries were not the result of - - any of the injuries were not the result of nursing care. (Pp. 245:17-246:3).

[4] See Dr. Aris' untimely and improper "Supplemental" Disclosure, attached as **Collective Exhibit 2**. Dr. Aris was deposed on September 29, 2016. See attached **Exhibit 4**. During his deposition, he testified,

- Q. So just to shorten it, then, you do not plan to offer nursing standard of care opinions at the trial of this case – is that correct?

A. Correct.

Q. So you're not going to offer any nursing standard of care opinions or causation opinions directed against the nursing in this case – is that fair?

A. Yes.

(Pp. 177-178).

[5]Dr. Workman testified under oath that he will not testify at trial and does not want, and never wanted, to be a standard of care expert. See attached **Exhibit 5**, hearing transcript - March 23, 2018 hearing. Despite this testimony, Plaintiff counsel now states, without a sworn affidavit, that Dr. Workman has recanted his sworn testimony and will testify at trial.

DR. SWARTZ - COULD NOT TESTIFY THAT ALLEGED NURSING VIOLATIONS CAUSED AN INJURY

Dr. Swartz was deposed on September 20, 2016. See attached **Exhibit 6**. During his deposition, he testified:

- Ms. Braden should have been returned to the operating room to repair the small bowel perforation no later than September 9, 2012 (as compared to September 13, 2012). (Pp. 157-158). Had Ms. Braden been returned to the operating room on or before September 9, 2012, she would not have required an ileostomy[6] and small bowel resection. (Pp. 72-73).

- He did not read the nursing depositions "cover to cover" because he didn't believe they contained anything relevant to his opinions. (pp. 11-12). Instead, he "skimmed" the depositions - nothing in the depositions changed his opinions. (pp. 194).

- He did not review the nursing notes in formulating the opinions set forth in his original disclosure. Of the 2700 pages of the September-November 2012 medical record, he only received and reviewed 300-400 pages, which included the op notes, progress notes, physicians' orders, discharge summary, and history and physical, prior to formulating his opinions. (Pp. 190).

- He reviews around 50 cases a year; 95% for the plaintiff. (Pp. 22-24).

- **With regard to the nursing standard of care, his opinions were that:**
  - **(1) the nurses failed to notify doctors about fevers.**
  - **(2) there was improper charting of morphine.**
  - **(3) vital signs were not taken every four (4) hours as ordered;**
  - **(4) there were incomplete vital signs recorded. (Pp. 194-196).**

- He is **not familiar** with nursing standard of care guidelines and has not reviewed any of his hospital's or Methodist's nursing policies and procedures. (Pp. 219).

- ***Regarding his first opinion - failure to notify the physician regarding fever*** - there are many things in a post-op course that can cause a fever (which is a temperature greater than 100.4). It is not uncommon to see a temperature over 100.4 in a patient post-operatively in the absence of a bowel leak. (Pp. 132-134). *Dr. Swartz could not state to a reasonable degree of medical certainty that reporting fevers would have made a difference in Ms. Braden's outcome. (Pp. 223). Specifically regarding the temperature of 101.2 on September 8, Dr. Swartz testified that he could not state that had the nurse called a doctor that the doctor would have done anything different. He further testified, "certainly one could argue that since by the time [the fever temperature] was*

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[6]An ileostomy is an opening in the belly (abdominal wall) that's made during surgery. The end of the ileum (the lowest part of the small intestine) is brought through this opening to form a stoma, usually on the lower right side of the abdomen. See https://www.cancer.org/treatment/treatments-and-side-effects/physical-side-effects/ostomies/ileostomy/what-is-ileostomy.html. (February 21, 2018).

noticed [by the physician] the next morning [and the doctor] did not act on it, that [the doctor] might not have acted on it that afternoon as well." (Pp. 243). He further testified that he had read the depositions of Drs. Metcalf and Long where they both testified that had they been notified of the 101.2 temperature they would have done nothing differently. (Pp. 245-246).

- **Regarding his second opinion - charting of morphine** - Dr. Swartz testified that he could not determine how much morphine Ms. Braden actually received. (Pp. 202). *He further testified, however, that there was no evidence in the record that Ms. Braden's treating physicians didn't have access to the vital signs, pain levels, and medication administration or that Ms. Braden's treating physicians were unable to determine the amount of Ms. Braden's morphine.* (Pp. 248–250).

- **Regarding his third opinion - failure to record vital signs every four (4) hours** - Dr. Swartz provided no opinion that this alleged failure caused an injury to Ms. Braden that would not have otherwise occurred.

- **Regarding his fourth opinion - incomplete vital signs** - Dr. Swartz is including pain as a vital sign. (Pp.. 220-221). *Regarding missing respiration recordings, Dr. Swartz could not say to a reasonable degree of medical certainty that the missing respiration rate on September 10 affected Ms. Braden's outcome. (Pp. 223). Regarding the alleged failures in charting regarding vital signs and pain scales, Dr. Swartz could not state to a reasonable degree of medical certainty that alleged negligent charting caused any injury to Ms. Braden. (Pp. 223-225).*

- Dr. Swartz offered no testimony that the nurses provided fake or fraudulent charting. In fact, the words "fraud", "fake", and/or "intentional misrepresentation" do not appear in his deposition word index. See Depo word index.

-Dr. Swartz agreed that there were criticisms in his supplemental disclosure, served on Defendants' counsel only a few hours before Dr. Swartz deposition, that were not supported by the facts. (Pp. 237-240).

- From his review of the 300-400 pages of medical records, without having looked at the nursing charting, Dr. Swartz was able to formulate his opinion that Ms. Braden had a small bowel leak on September 6, 2012. (Pp. 201). Stated differently, in the absence of any nursing actions or failures to act with regard to nursing assessments, charting errors, or failures to communicate with the treating physicians, Dr. Swartz was able to make a medical determination regarding Ms. Braden's medical condition.

-Dr. Swartz agreed that all the opinions offered during the deposition were all the opinions he would offer at trial. (Pp. 197).

RALPH SILVERMAN, M.D. - SPECULATING THAT ALLEGED NURSING VIOLATIONS CAUSED INJURY THAT WOULD NOT HAVE OTHERWISE OCCURRED

Dr. Silverman was deposed on September 16, 2016 and November 11, 2016. See attached collective **Exhibit 7**. During his depositions, he testified,

- Prior to his initial disclosure on January 4, 2016, Dr. Silverman was able, from a review of the medical record, to determine that Ms. Braden had a small bowel leak on September 6, 2012; that Ms. Braden's physicians needed to order additional labs and radiology films on September 8; and that Ms. Braden was septic as of September 8th. Ms. Braden's treating physicians had the same medical records available to them and therefore, presumably, could have made the same medical diagnoses. (2nd Depo., pp. 66-67).

- The latest Ms. Braden could have been returned to the operating room was September 9th (pp. 143). At any time thereafter, the same outcome would have occurred. (pp. 143). As such, any alleged nursing standard of care violations on September 10, 11, 12, or 13th could not and did not cause any harm to Plaintiff which would not have otherwise occurred. (pp. 143).

- If his assessment of a patient differed from a nursing assessment, he would give his opinion more clinical significance. (2nd Depo., pp. 106).

- His nursing standard of care opinions, as of his first deposition on September 20, 2016:

1. The MAR was inaccurate;
2. There is a discrepancy between what was ordered and what was actually charted with the vital signs; and
3. There were signs and symptoms not reported to the physician.

(Pp. 151-152).

- During his continuing November 11, 2016 deposition, he offered new opinions: "it was pointed out to me that there **may be** some cutting and pasting in regards to some of the vital signs" and that there "seemed to be some discrepancies with the mental status" and "discrepancies with the lung exams." (2nd Depo., pp. 111-112).

- Regarding his **first opinion** - MAR was inaccurate - Dr. Silverman *was able* to determine on a daily basis now much morphine Ms. Braden was receiving. (2nd Depo., pp. 116:12-15).

- Q. To a reasonable degree of medical certainty, can you tell me the ways in which your opinion that the MAR is inaccurate caused an injury to Ms. Braden that would not have otherwise occurred?

A. I think that the fact that the MAR was inaccurate kind of leads to doctors **may not have** intervened earlier. I also think that it lends some patterns to the nurse that **may not have been** taking care of the patient to the best of the abilities and would - **maybe** the patient would have – **maybe** clearer date could have showed distress a bit earlier. I'm kind of concerned that some of the

– the nursing documentation, if you will, you know, definitely **could have** lead – **maybe** led the doctors astray, **maybe** there wasn't a clear picture, of that –that sort. (2nd Depo., pp. 129:10-130:2).

- Even though Dr. Silverman testified that the MAR documentation *may* have led the doctors astray, he was able to precisely determine when Ms. Braden had a bowel leak and that she needed to be returned to surgery on September 8 or 9th. Specifically, Dr. Silverman testified:

Q. Dr. Silverman, you agree that, upon your review of the chart, you were able to make a determination as the when Ms. Braden had a bowel leak?

A. Yes.

Q. And so such that the MAR was not so inaccurate that you were not able to make a differential diagnosis and then ultimately conclude that a bowel leak was present as of September 6, 2012?

A. I was able to determine that, yes. (2nd Depo., pp. 126:13-25).

- Regarding his **second opinion** - that vital signs were not taken as ordered - he testified:

"There looks like there's some repeat data that's kind of suspicious, and there's gaps that are not taken – there were gaps in the –in the records that doesn't look like it's every four hours, and especially the fifth vital sign, pain." (2nd Depo., pp. 131:15-21).

- Regarding pulse, respirations, blood pressure, and temperature, Dr. Silverman, upon review of the records, agreed that vital signs were taken every 4 hours as ordered by Ms. Braden's attending physician. (2nd Depo., pp. 133:1-15).

- Regarding pain scale, Dr. Silverman could not recall a specific order in the medical record ordering pain scales to be charted every four hours. (2nd Depo., pp. 133:16-134:16). He further opined:

Q. Doctor, how would the recording of a pain scale every four hours changed Ms. Braden's outcome in this case?

A. I think that it **could – it could have**, particularly given a clearer picture that more likely than not she was in distress earlier and would have gone back to – **could have** gone back to surgery earlier. (2nd Depo., pp. 135:14-21).

The very next question and answer:

Q. From your review of the chart, was the picture clear enough to allow you to make an opinion to a reasonable degree of medical certainty that Ms. Braden needed to return to surgery sooner?

A. Yes. (Pp. 136:3-8).

- Dr. Silverman also testified as follows:

Q. So failure to report anything about the MAR or the vital signs couldn't have caused a change in outcome because that information was already available to the physicians?

A. I think if the MAR was clear, I think they **could have** made better decisions.

(2nd Depo., pp. 158).

- Regarding his opinion that there is some "repeat data that's kind of suspicious", Dr. Silverman testified:

Q. Can you state to a reasonable degree of medical certainty that the vital signs recorded are not true and accurate?

A. I can't – I mean, I wasn't there. I can't say that it's inaccurate. I can just say it's statistically unlikely. (2nd Depo., pp. 135:5-12).

- Regarding his **third opinion** - signs and symptoms not being reported to the physician - Dr. Silverman opined that a pain scale of 9/10, low blood pressures, and fevers were not reported to a physician. (2nd Depo., pp. 139:1-140:4).

- Regarding low blood pressures, Dr. Silverman identified two blood pressure readings on September 7th of 98/65 and 84/60 that, in his understanding, where not reported to a physician. (2nd Depo., pp. 140:14-22).[7] Dr. Silverman took those vital signs as true and accurate. (2nd Depo., pp. 142:24-143:6).

- Regarding fever not called, Dr. Silverman identified a fever of 101.2, 100.7, and 100.2 not called to a physician. (2nd Depo., pp. 142:12-16; 143:7-13).

- Dr. Silverman also testified "I think there were some instances of low urine output as well as increasing nasogastric tube output that **may have not** been reported. (2nd Depo., pp. 144:2-5).

- The last day that Ms. Braden should have been returned to surgery, such that she would not have needed an ileostomy, was September 9, 2012. At anytime after the 9th, the same outcome would have occurred. (Pp. 143:14-21).

- All of Dr. Silverman's standard of care opinions were discussed during his deposition. (Silverman, 1st Depo., pp 151-152; Silverman 2nd Depo., pp. 111-112, 130-131, 138-139, 147).

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[7]Dr. Metcalf testified that he was notified of the blood pressures and that is why he ordered a fluid bolus. (Metcalf Depo., pp. 214-215, attached as **Exhibit 8**).

EDWARD WORKMAN, M.D. - PROHIBITED FROM TESTIFYING ON CAUSATION AND NUMEROUS STANDARD OF CARE OPINIONS

Dr. Workman was deposed on September 22, 2016 and November 4, 2016. See attached collective **Exhibit 9**. By Order of this Court, as relating to the issues of the nursing standard of care and causation:

- Dr. Workman is *PRECLUDED* from testifying to the following:
  - any aspect of the surgery
  - the location of any bowel leak
  - the source of any leak
  - what caused the leak
  - any delayed breakdown of the small bowel
  - when plaintiff should have been taken back to surgery
  - any opinions as to whether the post-operative complication was due to an ileus or a bowel leak
  - alleged failing to investigate a pain spike after having been given Tylenol
  - the existence or absence of bowel sounds after surgery
  - whether it is a violation of the standard of care to "ignore a patient's claim that her legs feel dead."
  - any issue regarding the pathology slides or histopathology report
  - the failure to order differential lab studies
  - the failure to conduct/order radiology studies
  - the failure to notify the doctor of a worsening condition (unless related to vital signs or pain).
  - any issue regarding the presence of tachycardia after the administration of a beta blocker
  - any issue regarding the presence of or documentation of abdominal distension
  - ***that any alleged inaccurate or missing nursing documentation prevented the defendant physicians from making informed decisions.***
  - ***the actions that any physician should or would have taken if made aware of pain scales and/or pain assessments.***
  - monitoring for bowel leaks
  - recognition of bowel leaks, peritonitis, or sepsis
  - that Ms. Braden's current diagnoses were caused by negligence

-Dr Workman is permitted to testify on the following issues:
  - taking and recording of vital signs, including "fake charting"
  - Administration and recording of various pain medications, including the manner of determining the presence of pain

(See February 13, 2018 Order). On the limited issues that Dr. Workman is permitted to testify, Dr. Workman testified as follows:

- With regard to the first issue - taking vital signs and "fake charting" of vital signs, Dr. Workman opined that:

1. it is a violation of the standard of care for a nurse to take a respiratory rate over 15 seconds and multiply times 4 (Pp. 21);

2. the vital signs were "copied and pasted" from prior entries (pp. 24);

3. there are 3 missing pain scales on September 9th (pp. 77-78); and

4. Nurse Gallaher violated the nursing standard of care by taking respirations without looking at a clock (pp. 82).

- Dr. Workman could not identify any nurse who testified that vital signs were "copied and pasted" or that any vital signs were faked. (Pp. 300-304).

-Dr. Workman testified that vital signs are not taken by machine (like a Dynamap), but are instead taken "manually". Specifically, he stated, "No one does vitals by machine. The nurses do vitals on patients." (Pp. 305). He further stated that *if* the vital signs were taken by machine, the machine was falsifying the vital signs. (Pp. 306).

- Dr. Workman testified that the vital signs recorded were statistically impossible, but provided no basis for such an opinion, provided no literature or data to support his opinion, and failed to demonstrate any expertise in statistical analysis or a post-operative patient's expected vital signs.

- With regard to second issue - charting medications, Dr. Workman testified that:

1. not all morphine administration was documented in the MAR (pp. 25); and

2. that the morphine administration records do not contain a minute-to-minute accounting of morphine dosaging (pp. 54).

- Dr. Workman also testified that he last used a PCA pump, in a hospital setting, at UT "more than 10 years ago." (Pp. 258). And, as he has only worked at UT, he is not familiar with other hospitals and how they report PCA dosaging in the medical record. (Pp. 266).

- Dr. Workman testified that medications were identified as being prescribed by the wrong doctor. (Pp. 282). Upon a review of the physician orders, however, Dr. Workman agreed that the physician orders correctly identify the ordering physician and that a "soft stop" document in the chart is not a physician order. (Pp. 286-287).

-Dr. Workman testified that none of the journals that he reads "relate to this case." (Pp. 60-61).

Of particular importance, none of Plaintiff's experts disclosed any opinions regarding any care after September 13, 2012 and offered no opinions during their depositions regarding any care after September 13, 2012.

MS. BRADEN'S TREATING PHYSICIANS - TESTIMONY DOES NOT DEMONSTRATE REQUISITE CAUSAL CONNECTION; THAT TREATING DOCTORS WOULD HAVE ACTED DIFFERENTLY "BUT FOR" ALLEGED VIOLATIONS OF NURSING STAFF.

DR. JOSEPH METCALF

- The Methodist nurses provided "excellent care" to Ms. Braden. (pp. 279).

- The Methodist nurses did not violate the nursing standard of care. (Pp. 279).

- In the days that Dr. Metcalf was providing care, he had access to the electronic medical record either before, during, or after his assessments. He had access to all information needed to perform his daily assessment of Ms. Braden. (pp. 281-282).

- Failing to take vital signs precisely ever 4 hours as ordered "has never affected [Dr. Metcalf's] clinical judgment". (Pp. 105).

- Regarding the taking of respirations, he would expect the nursing staff to take over 15 or 20 seconds and multiply by 4 or 3. (pp. 106).

- Dr. Metcalf testified that he would do nothing different in this case if he had to do it all over again and that he wouldn't do anything different with the nursing staff. (Pp. 208).

DR. SCOTT PETERS

- He testified that he had no criticisms of the nursing staff; the nurses followed his orders, and on the dates that he saw Ms. Braden he had available any portion of the medical chart that he needed or wanted to review. (pp. 272, 276, attached as **Exhibit 10**).

TESTIMONY OF DEFENDANTS' EXPERTS REGARDING NURSING CARE; NURSING DOCUMENTATION DID NOT CAUSE AN INJURY TO PLAINTIFF

Although Plaintiff has argued in pleadings that Defendant experts testified that the nursing staff violated the nursing standard of care (which Methodist strongly denies), Plaintiff has not argued and cannot argue that any Defendant expert testified that any alleged violation caused an injury to Plaintiff.

II. SEPT. 6-12 NURSING CARE - PLAINTIFF HAS FAILED TO SET FORTH ANY EXPERT MEDICAL PROOF TO SUPPORT NUMEROUS NURSING STANDARD OF CARE VIOLATIONS ALLEGED IN THE ANTICIPATED SECOND AMENDED COMPLAINT

In a medical malpractice case, in order to overcome a motion for summary judgment, Plaintiff must set forth, at *this* stage, competent, expert medical proof demonstrating the applicable standard of care and violation of the applicable standard of care. As explained by the Tennessee Supreme Court in Estate of French v. Stratford House, 333 S.W.3d 546, 562 (Tenn. 2011) (*overruled by statute on other grounds*), "In order to prove a violation of the TMMA, a plaintiff must show that his or her injuries resulted because "the defendant failed to act with ordinary and reasonable care when compared to the customs or practices of [healthcare providers] from a particular geographic region.'" (Quoting Sutphin v. Platt, 720 S.W.2d 455, 457 (Tenn. 1986)).

In this instance, despite the anticipated numerous allegations of nursing negligence, the only standard of care criticisms supported by Plaintiff's expert medical proof are the narrow opinions of Drs. Swartz and Silverman (as specifically set forth in their, respective, depositions) and the limited opinions of Dr. Workman.[8] Those violations are narrowed to the following:

(1) the nurses failed to notify doctors about fevers/low blood pressure;
(2) there was improper charting of morphine/MAR inaccurate;
(3) pain scale was not taken every four (4) hours as ordered;
(4) there were incomplete vital signs recorded;
(5) There were signs and symptoms not reported to the physician;
(6) The taking of respirations was done incorrectly;
(7) The nurses "cut and pasted" vital signs; and
(8) There is no minute-to-minute dosaging recordings contained in the MAR.

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[8]See Order - Defendants' Motion to Exclude Dr. Workman. Methodist also has a McDaniel motion pending, seeking to prohibit Dr. Workman from testifying on issues for which he cannot demonstrate that he has the requisite "scientific, technical, or other specialized knowledge" to "substantially assist the trier of fact." Tenn. R. Evid. 702. Methodist has been attempting since **May 2017** to get a McDaniel hearing scheduled and it has been scheduled on at least two occasions, but Dr. Workman has never appeared for a hearing.

These were the ONLY standard of care opinions proffered by Drs. Swartz, Silverman, and Workman. As such, allegations of negligence in the to-be-filed Second Amended Complaint, related to Plaintiff's skin color, O2 Saturations, cardiovascular assessments, respiratory assessments, or the charting of "inappropriate" are not supported by the expert medical proof and should be dismissed as a matter of law, on the merits and with prejudice, for failure to comply with the mandatory requirements of Tennessee Code Annotated section 29-26-115(a)(2).

III. DRS. SWARTZ, SILVERMAN, AND WORKMAN HAVE FAILED TO DEMONSTRATE THEIR FAMILIARITY WITH THE APPLICABLE STANDARD OF CARE FOR NURSES, AS REQUIRED IN TENNESSEE CODE ANNOTATED SECTION 29-26-115(B).

Tennessee Code Annotated section 29-26-115(b) states, in pertinent part,

> No person in a health care profession requiring licensure under the laws of this state shall be competent to testify in any court of law to establish the facts required to be established by subsection (a), unless the person was licensed to practice . . . a profession or specialty which would make the person's expert testimony relevant to the issues in the case . . . .

As explained in Westmoreland v. Bacon, 2011 Tenn. App. LEXIS 38, at *14-15 (Tenn. Ct. App. Jan. 31, 2011):

> Tenn. Code Ann. § 29-26-115(b) does not require that an expert witness practice the same specialty as the defendant; nevertheless, the expert witness "must be *sufficiently familiar* with the standard of care of the profession or specialty and be able to give relevant testimony on the issue in question." Therefore, "where an expert has a sufficient basis on which to establish familiarity with the defendant's field of practice, the expert's testimony may be accepted as competent proof even though he or she specializes or practices in another field." This is generally referred to as the fungibility of experts, which is recognized and permitted under Tennessee's Medical Malpractice Act. Although fungibility of experts is allowed, "where an expert is unfamiliar with the *practice* of another field and with its standard of care . . . ," it would be inconsistent "with the terms or the policy of the Medical Malpractice Act to permit . . . generalized evidence."

(Internal citation omitted) (italics added).

In this instance, Plaintiff has failed to demonstrate admissible nursing standard of care testimony in order to justify a valid claim against the nursing staff at Methodist regarding the care and treatment of Plaintiff. Plaintiff has not offered any witness who is *qualified* to testify in conformity with the statutory requirements. Instead, Plaintiff has elected to use physician witnesses who claim to be experts with regard to nursing standards of care because of what that physician "expects" of a nurse in the same or similar circumstances or that because the physician "works with"[9] nurses and has interactions with nurses, the physician is somehow qualified to espouse a nursing standard of care. These are illusory standards and are not in conformity with the recognized standard of care language in the statute.

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[9]Specifically, during the deposition of Dr. Swartz, he testified:

Q. Other than working with nurses in providing post-operative care in a hospital setting, is there anything else that you believe makes you qualified to offer nursing standard-of-care opinions in this case?

A. I think I'm going to say no.

Q. No, that there's nothing else other than the fact that you **work with** nurses?

A. I think that's --

MR. JUSTICE:· Objection to form.

THE WITNESS:· I think that's enough.

(Depo., pp. 216:1-10).

In Dr. Workman's disclosure, it stated that he is familiar with the nursing standard of care because he practices in Knoxville and because of "the frequency [that he] reviews medical records from Methodist". See Exhibit 1, Workman disclosure, ¶ 2.

In his first deposition, Dr. Workman stated that there was no other basis (other than what was stated in his disclosure) that qualified him to testify to the standard of care. Workman Depo., pp. 42:7-13. In his supplemental deposition, he was specifically asked how he was qualified to testify to the nursing standard of care. He testified:

A. All doctors are experts on nursing care because they've **worked with** nurses throughout their career. I am not a nurse. To ask me those questions is more harassment because you have enough sense, unless you are senile, to know that a doctor is not the same thing as a nurse.· Maybe you're getting senile. (Depo. Pp. 230:25-231:6).

In Dr. Silverman's disclosure, he was identified as an expert on the nursing standard of care in Oak Ridge, Tennessee solely on the basis that he is a colo-rectal and general surgeon in St. Louis, Missouri and **works with** nurses at his hospital. See Exhibit 1, Silverman disclosure, ¶ 6.

With regard to the theory that a physician can testify to the nursing standard of care because the physician "works with" nurses, as held by the Tennessee Court of Appeals "the fact that [Plaintiff's expert physician] worked with nurses did not establish that he was familiar with the relevant standard of care . . . ." Mise v. Methodist Med. Ctr. of Oak Ridge, 2012 Tenn. App. LEXIS 259, at *32-33 (Ct. App. Apr. 23, 2012). In Mise, the plaintiff expert testified by affidavit that he was qualified to testify as to the nursing standard of care because:

> ". . . Over the last 20 years I have **worked** with nurses; I have **supervised** nurses; I have **written orders** for nurses; I have **viewed orders** written by other physicians for nurses, I have **trained** nurses and I have **observed** nurses respond to monitors going off, as well as, observed nurses caring for patients."

Id. (emphasis added). The plaintiff expert further stated that he had worked with nurses "on a regular and daily basis" Id. at *32. With this testimony proffered by the plaintiff at the summary judgment stage, the Mise court affirmed the trial court's grant of summary judgment to the defendant hospital, holding:

> In an effort to demonstrate his familiarity with the standard of care relevant to nurses, Dr. Boyd stated that he had worked with, supervised, trained, and observed nurses. Based upon his experience, he believed the "individual aggressive attention was not there for "Decedent in that the nurses failed to closely monitor a high-risk patient who underwent an "unsuccessful procedure." While helpful, the fact that Dr. Boyd worked with nurses did not establish that he was familiar with the relevant standard of care applicable in this case, specifically whether the nurses were negligent in their care and observation of a patient in chronic renal failure who had undergone central venograms and CO2 arteriograms. Following our review, we believe that Dr. Boyd did not present sufficient information to demonstrate that he was qualified to render an expert opinion on the standard of care relevant to nurses. Accordingly, the trial court did not err in granting the motion for summary judgment because Plaintiffs failed to submit sufficient rebuttal proof.

Id. at *32-33.

With regard to the theory that a physician's "expectation" establishes the standard of care, an individual physician's "expectation" is based upon that physician's subjective standard as to what he would expect of a nurse. This is not the recognized nursing standard of care. One doctor might expect a nurse to contact him if the patient's heart rate reached the level of 120 BPM; another doctor might expect a call if the heart rate was above 110 BPM, and another physician might not expect a call unless the heart rate was above 135 BPM. What an individual doctor or a group of doctors "expect" from nurses does not establish the standard of care for the nurse.[10] This would be similar to a patient testifying that the patient's expectation was that a doctor would sit at the bedside from the time of admission until the time of discharge. This would be a patient expectation but it clearly would not establish the standard of care. A nurse might expect a physician to come to the hospital to see the patient on each occasion that the nurse contacts the doctor with a variation in signs, symptoms or vital signs of a patient. This expectation does not establish the standard of care for the physician.

These physician "experts" with regard to nursing standard of care have offered no scientific justification by way of knowledge, training, or experience to state that the expectation of a physician in their locality would be the equivalent of a physician expectation of a nurse in any other locality. They cannot even establish that the individual physician's subjective expectation of a nurse would apply to the other physicians practicing in the same community as the purported "expert".

The testimony of Drs. Silverman, Swartz, and Workman also affirmatively demonstrates their, respective, lack of the requisite "familiarity" to testify to the nursing standard of care. In Land

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[10]Dr. Workman's expectation that the nurses at his office take vital signs manually and that "no one does vital signs by machine", (Workman 2nd Depo, pp. 305), does not establish that it was a violation of the standard of care for the Methodist nurses to take vital signs using a Dynamap machine. See e.g., Exhibit 14 and 15.

v. Barnes, 2008 Tenn. App. LEXIS 523 (Tenn. Ct. App. Sept. 19, 2008), the plaintiff's proffered expert, a physician testifying on the nurse practitioner standard of care, testified that he was familiar with the nurse practitioner standard of care but admitted that he did not know a nurse practitioner's *scope of practice*. With this admission of lack of knowledge, the Court of Appeals agreed that the proffered expert lacked "sufficient familiarity" to testify to the nurse practitioner standard of care. The same reasoning applies to the scope of practice of nurses.

In this instance, Dr. Silverman testified that nurses can make medical diagnoses (Silverman, 2nd Depo., pp. 86-87) and can establish a plan of care (Id., pp. 87-88). Moreover, Dr. Silverman was not sure whether nurses could order labs or order medications. (Id., pp. 89-90). In Tennessee, nurses cannot make medical diagnoses, cannot make medical plans of care, and cannot order labs or radiology studies absent a physician's order. See Tenn. Code Ann. § 63-7-103(b) ("Notwithstanding subsection (a), the practice of professional nursing does not include acts of medical diagnosis or the development of a medical plan of care and therapeutics for a patient . . . ."). As such, Dr. Silverman, by his clear and unequivocal testimony, demonstrated that he lacked knowledge of the scope of practice of nurses in Tennessee.

As set forth in footnote 9, the only asserted knowledge of the nursing standard of care by Plaintiff's experts is the fact that they "work with" nurses. None has ever taught or trained nurses on the standard of care or nursing practices; nor practiced as a nurse. Dr. Swartz has testified in the past that he is not familiar with the nursing standard of care. When asked to define the nursing standard of care, Dr. Swartz, who reviews 50 cases a year and has testified more than 100 times, stated that he has never had to define the nursing standard of care and "would have to *assume* it is along the same lines of what a reasonably prudent nurse would do in following the standards that

have been set forth for nurses." (Depo., pp. 217:4-9) (emphasis added). Moreover, when asked who sets the nursing standard of care for nurses in Tennessee, Dr. Swartz testified:

> I imagine there's more than one institution that sets the nursing standard of care. I know the AORN's have set the standard of care for most operating-room nurses. And I think it is the ANA that sets the standard of care for a lot of others. I can't remember specifically if there's a hospital organization, although the Joint Commission on the Accreditation of Hospitals does set of lot of standards of care for nursing and documentation generally in the hospital.

Following this testimony, Dr. Swartz was then specifically asked "what [do] the ANA or Joint Commission say regarding the nursing standard of care for nurses providing care in a post-operative setting"? Dr. Swartz did not know and could not say. (Depo, pp. 218:21-25). As for Dr. Workman, his entire understanding of the floor nurse scope of practice was only that the nurse is to "[t]ake doctors' orders and carry them out." (Workman Depo., pp. 231).

Based upon the clear and unequivocal testimony and applicable case law, Plaintiff's remaining nursing standard of care experts (Drs. Swartz, Silverman, and Workman) have failed to demonstrate the requisite familiarity with the applicable nursing standard of care to testify in this case. See Tenn. Code Ann. § 29-26-115(b). They lack the required knowledge of the scope of practice for nurses, and merely working with and having personal expectations of what they want nurses to do does not demonstrate the requisite familiarity of the applicable nursing standard of care. For this reason, Plaintiff's medical malpractice claims against Methodist should be dismissed for failure to demonstrate a necessary element - the applicable nursing standard of care. See Tenn. Code Ann. § 29-26-115(a)(1).

IV. PLAINTIFF HAS FAILED TO SET FORTH ANY EXPERT MEDICAL PROOF DEMONSTRATING THAT THE ALLEGED NURSING STANDARD OF CARE VIOLATIONS *CAUSED* AN INJURY TO MS. BRADEN

While Drs. Swartz, Silverman, and Workman choose to opine on limited nursing standard of care violations, those opinions do not overcome Methodist's Motion for Summary Judgment. Because neither Dr. Swartz nor Dr. Silverman could testify to a reasonable degree of medical certainty that any alleged violation caused an injury to Plaintiff that would not have otherwise occurred, Methodist is entitled to summary judgment as a matter of law.[11]

The final element of Plaintiff's prima facie health care liability action is causation. Tenn. Code Ann. § 29-26-115(a)(3). In order to overcome Methodist's Motion, Plaintiff must proffer competent evidence, at the summary judgment stage, that "[a]s a proximate result of the defendant's negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred." Id. A mere possibility of causation is not enough to satisfy this burden. White v. Methodist Hosp. S., 844 S.W.2d 642, 649 (Tenn. Ct. App.1992). Instead, the "plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is *more likely than not* that the conduct of the defendant was a cause in fact of the result." Lindsey v. Miami Development Corp., 689 S.W.2d 856, 861 (Tenn. 1985) (emphasis added); see also Kilpatrick v. Bryant, 868 S.W.2d 594, 602 (Tenn.1993). Plaintiff has the burden of proving that the "injury or harm would not have occurred **'but for'** the [nursing staff's] negligent conduct." Kilpatrick, 868 S.W.2d at 598 (emphasis added) (citing Caldwell v. Ford Motor Co., 619 S.W.2d 534, 543 (Tenn. Ct. App. 1981)).

[11]This Court has already ruled that Dr. Workman is not qualified to testify to causation and Drs. Aris and Taylor have testified that nothing the nurses did or failed to do caused an injury to Ms. Braden.

On the issue of causation, the Kilpatrick Court explained,

> The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. **A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.** . . .
>
> . . .
>
> The mere possibility of a causal relationship, without more, is insufficient. . . .
>
> **Thus, proof of causation equating to a "possibility," a "might have," "may have," "could have," is not sufficient as a matter of law, to establish the required nexus between the plaintiff's injury and the defendant's tortious conduct by a preponderance of the evidence in a medical malpractice case. Causation in fact is a matter of probability, not possibility, and in a medical malpractice case, such must be shown to a reasonable degree of medical certainty.**
>
> Even when it is shown that the defendant breached a duty of care owed to the plaintiff, the plaintiff must still establish the requisite causal connection between the defendant's conduct and the plaintiff's injury." ("**Proof of negligence without proof of causation is nothing**").
>
> ...
>
> **A mere possibility of such causation is not enough**; and when the matter remains one of pure speculation or conjecture or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.

Kilpatrick, 868 S.W.2d at 600-603 (italicized emphasis in original; bold emphases added). More recently, in Jenkins v. Big City Remodeling, 515 S.W.3d 843 (Tenn. 2017), the Tennessee Supreme Court again addressed the plaintiff's burden of proof regarding the causation. The Court, in affirming and citing to Kilpatrick, held:

> It is not enough for a plaintiff to show that a defendant's conduct was a possible cause of the injury; the defendant's conduct must be shown to be *the probable cause*.
>
> ...
>
> Where proof of causation is made by circumstantial evidence, the evidence must be such that it tends to *exclude any other cause*.

Id. at 852. After reviewing the evidence in the light most favorable to the plaintiff, the Supreme Court affirmed the trial court's grant of summary judgment holding: "[W]e conclude that the plaintiffs did not produce sufficient evidence to establish that any negligence of the [defendants] was the cause in fact of the [injury], an essential element of the plaintiffs' cause of action." Id. The Court explained the holding by noting the well establish principle that "Proof of negligence is not a substitute for evidence of causation." Id. (numerous citations omitted).

In the present matter, Plaintiff also cannot demonstrate that any alleged negligence on the part of the Methodist nursing staff was the cause in fact or "but for" cause of any injury to Ms. Braden, and for same, Methodist is entitled to summary judgment on the merits and with prejudice.

Same Result if Surgery Not Performed on or before September 10th

Plaintiff's expert, Dr. Taylor, testified that the latest that Ms. Braden could have been returned to the operating room to repair her bowel leak and avoid the need for a small bowel resection with an ileostomy was September 10th. Surgery at anytime after the 10th (i.e., the 11th, 12th, or 13th) would have resulted in the same outcome that occurred during the surgery on September 13, 2012. As such, any alleged nursing standard of care violations on the evening of September 10th or on September 11, 12, or 13th could not and did not cause any harm to Plaintiff which would not have otherwise occurred. (Taylor Depo., pp. 229-230).

Plaintiff's expert, Dr. Silverman, testified that the latest Ms. Braden could have been returned to the operating room was September 9th (Silverman Depo., pp. 143). At any time thereafter, the same outcome would have occurred. (Silverman Depo., pp. 143). As such, any alleged nursing standard of care violations on the evening of September 9th or on September 10, 11, 12, or 13th could not and did not cause any harm to Plaintiff which would not have otherwise occurred. (Silverman Depo., pp. 143).

Given Plaintiff's proof, any alleged standard of care violations by the nursing staff on or after September 10th could not and did not cause an injury to Plaintiff. As such, Plaintiff's claims regarding alleged failures on September 10th, 11th, 12th or 13th, including the failure to report Plaintiff' condition to Drs. Dallas and Long (who were managing Ms. Braden's care on September 11th, 12, and 13th); the failure to properly report Plaintiff's condition on those dates; alleged charting errors and omissions on those dates, and/or alleged negligence in assessment of Ms. Braden on those dates are not, and could not be, the "but for" cause of Ms. Braden's injuries. As such, those alleged standard of care violations, asserted in the anticipated Second Amended Complaint should be dismissed on the merits and with prejudice.

Plaintiff's Causation Proof Must Rely on Speculation and Possibilities

Speculation or guesswork by the jury is not permitted. See Martin v. Washmaster, 946 S.W.2d 314, 317 (Tenn. Ct. App. 1996), *perm. app. denied* (Tenn. 1997). "A judgment cannot be based upon conjecture or speculation, and the probable effect of an injury must be shown to be reasonably certain, and not a mere likelihood or possibility. White v. Methodist Hosp., 844 S.W.2d 642, 649 (Tenn. Ct. App. 1992). Causation testimony which amounts to mere speculation and

conjecture does not substantially assist the jury in its determination and is, therefore, insufficient to qualify as admissible evidence. Tenn. R. Evid. 702; see Primm v. Wickes Lumber Co., 845 S.W.2d 768, 771 (Tenn. Ct. App. 1992).

With regard to Dr. Swartz, in his deposition, he specifically testified that he could not state to a reasonable degree of medical certainty that any alleged nursing violation caused an injury to Ms. Braden. See *supra* pp. 8-9.

As for Dr. Silverman, he could only speculate that the doctors might have acted differently. On every occasion where he was asked about the causal effect of an alleged nursing violation, he testified that "maybe" the doctors would have acted differently see *supra* pp. 10-12 ; but Plaintiff has offered no proof.

As for Dr. Workman's opinions regarding nursing standard of care violations, there is no opinion (not even an attempt to offer an opinion) by any physician permitted to testify on the issue of causation that Dr. Workman's alleged violations caused an injury to Plaintiff.

The analysis in Yeubanks v. Methodist Healthcare-Memphis Hosps., 2003 Tenn. App. LEXIS 437, at *11-12 (Tenn. Ct. App. June 10, 2003) is instructive. In that case, the plaintiff's standard of care experts claimed deviations in the charting/documentation by the hospital nursing staff. Plaintiff's causation expert testified "[o]n direct examination, when asked what injuries [the plaintiff] sustained as a result of this deviation from the standard of care, . . . that if the documentation had been adequate, then **maybe** somebody would have picked up sooner that she, indeed, was in shock and that she was not stable and she should not have been in CAT scan. At that point, it's **possible** that things could have been revved up and a different track taken so that she could

have gotten to the operating room where she needed to be." (Emphases added). With that testimony, the defendant moved for a directed verdict.

Based on the Plaintiff's proffered causation testimony, the trial court granted the defendant's motion, holding:

> . . . I think that [the causation expert's] opinion was **speculative** as to what might have happened, what might not have been observed by the doctors. . . . The opinion of [the causation expert] that the deviation from the standard of care in the recording does not approach the degree of medical certainty as to causation that in the Court's mind can make this a case of controversy for the jury.

Id. at *32-33 (emphasis added). The Court of Appeals, citing Kilpatrick and Lindsay, finding no error, affirmed the Trial Court's dismissal of the claims against the nursing staff. Other courts have similarly held. In Taylor v. Jackson-Madison County General Hosp., 231 S.W.3d 361, 378 (Tenn. Ct. App. 2006), the Court of Appeals reversed the trial court's finding that the plaintiff had established the causation element of his medical malpractice case. Specifically, the Court held that the testimony of the plaintiff's causation expert that the "alleged negligent acts of the Defendant's employees "might have" or "possibly" resulted in [the plaintiff] not making as full a recovery" was not sufficient to demonstrate the requisite causal connection between the alleged negligence and the injury that resulted. Id.

Dr. Silverman's testimony is identical to that of the causation expert in the Yeubanks case - all Dr. Silverman could do was speculate and state that "maybe" the treatment would have been different. Yet, there is absolutely no proof that the Ms. Braden's treating physicians would have done anything different than what occurred in this case. See Metcalf Depo., pp. 208.

Tennessee case law makes clear that "conduct cannot be a cause in fact of an injury when the injury would have occurred even if the conduct had not taken place." Waste Management MGMT v. South Cent. Bell Tel., 15 S.W.3d 425, 430 (Tenn. Ct. App. 1997). "[A] mere possibility is not an affirmative basis for a finding of fact . . . almost anything is possible and it is thus improper to allow a jury to consider and base a verdict upon a 'possible' cause of death. Lindsey v. Miami Dev. Corp., 689 S.W.2d 856, 862 (Tenn. 1985). In this instance, all Plaintiff has are "possibilities."

At this "put up or shut up stage", Plaintiff has no proof to demonstrate that "but for" the alleged nursing violations, Defendant doctors (or any of Ms. Braden's physicians while she was a patient at Methodist) would have ordered additional radiology or laboratory studies, established a different plan of care, and/or diagnosed earlier a small bowel leak such that Ms. Braden would have been returned to the operating room earlier, thus preventing her ileostomy, elongated hospital stay, and subsequent medical treatment that Ms. Braden is claiming as related. In fact, the undisputed facts are that Plaintiff's treating physicians (including co-defendants) are all of the opinion that there was no small bowel leak until September 12 and, therefore, even today those physicians have opinions that there was no need to change Ms. Braden's medical care and treatment. See e.g., Metcalf Depo., pp. 208. And, importantly, these opinions are based upon those treating physicians' own observations of Ms. Braden during their, respective, daily interactions with Ms. Braden; their own medical assessments and findings; and their own medical judgments...not the nursing assessments and documentation criticized by Plaintiff's counsel.

Because Plaintiff's proof, including Plaintiff's experts, Defendants' experts, and the treating physicians, fails to establish that any alleged nursing standard of care violation caused an injury to

Plaintiff that would not have otherwise occurred, Plaintiff's medical malpractice cause of action against Methodist should be dismissed on the merits and with prejudice.

Plaintiff's Proof Must Rely Upon a "Domino Theory" of Causation

A recent opinion of the Tennessee Court of Appeals further demonstrates Plaintiff's lack of proof regarding causation. In Franklin-Mansuo v. AMISUB (SFH), Inc., 2017 Tenn. App. LEXIS 599 (Tenn. Ct. App. Sept. 6, 2017), the plaintiff expert alleged that an emergency department physician who was supervising a physician assistant was negligent in supervision and failed to act within the standard of care, and that these failures proximately caused the death of the patient. It was alleged through the expert that the physician should have recognized the danger of the medical condition and should have made sure a specialist saw the patient or undertaken intubation or secured the patient's airway in the emergency department while waiting for the patient to be transported to the ICU.

In addressing causation, the Court of Appeals noted that the defendant physician's action or inaction had to be shown to be the proximate cause of the injury/death and the "but for" analysis had to be applied. After analyzing the evidence, the Court found that the physician was not liable based upon the expert's testimony as to causation:

> Dr. Holmes' [the plaintiff's expert] testimony as to causation does not establish, to a reasonable degree of medical certainty, that it is more likely than not that Ms. Franklin would not have suffered injury and death but-for the alleged negligent supervision by Dr. Abushaer. Dr. Holmes faults Dr. Abushaer for not ensuring that Dr. Clemons [specialist] arrived to assess Ms. Franklin. However, Dr. Holmes was not able to say whether Dr. Clemons **would have** performed any particular procedure that **would have** prevented Ms. Franklin's hypoxic event. Even if Dr. Clemons had arrived and attempted to intubate Ms. Franklin, Dr. Holmes conceded that there are difficulties

> and risks associated with establishing an airway in a patient with epiglottitis. Also, according to Dr. Holmes, the determination of if, when, and what kind of procedure to perform would have been dependent on the medical conclusions of the ENT and anesthesiologist involved - not Dr. Abushaer. Dr. Holmes' testimony contains **too many contingencies and is the equivalent of a domino theory of causation.** Dr. Holmes' testimony did not establish, with a reasonable degree of medical certainty, that Dr. Abushaer's role as a supervising physician was, more likely than not, the cause of Ms. Franklin's hypoxic event.

Id. (emphasis added).

In the present case, there is no testimony from the physicians involved with Ms. Braden's care that had any action or failure to act on the part of a nurse been brought to the attention of the appropriate physician that a CT scan would have been performed or other testing would have been performed in order to diagnose the alleged perforation of the small bowel during the time frame that Plaintiff experts claim the surgery would have needed to be performed to avoid the same result that occurred on September 13, 2012. Just as noted by the Franklin-Mansuo Court, the claims against the hospital in this case constitute a "domino theory of causation."

To find causation in this case, the jury would have to speculate that had the nurses acted as Drs. Swartz, Silverman, and Workman have testified they should have, the treating physicians would have, more probably than not:

> (1) ignored their, respective, daily assessments[12] of Ms. Braden wherein they found, after personal observation and direct communication with Ms. Braden, that she was improving, without complication, without a bowel leak, and without the signs and symptoms of a concerning medical condition;

[12]Even Dr. Silverman testified that he would give more weight and credibility to his own assessments of a patient as compared to the assessments of a nurse. (Pp. 106).

(2) ordered a radiology or laboratory study, despite the fact that no such testing was ordered following the daily physician assessments and despite the fact that Ms. Braden's treating physicians, even with hindsight and knowing her eventual diagnosis, testified that they would do nothing different;

(3) ordered a study that would have diagnosed bowel leak despite the belief, even with hindsight, that Ms. Braden did not have a bowel leak until the time of her return to surgery on September 13th;

(4) ordered the unknown radiology or laboratory study on or before September 9, 2012, such that Ms. Braden could have been returned to the operating room in the time frame that Plaintiff's experts state Ms. Braden needed to have repair surgery in order to prevent the need for her ileostomy;

(5) interpreted the radiology and laboratory studies as diagnostic evidence of bowel leak;

(6) taken Ms. Braden to the operating room on or before September 9, 2012 for a bowel leak repair surgery; and

(7) performed a successful surgery, without complication, that did not require an ileostomy.

All of these "dominoes" are entirely hypothetical. All seven steps would had to have occurred for the nurses to be the "but for" cause of Ms. Braden's injuries. In this instance, there is no evidence before this Court that any of the seven steps would have occurred more probably than not. For this reason, Methodist is entitled to summary judgment.

V. WOUND CARE CLAIM - PLAINTIFF'S PROOF FAILS TO DEMONSTRATE THE NECESSARY ELEMENTS OF PLAINTIFF'S WOUND CARE CLAIM

Despite the allegations in the anticipated Second Amended Complaint regarding wound care, Plaintiff has failed to proffer any expert medical proof, in compliance with Tennessee Code Annotated section 29-26-115(a), demonstrating the applicable standard of care regarding wound care, any alleged violation of that standard, and/or that any alleged violation caused an injury to Ms. Braden that would not have otherwise occurred. None of Plaintiff's experts were disclosed on the issue of wound care and none of those experts provided testimony during their depositions on the issues of wound care. In fact, the original and supplemental disclosures of Plaintiff's experts specifically referenced the time frame of September 6-13, 2012, before wound care treatment occurred. See Exhibits 1 and 2.

Even if Plaintiff asserts the "common knowledge" exception or cites to the testimony of the nursing staff in an attempt to establish a violation of the standard of care, the testimony of the nurses does not establish the mandatory element of causation. The Tennessee Court of Appeals, on numerous occasions, has held that "[a] nurse is not an expert who can testify as to medical causation." See e.g., Hinson v. Claiborne & Hughes Health Ctr., No. M2006-02306-COA-R3-CV, 2008 Tenn. App. LEXIS 105, 2008 WL 544662, *5 (Tenn. Ct. App. Feb. 26, 2008) (no Tenn. R. App. P. application filed). In this instance, as no expert was disclosed on the issue of wound care, no expert opined that any action or inaction by a nurse caused an injury to Plaintiff that would not have otherwise occurred.

For these reasons, any medical malpractice claim related to wound care should be dismissed on summary judgment, on the merits and with prejudice, for failure to demonstrate the necessary elements set forth in Tennessee Code Annotated section 29-26-115(a).

VI. No Evidence, Testimony, or Proof of Fraud

In the anticipated Second Amended Complaint, it is expected that Plaintiff will assert claims of fraudulent actions on the part of the nursing staff in an effort to seek punitive damages. For the reasons set forth herein, Plaintiff's claims of fraud should be dismissed on the merits and with prejudice.

In numerous pleadings, Plaintiff has asserted that Plaintiff and Defendant experts "have spoken of fraud and corruption." Such statements are, again, not supported by the facts and are a complete misrepresentation of the evidence.

Fraud requires an intent to deceive, usually for one's personal gain. "The elements of fraud are: (1) an **intentional** misrepresentation of a material fact, (2) **knowledge of** the representation's **falsity**, (3) **an injury** caused by reasonable reliance on the representation, and (4) the requirement that the misrepresentation involve a past or existing fact." Dobbs v. Guenther, 846 S.W.2d 270, 274 (Tenn. Ct. App. 1992) (citations omitted) (emphases added).

Of note, the words "fraud", "fraudulent", "fake" and/or "intentional misrepresentation" do not appear in the deposition testimony of any of the experts, for Plaintiff or Defendants, other than Dr. Workman. And, while Dr. Workman baldly asserts that the nursing staff "faked" vital signs, no expert has testified that "but for" the vital signs charting, a treating physician would have treated Ms. Braden any differently, such that Ms. Braden's injuries would not have occurred.

Although at the time of the filing of this Motion for Summary Judgment there is currently: (1) no Second Amended Complaint filed alleging fraud; (2) no fact witness testimony admitting the intentional misrepresentation of Ms. Braden's medical record or testifying to the firsthand knowledge of another nurse intentionally misrepresenting Ms. Braden's medical condition; and (3) no expert

testimony demonstrating that a specific nurse's charting was fraudulent, in several pleadings, Plaintiff has argued that a fraud claim is supported by the following "facts":

(1) That the nurses "cut and pasted" vital signs[13];

(2) That the medical record identifies the wrong ordering physician for certain medications[14];

(3) That the nurses' assessments of Ms. Braden's skin color differ[15];

(4) That the nurses failed to record and/or deleted Ms. Braden's weight records from Sept 6-Sept 13, 2012[16];

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[13]No nurse testified that he/she "cut and pasted" false, fake, or inaccurate vital signs. And, in fact, the electronic medical record program used at Methodist Medical Center does not permit the "cutting and pasting" of vital signs. See Horizon Expert Documentation Clinical Manual, pp. 31-33, attached as **Exhibit 11**. Moreover, the one expert who testified that the nurses were faking the vital signs also believed that the vital signs were not taken by a machine, such as a Dynamap. See Workman Depo., pp. 305. In fact, between September 6-12, Ms. Braden's pulse and blood pressure, would have been taken by a Dynamap machine. See e.g., CNA Duggar Depo., pp. 13, attached as **Exhibit 14**; Byrum Depo., pp. 23, attached as **Exhibit 15**.

[14]This is another example of Plaintiff misrepresenting the facts. The "physician orders" section of the medical record correctly identifies the ordering physician for the medications potassium, magnesium, and Heparin. (Medical Record, pp. 202, 210, 213, attached as **Exhibit 12**). Plaintiff ignores the physician orders section of the medical record, however. Instead, she argues that "soft stop" documents used by pharmacy that list Ms. Braden's attending physician and not the ordering physician somehow support fraud. The "soft stop" documents, however, are not orders. And, more importantly, it is undisputed that Ms. Braden's physicians did order potassium, magnesium, and Heparin, and those medications were administered in accordance with physician order. As such, there was no harm or injury to Ms. Braden. Moreover, Plaintiff's expert proof is that nothing that occurred on or after September 10th caused an injury to Plaintiff, so there is unequivocally no injury that resulted from this alleged "fact".

[15]It is undisputed that the nursing assessments differ in their subjective observations of Ms. Braden's skin color. There is no evidence, however, that their assessments were fraudulent...that the nurses intended to deceive anyone with their assessments...or that the physicians relied upon these assessments to the detriment of Ms. Braden. The treating physicians personally assessed Ms. Braden and were able to establish their own medical opinions regarding her skin color. Moreover, Plaintiff's expert proof is that nothing that occurred on or after September 10th caused an injury to Plaintiff, so there is unequivocally no injury that resulted from this alleged "fact".

[16] Again, there is no evidence of fraud. The nursing staff was not ordered to take weight measurements between Sept. 6-12, 2012, and as such, the nursing staff did not take and record weight measurements. There is no evidence of deleting any records...absolutely none. And, there can be no fraud for failure to take weight measurements when there was no physician order to take weight

(5) That the nurses did not record pain scales every 4 hours as ordered[17];

(6) That on two occasions all four vital signs were not recorded[18];

(7) That Ms. Braden had a fluid deficit on September 13th;[19]

(8) That a doctor was not called when Ms. Braden's bp was recorded on September 7th as 84/60;[20]

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measurements. Moreover, there is no causation proof on this issue...NONE.

[17]It is undisputed that the nursing staff did not *chart* pain scale assessments every four hours. But, there is no evidence that the failure to document pain scales was fraudulent or that the failure to record pain scales caused an injury to Ms. Braden. The pain scales that were recorded were not concerning. The one pain scale that was elevated, a 9/10, the nursing staff re-evaluated Ms. Braden 30 minutes later (so less than four hours later) and the pain was reduced to 3/10. See Medical Record, pp. 1535, 1542. Moreover, each day, Ms. Braden's physicians were assessing Ms. Braden, asking her about her pain, and describing her in the progress notes as: "in good spirits", "looks better", "looking good", and "states she [is] just much better". See Medical Record, pp. 255, 254, 364. Moreover, Plaintiff's expert proof is that nothing that occurred on or after September 10th caused an injury to Plaintiff, so there is unequivocally no injury that resulted from this alleged "fact".

[18]This "fact" is incredibly misleading. On one such occasion where the nurse did not record all four vital signs, September 7 at 06:43 a.m., she had recorded a full set of vital signs at 5:41 a.m. and again at 7:30 a.m. (Medical Record, pp. 2066, 2067). As such, she was charting more than was ordered (every four hours). When presented with these facts, Plaintiff's expert, Dr. Swartz, testified that this was "good nursing"; not fraud. (Swartz Depo., pp. 242). On the other occasion, September 11th, the nurse could not explain why a respiration rate was not recorded; testifying that she would have taken a respiratory rate. Again, nothing about this testimony demonstrates fraud. Moreover, Plaintiff's expert proof is that nothing that occurred on or after September 10th caused an injury to Plaintiff, so there is unequivocally no injury that resulted from this alleged "fact".

[19]Admitting for the purposes of this Motion that this fact is true, nothing about this "fact" demonstrates fraud. The fluid deficit was properly recorded and Ms. Braden was returned to surgery on the 13th to repair a bowel leak. Moreover, Plaintiff's expert proof is that nothing that occurred on or after September 10th caused an injury to Plaintiff, so there is unequivocally no injury that resulted from this alleged "fact".

[20]Again, a complete misrepresentation of the facts. The medical record details a call to Dr. Metcalf on the morning of the 7th. An order for fluid bolus was received. (Medical Record, pp. 1523. When Dr. Metcalf was specifically asked about being called regarding the 84/60 blood pressure, he testified that he obviously was called, as he ordered a fluid bolus, which is what he would order if made aware of a low blood pressure. (Metcalf Depo., pp 214-217). Following the bolus, Ms. Braden's blood pressure returned to the normal range, when rechecked less than 1 hour later, and remained in the normal range from the 7th-13th. See Ex. 11 to Silverman Depo.

(9) That there are two sets of vital signs missing on September 12;[21] and

(10) That the nursing staff did not correctly chart morphine administration.[22]

Not only are Plaintiff's "facts" regarding fraud not truthful, based in reality, or supported by the testimony of the fact and expert witnesses, with the exception of vital signs, Plaintiff's experts do not even allege that these "facts" demonstrated negligence on the part of the nursing staff, let alone fraud. Moreover, there is ZERO testimony that Ms. Braden was injured by the alleged "fraud". As a necessary element of a fraud claim is an injury, Plaintiff's fraud claim should be dismissed on the merits and with prejudice.

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[21]While it is admitted that from the 6th-13th, on two occasions, a four-hour set of vital signs was not recorded, there is no evidence that the failure to record these vitals was fraud or that any injury resulted as a failure to record. The vital signs recorded before and after the "missed" sets were completely normal (within acceptable ranges). There is no evidence to suggest that the "missed" vital signs would have been any different. Moreover, Plaintiff's expert proof is that nothing that occurred on or after September 10th caused an injury to Plaintiff, so there is unequivocally no injury that resulted from this alleged "fact".

[22]Plaintiff's complaint is that the nursing staff charted *too much* medication. Accepting this "fact" as true for the purposes of this Motion (a "fact" that is strongly denied by Methodist), there is no proof that there was any injury to Ms. Braden. Plaintiff's treating physicians testified that if they had questions about Ms. Braden's pain or morphine administration, they would have just talked to Ms. Braden. See e.g., Dallas Depo., pp. 223-224 attached as **Exhibit 13**. Moreover, Plaintiff argues that the morphine administration was so high that it was masking her bowel leak. If, as Plaintiff alleges, the nursing staff was over charting the medication actually administered, then the actual morphine Ms. Braden was receiving would have been less, thus making it less likely that the morphine was masking her bowel leak. Like all of Plaintiff's case, she tries to argue both sides of every issue; both sides lacking credibility and factual support. Additionally, as relating to the charting of 30 mg on September 13th, as Plaintiff's expert proof is that nothing that occurred on or after September 10th caused an injury to Plaintiff, so there is unequivocally no injury that resulted from this alleged "fact".

VII. No Evidence, Testimony, or Proof to Support Punitive Damages

Plaintiff has asserted a claim for punitive damages for the alleged "fraudulent" charting on the part of the nursing staff. "Punitive damages are to be awarded only in the most egregious of cases." Hodges v. S. C. Toof & Co., 833 S.W.2d 896, 901 (Tenn. 1992). In proving punitive damages "a plaintiff must prove the defendant's . . . fraudulent . . . conduct by clear and convincing evidence." Id. Evidence is clear and convincing when it leaves "no serious or substantial doubt about the correctness of the conclusions drawn." Id. at 901 n.3. "In other words, the evidence must be such that the truth of the facts asserted be 'highly probable.'" Goff v. Elmo Greer & Sons Constr. Co., 297 S.W.3d 175, 187 (Tenn. 2009) (internal citation omitted).

In this instance, Plaintiff has made a bald allegation of fraud. As discussed, *supra*, a person acts fraudulently when (1) the person intentionally misrepresents an existing, *material* fact or produces a false impression, in order to mislead another, and (2) another **is injured** because of reasonable reliance upon that representation. See First Nat'l Bank v. Brooks Farms, 821 S.W.2d 925, 927 (Tenn. 1991). As previously set forth, Plaintiff has not demonstrated and cannot demonstrate by clear and convincing evidence that the nursing staff acted fraudulently.

Plaintiff has failed to proffer any evidence, let alone clear and convincing evidence, of any fact witness or testifying expert of fraud or that any alleged fraud caused an injury to Ms. Braden. Because Plaintiff has not and cannot carry her burden of proof on this issue, Plaintiff's punitive damages claim should be dismissed on the merits and with prejudice.

Undisputed, Material Facts

Filed with the Motion for Summary Judgment and incorporated herein.

CONCLUSION

For the reasons set forth herein, Methodist submits that there is no genuine issue of material fact in dispute and that summary judgment is appropriate as a matter of law at this stage in this litigation. Specifically, Plaintiff's claims of medical malpractice, fraud, and punitive damages fail as a matter of law as Plaintiff has not proffered and cannot proffer evidence demonstrating: (a) any of the necessary elements of a medical malpractice cause of action as set forth in Tennessee Code Annotated section 29-26-115(a); (b) any of the necessary elements of her fraud claims; and © by clear and convincing evidence that the alleged actions by Methodist's nursing staff were fraudulent. Accordingly, Methodist respectfully requests that the Court grant its motion, dismissing Plaintiff's claims against Methodist, by operation of law pursuant to Rule 56 of the Tennessee Rules of Civil Procedure, and thereby dismissing the claim of Plaintiff against Methodist Medical Center pursuant to Rule 54 of the Tennessee Rules of Civil Procedure.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of this pleading or document has been served upon counsel in interest in this case by delivering a true and exact copy of said pleading or document to the office of said counsel or by placing a true and exact copy of said pleading or document in the United States Mail, addressed to said counsel, with sufficient postage thereupon to carry the same to its destination.

This 23rd day of June, 2018.

ARNETT, DRAPER AND HAGOOD, LLP

By _____

IN THE CIRCUIT COURT FOR ANDERSON COUNTY, TENNESSEE

PAMELA BRADEN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. B5LA0017**
	)	
METHODIST MEDICAL CENTER OF OAK RIDGE, SCOTT PETERS, M.D., OBSTETRIC & GYNECOLOGY ASSOCIATES OF OAK RIDGE, P.C., JOSEPH METCALF, IV, M.D. and OAK RIDGE SURGEONS, P.C.	)	**12 PERSON JURY DEMAND**
	)	
Defendants.	)	

STATEMENT OF MATERIAL FACTS SUBMITTED BY METHODIST MEDICAL CENTER PURSUANT TO MOTION FOR SUMMARY JUDGMENT

Defendant, Methodist Medical Center of Oak Ridge, pursuant to Rule 56 of the Tennessee Rules of Civil Procedure submits the following Statement of Material Facts as to which the moving party contends there is no genuine issue for trial:

1. Plaintiff has not presented any evidence or opinion and there is no evidence or opinion with a reasonable degree of medical certainty that any physician involved in the care and treatment of Plaintiff at Methodist Medical Center during the hospitalization of September-November 2012 would have changed any treatment or done anything different from what was done if the physician had knowledge of any alleged nursing violations of any standard of care or if the nursing staff had acted as Plaintiff alleges the standard of care required. See Depositions of Plaintiff's experts and Ms. Braden's Treating Physicians.

2. Plaintiff has not presented any evidence or opinion and there is no evidence or opinion with a reasonable degree of medical certainty that any alleged violations of the standard of care by

any hospital staff caused an injury to Plaintiff that would not have otherwise occurred. See Plaintiff and Defendant Expert Depositions.

3. No action or failure to act by the nursing staff caused an injury to Ms. Braden. Plaintiff Expert Taylor Depo., pp. 245:17-246:3.

4. The latest that Ms. Braden could have been returned to the operating room to repair her bowel leak and avoid the need for a small bowel resection with an ileostomy was September 10th. Surgery at anytime after the 10th (i.e., the 11th, 12th, or 13th) would have resulted in the same outcome that occurred during the surgery on September 13, 2012. As such, any alleged nursing standard of care violations on September 11, 12, or 13th could not and did not cause any harm to Plaintiff which would not have otherwise occurred. Taylor Depo., pp. 229-230.

5. Plaintiff Expert Dr. Silverman testified that the latest Ms. Braden could have been returned to the operating room was September 9th. Silverman 2nd Depo., pp. 143. At any time thereafter, the same outcome would have occurred. Silverman 2nd Depo., pp. 143. As such, any alleged nursing standard of care violations on September 10, 11, 12, or 13th could not and did not cause any harm to Plaintiff which would not have otherwise occurred. Silverman 2nd Depo., pp. 143.

6. There is no evidence, to a reasonable degree of medical certainty, that any alleged inaccuracy in the medication administration record (MAR) caused an injury to Plaintiff that would not have otherwise occurred. Silverman 2nd Depo., pp. 129-130.

7. Plaintiff Expert Dr. Taylor testified that no alleged medication error by hospital staff caused an injury to Plaintiff. Taylor Depo., pp. 212.

8. Plaintiff Expert Dr. Taylor testified that nothing the nurses did or failed to do caused any injury to Plaintiff that would not have otherwise occurred. Taylor Depo., pp. 245-246.

9. Plaintiff Expert Dr. Swartz could not testify to a reasonable degree of medical certainty that even if the treating physicians had been notified of nursing observations, vitals, or other information that to a reasonable degree of medical certainty the doctors would have taken any action or ordered any scan or done anything different. Swartz Depo., pp. 224-225; 243-248.

10. The alleged missing respiration rate on September 10, 2012 did not affect Ms. Braden's outcome. Swartz Depo., pp. 223.

11. The alleged failures in charting vital signs and pain scales did not, with a reasonable degree of medical certainty, cause an injury to Ms. Braden. Swartz Depo., pp. 223-225.

12. There is no evidence or proof that Plaintiff's treating physicians did not have access to the medical administration record contained in the electronic medical record. Swartz Depo., pp. 248-249.

13. There is no evidence or proof that Plaintiff's treating physicians were not aware of Ms. Braden's vital signs and did not have access to vital signs contained in the electronic medical record. Swartz Depo., pp. 248.

14. There is no evidence or proof that Plaintiff's treating physicians did not have access to Plaintiff's pain levels. Swartz Depo., pp. 248.

15. Regarding Plaintiff Expert Dr. Swartz' standard of care opinion relating to the medical administration record, none of Plaintiff's treating physicians testified that they were unable to determine the amount of morphine administered to Plaintiff or that the amount of morphine administered caused any harm to Plaintiff that would not have otherwise occurred. Swartz Depo., pp. 248-250.

16. Regarding Plaintiff Expert Dr. Swartz' standard of care opinion that the nursing staff should have reported fevers to Ms. Braden's attending physicians, Dr. Swartz could not state to a reasonable degree of medical certainty that reporting fevers would have made a difference in Ms. Braden's outcome. Swartz Depo., pp. 223.

17. Plaintiff Expert Dr. Silverman could not state to a reasonable degree of medical certainty that his nursing standard of care opinion that the MAR was inaccurate caused an injury to Ms. Braden that would not have otherwise occurred. Silverman 2nd Depo., pp. 129-130.

18. The only basis upon which Plaintiff Expert Dr. Swartz claims to be qualified to testify to the nursing standard of care is the fact that he works with nurses. Swartz Depo., pp. 216:1-10.

19. Plaintiff Expert Dr. Swartz did not know who set the standard of care for nurses in Tennessee. Swartz Depo., pp. 218.

20. Plaintiff Expert Dr. Swartz speculated that the Joint Commission and the American Nursing Association set the nursing standard of care in Tennessee but could not testify as to what those entities say regarding the nursing standard of care. Swartz Depo., pp. 218.

21. Plaintiff Expert Dr. Silverman testified that nurses can make medical diagnoses. Silverman, 2nd Depo., pp. 86-87.

22. Plaintiff Expert Dr. Silverman testified that a nurse can establish a plan of care. Silverman, 2nd Depo., pp. 87-88.

23. Plaintiff Expert Dr. Silverman does not know whether nurses at Methodist can order labs, radiology studies, or medications. Silverman, 2nd Depo., pp. 89-90.

24. Nurses cannot diagnose bowel leak; cannot order labs, cannot order radiology studies; cannot establish a medical plan of care. Tenn. Code Anno. § § 63-7-103(b); see Workman Depo., pp. 232-33.

25. Plaintiff expert Mark Taylor testified that he does not deal with any Board of Nursing in Alabama (his residence); he assumes the State Nursing Board in Tennessee sets the standard of care for nursing; he has never dealt with the Tennessee Board of Nursing; he has never studied the guidelines of any Nursing Board in any state. Taylor Depo., pp. 188.

26. Plaintiff expert Mark Taylor testified: "I'm not aware of if there is any defined standard for nurses providing care postoperatively in Tennessee." Taylor Depo., pp. 189.

27. Plaintiff expert Mark Taylor testified that he practices at a VA hospital in Montgomery County, Alabama and there are three private hospitals in that same county, he has never practiced in any of the private hospitals, and "I'm assuming its [standard of care for nurses] similar to the standards in other facilities nationally, but I can't speak to the specifics of what they prescribe either in their hospital documents or what the state provides as far as the standard." He is making assumptions but does not really know the standard of care. Taylor Depo., pp. 191-192.

28. Plaintiff expert Mark Taylor did not review the chart to actually determine which physician or physicians may have ordered particular medications. He simply saw that some of the physicians testified that the pharmacy documents showed them as the ordering physician when they did not order that particular medication. Taylor Depo., pp. 212.

29. Plaintiff Expert Dr. Taylor further testified:

> Q: And also, would you agree that you were not going to testify that because of this perceived error in assigning a medication to a particular doctor that any harm occurred to Ms. Braden, are you?
> A: I agree with what you said. Taylor Depo., pp. 212.

30. Plaintiff Expert Dr. Aris testified that he will not offer nursing standard of care or causation opinions at trial. Aris Depo., pp. 177:18-178:1.

31. Plaintiff Expert Dr. Workman testified before this Court that he was not going to testify at trial. March 23, 2018 Hearing transcript.

32. Plaintiff Expert Dr. Swartz testified that his only nursing standard of care criticisms were that: (1) the nurses failed to notify doctors about fevers; (2) there was improper charting of morphine; (3) vital signs were not taken every four (4) hours as ordered; (4) there were incomplete vital signs recorded. Swartz Depo., pp. 194-196.

33. The purported "supplemental disclosure" for Plaintiff Expert Dr. Swartz contained criticisms that were not supported by the facts. Swartz Depo., pp. 237-240.

34. At trial, Plaintiff Expert Dr. Swartz will only testify to the opinions offered during his deposition. Swartz Depo., pp. 197.

35. Plaintiff Expert Dr. Silverman testified that his only nursing standard of care criticism were that: (1) The MAR was inaccurate; (2) There is a discrepancy between what was ordered and what was actually charted with the vital signs; (3) There were signs and symptoms not reported to the physician; (4) there **may be** some cutting and pasting in regards to some of the vital signs; and (5) there "**seemed to be** some discrepancies with the mental status" and "discrepancies with the lung exams." Silverman, 1st Depo., pp 151-152; Silverman 2nd Depo., pp. 111-112.

36. All of Plaintiff Expert Dr. Silverman's standard of care opinions were discussed during his deposition. Silverman, 1st Depo., pp 151-152; Silverman 2nd Depo., pp. 111-112, 130-131, 138-139, 147.

37. It is the standard of care for nurses to count respiration rates and heart rates for 15 seconds and multiply by 4 or for 30 seconds and multiply by 2 in order to get a one minute interval for respirations and heart rate. Aris Depo., pp. 179-181.

38. Dr. Metcalf was aware and expected the nurses to count respirations for fifteen seconds and multiply by 4. Metcalf Depo., pp. 106.

39. The Methodist nursing staff used a Dynamap machine to electronically calculate Ms. Braden's heart rate/pulse and blood pressure. CNA Duggar Depo., pp. 13; Byrum Depo., pp. 23.

40. Ms. Braden's nurse did call Dr. Metcalf on September 7, 2012 to report the 84/60 blood pressure. Metcalf Depo., pp 214-217; Medical Record, pp. 205.

41. No treating physician of Ms. Braden ordered the nursing staff to take Ms. Braden's weight between September 6-13, 2012. See Medical Record.

42. Dr. Metcalf ordered pulse, blood pressure, respirations and temperature to be taken every four hours. Medical Record, pp. 202.

43. Ms. Braden's pulse, blood pressure, respirations, and temperature were taken and recorded at 5:41 a.m. and again at 7:30 a.m. on September 7th. Medical Record, pp. 2066, 2067.

44. Plaintiff Expert Dr. Swartz testified that taking vital signs at 5:41, 6:43, and 7:30 a.m. on September 7th was more than was ordered by Dr. Metcalf and demonstrated "good nursing". Swartz Depo., pp. 242.

45. No Plaintiff expert testified to a reasonable degree of medical certainty that any nurse violated the applicable standard of care regarding respiratory, cardiovascular/gastrointestinal/edema/ mental status assessments. See Plaintiff Expert Depositions.

46. Regarding his nursing standard of care opinion that there was a discrepancy between what was ordered and what was actually charted with the vital signs Plaintiff Expert Dr. Silverman testified that regarding the pulse, respirations, blood pressure, and temperature, those vital signs were taken every 4 hours as ordered by Ms. Braden's attending physician. Silverman 2nd Depo., pp. 133:1-15.

47. Plaintiff Expert Dr. Silverman could not state to a reasonable degree of medical certainty that charting a pain scale every four hours would have changed Ms. Braden's outcome. Silverman 2nd Depo., pp. 133-135.

48. Regarding his standard of care opinion that the nurses failed to report signs and symptoms to Ms. Braden's treating physicians, Plaintiff Expert Dr. Silverman could not testify to a reasonable degree of medical certainty that failing to call the doctors caused an injury to Ms. Braden that would not have otherwise occurred. Silverman, 2nd Depo, pp. 158.

49. In Dr. Workman's disclosure, it stated that he is familiar with the nursing standard of care because he practices in Knoxville and because of "the frequency [that he] reviews medical records from Methodist". See Exhibit 1, Workman disclosure, ¶ 2.

50. In his first deposition, Dr. Workman stated that there was no other basis (other than what was stated in his disclosure) that qualified him to testify to the standard of care. Workman Depo., pp. 42:7-13.

51. In his supplemental deposition, he was specifically asked how he was qualified to testify to the nursing standard of care. He testified:

> A. All doctors are experts on nursing care because they've **worked with** nurses throughout their career. I am not a nurse. To ask me those questions is more harassment because you have enough sense, unless you are senile, to know that a doctor is not the same thing as a nurse. Maybe you're getting senile.
> Workman 2nd Depo., pp. 230:25-231:6.

52. Dr. Workman could not identify any nurse who testified that vital signs were "copied and pasted" or that any vital signs were faked. Dr. Workman 2nd Depo., pp. 300-303.

53. Dr. Workman testified that "No one does vitals by machine. The nurses do vitals on patients." Dr. Workman 2nd Depo., pp. 305.

54. Dr. Workman provided no literature or data to support his opinion that the vital signs recorded were statistically impossible, and failed to demonstrate any expertise in statistical analysis or a post-operative patient's expected vital signs. See Workman depositions.

55. Dr. Workman testified that he last used a PCA pump, in a hospital setting, at UT "more than 10 years ago." Dr. Workman 2nd Depo., pp. 258.

56. Upon a review of the physician orders, Dr. Workman agreed that the physician orders correctly identify the ordering physician for Heparin, magnesium, and potassium, and that a "soft stop" document in the chart is not a physician order. Dr. Workman 2nd Depo., pp. 286-287.

57. Dr. Workman testified that none of the journals that he reads "relate to this case." Dr. Workman 2nd Depo., pp. 60-61.

58. The Court has ruled that Dr. Workman is not permitted to testify to the issue of causation. Order on Defendants' Motion to Exclude Dr. Workman.

59. The Court has ruled that Dr. Workman is prohibited from testifying that any alleged inaccurate or missing nursing documentation prevented the defendant physicians from making informed decisions. Order on Defendants' Motion to Exclude Dr. Workman.

60. The Court has ruled that Dr. Workman is prohibited from testifying as to what any physician should or would have taken if made aware of pain scales and/or pain assessments. Order on Defendants' Motion to Exclude Dr. Workman.

61. The Court has ruled that Dr. Workman is prohibited from testifying on the issue of failing to investigate a pain spike after having been given Tylenol. Order on Defendants' Motion to Exclude Dr. Workman.

62. The Court has ruled that Dr. Workman is prohibited from testifying on the issue of the existence or absence of bowel sounds after surgery. Order on Defendants' Motion to Exclude Dr. Workman.

63. The Court has ruled that Dr. Workman is prohibited from testifying on the issue of whether it is a violation of the standard of care to "ignore a patient's claim that her legs feel dead." Order on Defendants' Motion to Exclude Dr. Workman.

64. The Court has ruled that Dr. Workman is prohibited from testifying on any issue regarding the pathology slides or histopathology report. Order on Defendants' Motion to Exclude Dr. Workman.

65. The Court has ruled that Dr. Workman is prohibited from testifying on the failure to notify the doctor of a worsening condition (unless related to vital signs or pain). Order on Defendants' Motion to Exclude Dr. Workman.

66. The Court has ruled that Dr. Workman is prohibited from testifying on any issue regarding the presence of tachycardia after the administration of a beta blocker. Order on Defendants' Motion to Exclude Dr. Workman.

67. The Court has ruled that Dr. Workman is prohibited from testifying on any issue regarding the presence of or documentation of abdominal distension. Order on Defendants' Motion to Exclude Dr. Workman.

68. Dr. Metcalf testified that the Methodist nurses provided "excellent care" to Ms. Braden. Metcalf Depo., pp. 279.

69. Dr. Metcalf testified that the Methodist nurses did not violate the nursing standard of care in the care and treatment of Ms. Braden. Metcalf Depo., pp. 279.

70. The treating physicians for Plaintiff had access to the electronic medical record and had access to all information needed to perform a daily assessment of Plaintiff. Metcalf Depo., pp. 281-282.

71. Dr. Metcalf's clinical judgment has never been affected by the failure of the nursing staff to take vital signs every four hours as ordered. Metcalf Depo., pp. 105.

72. Dr. Metcalf testified that he would do nothing different in this case if he had to do it all over again and that he wouldn't do anything different with the nursing staff. Metcalf Depo., pp. 208.

73. Dr. Peters had available any portion of the medical chart that he needed or wanted to review during the time of Ms. Braden's hospitalization at Methodist. Peters Depo., pp. 272, 276.

74. With regard to nursing documentation, Dr. Long, during the time he was seeing Ms. Braden, he relied on the most important thing, which was his own clinical evaluation at the bedside of the patient; he would rely upon his own clinical assessment and when possible he might talk to the nurses who were caring for Ms. Braden. Long Depo., pp. 17, attached as **Exhibit 16**.

75. Only considering Ms. Braden's medical record, including a review of the physician's op notes, physician progress notes, the vital signs, MAR, and laboratory and radiology results,

Plaintiff's experts were able to diagnose Ms. Braden bowel leak and pinpoint the date upon when the leak was present. See generally, Depositions of Plaintiff's experts; Silverman 2nd Depo., pp. 66-67.

76. Plaintiff Experts Drs. Swartz, Aris, and Taylor did not offer any testimony that the nursing staff intentionally misrepresented any nursing assessment or documentation in the electronic medical record. See Swartz, Aris, Taylor Depositions.

77. Plaintiff Expert Dr. Silverman could not testify to a reasonable degree of medical certainty that the nursing staff falsified or faked vital signs. Silverman, 2nd Depo., pp. 135.

78. There is no evidence or opinions by any fact or expert witness stating with a reasonable degree of medical certainty that the vital signs recorded in the hospital chart are not true and accurate. See Plaintiff and Defendant Expert Depositions.

79. No expert for Plaintiff has been disclosed as a statistical expert on the probabilities of repetitive vital sign values. Plaintiff Expert Depositions.

80. Plaintiff has failed to set forth any qualified expert proof to be presented at trial that any vital signs having the same values on multiple occasions statistically could not be the same. Plaintiff Expert Depositions.

81. None of Ms. Braden's nurses testified that they "cut and pasted" vital signs. See Nursing Depositions.

82. The electronic medical record software does not allow nurses to cut and paste vital signs. Horizon Expert Documentation Clinical Manual, pp. 31-33.

83. The "physician orders" section of the medical record correctly identifies the ordering physician for the medications potassium, magnesium, and Heparin. Medical Record, pp. 202, 210, 213.

84. As Heparin, Magnesium, and Potassium were ordered by Plaintiff's attending physician and appropriately administered, the "soft stop" records did not cause an injury to Ms. Braden. See Plaintiff and Defendant Depositions.

85. There is no evidence or opinions by any expert witness that the nursing assessments of skin color caused an injury to Ms. Braden that would not have otherwise occurred. See Plaintiff Expert Depositions.

86. There is no evidence that any nurse intentionally misrepresented Ms. Braden's skin color or that any of Ms. Braden's physician's relied upon the nursing assessments of Ms. Braden's skin color to the detriment of Ms. Braden. See Plaintiff Expert Depositions.

87. There is no evidence or opinions that the failure to record a pain scale every 4 hours caused an injury to Ms. Braden that would have otherwise occurred. See Plaintiff Expert Depositions.

88. There is no evidence or opinions that any nurse intentionally misrepresented Ms. Braden's pain scales. See Plaintiff Expert Depositions.

89. There is no evidence or opinions that the nursing assessment of "inappropriate" caused an injury to Ms. Braden that would not have otherwise occurred. See Plaintiff Expert Depositions.

90. There is no evidence or opinions that the nursing documentation in the MAR caused an injury to Plaintiff. See Plaintiff Expert Depositions.

91. Plaintiff was on a PCA morphine pump which permitted her to receive a maximum dosage 20 mg of Morphine every 4 hours. Metcalf Depo., pp. 225. At 20 mg a day, a total 24-hour maximum dosage would be 120 mg. 20mg/4hr * 6 = 120 mg.

92. The amount of Morphine Plaintiff was receiving on a daily basis was capable of being determined. Silverman Depo., pp. 116; Defendant Expert, Nurse Jones, Depo., pp. 204, attached as **Exhibit 17**.

93. The maximum dosage of Morphine Ms. Braden received by Ms. Braden was 55.5 mg over a 28 hour period. See Medical Record, pp. 614, 615 (9/8, 20:32 - 9/10, 00:49).

1. The allegations in the Second Amended Complaint) or any Amended Complaint that is permitted) regarding wound care are not supported by any expert medical evidence or proof in compliance with Tennessee Code Annotated section 29-26-115. See Plaintiff and Defendant Expert Depositions.

94. No Plaintiff expert was disclosed on the issue of wound care and no Plaintiff expert provided any testimony regarding wound care. See Plaintiff Expert Disclosures.

95. Plaintiff has failed to offer any expert medical evidence or proof, in compliance with Tennessee Code Annotated section 29-26-115, demonstrating the applicable nursing standard of care regarding wound care or violation of same. See Plaintiff and Defendant Expert Depositions.

96. Plaintiff has failed to offer expert medical evidence or proof, in compliance with Tennessee Code Annotated section 29-26-115, that any alleged deviation in the nursing standard of care relating to wound care caused an injury to Ms. Braden that would not have otherwise occurred. See Plaintiff and Defendant Expert Depositions.

97. Plaintiff has not presented evidence and there is no evidence which is clear and convincing of egregious conduct by hospital staff which demonstrates harm or injury to Plaintiff that would not have otherwise occurred. See Plaintiff Expert Depositions.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of this pleading or document has been served upon counsel in interest in this case by delivering a true and exact copy of said pleading or document to the office of said counsel or by placing a true and exact copy of said pleading or document in the United States Mail, addressed to said counsel, with sufficient postage thereupon to carry the same to its destination.

This 23rd day of April, 2018.

ARNETT, DRAPER AND HAGOOD, LLP

By _____

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

MARY RIDENOUR, individually, and JACOB RIDENOUR, a minor, by MARY RIDENOUR, his mother and next friend,	
Plaintiffs/Appellants,	**Appeal No. E2014-01408-COA-R3-CV**
v.	
COVENANT HEALTH, RENTENBACH CONSTRUCTORS, INC., and TEG ARCHITECTS, LLC,	**Circuit Court of Anderson County No. B4-LA-0016**
Defendants/Appellees.	

BRIEF OF APPELLEE, COVENANT HEALTH

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ORAL ARGUMENT REQUESTED

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the Trial Court correctly granted Covenant Health's Motion for Summary Judgment, finding as a matter of law that: (1) Plaintiffs' claims against Covenant Health were time-barred by the applicable statute of limitations, Tenn. Code Ann. § 28-3-202; (2) Covenant Health did not possess, own, or control the radiology imaging facility at issue; (3) Plaintiffs failed to competently plead fraud or wrongful concealment on the part of Covenant Health; and (4) Plaintiffs failed to demonstrate that additional discovery was needed to fully respond to Covenant's Motion for Summary Judgment?

II. Whether the Trial Court, in its discretion, correctly denied Plaintiffs' Motion to Amend Complaint, finding that the Motion was futile?

STATEMENT OF THE CASE

In January 2004, Methodist Medical Center of Oak Ridge (hereinafter "Methodist") entered into a contractual agreement with Rentenbach Constructors, Inc. (hereinafter "Rentenbach") to renovate and expand the hospital known as Methodist Medical Center of Oak Ridge (hereinafter "Methodist Hospital"). (Pl. Resp. to Covenant Undisputed Facts, T.R. V, pp. 621, ¶ 1). As part of the renovations, radiology facilities, including a computerized tomography "CT" scan room (hereinafter "CT Room"), were added in the Emergency Department. It is the Emergency Department CT Room that is the subject of this lawsuit.

The Emergency Department additions, including the CT Room, were completed in February 2006. (Complaint, T.R. I, pp. 4, ¶ 10). On March 23, 2006, Rentenbach provided Methodist with a Certificate of Substantial Completion, certifying that the Emergency

Department was "substantially complete in accordance with the Contract Documents so that the Owner (identified as Methodist on the Certificate) can occupy or utilize the Work for its intended use." (Certificate of Substantial Completion, T.R. III, pp. 388). On April 4, 2006, the City of Oak Ridge, Codes Enforcement Division, issued a "Use Permit" to Methodist for the Methodist Hospital "Emergency Room Area", confirming that the Emergency Room was properly inspected and permitted for use as an emergency room. (Use Permit, T.R. II, pp. 199-201).

On March 28, 2006, Methodist, as owner and possessor of the CT Room, registered in accordance with Tennessee Code Annotated Title 68, Chapter 202 the CT Room radiology equipment with the Tennessee Department of Environment and Conservation, Division of Radiological Health, (Registration of X-Ray Producing Equipment, T.R. III, pp. 329) (T.R. V, pp. 621, ¶ 4), and reported to the U.S. Department of Health and Human Services, Food and Drug Administration division, that the CT Room radiology equipment was fully assembled, (Report of Assembly, T.R. III, pp. 328). Also on March 28, 2006, the Tennessee Department of Environment and Conservation, Division of Radiological Health, certified to Methodist that the CT Room was surveyed and found to have "adequate shielding." (Computerized Tomography and Bone Densitometer X-ray Report Form, T.R. III, pp. 330). Again in 2007, 2008, 2009, 2010, 2011, 2012, and 2013, Methodist was provided with certification that the CT Room was found to have "adequate shielding." (X-ray Report Forms, T.R. III, pp. 330-338).[1]

From March 2006 until December 2013, the CT Room was in continuous use for its intended purpose. (T.R. V, pp. 737). In December 2013, however, Methodist discovered for the first time that a small portion of one of the exterior walls of the CT room did not have the lead

[1] Importantly, none of the documents provided from any local, state, or federal agency identified Covenant Health as the owner, operator, possessor, controller, or maintainer of Methodist Hospital, the CT Room, or the CT Room radiology equipment.

shielding that was supposed to have been installed at the time of construction. (T.R. II, pp. 277, T.R. V, pp. 623, ¶ 1). The wall was timely repaired that same month. Approximately one month later, Plaintiffs filed the pending litigation alleging radiation exposure, but Plaintiffs' attorney admitted that no known injury had occurred. (T.R. I, pp. 1; T.R. V, pp. 602, transcript pp. 4-5).

At all times material, Mary Ridenour was an employee of Methodist, working in the Methodist Hospital Radiology Department. (T.R. V, pp. 623, ¶ 6).

PROCEDURAL HISTORY

On January 13, 2014, Plaintiffs filed a construction law cause of action against numerous defendants, including Covenant Health, for alleged negligence in the 2005-2006 design, construction, and inspection of the Emergency Department CT Room. (T.R. I, pp. 1-13). In the Complaint, Plaintiffs averred that the Methodist Hospital Emergency Department, including the CT room, "was substantially completed and opened in February 2006", **eight** years before the Complaint was filed. (T.R. I, pp. 4, ¶ 10). Even though Ms. Ridenour worked at Methodist Hospital (T.R. I, pp. 3, ¶ 7) and presumably knew of Methodist's ownership of Methodist Hospital, Methodist was not named as a defendant in the Complaint. Instead of naming Methodist as a party to the lawsuit, Plaintiffs sued Covenant Health in a veiled attempt to avoid Tennessee's workers' compensation laws.

In March 2014, all Defendants filed Answers, denying liability and averring that the claims set forth in Plaintiffs' Complaint were time-barred by the applicable statute of limitations, Tennessee Code Annotated section 28-3-202. (T.R. I, pp. 14-69) (Covenant Health Answer, T.R. I, pp. 70-79) (T.R. I, pp. 80-164).

During the course of discovery[2], in late March Covenant filed a Motion for Summary Judgment. (T.R. II-III, pp. 271-376). Co-Defendants also filed similar motions. (T.R. II, 165-268; T.R. III-IV, pp. 377-553). In its Motion, Covenant asserted that it was entitled to summary judgment because: (1) Covenant did not own, operate, control, or possess the CT Room; (2) any claims for negligent design, construction, or inspection were time-barred by the applicable statute of limitations; and (3) because Ms. Ridenour was an employee of Methodist at the times relevant, her exclusive remedy was under the provisions of the Tennessee Workers Compensation Act. (T.R. II, pp. 271-276). Attached to Covenant's Motion were an Owner-Construction Manager Agreement between Methodist and Rentenbach, the Affidavit of the Chief Administrative Officer at Methodist Hospital (wherein he testified that Methodist employed Ms. Ridenour and Methodist owned, operated, possessed, and controlled the CT Room), the Deed and Bill of Sale for Methodist Hospital, the Division of Radiological Health licensee documentation obtained by Methodist at the time of completion of the CT Room in April 2006, the Division of Radiological Health inspection reports for 2006-2014, and relevant legal authority. (T.R. II-III, pp. 294-372). Defendants' Motions were noticed for hearing for May 19, 2014. (See T.R. IV, pp. 557).

Subsequently, Plaintiffs filed Motions to Quash Defendants' Notices of Hearing on their respective Motions for Summary Judgment. In the Motions, Plaintiffs argued that they needed an opportunity to conduct discovery in order to adequately respond to Defendants' Motions. (T.R. IV, pp. 557-562). Plaintiffs failed to state specifically what additional discovery was

[2] Counsel for Plaintiffs filed 5 similar causes of action against the same three defendants, all causes that are currently before this Court on appeal. Amongst those 5 cases, counsel for Plaintiffs propounded 78 Interrogatories, 28 Requests for Production, and 7 Requests for Admissions. Covenant Health responded to those lengthy Interrogatories, Requests for Production, and Requests for Admission prior to the Court's ruling on Covenant's Motion for Summary Judgment. Because some but not all of the Notices of Service of discovery responses are in the technical record, all Notices are attached as **Appendix A1-A9**.

needed, instead stating "significant discovery [is] still required regarding complex issues of law and factual issues that constitute the basis of the Plaintiffs' claims." (T.R. V, pp. 577, ¶ 4).

Plaintiffs also filed a Rule 15.01 Motion to Amend Complaint, moving the Court to allow them to name Methodist "as owner of the premises in question" as a defendant, "to clarify allegations of willful misconduct by one or all the [sic] Defendants in the form of concealment", and to add an "ultra-hazardous" claim against Defendants. (T.R. IV, pp. 554-556, ¶ 7-9). The Motion did not reference section 20-1-119 or comparative fault in any way.[3] A proposed amended complaint filed with the Motion added Methodist as a party defendant and without any specificity asserted that the actions of Defendants "constitute ultra-hazardous activities". (T.R. IV, pp. 563-575). Additionally, in paragraph 8, Plaintiffs changed the following sentence from "The Defendants' acts of negligence, gross negligence, and willful misconduct with regard to the inadequate . . ." to "The Defendants' acts of negligence, gross negligence, and willful misconduct, including wrongful concealment by one or all Defendants, regarding the inadequate . . . ." (T.R. IV, pp. 565, ¶ 8 (emphasis added)). No additional factual allegations were made to the proposed Amended Complaint.

On April 30, Defendants filed a Joint Response in Opposition to Plaintiffs' Motion to Quash Defendants' Notice of Hearing asserting that Defendants' Motions for Summary Judgment required only the application of law to undisputed fact and therefore additional discovery was not needed to resolve the motions pending before the trial court. (T.R. IV, pp. 580-592). Specifically, Defendants argued that their Motions were predicated on the four-year construction statute of repose codified in Tennessee Code Annotated section 28-3-202 and that Plaintiffs admitted in the Complaint that the CT Room was "substantially completed and opened

[3] Plaintiffs had the opportunity to amend their complaint as a matter of right, pursuant to Tennessee Code Annotated section 20-1-119, to add Methodist as a comparative fault tortfeasor but chose not to do so.

in February 2006."[4] (T.R. IV, pp. 581). Additionally, Defendants denied that the exclusions to the four-year statute of repose were applicable, asserting that no Defendant was in possession or control of the premises at issue and denying that Plaintiffs had pled fraud or wrongful concealment of the cause of action. Tenn. Code Ann. § 28-3-205(a-b). Therefore, taking the facts in the light most favorable to Plaintiffs, all Defendants were entitled to summary judgment as a matter of law.

On May 9th, the trial court heard Plaintiffs' Motion to Quash. After reviewing the pleadings and hearing the argument of counsel, the trial court permitted Plaintiffs up to an additional 45 days in which to obtain discovery related to the limited issue relevant in the pending motions for summary judgment - the "date of substantial completion of the project in question . . . as it relates to the statute of repose found at Tenn. Code Ann. § 28-3-202, which has been asserted as a defense by the Defendants in their respective Motions for Summary Judgment."[5] (Order, T.R. IV, pp. 593-594). During the oral argument, the trial court informed counsel for Plaintiffs that there was no allegation of fraud in the Complaint, (T.R. V, pp. 609, transcript pp. 31:20), and stated that Methodist was the owner of the premises at issue, (T.R. V, pp. 606, transcript pp. 21:10-16).

[4] Plaintiffs also averred in the proposed Amended Complaint that the CT Room was "substantially completed and opened in February 2006." (T.R. IV, pp. 566, ¶ 11).

[5] See Tenn. R. Civ. P. 56.07 ("Should it appear [that a party opposing a motion for summary judgment] cannot for reasons stated present . . . facts essential to justify the opposition, the court may . . . order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.").

On or about May 30th, Plaintiffs responded to Defendants' Motions for Summary Judgment.[6] (T.R. V, pp. 620-707). In the Response, Plaintiffs made no allegation that additional facts were needed to respond to Covenant's Motion. (See T.R. V, pp. 620-630). Plaintiffs did, however, set forth additional undisputed facts in opposition to Defendants' Motions. On June 4th, Covenant responded to Plaintiffs' Response and Statement of Additional Facts, arguing that Plaintiffs' "filings and documents do not present any evidence that is sufficient to support the essential elements of the Plaintiffs' claims and that the statute of repose bars all of these claims." (T.R. V, pp. 711). Co-Defendants also filed Reply briefs. (T.R. V-VI, pp. 718-801).

On June 6th, Defendants' Motions for Summary Judgment were heard. After hearing argument of counsel and considering the entire record, the trial court granted Defendants' Motions, holding that because the CT Room was substantially complete no later than March 23, 2006, Plaintiffs' claims were time-barred by the applicable statute of limitations, codified at Tennessee Code Annotated section 28-3-202. (T.R. VI, pp. 803-821). The trial court further held that because Defendants did not control or possess the CT Room and there had been no competent allegation of fraud or wrongful concealment in the Complaint, the exceptions to 28-3-202 that toll the statute of limitations did not apply. (T.R. VI, pp. 818-819). The Court further denied Plaintiffs' Motion to Amend Complaint as futile. (T.R. VI, pp. 804). An Order reflecting the opinions of the trial court was subsequently entered on June 26, 2014. (T.R. VI, pp. 803-804). On or about July 22, 2014, Plaintiffs timely filed their notice of appeal.

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[6] Prior to the summary judgment hearing, Plaintiffs requested and took three depositions: David Newman, Director of Radiology at Methodist (May 21, 2014); Kevin Russell, Vice-President Construction Administration for TEG Architects; and David Whaley, Project Manager for Rentenbach Construction. (T.R. V, pp. 736). Plaintiffs never requested to take the deposition of any Covenant Health employee or any other factual witness identified in Covenant's Responses to Interrogatories and Requests for Production of Documents as having knowledge of the construction of the CT Room. Covenant would have attempted to provide any person requested for a deposition.

STANDARD OF REVIEW

Motion for Summary Judgment

The trial court's decision to grant Covenant's Motion for Summary Judgment presents solely a question of law – the application of Tennessee Code Annotated section 28-3-202 – and, therefore, on appeal, this Court's review is *de novo*. Bain v. Wells, 936 S.W.2d 618, 622 (Tenn. 1997). In determining the application of a statute to the undisputed facts, this Court's duty

> "is to ascertain and give effect to the intention and purpose of the legislature." Jordan v. Knox County, 213 S.W.3d 751, 763 (Tenn. 2007). Whenever possible, this intent is gleaned from the plain and ordinary meaning of the statutory language. Id. A statute should be read naturally and reasonably, presuming that the legislature says what it means and means what it says. See In re Samaria S., 347 S.W.3d 188, 203 (Tenn. Ct. App. 2011). If the language of a statute is clear, we apply the plain meaning of the statute without complicating the task and without giving it "a forced interpretation that would limit or expand the statute's application." Eastman Chem. Co. v. Johnson, 151 S.W.3d 503, 507 (Tenn. 2004).

Id. at *26-27. And, in cases such as this one, where the facts are undisputed, "[s]ummary judgments are appropriate [when the case] can be resolved on the basis of legal issues alone." CAO Holdings, Inc. v. Trost, 333 S.W.3d 73, 81 (Tenn. 2010).

For cases filed after July 1, 2011[7], the summary judgment standard is codified at Tennessee Code Annotated section 20-16-101, which provides,

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

[7] Perdue v. Estate of Jackson, 2013 Tenn. App. LEXIS 386, *8 n.4 (Tenn. Ct. App. June 12, 2013) (attached **Appendix A-100**).

(Emphases added). The standard is explained by this Court in Estate of Boote v. Roberts,

> Section 20–16–101 was enacted to abrogate the summary-judgment standard set forth in Hannan [v. Alltel], which permitted a trial court to grant summary judgment only if the moving party could either (1) affirmatively negate an essential element of the nonmoving party's claim or (2) show that the nonmoving party cannot prove an essential element of the claim at trial. The statute is intended "to return the summary judgment burden-shifting analytical framework to that which existed prior to Hannan, reinstating the '**put up or shut up' standard**."

2013 Tenn. App. LEXIS 222, *25, n.6 (Tenn. Ct. App. Mar. 28, 2013) (internal citation omitted) (emphasis added) (attached **Appendix A-22**).

Motion to Amend Complaint

This Court reviews a trial court's ruling on a motion to amend under an abuse of discretion standard. State v. McCrary, 2006 Tenn. App. LEXIS 459 at * 6 (Tenn. Ct. App. July 6, 2006) (attached **Appendix A-136**) (citing Merriman v. Smith, 599 S.W.2d 548, 559 (Tenn. Ct. App. 1979)).

> Under the abuse of discretion standard, a trial court's ruling "will be upheld so long as reasonable minds can disagree as to the propriety of the decision made." A trial court abuses its discretion only when it "applies an incorrect legal standard, or reaches a decision which is against logic or reasoning that causes an **injustice** to the party complaining." The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court.

Eldridge v. Eldridge, 42 S.W.3d 82, 85 (Tenn. 2001) (citations omitted) (emphasis added).

Limiting Discovery

This Court reviews a trial court's ruling on discovery decisions under an abuse of discretion standard. Frye v. St. Thomas Health Servs., 227 S.W.3d 595, 600 (Tenn. Ct. App. 2007) (citing Benton v. Snyder, 825 S.W.2d 409, 416 (Tenn. 1992)).

LAW AND ARGUMENT

I. THE TRIAL COURT CORRECTLY GRANTED COVENANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE PLAINTIFFS' CLAIMS WERE TIME-BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS, T.C.A. § 28-3-202.

STATUTE OF LIMITATIONS, 28-3-202

In their Complaint, Plaintiffs allege that all Defendants (including Covenant) were negligent in the "design, construction, and inspection of all, or portions, of the Radiology Rooms and in-department imaging centers located at, and within, the Methodist Medical Center of Oak Ridge".[8] (T.R. I, pp. 3, ¶ 7). As such, Plaintiffs' claims are construction law claims subject to the provisions of Tennessee Code Annotated section 28-3-201 *et seq.*, Limitations on Actions for Defective Improvement of Real Estate. Pursuant to those provisions and their application to the undisputed facts, Plaintiffs' claims were time-barred by the applicable "construction" statute of limitations and repose. That statute, codified at Tennessee Code Annotated section 28-3-202, provides:

> **All actions** to recover damages for any deficiency in **design**, planning, supervision, **observation of construction**, or **construction** of an improvement to real property, . . . for injury to the person or for wrongful death arising out of any such deficiency, shall be brought against any person performing or furnishing the design, planning, supervision, observation of construction, construction of, or land surveying in connection with, such an improvement within **four (4) years** after substantial completion of such an improvement.[9]

(Emphases added).

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[8] Importantly, even though Plaintiffs admitted that Ms. Ridenour was employed as a CT technologist at Methodist Hospital, Plaintiffs did not allege negligent operation or use of the CT radiology equipment during Ms. Ridenour's employment at Methodist Hospital from 2006-2013 and did not name Methodist as a Defendant. Instead, all claims related to the alleged involvement of Covenant, Rentenbach, and TEG Architects in the "design, construction, and inspection" of the CT Room during the construction phase in 2004-2006.

[9] In Appellants/Plaintiffs' Brief, they incorrectly cite subsection -202 to state "within four (4) years after substantial improvement." (Brief, pp. 8).

Section 28-3-201 defines "substantial completion" as

> that degree of completion of a project, improvement, or a specified area or portion thereof (**in accordance with the contract documents**, as modified by any change orders agreed to by the parties) upon attainment of which the owner can **use the same for the purpose for which it was intended**; the date of substantial completion **may be established by written agreement between the contractor and the owner**.

(Emphases added).

Tennessee's appellate courts have explained that section 28-3-202 is a "statute of repose" that bars **all** actions four (4) years after substantial completion, "regardless of when a plaintiff may have reasonably discovered an injury" or damages. Chrisman v. Hill Home Development, Inc., 978 S.W.2d 535, 538 n.5 (Tenn. 1998); see also Watts v. Putman County, 525 S.W.2d 488, 491 (Tenn. 1975); Caldwell v. PBM Properties, 310 S.W.3d 818, 821 (Tenn. Ct. App. 2009). In fact, the Watts Court stated unequivocally that four (4) years is the "outer limit or ceiling" on claims falling under the purview of section 28-3-202 "without regard to the date of discovery." Id. The Watts Court further held that the legislative intent in passing subsection -202 was to "insulate contractors, architects, engineers, and the like from liability for their defective construction or design of improvements to realty where either the occurrence giving rise to the cause of action or the injury happens more than four years after the substantial completion of the improvement." Id. (citing references omitted).

In this case, in their Complaint, Plaintiffs aver that the Emergency Department was "substantially completed and opened in February 2006."[10] (T.R. I, pp. 4, ¶ 10). The undisputed documents provided by Defendants clearly demonstrated that the Emergency Department,

[10] Plaintiffs also averred in the proposed Amended Complaint that the CT Room was "substantially completed and opened in February 2006." (T.R. IV, pp. 566, ¶ 11).

including the CT Room, was being used for its intended purpose no later than March 2006[11], and therefore, taking the facts in the light most favorable to Plaintiffs, the applicable four year statute of limitations expired no later than April 1, 2010, nearly four years before Plaintiffs filed the pending cause of action on January 13, 2014. Accordingly, Plaintiffs were timed-barred from asserting any claim for which relief can be granted relating to the alleged negligent "design, planning, supervision, observation of construction, or construction of an improvement to" the radiology facilities at issue. Tenn. Code Ann. § 28-3-202.

Importantly, and contrary to Appellants/Plaintiffs' argument on appeal, the fact that a defect was discovered and repairs made after the date of substantial completion does not change the date of substantial completion. See e.g., Counts v. Praters, Inc., 392 S.W.3d 80 (Tenn. Ct. App. 2012); Meyer v. Bryson, 891 S.W.2d 223, 225 (Tenn. Ct. App. 1994) (holding that substantial completion occurred when the owner could use the building for its intended purpose, even though defects existed, and to hold otherwise would obliterate the purpose of the statute); Hammonds v. Jones, 1997 Tenn. App. LEXIS 509 (Tenn. Ct. App. July 23, 1997) (attached **Appendix A-62**) (relying on Meyer, the Court held that substantial completion occurred when the owner could use the premises for its intended purpose); Automotive Fin. Servs. v. Azalea, 1996 Tenn. App. LEXIS 647 (Tenn. Ct. App. Oct. 10, 1996) (attached **Appendix A-14**) (holding that substantial completion occurs when the premises can be used for its intended purpose, even if the premises has defects, the subsequent repairs do not affect the date of substantial

[11] All Defendants assert and the trial court held that the date of substantial completion was March 23, 2006. (T.R. VI, pp. 814). See Certificate of Substantial Completion (Mar. 23, 2006), T.R. III, pp. 388; City of Oak Ridge, Codes Enforcement Division "Use Permit" (Apr. 4, 2006), T.R. II, pp. 199-201; Tennessee Department of Environment and Conservation, Division of Radiological Health Registration of X-Ray Producing Equipment (Mar. 28, 2006), T.R. III, pp. 329; F.D.A. Report of Assembly (Mar. 28, 2006), T.R. III, pp. 328; Tennessee Department of Environment and Conservation, Division of Radiological Health Computerized Tomography and Bone Densitometer X-ray Report Form (Mar. 28, 2006), T.R. III, pp. 330.

completion); Conley v. Jim Wright Constr. Co., 1991 Tenn. App. LEXIS 501 (Tenn. Ct. App. June 21, 1991) (attached **Appendix A-41**). As held by this Court in Counts, "plaintiff's allegation that the attempted repairs by defendant would change the date of substantial completion is a conclusion, not accepted by the courts. [The case law] makes clear that the date of substantial completion is determined by the date upon which the improvement can be used for that which it was intended." 392 S.W.3d at 86. In this case, unequivocally, the CT Room had been in use, as intended, since March 2006.[12]

In an attempt to circumvent the applicable statute of repose, Plaintiffs also argue that the CT Room was not defective but instead "incomplete" until the small portion of one wall was repaired in December 2013. In support of this argument, Plaintiffs cite and rely upon Pons v. Harrison, 2008 Tenn. App. LEXIS 400 (Tenn. Ct. App. July 9, 2008) (attached **Appendix A-114**). This case, however, does not support Plaintiffs' argument. In Pons, the plaintiff sued the defendant for breach of contract for failure to complete nearly $100,000 in construction projects (nearly one-third of the project). The defendant argued that the statute of repose in section 28-3-202 barred plaintiff's claims. The Court of Appeals, however, determined that the gravamen of the plaintiff's complaint sounded in "nonfeasance more than malfeasance, or partial performance rather than defective performance" and as such the plaintiff's claim was for breach of contract and not for negligent construction. 2008 Tenn. App. LEXIS at *9. In this instance, clearly the gravamen of Plaintiffs' Complaint (and proposed Amended Complaint) is negligent construction, supervision, and design of the CT Room and not partial performance. (T.R. I, pp. 3, ¶ 4; T.R. IV, pp. 565, ¶ 8). As such, Pons is not applicable.

[12] In fact, had the CT Room not been used for its intended purpose, performing computed tomography scans, Plaintiffs would not have been able to allege radiation exposure as a result of being near the CT Room while CT scans were being performed.

Without dispute, the CT Room was designed, constructed, completed, and put into use for its intended purpose no later than March 2006. As such, Plaintiffs' claims against Covenant for the alleged negligent "design, construction, and inspection" of the CT Room were time-barred by the applicable statute of limitations, codified at Tennessee Code Annotated section 28-3-202.

OWNERSHIP, 28-3-205(A)

On appeal, Plaintiffs aver that the statute of repose, as discussed *supra*, should not apply to Covenant because of an exception to the statute, as set forth in section 28-3-205(a), which states:

> The limitation provided by this part shall not be asserted as a defense by any person in actual possession or the control, as owner, tenant, or otherwise, of such an improvement **at the time** any deficiency in such an improvement constitutes the proximate cause of the injury or death for which it is proposed to bring an action.

(Emphasis added).

"Actual Possession" is defined as "physical occupancy or control over the property" and "[e]xists where the thing is in the immediate occupancy of the party." Black's Law Dictionary, Pocket Ed., pp. 488; 4th Ed. Rev., pp. 1325. "Control" is defined as the "power and authority to manage, direct, superintend, restrict, regulate, direct, govern, administer, or oversee." Black's Law Dictionary, 4th Ed. Rev., pp. 399. In this instance, the undisputed facts presented before the trial court were that Methodist was in the actual possession and control of the Methodist Hospital Emergency Department CT Room at all times when Plaintiffs allegedly could have sustained any potential injury.

Specifically, the Chief Administrative Officer of Methodist Hospital testified that: (1) Methodist was the owner of Methodist Hospital, including the Emergency Department and

radiology facilities at issue, and had been since the re-opening of the Emergency Department in 2006, (T.R. III, pp. 318, ¶ 5); (2) Methodist held the license to own, operate, possess, and control the radiation equipment and CT Room, (T.R. III, pp. 318, ¶ 8); and (3) Covenant did not own, operate, possess, or control Methodist Hospital or the CT Room, (T.R. III, pp. 318, ¶ 7). Additionally, the Deed and Bill of Sale demonstrated Methodist's "physical occupancy", "immediate occupancy", and ownership of Methodist Hospital, (T.R. III, pp.321-327), and licensing and registration documentation from the Tennessee Department of Environment and Conservation, Division of Radiological Health, identified Methodist as the owner and possessor of radiation equipment within the Methodist Hospital Emergency Department CT Room, (T.R. III, pp. 329-338). This evidence was undisputed before the trial court.

On appeal, Plaintiffs appear to argue that there was a disputed question of fact as to whether Covenant owned the premises at issue because the architectural contract for the construction project identified Covenant as the owner. (Appellant Brief, pp. 2). Plaintiffs' argument fails for several reasons.

First, as set forth above, the undisputed facts were that Methodist was in "actual possession and control" of Methodist Hospital and the CT Room. See Tenn. Code Ann. § 28-3-205(a).

Second, the architectural agreement referenced, prepared by co-Defendant TEG Architects, while improperly[13] identifying Covenant Health as the "owner", was signed by Jan McNally, President and Chief Administrative Officer of Methodist Medical Center in 2006, and was for architectural services relating to a construction project at Methodist Hospital, which as

[13] In their Amended Answer, TEG Architects averred that although the contract listed "Covenant Health" as the owner, "TEG sent invoices to 'Methodist Medical Center of Oak Ridge,' which were paid by checks from 'Methodist Medical Center.'" (T.R. I, pp. 57, ¶ 8).

referenced in the Deed and Bill of Sale, is owned by Methodist. (T.R. I, pp. 42, 54). Accordingly, the architectural agreement does not establish a genuine issue of material fact regarding the actual possession and control of the CT Room.

Third, every document, including the Deed and Bill of Sale, the construction agreement with Rentenbach, and the documents from the City of Oak Ridge, State of Tennessee, and U.S. Department of Health and Human Services, identify Methodist as the owner, possessor, and controller of the Methodist Hospital Emergency Department and CT Room. See footnote 11.

Fourth, even if the Court could conclude that Covenant owned Methodist Hospital at the time of construction, nothing in the TEG Architects' contract or any other document or deposition testimony provides any evidence to dispute the affidavit and documentation produced by Covenant in support of their Motion for Summary Judgment that Methodist was in actual possession or control of Methodist Hospital during the times that the alleged injuries occurred. Since the exclusion to the statute of repose only applies to the actual possessor or controller of the premises at the time of injury, see Tenn. Code Ann. § 28-3-205(a), Plaintiffs' claim of Covenant's alleged ownership during the construction phase does not trigger the application of the exclusion because no CT scans were being performed during the construction of the CT Room. It was not until the construction project was completed and the room was properly licensed, certified, registered, and permitted by the appropriate local, state, and federal agencies that Methodist began performing CT scans. See Footnote 11.

Therefore, based upon the above, Tennessee Code Annotated section 28-3-205(a) does not apply to save Plaintiffs' time-barred construction lawsuit. And, for same, the trial court properly and appropriately granted Covenant's Motion for Summary Judgment.

FRAUD OR WRONGFUL CONCEALMENT, 28-3-205(B)

On appeal, Plaintiffs aver that the statute of repose, see *supra*, should not apply to Covenant because of an exception to the statute, as set forth in section 28-3-202(b), which states:

> The limitation hereby provided shall not be available as a defense to any person who shall have been guilty of **fraud** in performing or furnishing the design, planning, supervision, observation of construction, construction of, or land surveying, in connection with such an improvement, or to any person who shall **wrongfully conceal** any such cause of action.

(Emphases added). In this instance, Plaintiffs failed to competently plead fraud or wrongful concealment on the part of Covenant and failed to allege or establish any facts that Covenant fraudulently performed any action in relation to the "design, construction, and inspection" of the CT Room or wrongfully concealed any fraud either by Covenant or any other person or entity.

This Court has held that in order to toll the statute of repose (28-3-202), "plaintiff must allege that 'the cause of action was known to the defendant and fraudulently concealed by him.'" Counts, 392 S.W.3d at 86 (quoting Conley, 1991 Tenn. App. LEXIS 501). Regarding fraud specifically, the Counts Court explained that Tenn. R. Civ. P. 9.02 requires that "in pleadings averring fraud, the circumstances constituting fraud 'shall be stated with particularity." Id. at 86. Regarding wrongful concealment, this Court has held, "[w]here concealment is relied on to toll the statute of limitations it must be evidenced, in the absence of a fiduciary relationship, by some overt act or affirmative representation." Ogles v. C&S Builders, Inc., 1984 Tenn. App. LEXIS 3042, *5-6 (Tenn. Ct. App. Aug. 3, 1984) (attached **Appendix A-95**) (citing Clark v. American National Bank & Trust Co., 531 S.W.2d 563 (Tenn. Ct. App. 1974); Hudson v. Shoulders, 164 Tenn. 70, 45 S.W.2d 1072 (1931)). Here, Plaintiffs failed to plead a claim of fraud or wrongful concealment of any kind, let alone pleading those claims with any "particularity" and proof of "affirmative representation". Id.

On appeal, Plaintiffs argue that they did plead fraud and wrongful concealment in paragraph 16(e) of the Complaint. (T.R. I, pp. 6) ("Defendants falsely or deceptively omitted material facts regarding inadequate, or improper, shielding, in and around the radiology and imaging area to the Plaintiff, Mary Ridenour.") This sole averment, however, does not provide any facts to support a claim for fraud or wrongful concealment, and does not even baldly state fraud in the design, observation of construction, or construction or wrongful concealment of such fraud, which is precisely what the statute requires. As held by this Court in Henry v. Cherokee Constr. & Supply Co., 301 S.W.3d 263, 267 (Tenn. Ct. App. 2009), "[t]he concealment referred to in the statute is not concealment in the original construction, but rather a concealment by defendant of plaintiff's cause of action once it arises." Citing Register v. Goad, 1985 Tenn. App. LEXIS 3104, at *9 (Tenn. Ct. App. Aug. 23, 1985) (attached **Appendix A-120**). Stated differently, if a plaintiff fails to allege that the defendant did anything to conceal the cause of action once it arose, the plaintiff cannot rely upon the wrongful concealment exception to the statute of repose. And, because fraud must be plead with particularity, and this was not done, subsection 28-3-205(b) does not apply in this instance to toll the applicable statute of repose.

Although merely dicta to this analysis, Plaintiffs also failed to create a genuine issue of material fact that Covenant committed any fraudulent act or wrongfully concealed any such fraudulent action.

> Fraudulent concealment has been defined as when a defendant "purposefully engages in conduct intended to conceal the plaintiff's injury from the plaintiff." In interpreting Tennessee Code Annotated section 28-3-205, this Court has held that it is defendant's intentional "concealment of a cause of action" rather than concealment of some problem in construction that will toll the statute.

Counts, 392 S.W.3d at 86-87 (internal citation omitted). To toll the statute of repose based on an allegation of fraudulent concealment, a plaintiff is required to prove the following: (1) that the

defendant took affirmative action to conceal the cause of action or remained silent and failed to disclose material facts despite a duty to do so; (2) the plaintiff could not have discovered the cause of action despite exercising reasonable care and diligence; (3) knowledge on the part of the defendant of the facts giving rise to the cause of action; **and** (4) concealment of material information from the plaintiff. Shadrick v. Coker, 963 S.W.2d 726, 735 (Tenn. 1998) (emphasis added). Here, Plaintiffs made no such allegations or offered any such proof before the trial court. Instead, the undisputed proof was that Covenant did not design, construct, inspect, own, operate, or license Methodist Hospital, the CT Room, and/or the CT Room radiology equipment.

For these reasons, Plaintiffs failed to plead or provide any facts to create a genuine issue of material fact that Covenant committed a fraud or wrongfully concealed such fraud. As such, the trial court properly and appropriately granted Covenant's Motion for Summary Judgment.

LIMITATION OF DISCOVERY

On appeal, Plaintiffs also argue that the trial court erred in limiting discovery to the issue of "the date of substantial completion of the project." (Appellant Brief, pp. 12). Plaintiffs' argument is without merit.

First, Plaintiffs' argument is an incomplete representation of the facts. At the time of the filing of five related lawsuits (which are all currently before the Court), counsel for Plaintiffs served Covenant with 78 interrogatories, 28 requests for production, and 7 requests for admissions.[14] See e.g., T.R. V, pp. 634-635, 648-652; footnote 2. Those discovery requests, which related to matters other than the date of substantial completion of the CT Room, were

[14] So as to circumvent the 30 interrogatory limit set forth in Local Rule 116.03 of the Local Rules of Anderson County Circuit Court, Plaintiffs' counsel filed different sets of interrogatories in the Raby, Phillips, and Gillis matters. See Appendix A1-A9.

answered by Covenant well before Covenant's Motion for Summary Judgment was heard. Those discovery requests inquired into the ownership, possession, and control of Methodist Hospital, what Covenant knew at the time of construction regarding the missing lead-lining, what inspections, certifications, and reports were prepared or obtained at the time of construction regarding the CT room, and when Covenant first learned of the missing lead-lining in the CT Room wall. Id. Additionally, after this lengthy discovery was answered (all of which supported Covenant's argument that Methodist was in actual possession and control of the CT Room) and Covenant's Motion for Summary Judgment was filed, Plaintiffs did not request the deposition of a Covenant employee or representative. Plaintiffs also did not request the deposition of Methodist's Chief Administrative Officer, who provided the affidavit proof that Methodist owned, operated, controlled, and possessed the CT Room. Instead, Plaintiffs took the deposition of Methodist employee, David Newman, Director of Radiology at Methodist Hospital.[15]

Second, Plaintiffs failed to provide the trial court with any specific reason why additional time was needed to take additional discovery. Martin v. Doughtie, 2010 Tenn. App. LEXIS 1, *19 (Tenn. Ct. App. Jan. 4, 2010) (attached **Appendix A-71**) (holding that the affidavit of counsel did not comply with Rule 56.07 because it "did not include any facts essential to justify further discovery."); Frazier v. Brock's Open Air Mkt., 2002 Tenn. App. LEXIS 665, *16 (Tenn. Ct. App. Sept. 17, 2002) (attached **Appendix A-49**) ("Tenn. R. Civ. P. Rule 56.07 presupposes that the opponent of the motion seeking a continuance will set forth facts in an affidavit essential to justify the continuance."). "The party opposing a summary judgment motion that challenges their ability to prove an essential element of their case may seek an extension of time for discovery by submitting an affidavit in accordance with Tennessee Rule of Civil Procedure

[15] During that deposition, Mr. Newman unequivocally testified that the CT Room has been in use for its intended purpose since March 2006. (T.R. V, pp. 737).

56.07." Barnett v. Tenn. Orthopedic Alliance, 391 S.W.3d 74, 79 (Tenn. Ct. App. 2012) (citing Rains v. Bend of the River, 124 S.W.3d 580, 587-88 (Tenn. Ct. App. 2003)). "When a party has submitted a Rule 56.07 affidavit and the trial court refuses to grant a continuance, we review the trial court's decision in the context of the issues being tried and the posture of the case at the time the request is made pursuant to the very deferential abuse of discretion standard." Id. (citing Regions Fin. Corp. v. Marsh USA, Inc., 310 S.W.3d 382, 401 (Tenn. Ct. App. 2009)). In this instance, Plaintiffs' counsel did not provide the trial court with any fact to justify further discovery; Plaintiffs had admitted in their Complaint that the date of substantial completion was in 2006, had not competently alleged fraud or wrongful concealment, and had presented no fact, even a hypothetical possibility, to allow a reasonable trier of fact to conclude that anyone but Methodist owned, operated, possessed, and controlled the CT Room.

Based on the facts before the court, the trial court limited additional discovery to the sole issue of the date of substantial completion and gave Plaintiffs up to an additional 45 days to obtain discovery on this issue. (T.R. V, pp. 612). This limitation was based upon the trial court's findings that Plaintiffs had failed to plead fraud or wrongful concealment in the Complaint, (T.R. V, pp. 609, transcript pp. 31:20), and that Methodist was the owner of the premises at issue, (T.R. V, pp. 606, transcript pp. 21:10-16). Importantly, this limitation did not and has not barred Plaintiffs from seeking a remedy before the proper tribunal against the proper party. See Eldridge, 42 S.W.3d at 85 ("A trial court abuses its discretion only when it 'applies an incorrect legal standard, or reaches a decision which is against logic or reasoning **that causes an injustice to the party complaining**.') (internal citation omitted) (emphasis added). Any time prior to the trial court ruling on Covenant's Motion for Summary Judgment and for several months after the trial court's final Order was entered, Plaintiffs could have sought a legal remedy

against Methodist, and as discussed *infra*, Ms. Ridenour did file on December 16, 2014, and currently has pending, a Request for a Benefit Review Conference with the Tennessee Department of Labor and Workforce Development, Division of Workers' Compensation.

"Discovery disputes address themselves to a trial court's discretion." Johnson v. Nissan N. Am., Inc., 146 S.W.3d 600, 604 (Tenn. Ct. App. 2004) (referenced citations omitted). Under the abuse of discretion standard, this Court should refrain from second-guessing the trial court, White v. Vanderbilt Univ., 21 S.W.3d 215, 223 (Tenn. Ct. App. 1999), or from substituting this Court's discretion for the trial court's discretion, Myint v. Allstate Ins. Co., 970 S.W.2d 920, 927 (Tenn. 1998); State ex rel. Vaughn v. Kaatrude, 21 S.W.3d 244, 248 (Tenn. Ct. App. 2000). In determining whether the trial court abused its discretion, this Court should review the trial court's underlying factual findings using the preponderance of the evidence standard set forth in Tenn. R. App. P. 13(d). Brown v. Birman Managed Care, Inc., 42 S.W.3d 62, 66 (Tenn. 2001).

"A typical analysis [in determining whether to limit discovery] involves whether the discovery is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party. Johnson, 146 S.W.3d at 605. As discussed *supra*, the undisputed facts were that Plaintiffs failed to plead fraud or wrongful concealment and clearly Methodist was in actual possession and control of Methodist Hospital. Therefore, the only relevant issue to be resolved prior to the trial court ruling on Defendants' Motions for Summary Judgments was the only fact relevant to Defendants' defense to liability - the date of substantial completion of the CT Room.

Given the undisputed facts before the trial court, the affirmative defense of the construction statute of repose (T.C.A. § 28-3-202), and the posture of the case, the trial court

appropriately and within its discretion limited the time in which Plaintiffs could take additional discovery in order to respond to all Defendants' Motions for Summary Judgment.

II. THE TRIAL COURT CORRECTLY DENIED PLAINTIFFS' MOTION TO AMEND COMPLAINT BECAUSE PLAINTIFFS' MOTION WAS FUTILE.

On appeal, Plaintiffs aver that the trial court erred in denying their motion to amend[16] to add Methodist as a defendant. (Appellant Brief, pp. 14). For the reasons set forth below, Plaintiffs' argument is without merit.

Tennessee Rule of Civil Procedure 15.01 provides:

> A party may amend the party's pleadings once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been set for trial, the party may so amend it at any time within 15 days after it is served. Otherwise a party may amend the party's pleadings only by written consent of the adverse party or by leave of court; and leave shall be freely given when justice so requires.

As this Court has held:

> The rule means precisely what it says, that "leave shall be freely given when justice so requires." Branch v. Warren, 527 S.W.2d 89, 92 (Tenn. 1975) (quoting Tenn. R. Civ. P. 15.01). The rule, however, does not state that "leave shall be given," it states that "leave shall be freely given." See Tenn. R. Civ. P. 15.01 (emphasis added). Moreover, once a responsive pleading has been filed, the party's entitlement to amend as a matter of right, without leave of the court or consent of the adverse party, is terminated. Keweenaw Bay Indian Cmty. v. State of Michigan, 11 F.3d 1341, 1348 (6th Cir. 1993). Accordingly, after a responsive pleading is filed, a party is only entitled to amend a pleading with leave of court, which may be granted or denied by the trial court in its discretion. Id.; Tenn. R. Civ. P. 15.

[16] In their brief on appeal, Plaintiffs seem to alternatively allege that Plaintiffs did not need leave of the trial court to amend the Complaint to add Methodist as a defendant pursuant to Tennessee Code Annotated section 20-1-119. While an accurate statement of the law, Plaintiffs did not file in the trial court a Motion to Amend pursuant to section 20-1-119. Nowhere in Plaintiffs' Motion to Amend is "20-1-119" or "comparative fault tortfeasor" referenced. Additionally, Plaintiffs' proposed Amended Complaint does more than just add Methodist as a defendant. It also proposed a new claim against Defendants for "ultra-hazardous activities" and minimally changed certain averments. Thus, Tennessee Code Annotated section 20-1-119 is not applicable in this case.

Waters v. Coker, 2008 Tenn. App. LEXIS 511, at *9-10 (Tenn. Ct. App. Aug. 28, 2008) (attached **Appendix A-153**). Factors the trial court, within its discretion, should consider when deciding whether to allow amendments to a complaint include "[u]ndue delay in filing[17]; lack of notice to the opposing party; bad faith by the moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, and futility of amendment." Merriman v. Smith, 599 S.W.2d 548, 559 (Tenn. Ct. App. 1979). "The futility of an amendment is clear when granting it would prolong the litigation, but almost certainly not lead to a different ultimate result." Welch v. Thuan, 882 S.W.2d 792, 793 (Tenn. Ct. App. 1994). In this instance, Plaintiffs' Motion was futile.

First, the "exclusive remedy" provisions set forth in the Tennessee Workers' Compensation Act ("Act") serve as a bar to common law tort claims. Malkiewicz v. R.R. Donnelley & Sons Co., 794 S.W.2d 728, 728 (Tenn. 1990) ("Under the 'exclusive remedy' provisions of the Tennessee Workers' Compensation Law, an employee cannot pursue a common-law tort action against an employer who has exclusivity provisions."). As such, Ms. Ridenour's sole and exclusive remedy for any alleged injury she sustained while working at Methodist is pursuant to the Act. Because the Act requires that a benefit review conference ("BRC") process must be exhausted before a workers' compensation action can be filed in court, Tenn. Code Ann. §§ 50-6-203(a)(1), 50-6-225(a)(1), and 50-6-225(a)(2)(A) (2014), the trial court could not acquire subject matter jurisdiction over any such workers' compensation claim until the administrative process was completed. S. Cellulose Prod., Inc. v. Defriese, 2009 Tenn. LEXIS 11, at *6 (Tenn. Workers' Comp. Panel Jan. 22, 2009) (attached **Appendix A-127**).

[17] Although not specifically alleged before the trial court, Plaintiffs were fully aware and apprised of Methodist's ownership of Methodist Hospital as Ms. Ridenour was an employee of Methodist. Plaintiffs purposefully delayed filing a lawsuit against Methodist in a veiled attempt to avoid the workers' compensation statutes.

Accordingly, allowing Plaintiffs to amend the Complaint to add Methodist as a party defendant would have been futile given that the court would not have had jurisdiction to hear Plaintiffs' workers' compensation claim.

Second, Plaintiffs' proposed Amended Complaint would have had no impact on Defendants' Motions for Summary Judgment as the proposed Amended Complaint still averred that the CT Room was "substantially completed and opened in February 2006", (T.R. IV, pp. 566, ¶ 11), did not include any new factual allegations to create a genuine issue of material fact, and did not include any competent allegation of fraud or wrongful concealment. See Butler v. Madison County Jail, 109 S.W.3d 360, 369 (Tenn. Ct. App. 2002) (holding that the trial court did not abuse its discretion in denying the plaintiff's motion to amend "because such an amendment would have been futile given the fact that, under Tenn. R. Civ. P. 56.06, [the plaintiff] could not have relied upon his complaint to oppose the Defendants' motions for summary judgment").

Third, the trial court's denial of Plaintiffs' Motion to Amend did not prevent Plaintiffs from filing a lawsuit against Methodist. See Eldridge, 42 S.W.3d at 85 ("A trial court abuses its discretion only when it 'applies an incorrect legal standard, or reaches a decision which is against logic or reasoning **that causes an injustice to the party complaining**.') (internal citation omitted) (emphasis added). The discovery of the absence of lead-lining in a small portion of an exterior wall of the CT Room was first discovered in December 2013. As such, the applicable one-year personal injury statute of limitations against Methodist had not run as of the date of the trial court's entry of its final Order on June 26, 2014. At any point before the entry of that Order or for several months after the Order was entered, Plaintiffs could have filed new, separate actions against Methodist for alleged radiation exposure (workers' compensation and tort,

respectively). And, in fact, on December 16, 2014, Ms. Ridenour did file, and currently has pending, a Request for a Benefit Review Conference with the Tennessee Department of Labor and Workforce Development, Division of Workers' Compensation. See Appendix A-10. In the Request for Benefit Review Conference, Ms. Ridenour admitted that she was an employee of Methodist and that the date of injury was December 19, 2013. Id.

Fourth, Plaintiffs' argument is moot. Plaintiffs made the calculated and purposeful decision not to name Methodist in the original filing in a veiled attempt to avoid the workers compensation statutes. Plaintiffs had knowledge of Methodist's ownership of Methodist Hospital, knew that Ms. Ridenour was employed by Methodist, and knew, as evidenced by Appendix A-10, that the appropriate remedy for her claim was with the Tennessee Department of Labor and Workforce Development, Division of Workers' Compensation. Therefore, in its discretion, the trial court dismissed the meritless filings against Defendants knowing that Plaintiffs were not procedurally barred from pursuing a legal remedy against Methodist. Plaintiffs have suffered no harm by having their Motion to Amend denied, and, in fact, have since sought a legal remedy before the proper tribunal against the proper party. Accordingly, this Court should find Plaintiffs' argument moot. McIntyre v. Traughber, 884 S.W.2d 134, 137 (Tenn. Ct. App. 1994) (holding that an appeal is moot "if it no longer serves as a means to provide relief to the prevailing party").

CONCLUSION

For the reasons set forth above, unequivocally the Trial Court correctly dismissed Plaintiffs' construction law cause of action as time-barred by the applicable statute of limitations and appropriately and within its discretion denied Plaintiffs' Motion to Amend Complaint. For

each and all of the above reasons, Plaintiffs' appeal should be denied and the Trial Court's grant of Covenant's Motion for Summary Judgment and the Trial Court's denial of Plaintiffs' Motion to Amend Complaint should be affirmed.

Respectfully submitted this 29th day of January, 2015.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of this pleading or document has been served upon counsel for all parties in interest in this case by delivering a true and exact copy or by placing a true and exact copy of said pleading or document in the United States Mail, addressed to said counsel's office, with sufficient postage thereupon to carry the same to its destination.

This the 29th day of January, 2015.

ARNETT, DRAPER AND HAGOOD, LLP

Rachel Park Hurt