The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: Mary L. Wagner

Office Address: (including county) 140 Adams, Room 212, Memphis TN 38103, Shelby County

Office Phone: 901-222-3847 Facsimile: 901-222-3819

Email Address:

Home Address: (including county) Germantown, TN 38139, Shelby County

Home Phone: Cellular Phone:

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 john.jefferson@tncourts.gov .

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Judge, Circuit Court for the Thirtieth Judicial District at Memphis, Division VII

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

2009, BPR No. 028165

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.

TN, BPR No. 028165. I was licensed in 2009 and my license is currently active.

MS, BPR No. 103235. I was licensed in 2009. My license is currently inactive. I placed it in inactive status shortly after being appointed as Circuit Court Judge as I would no longer be practicing in Mississippi.

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).

State of Tennessee, Judge for the Circuit Court for the Thirtieth Judicial District at Memphis, Division VII **October 2016 to Present**

- Appointed by Governor Bill Haslam. Elected on August 2, 2018. Re-Elected on August 4, 2022.
- Special Judge, Tennessee Supreme Court Worker's Compensation Appeals Panel
- Appointed by Tennessee Supreme Court to sit as Judge on two Three Judge Panel cases involving constitutional challenges.

Rice, Amundsen & Caperton PLLC **February 2011 to 2016**

- Associate

- Appellate Practice Group Chair

University of Memphis School of Law **2012 to 2014**

- Advanced Appellate Advocacy- Adjunct Professor. Teaching 2nd year law students advanced skills in legal writing and oral advocacy. Fall 2014.
- Adjunct Legal Methods Professor – Teaching first year law students legal writing, research, analysis and advocacy skills. Fall 2012 through Spring 2014.

Leitner, Williams, Dooley and Napolitan PLLC September 2010 – February 2011

- Associate

Judge Steven Stafford, Tennessee Court of Appeals September 2009 – September 2010

- Law Clerk

During college, I worked in retail sales. I worked for Pottery Barn Kids as a sales associate. I also worked for Gymboree. I started with Gymboree as a sales associate, rising to assistant manager and store manager of the store in Broomfield, Colorado. As store manager, I was fully responsible for retail operations for the children's clothing store that had over $1,000,000 in sales each year. In addition to being responsible for sales and customer relations, I managed 10-15 employees. Our store set record sales for our district. I did this full-time while a full-time undergraduate student.

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

I have not been unemployed since completion of my legal education.

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

I do not currently practice law.

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.

When first licensed as an attorney, I served as a law clerk to Judge J. Steven Stafford for the Tennessee Court of Appeals, Western Section. I performed detailed review of the records and briefs in all appeals assigned to me. I prepared bench briefs for oral arguments for the entire hearing panel. I drafted opinions for matters assigned to me. These varied from appeals as of right and interlocutory appeals, bench and jury trials, review of factual findings and legal issues and more. I assisted with the review of opinions drafted by other judges and assisted with review of motions filed in appeals.

Prior to serving in the current judgeship, I practiced in every civil court in Shelby County, including Federal Court. I also appeared in many Circuit and Chancery courts across West Tennessee. I have appeared before the Tennessee Court of Appeals and before the Tennessee Supreme Court (in briefing).

My practice at Rice, Amundsen & Caperton PLLC constituted a broad civil litigation practice. A significant portion of my practice involved family law matters. I represented both men and women. My cases ranged from the basic uncontested divorce with simple assets to complex cases with high-value multi-faceted assets and/or complex custody determinations with custodial evaluations and psychological proof. I addressed issues of first impression such as divorces involving multi-million dollar trusts intertwined in sophisticated tax and estate planning and combined with a simultaneous claim for fraud and breach of duty by a fiduciary.

As a family law practitioner, I dealt with clients, opposing parties and counsel on perhaps their worst days. These cases were often fraught with emotion and tension. I understand that these cases demand jurists and lawyers who can separate themselves from the emotions and remain focused on the legal principles at issue. I understand the need for consistent application of the law and rules of procedure in all cases, but especially family law.

As another portion of my practice at Rice, Amundsen and Caperton, I represented individuals and entities in personal injury claims. I handled these matters for both plaintiffs and defendants. As plaintiff's counsel, I evaluated and developed a case before preparing a lawsuit. At times, after talking with witnesses and examining the proof, I found it necessary to give the unwelcomed advice that no lawsuit should be filed. As defense counsel, I represented entities, mainly non-profit volunteer organizations, in defending against personal injury claims. I have been responsible for evaluating, strategizing and defending claims that at times involved injuries resulting in multi-million dollar medical bills and even death. In addition to being difficult cases due to damages and proof issues, they also included significant legal issues related to liability.

I also represented businesses, non-profit organizations and individuals in commercial disputes and transactions. This includes disputes between partners, disputes following the sale of a business, and contractual disputes handled through litigation and/or arbitration. It also consists of transactional work related to the sale or transfer of a business and advising on organizational structures.

I chaired the firm's appellate practice section. I regularly took matters on appeal and consulted

on appellate issues. This included both inner office matters and as outside counsel. This work involved preparation of briefs and oral argument before the Court of Appeals. It also included the preparation and arguments of Motions for Rule 9 interlocutory appeals and Applications for Rule 9 and Rule 10 interlocutory appeals. I also prepared Rule 11 applications to the Tennessee Supreme Court. At times, I reviewed action in a trial court to determine if an appeal, interlocutory or as of right, was prudent. Often, I was also brought in to discuss and strategize on preparing a proper record before the trial court. This included participating in trial as appellate counsel.

At Leitner Williams, my practice focused on insurance defense. This included all types of personal injury claims, workers' compensation and unemployment claims. I was involved in all stages of litigation from the initial preparation of a defense upon receipt of a Complaint, to written discovery, motion practice, and depositions, through trial and even appeal. I regularly appeared before the Department of Labor in addressing Workers' Compensation claims including participating in Benefit Review Conferences. My practice included appearing before the Tennessee Department of Labor, courts across West Tennessee, courts in Northern Mississippi and the Mississippi Department of Labor. In representing insurance companies, I also performed Examinations Under Oath to address coverage issues.

Through my litigation practice, I prosecuted and defended all manner of civil lawsuits. I prosecuted lawsuits and met burdens of proof, which always began before a Complaint was even filed. On the other hand, I have defended lawsuits starting from the first Answer through trial or resolution. Having been responsible on both sides of a variety of types of cases provides me with unique experience and skill to evaluate cases from the bench and preside over a variety of cases.

I have always taken seriously the need to understand the claim to be established, the legal principles involved, and the burdens of proof. This knowledge, along with the rules of civil procedure and rules of court, enabled me to obtain the best possible result for my client. I have continued this process as a trial judge. I understand that maintaining this knowledge and understanding is a continuing process involving dedicated ongoing study of the law. These are skills and principles that I brought to the trial bench and would allow me to serve well on the Supreme Court.

My experience as a trial judge is described below.

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

For cases that I have presided over, I would cite to those described in my answer to Question No. 10 and attached hereto as writing samples.

For cases that I handled in private practice, I would cite to the following:

Davey and Teresa Mann v. Jeffrey Callicutt et al., Shelby County Circuit Court CT-003646-07, 380 S.W.3d 42 (Tenn. 2012), and No. W2012-00972-COA-R3-CV. This was a complex personal injury action. At its height, this case involved twelve different parties each with their own attorneys. It involved personal injury claims from a tragic car accident that resulted in life

threatening injuries including over $1,000,000 in medical bills. This case included claims based on drunk driving, social host liability, premises liability, agency, and vicarious liability. Litigation involved complex legal disputes and issues of first impression. It went twice to the Court of Appeals and once to the Tennessee Supreme Court on interlocutory appeals and was pending for almost seven years. I saw firsthand the need to apply the law consistently across the state and the effect that it can have on litigants when the law is not applied consistently. I have seen the impact state litigation can have on similar litigation around the country. I saw and worked through the difficulty in preparing a case with complex issues of law and fact on damages and liability, involving a substantial number of parties and counsel.

Hannah Culbertson v. Randall Culbertson, Shelby County Circuit Court No. CT-005484-10, 393 S.W.3d 678 (Tenn. Ct. App. 2012)(cert. denied); 455 S.W.3d 107 (Tenn. Ct. App. 2014)(cert. denied). This was a divorce matter with highly contested custody issues relating to mental health. The main issue in this case centered on discovery of the Father's mental health status. This matter involved detailed legal and factual arguments related to statutory interpretation and the application of case law. Due to the many contested issues, I represented my client in numerous contested evidentiary hearings on matters including temporary alimony and child support, order of protection, injunctive relief and custody. It involved the use of expert witnesses, many fact witnesses, and a Rule 35 evaluation. Due to the request by the Mother (my client) to review Father's mental health records, there was significant litigation on this discovery issue. It resulted in two Rule 10 Extraordinary Appeals to the Tennessee Court of Appeals. Both of which I briefed and argued. Further, each party filed Rule 11 Applications for permission to appeal to the Tennessee Supreme Court. I was responsible for the briefing on behalf of the Mother related to the Rule 11 applications.

Stanley Wickfall v. Maria Ann Michlin Wickfall, Shelby County Circuit Court, CT-003157-12. This matter was a relatively straightforward divorce matter. The notable part, however, was my client. I agreed the morning of the trial to represent the Wife, who had been proceeding *pro se*. Not only did I take on this case *pro bono* the morning of the trial, but my client was currently in prison for 2nd degree murder. Locked in the jury room with my client (and her two guards), I set forth to begin to prepare for trial in thirty minutes. I listened to her concerns and wishes. I explained to her what the Judge could and could not decide that day and the possible outcomes. We discussed the documents that she had with her and her testimony. We analyzed what the Judge would likely do with what she would be able to prove. She was respectful and thankful. For the first time someone had included her in the legal process that was her divorce. With my involvement, advocacy and explanation to not only my client, but the other side's attorney, the parties were able to reach a resolution without a trial. This resolution included an equitable division of the property and even an alimony award to the imprisoned Wife. While the legal issues were not notable, the parties demonstrated the issues of access to justice faced in all of our trial courts. It was the poster case reflecting the need to treat all litigants with respect regardless of their status or representation.

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.

On October 24, 2016, Governor Haslam appointed me to serve as Judge for the Circuit Court for the 30th Judicial District at Memphis, Division VII. I was elected to continue serving in this Judgeship on August 2, 2018 and re-elected on August 4, 2022. I continue to serve in this role today.

The Judgeship in which I serve is one of the nine divisions of the Circuit Court of Shelby County. This Judgeship is limited to exclusively civil matters. Across the nine divisions, there are between 5,000 and 6,000 cases filed and disposed of each year. Of these dispositions, approximately 43% are damages/tort, 33% are family law, 12% are miscellaneous general civil, and 11% are contract/debt. Approximately 600-700 are disposed by trial each year. Of these trials, approximately 93% are bench trials, as opposed to jury trials. Each Circuit Judge presides over 5-8 civil jury trials per year on average.

Since being appointed to this Judgeship, I have conducted 48 jury trials. These ranged from the less complex two day trials to a complex three and one-half week trial. In my time on the bench, I have disposed of over 4,000 cases. I regularly conduct bench hearings on non-jury matters and have heard countless dispositive and non-dispositive motions.

In this capacity, I have sat as a special judge on the Tennessee Supreme Court Worker's Compensation Appeals Panel and been appointed by Tennessee Supreme Court to sit as Judge on two Three Judge Panel cases involving constitutional issues.

I have handled cases where there is a lot of money and complex issues on the line. I have also handled cases that, while simpler in legal nature, involve issues that deeply impact the people involved. I have handled litigation that has turned traumatic tragic situations around, setting those involved on a new and positive path. I have also handled litigation that has torn families apart and had negative impacts on those persons and families involved. I have handled litigation which has generated high media and public interest. All of this has given me a deeper appreciation for the role the courts play and the impact the courts have on individuals, families, communities, and our State. It further emboldens my passion for our courts, the institution that they are and the role that they play. I know that no matter the type of case, issues involved, or external forces at hand, the rule of law is paramount. As jurists, we have a duty to uphold the law provided by the General Assembly and protect the separation of powers. We also have a duty to ensure that courts operate in a manner to allow the law to be upheld as enacted. We must be dutiful to the operation of our courts and sensitive to the impact those operations have on our communities.

I am hesitant to discuss many of my significant cases in this application due to the Rules of Judicial Conduct. Some of them are either still in litigation, or in a status that they could still come back to be heard before me. Below are some brief descriptions of some notable cases.

The Metropolitan Government of Nashville and Davidson County, Tennessee et. Al., vs. Bill Lee, Governor for the State of Tennessee, et al., Pending in the Davidson County Chancery Court No. 23-0336-I and No. 23-0395-III(I). This case is part of a Three Judge Panel appointed by

the Tennessee Supreme Court. It involves a constitutional challenge to 2023 amendments to the Metropolitan Government Charter Act. The amendments affect the size of Metropolitan Government of Nashville and Davidson County's Metropolitan Council. The Metropolitan Government of Nashville and Davidson County and several individuals brought claims challenging the constitutionality of the amendments. It is still pending.

Alicia Franklin v. City of Memphis, CT-3860-22. This is a personal injury action. A summary of the case can be found in the attached writing sample. This case is pending on appeal.

Shaynne Bradley, as Limited Conservator for Prince D. Bradley v. Support Solutions of the Mid-South, LLC., CT-0023890-16. This is a medical malpractice and personal injury case. The Defendant brought a Motion for Judgment on the Pleadings arguing that the statute of limitations barred the claim. It involved questions about the tolling or the statue of limitations due to incapacity or disability. It challenged the constitutionality of statutory amendments. This was an issue of first impression. The Attorney General intervened. A copy of my order is attached.

Errol Sherrod v. Smith & Nephew, Inc. CT-002471-18. This was a products liability action. Shortly before trial, the parties argued a motion for summary judgment. The Defendant argued that federal law preempted the state products liability claim. It required the interpretation and application of the Medical Device Amendments of 1976 and the FDA Device Classification. It also included the consideration of how various Federal Courts interpreted and applied these laws.

Christian Jones, a minor by and through his next of Friends and Mother, Dekenya Parker v. State of Tennessee, CT-000377-18. This is a healthcare liability case involving claims of a traumatic birth injury to a child. It comprised two cases; one that originated in the Tennessee Claims Commission and one initiated in Circuit Court against the medical providers. The State moved to dismiss the claims made against it for failure to comply with the healthcare liability act with regard to the timeliness of the filing and the pre-suit notice. It required statutory interpretation and application of the Healthcare Liability Act with regard to claims initiated in the Claims Commission.

Harmon v. Harmon, 2018 WL 6192233, No. W2017-02452-COA-R3-CV (Tenn. Ct. App. Nov. 27, 2018), CT-001670-13. This was a relocation case that was highly emotional for both parties. It involved legal issues of statutory interpretation and fact intensive rulings. It was heard over three days in October and November 2017.

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.

The Estate of John O. Wagner, Shelby County Probate Court, No. D0010904. I served as *Administrator CTA* of my grandfather's estate. The Estate was closed in 2012.

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

attention of the Council.

Judge Robert L. Childers Shelby County Circuit Court

- May 2008- May 2009, Law Clerk
- I prepared the motion docket, researched legal issues, and drafted opinions. In this capacity, I had firsthand experience as to the role of a trial court. I learned the need to work hard, be fully prepared, and study the law. I also learned the importance of a proper and respectful judicial temperament.

United States Attorney for the Western District of Tennessee

- Summer 2008 – Extern

Professor Andrew McClurg, Cecil C. Humphrey's School of Law

- Summer 2007- Research Assistant

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.

In June 2016, I submitted an application for the appointment to the Judgeship for Circuit Court for the 30th Judicial District at Memphis, Division VII. The Trial Court Vacancy Commission interviewed applicants on August 8, 2016. I was one of the nominees submitted to Governor Haslam. On October 24, 2016, Governor Haslam appointed me to the Judgeship in which I continue to serve today.

In February 2019, I submitted an application for the appointment to the Tennessee Court of Appeals – Western Section. The Governor's Counsel for Judicial Appointments interviewed the applicants on March 11, 2019. I was one of the three nominees submitted to Governor Lee. Ultimately, I was not selected to fill that vacancy.

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.

The University of Memphis Cecil C. Humphreys School of Law - Juris Doctor 2009, *Magna Cum Laude*

- Attended August 2006-May 2009
  - GPA: 3.8; Rank: 4th
  - *Law Review*, Notes Editor 2008-2009, Staff 2007-2008

- CALI Awards for Excellence (highest grade in a course): Evidence, Secured Transactions, Workers' Compensation, Business Organizations and Legislation.
- Joseph Henry Shepard Scholarship 2008-2009
- Cecil C. Humphreys Fellowship, 2007-2008

The University of Colorado at Boulder - Bachelor of Arts 2006

- Attended August 2003 – May 2006
  - Major: Political Science
  - GPA: 3.6
  - Dean's List: Fall 2003, Spring 2004, Fall 2004, Spring 2006
  - Golden Key International Honour Society (Top 15% of Students)
  - Phi Beta Kappa Society

The University of Memphis

- Attended Spring 2003, Dean's List
- GPA: 3.9
- Sigma Alpha Lambda National Leadership & Honors Organization
- I left the University of Memphis to attend the University of Colorado at Boulder.

The University of Alabama

- Attended Fall 2003, President's List
- GPA: 4.0
- Emerging Leaders Member

I left the University of Alabama in order to attend the University of Colorado. I initially transferred to the University of Memphis for financial reasons.

PERSONAL INFORMATION

15. State your age and date of birth.

39. [redacted] 1984

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

17 years.

I have lived continuously in the State of Tennessee since May 2006. I was a resident of the State of Colorado while I attended the University of Colorado. Prior to that, I continuously resided in Tennessee since birth.

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

17 years.

While clerking for Judge J. Steven Stafford (September 2009-September 2010), I had an apartment in Dyersburg (Dyer County) where I lived during the week. My residence remained in Shelby County during this time. I have resided in Shelby County continuously since birth with the exception of the time I resided in Colorado while attending the University of Colorado.

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

Shelby

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

Not applicable.

20. Have you ever pled guilty or been convicted or 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.

I have not had any complaints to a supervisory authority to which I have been required to respond.

I would disclose that in February 2019, then Circuit Court Clerk Temiika Gibson filed a

complaint against me with the Board of Judicial Conduct. Then BJC counsel Tim Discenza reached out to have a conversation with me since she was the court clerk. He had advised that no response would be required. I was later advised the complaint was dismissed. I disclose this out of an abundance of caution due to my conversation with Mr. Discenza.

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.

June A. Floyd, Patricia Malone and Carolyn Kenyatta, Michael Floyd, Esquire, Individually and on behalf of all others and on behalf of all similar individuals vs. Shelby County Election Commission, Robert Myers, Norma Lester, Dee Nollner, Steve Stamson, Anthony Tate, in their Official Capacities as Members of the Shelby County Election Commission, Linda Phillips, Administrator of Elections, Judge Mary Wagner, Chancery Court of Shelby County, CH-18-1180. This was an election contest filed in August 2018. It was dismissed on Nov. 6, 2018.

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.

Germantown Kiwanis Club

- Member 2011 – present
- Key Club Advisor - Houston High, 2022 to present

Chi Omega Fraternity

- Member since October 2017
- Member of the Mock Trial Committee

Daughters of the American Revolution – Hermitage Chapter

- Member since 2012
- National Defense Secretary 2013-2016- responsible for programs and projects on national defense history and civics in local high school

University of Memphis Alumni Association, Member

Christ United Methodist Church, Member 2015 – 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.

Chi Omega Fraternity is an intergenerational women's organization that by its nature limits membership to females only. I do not plan to resign my membership unless required by the Rules of Judicial Conduct. Chi Omega serves to further friendship, personal integrity, excellence and intellectual pursuits, community involvement, and personal and career development for its members.

The Daughters of the American Revolution by its nature limits membership to females only. It does have a "brother" organization, The National Society, Sons of the American Revolution, for which only males are admitted. I do not plan to resign my membership unless required by the Rules of Judicial Conduct. The Daughters of the American Revolution serves noteworthy purposes including civic education, community service, preservation of history and patriotism.

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.

Tennessee Trial Judges Association

- Member, 2017 to present
- Executive Committee Member, 2022 to present
    - Chair, Subcommittee on Family Law Arbitration, 2023
    - Chair, Subcommittee on Board of Judicial Conduct Legislation, 2022

Tennessee Judicial Conference

- Secretary, 2020 to 2021
- Tennessee Pattern Jury Instructions Committee, Member 2018 to present, Co-Chair 2023 to present
- Security Committee, Co-Chair 2023 to present
- Co-Chair TN Judicial Conference Annual Convention - 2024.

Memphis Bar Association

- Member, 2009- present
- Publications Committee 2011- 2016
- Law Week Committee 2016-2017
- Leadership Forum Class of 2012-2013 graduate
- Membership Committee, 2022 to present
- Bench Bar Conference Co-Chair for 2024 and Chair for 2025.

Tennessee Bar Association

- Member, 2009- present
- Appellate Practice Section, Chair 2016, Vice-Chair 2015-2016, West Tennessee Delegate 2013 to 2015 and member 2011 to present
- Tennessee Bar Association Leadership Law Class 2016
- Alimony Bench Book Committee – 2017 to present
- Family Law Section Executive Committee – 2019 to present

ADR American Inn of Court

- Member 2022 to present

Leo S. Bearman Sr., American Inn of Court

- Emeritus Member 2020 to present
- Barrister Member 2017 to 2020
- Associate Member 2011 to 2014
- Student Member 2008 -2009

The Federalist Society, Memphis Chapter

- Member - 2013-2015, 2018 to present

Southwest Tennessee Community College- Paralegal Studies Advisory Committee

- Member since 2019

Mississippi Bar Association, Member since 2009

Republican National Lawyers Association, 2014-2015

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.

2019 Chancellor Charles A. Round Memorial Award for Outstanding Judge of the Year by the Young Lawyers' Division of the Memphis Bar Association.

2018 American Swiss Foundation Young Leaders Class. One of 25 Americans chosen to participate in a leadership conference with 25 Swiss. Each person was chosen based on his or her professional accomplishments and leadership.

2018 Twelve Most Outstanding Women, Honoring Women in the Judicial System. Chosen by the Memphis Inter-Denominational Fellowship Inc. as one of twelve honorees.

2018 Memphis Bar Foundation Fellow

2016 Tennessee Bar Association Leadership Law Class (1 of 33 from across the State)

2016 Rising Star for Super Lawyers

2015 Rising Stars for Super Lawyers

2012-2013 Memphis Bar Association Leadership Forum Class Member

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

Mary L. Wagner, Soft Skills to Excel in any Environment, Facts & Findings – The Magazine for Paralegals, Vol. XLII, 18 (Jan.-Feb. 2016). Republished in *MALA Moments*, by the Montana Association of Legal Assistants, September 2017.

Mary L. Wagner, Child Support 101: Compromise of Child Support Arrearages and Retroactive Modification, *Memphis Lawyer Magazine*, Vol. 32, Issue 5, 16 (Fall 2015).

Mary L. Wagner, Legal Methods Comes Back to Haunt – The Need for Properly Framed Legal Issues, *Memphis Lawyer Magazine*, Vol. 31, Issue 1, 20 (Jan./Feb. 2014).

Mary L. Wagner, Justice Scalia visits Memphis: 1st Justice to visit new Memphis Law Campus, *Memphis Lawyer Magazine*, Vol. 31, Issue 1, 8 (Jan./Feb. 2014).

Amy J. Amundsen & Mary L. Wagner, Alimony, You've Come A Long Way, *Tennessee Bar Journal* Vol. 48, No. 7, 14 (July 2012).

Coble Caperton & Mary L. Wagner, Tennessee Court Holds that National Fraternity Does Not Owe a Duty to Third Parties, *Fraternal Law*, No. 120 (March 2012).

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.

In the last five years, I taught the following CLE's:

"Recusal" Memphis Bar Association – Family Law Section Annual Seminar. Scheduled for December 12, 2023 (with Chancellor Kasey Culbreath)

"Ethics Update: A View from the Bench." Memphis Bar Association – Professionalism Committee. December 5, 2023 (with Magistrate Judge Charmiane Claxton and Attorney Marlinee Iverson).

"Family Law Update 2023" Tennessee Judicial Conference. October 18, 2023. (with Attorney Joe Smith).

"Airing Dirty Laundry…Or Not: placing matters under seal, protectice orders, etc." Memphis Bar Association – Family Law Section Annual Seminar. December 15, 2022 (with attorneys Leslie Gattas and Charles McGhee).

"Litigation 2022: Perspectives from the Bench." Tennessee Bar Association – Litigation Section. October 27, 2022 (virtual) (with Chancellor JoeDae Jenkins, Chancellor Jera Bryant, Judge Adrienne Frye, Judge Justin Angel).

"Recusal" Tennessee Judicial Conference. October 26, 2022. (with Judge Steven Stafford).

"Digital Trial Tools" Memphis Bar Association- Young Lawyers Division. October 17, 2022. (virtual)(with Magistrate Terri Fratesi and Attorney Amber Shaw).

"Experts 101" Memphis Bar Association – Mid Year Family Law Forum. May 18, 2022)(with Judge Bob Weiss and Chancellor Will Perry).

"Domestic Appeals" Tennessee Bar Association –Appellate Practice Section. April 20, 2022. (webinar) (with Donald Caperella and Chancellor Pat Moskal).

"A Conversation: Judicial Referral to Mediation." Memphis ADR Inn of Court. February 15, 2022 (virtual).

"TBA Family Law Forum - What would you do? Ethics and Decorum" Tennessee Bar Association. October 8, 2021. (virtual)(with Roger Manness).

"Pandemic Court Proceedings in Tennessee" TN Court Talk Podcast – Episode 14. Recorded June 2021. https://www.tncourts.gov/AOC%20Podcasts

"Best Practices for Success in Court" Greater Memphis Paralegal Alliance. April 21, 2021. (Virtual)

"Tennessee Virtual Proceedings Overview" Tennessee Administrative Office of the Courts. January 21, 2021. (virtual)(with Judge Godwin, Judge Sexton, and Chancellor Martin).

"Key Rules for Collecting and Presenting Evidence in Family Law Cases" Tennessee Bar Association. November 19, 2020 (virtual)

"TBA Family Law Forum 2020 – Practicing Family Law during a Pandemic" September 11, 2020 (with Judge J.B. Bennett, Judge Binley, Helen Rogers and Justin Seaman).

"Alimony Bench Book Annual CLE with COVID implications." By the Tennessee Bar Association. May 17, 2020 (virtual). (with Amy Amundsen and Kurt Myers).

"Circuit and Chancery Court Judges Town Hall" Memphis Bar Association. April 13, 2020. (with Judge Valerie Smith and Chancellor JoeDae Jenkins).

"Collecting Electronically Stored Evidence" - Tennessee Trial Lawyers Domestic Law Forum. February 6, 2020 (with Joe Smith).

"Preserving the Record on Appeal" Tennessee Court of Appeals Boot Camp hosted by the Tennessee Bar Association. November 6, 2019 (with Chancellor Pat Moskal).

"Alimony Bench Book Live Update" Hosted by the Tennessee Bar Association. March 27, 2019. (with Amy Amundsen)

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.

Judge, Circuit Court for the Thirtieth Judicial District at Memphis, Division VII. I was appointed to this judgeship in October 2016 by Governor Haslam. I was elected to continue in this judgeship for the completion of the term in August 2018. I was re-elected in August 2022.

Post-Conviction Defender Oversight Commission Member. I was appointed by Governor Haslam in June 2015. I served in this position until my appointment as Judge.

Tennessee Republican Party – State Executive Committeewoman for District 33. I was elected to this position in August 2014. I resigned in August 2016 when I was nominated for judicial appointment.

In May 2023, I submitted an application to Senator Marsha Blackburn and Senator Bill Hagerty for appointment to the United States District Court for the Western District of Tennessee.

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.

I have attached four orders that I have written as a trial judge. They are my own work. My law clerks may have reviewed them after my drafting for minor edits.

1. *Alicia Franklin v. City of Memphis, CT-3860-22.* Order on Defendant's Motion to Dismiss the Amended Complaint or in the Alternative, to Strike Certain Immaterial, Impertinent and Scandoulous Allegations from the Amended Complaint. This Order was entered on March 22, 2023. This was a motion to dismiss in a GTLA claim requiring the interpretation and application of the GTLA and the public duty doctrine.

2. *Errol Sherrod v. Smith & Nephew, Inc. CT-002471-18.* Order on Smith & Nephew's Motion for Summary Judgment. This Order was entered on August 10, 2021. This was an order on a motion for summary judgment addressing claims of federal preemption and the interpretation and application of the Medical Device Amendments of 1976 and the FDA Device Classification.

3. *Christian Jones, a minor by and through his next of Friends and Mother, Dekenya Parker v. State of Tennessee, CT-000377-18.* Order on Motion to Dismiss. This Order was entered on April 23, 2021. This was an order on a motion to dismiss addressing statutory interpretation and application of the Healthcare Liability Act with regard to claims initiated in the Claims Commission.

4. *Shaynne Bradley, as Limited Conservator for Prince D. Bradley v. Support Solutions of the Mid-South, LLC.*, CT-0023890-16. Order on Defendant's Motion for Judgment on the Pleadings. This Order was entered on January 3, 2018. This is a medical malpractice and personal injury case. The Defendant brought a Motion for Judgment on the Pleadings arguing the claim was barred by the statute of limitations. It was argued April 21, 2017 and November 14, 2017. This was an issue of first impression and included arguments as to the constitutionality of the statute at issue. The Attorney General intervened.

ESSAYS/PERSONAL STATEMENTS

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

I seek this position to further serve the State of Tennessee. From a young age, I learned the principles of working hard, respecting everyone no matter their station in life, and always serving. Moreover, I developed a passion for the law, the role our legal system plays in our democracy and the Courts as an institution. These principles guide my daily life and lead me to seek this position. I know that being a good judge requires hard work, dedication, and skill. It requires a servant's heart and a jurist who respects the rule of law and the role it plays. This position would allow me to further focus my skills of legal analysis and legal writing while simultaneously working to improve and protect the legal system and courts that I grew to love and respect at a young age.

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)***

When in practice, I provided pro bono services. I also provided pro bono legal services to organizations in which I was involved. I served on the Post-Conviction Defender Oversight Commission. This committee oversees the Post-Conviction Defender in handling final appeals for those on death row on a pro bono basis.

As a judge, I remain vigilant of our pro se litigants and pro bono needs. I work to make sure they all are treated with respect and that all cases are handled the same. In managing my docket, I always keep in mind efficiency and cost of resolution. Often the time to conclusion of litigation and the cost of such can be a bar to those seeking justice. Time and costs incurred can have a devastating effect on the individuals involved, families, businesses and thus, our society. I understand that our courts must be accessible to all.

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)***

The judgeship I seek is one of five members of the Tennessee Supreme Court. The Tennessee Supreme Court is the court of last resort for both civil and criminal cases across the State. The Tennessee Supreme Court is also charged with the administration of the lower courts across the State and the practice of law.

My background and record in handling varied and complex civil matters will be beneficial to the Court. I would bring valued perspective and knowledge to the Court reviewing the actions of the trial court and working on the administration of those courts and rules of practice. Furthermore, my understanding of the importance and role of the Courts would allow me to serve well in this role. My dedication to protecting the courts system, the rule of law, and to promoting confidence in the judiciary would be an asset to an already talented and dedicated bench.

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

My community service focuses in four main areas: promotion of the legal system, mentoring youth, historic preservation, and service to our veterans. I do this primarily through my involvement with the Daughters of the American Revolution and the Germantown Kiwanis Club. The Daughters of the American Revolution works on projects to accomplish historic preservation and service to veterans. We work on many projects focused on serving those at the Veterans' Hospital. As a younger judge, I feel that I have an important role in being involved with our youth, mainly high school or college students. It is important to show them a role model and to encourage them to continue their education, make wise choices and think about their future. I have done this through speaking to groups, working on the S.C.A.L.E.S. project, volunteering for mock trial tournaments, and serving on the Chi Omega Fraternity mock trial committee. I also believe that as judges, we have a duty to educate the public on the legal

system. One will only have confidence and trust in a system that they know and understand. For this reason, I believe it is important for us to work to educate the public on the legal system and also on simply who we are as judges. If appointed, I will continue this work.

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)***

At 10, I began working for my grandfather's law firm. They allowed me to work by filing lawsuits and pleadings at the courthouse, assisting with the preparation of pleadings and accountings, and other clerical tasks. I learned things about the legal system that you do not in law school. My daily work with my grandfather even further instilled his values in me. From growing up in rural west Tennessee, my grandfather learned at an early age and shared with us the values of hard work, service, humility and love of the legal system. Learning these values early, provided me with the tools to have the breadth of experience that I do.

In undergrad, I wanted to attend the University of Colorado. To do so, I had to pay all of my expenses on my own. Through those values learned at a young age, I did just that. I worked full time while maintaining a full course load and high grades. I knew, however, that I wanted to attend law school and return to Tennessee. I continued in law school, working part-time, to not only help with expenses, but to maximize my learning and experience.

Legal writing is one of my strengths and passions. This can be seen through my work as a law student and law clerk, through my appellate practice, my written orders and in teaching legal writing. It is this love that guides me to seek this judgeship and the ability to further serve the State of Tennessee.

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.

"If you're going to be a good and faithful judge, you have to resign yourself to the fact that you're not always going to like the conclusions you reach. If you like them all the time, you're probably doing something wrong." (Justice Antonin Scalia). I may not agree with the law at issue. I may not believe its application necessarily produces a "fair" result. Regardless, I do and will apply the law as written without regard to my personal feelings or beliefs.

I experienced this first as a law clerk. I experienced this as an attorney advising clients. I experienced this as a trial judge.

For example, in a relocation case, due to facts, the relocation statute did not allow me to consider the best interests of the children. Regardless of my thoughts on the best interests, I applied the statute strictly as written. I have also experienced this in a trial in which there was likely a basis for relief, but the plaintiff failed to present essential proof. Bound by the proof presented,

directed verdict was required. I have also seen this in cases with traumatic facts, but the law provided no remedy. I understand that not only is it my legal duty to apply the law as written without regard to my personal feelings, but it is also a duty owed to protect our system of government, the role of the Courts and separation of powers.

REFERENCES

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

A. Tre Harget, Secretary of State. State Capitol, Nashville TN 37243
B. Robert Stevens, State Representative District 13 and Attorney, Nashville TN 37243
C. Mike Keeney, Attorney, Lewis Thomason. Memphis TN 38103,
D. Jeffery Maddux. Attorney, Chambliss, Bahner & Stophel, P.C., Chattanooga, TN 37450,
E. Dan Springer. Deputy Chief Operating Officer, City of Memphis. Memphis TN 38103.

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] Tennessee Supreme Court 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: December 10, 2023

Mary L Wagner

Signature

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

THE GOVERNOR'S COUNCIL FOR JUDICIAL APPOINTMENTS

ADMINISTRATIVE OFFICE OF THE COURTS

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

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

WAIVER OF CONFIDENTIALITY

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

Mary L. Wagner
Type or Print Name

Mary L Wagner
Signature

12/10/2023
Date

028165
BPR #

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

Mississippi 103235

IN THE CIRCUIT COURT OF TENNESSEE FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

ALICIA FRANKLIN,

Plaintiff,

v.

FILED
JAMITA E. SWEARENGEN
MAR 22 2023
CIRCUIT COURT CLERK
BY ______ D.C.

Docket No. CT-3860-22
Division VII

CITY OF MEMPHIS, TENNESSEE,

Defendant.

ORDER ON DEFENDANT'S MOTION TO DISMISS THE AMENDED COMPLAINT OR IN THE ALTERNATIVE, TO STRIKE CERTAIN IMMATERIAL, IMPERTINENT AND SCANDOULOUS ALLEGATIONS FROM THE AMENDED COMPLAINT

This cause came to be heard before the Honorable Mary L. Wagner on March 8, 2023 on Defendant's Motion to Dismiss the Amended Complaint or in the Alternative, to Strike Certain Immaterial, Impertinent and Scandalous Allegations from the Amended Complaint. Having considered the Motion, Plaintiff's Response, Defendant's Reply, the Amended Complaint, and the arguments of counsel, the Court finds as follows:

This is a personal injury action filed by the Plaintiff, Alicia Franklin. Ms. Franklin alleges that she sustained injuries as a result of the City's failure, through the Memphis Police Department ("MPD"), to investigate her rape and kidnapping and failure to use evidence available to timely arrest the man who kidnapped and raped her. She contends that the City has a "duty to run the policing activities conducted by the MPD in a lawful manner so as to preserve not only the peace of the City of Memphis but also to preserve to its citizens safety and well-being..." She also alleges that the City of Memphis, through MPD, has a duty to investigate reports of criminal activities and to

arrest perpetrators immediately. Ms. Franklin brings this action under the Government Tort Liability Act, specifically Tenn. Code Ann. § 29-20-205, alleging that the City of Memphis is liable for the negligent acts of its employees that are not discretionary.

According to Ms. Franklin, on September 21, 2021, she met a man named "Cleo" for a first date at The Lakes at Ridgeway apartments.[1] The two met through a dating app. Cleo is Cleotha Abston aka Cleotha Henderson. Abston told Ms. Franklin that he worked in maintenance at the apartments. They two met outside an apartment at 5783 Waterstone Oak Way.

When they met, Abston forced Ms. Franklin into a vacant apartment, blindfolded her, threatened to kill her, led her through the apartment to a White Dodge Charger, and raped her. Ms. Franklin told Abston she was pregnant to attempt to get him to stop. He responded with comments that she believes indicate he had raped before. Abston went through Ms. Franklin's purse, took money and questioned her about her sister working in law enforcement. He then returned her to the vacant apartment, forced her to sit in a corner of one of the rooms, and instructed her to wait until she heard his car revving. She did as instructed. Immediately, Ms. Franklin sought medical attention and reported the crime. She underwent a forensic medical examination. This included a sexual assault kit to be tested for DNA.

Following the forensic investigation, officers were assigned to investigate. Officers who processed the crime scene took no physical evidence from the crime scene. Ms. Franklin provided officers with his first name as "Cleo," his telephone

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[1] The Court summarizes the facts as alleged in Plaintiff's Complaint. At this stage, the Court does not make factual findings but presumes all factual allegations to be true and gives the Plaintiff the benefit of all reasonable inferences. *Webb v. Nashville Area Habitat for Humanity, Inc.* 346 S.W.3d 422, 425-26 (Tenn. 2011).

number, a description of his vehicle, and his social media information. Within days, the officers provided Ms. Franklin a photo lineup. Abston was in the line-up. Ms. Franklin identified Abston as to one who looked most like her assailant.[2] The photo of Abston in this line-up was ten to twelve years old. The officers did not obtain a more recent photo from the Tennessee Department of Corrections. The officers told Ms. Franklin they would obtain a more recent photo. She was never shown a more recent photo or advised that one was obtained.

Shortly after the report, officers questioned Abston's girlfriend. Abston's girlfriend lived at 5781 Waterstone Oak Way, across from where Ms. Franklin met Abston. The girlfriend disclosed that she had two vehicles, including a white dodge charger, and that Abston had permission to use both vehicles. She also provided Abston's full name to the officers. Later, the girlfriend advised the Officers that Abston moved to his brother's apartment and provided that address. The officers did not arrest Abston.

Ms. Franklin alleges that the MPD knew, or should have known, of Abston as early as September 21, 2021, due to his extensive prior record. Abston had been released from prison in November 2020 following a conviction for aggravated robbery and kidnapping. Ms. Franklin alleges that MPD knew, or should have known, that Abston was a dangerous felon who presented further threat to Ms. Franklin as he knew who she was and where she lived and he was a threat to the community. Further, Ms. Franklin alleges that MPD knew, or should have known that Abston had prior juvenile

[2] The City contends that the Plaintiff did not make a positive identification from the line-up. For purposes of a Motion to Dismiss, the Court must read the facts in the light most favorable to the Plaintiff. For this reason, the Court infers that Ms. Franklin identified Abston from the line-up as the allegations, as plead, are not clear but do infer such.

and adult convictions for especially aggravated kidnapping, rape, and aggravated robbery, and failed to take reasonable steps to expedite its investigation.

MPD did not seek data or meta data from the dating app used by Abston to meet Ms. Franklin. The app's owner had a portal for emergency requests by law enforcement for information.

In September 2021, MPD submitted the sexual assault kit to the Tennessee Bureau of Investigation ("TBI"), but did not request it to be expedited or "rushed." TBI accepts "rush" requests and has used it to identify suspects. In the 2022 investigation of the kidnapping of Eliza Fletcher, the TBI used DNA to identify Abston within eighteen hours of the rush request by MPD. The TBI extracts DNA from physical evidence in sexual assault kits and uploads the information to a national database (CODIS) to compare with suspected or known criminal perpetrators. The DNA to match Abston to other crimes was available in September 2021. According to Ms. Franklin, however, MPD had enough information to arrest Abston with or without the DNA match.

Eventually, the TBI removed the sexual assault kit from storage on June 24, 2022. The TBI completed the initial report on August 29, 2022. On September 4, 2022, during the active investigation of the abduction of Eliza Fletcher, MPD informed the TBI of Ms. Franklin's sexual assault kit from September 21, 2021, and that Abston "may have been a suspect." The TBI uploaded the information to CODIS and matched to Abston on September 5, 2022. As alleged by Ms. Franklin, MPD did not revisit Ms. Franklin's case until Abston was determined to be a suspect in the abduction and murder of Eliza Fletcher in September 2022.

Specifically, Ms. Franklin alleges that the City of Memphis, through MPD, was negligent and reckless in the following ways:

a. Failure to investigate the rape of Alicia Franklin with the degree of care and caution required of a reasonable and prudent police officer under the circumstances;

b. Failure to submit the sexual assault kit of Alicia Franklin with a "rush" or expedited request for processing to the TBI despite the fact that MPD knew or should have known that Cleotha Abston was the likely suspect in Alicia Franklin's rape and presented an ongoing risk to Alicia Franklin and other women in the City of Memphis;

c. Failure to provide sufficient information to the TBI;

d. Failure to enlist the services of a private forensic laboratory to process Alicia Franklin's rape kit knowing that it would take months if not years for the TBI to process her kit without there being a request for rush processing;

e. Failure to obtain a more recent photo of Cleotha Abston, despite a stated intention of plan to obtain a more recent photo in order to make such a photo available to Alicia Franklin for review;

f. Failure to extract fingerprint evidence from items belonging to Alicia Franklin that Cleotha Abston had physically handled during the crime sequence against her, including her purse and her phone;

g. Failure to canvass the neighborhood and interview potential witnesses in the area;

h. Failure to follow up on social media information concerning Cleotha Abston;

i. Failure to contact the company that owned the dating app and request the data and metadata for "Cleo's" account;

and

j. Failure to apprehend/arrest Cleotha Abston on a timely basis under the circumstances and based upon available evidence.

(Amended Complaint ¶ 50). Ms. Franklin contends that as a result she sustained physical and mental injuries. She avers that her injuries include, but are not limited to:

a. Physical pain and suffering and intrusion upon her bodily integrity and privacy of a past nature, including being raped;

b. Emotional pain and suffering of a past, present and future nature, including fear, anxiety, sleep and appetite disruptions, and extreme sadness upon learning that the man suspected of raping her is also the man suspected of abducting and murdering Eliza Fletcher, when the abduction and murder of Eliza Fletcher could and likely would have been prevented if MPD had properly investigated Ms. Franklin's case as set forth above in this Complaint;

c. Medical bills and expenses of a past, present and/or future nature;

d. Loss of enjoyment of life;

e. Loss of earning capacity;

f. Prejudgment and/or post-judgment interest to the extent permitted by law; and

g. All such further relief, both general and specific to which she may be entitled under the premises.

(Complaint ¶ 51).

The Defendant makes two motions. First, a Motion to Dismiss. Second, and in the alternative, a Motion to Strike. The Court will address each motion separately.

MOTION TO DISMISS

Legal Standard

A motion to dismiss for failure to state a claim challenges the legal sufficiency of the Complaint. *Webb v. Nashville Area Habitat for Humanity, Inc.* 346 S.W.3d 422, 426 (Tenn. 2011). It does not challenge the strength of plaintiff's proof or evidence. *Id.* The relevant and material allegations of the complaint are taken as true and the plaintiff is afforded the benefit of all reasonable inferences that may be drawn. *Id.* Legal conclusions are not afforded the same weight. *Id.* at 427. To survive a motion to

dismiss, the Complaint must raise the pleaders right to relief beyond a speculative level. *Id.* at 427.

Tennessee follows a liberal notice pleading standard under Tennessee Rule of Civil Procedure Rule 8. *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.2d 422, 426 (Tenn. 2013). The complaint must give notice of the wrongs and injuries complained of by the pleader. *Id.* While it need not contain all of the detailed factual allegations, it must contain sufficient factual allegations so that the facts, and inferences therefrom, demonstrate a right to relief beyond a speculative level. *Id.*

Conclusions of Law

The City of Memphis argues that Ms. Franklin's lawsuit should be dismissed for failure to state a claim under four separate theories. First, the City argues that the City owed no duty to Ms. Franklin, and if it did that they met that duty. Second, the City contends that Ms. Franklin fails to allege a causal connection between her injuries and any act or omission of the City. Third, the City believes that the doctrine of sovereign immunity bars Ms. Franklin's claim. Fourth, the City asserts that the Public Duty Doctrine bars any claim of Ms. Franklin. The Court will address each argument separately.

1. Duty

The City of Memphis first argues that the City did not owe a duty to Ms. Franklin to investigate her rape. In sum, the City contends that there is no duty of reasonable investigation in Tennessee. A portion of the City's arguments in this regard overlap with the arguments related to sovereign immunity and the Public Duty Doctrine. The Court will address those arguments below.

The City of Memphis argues that the only duty to investigate applies to the Sherriff pursuant to Tenn. Code Ann. § 38-3-102 ("Sheriff's Statute"), and that therefore, the MPD did not owe a duty to investigate. In a county such as Shelby where the municipal police departments are responsible for patrolling, reporting and investigating crimes in place of the Sheriff within the city limits, do the duties created by the Sheriff's Statute apply to municipal police officers? Certainly, there could be an argument as there is legal authority which purports that municipal police officers are acting as assistants to the Sherriff and with all power of the Sheriff. *See* Tenn. Code Ann. § 38-3-103; Cornett v. City of Chattanooga, 56 S.W.2d 742, 743 (Tenn. 1933); Tenn. Op. Att'y Gen. 10-03 (Jan. 19, 2010); Tenn. Op. Att'y Gen. 08-134 (Aug. 14, 2008); Tenn. Op. Att'y Gen. 83-370 (Aug. 17, 1983). However, the Plaintiff has not brought this action pursuant to the Sheriff's Statute or argued that it applies or should be imputed to the officers in this case. Therefore, the Court does not consider or decide the application of the Sheriff's Statute to municipal police officers.

Nevertheless, even without considering the Sheriff's Statute, the current law in Tennessee supports a duty to reasonably investigate reports of criminal activity.[3] *See e.g., Seidner v. Metropolitan Government of Nashville-Davidson County*, No. 01-A-01-9012-CV00451, 1991 WL 66440 (Tenn. Ct. App. May 1, 1991)(perm. app. denied). In *Seidner*, the plaintiff brought a suit against the Metropolitan Government of Nashville and Davidson, County for the alleged negligence of the police officer in investigating the facts and stopping the dismantling of their home. *Seidner,* 1991 WL 66440, at *1. After a bench trial, the trial court held that the action or inaction of the police officer was a

[3] The majority of the cases regarding duties of law enforcement do not discuss whether a duty does or does not exist, but instead discuss whether the claim may proceed under the Government Tort Liability Act and the Public Duty Doctrine.

discretionary act and therefore, immunity applied to the Metropolitan Government of Nashville and Davidson, County for his actions or inactions. *Id.* The Court of Appeals did not affirmatively rule as to whether there was a duty or not. Instead, the *Seidner* Court held that under the facts of the case, there was no breach of that duty. *Id.* at *4. Additionally, in *Holt v. City of Fayetteville*, M2014-02573-COA-R3-CV, 2016 WL 1045537 (Tenn. Ct. App. Mar. 15, 2016), the plaintiffs brought a wrongful death suit when a police officer negligently secured a suspect in a police car, the suspect stole the police car, wrecked and killed their family member. The *Holt* court did not hold that the police did not owe a duty. *Id.* Instead, *Holt* held that the city was immune from suit under the public duty doctrine. *Id.*

Whether one owes a duty and whether one is immune from liability for breach of that duty are two separate questions. Accordingly, the Court finds that the Motion to Dismiss should be denied on the issue of whether the City owed a duty. This ruling, however, does not address the issue of sovereign immunity or immunity under the Public Duty Doctrine. Those issues are discussed below.

<u>*2. Causation*</u>

Next, the City of Memphis contends that even if Ms. Franklin could establish a duty she fails to articulate a causal connection. Negligence requires proof of two types of causation: causation in fact and proximate cause. *Hale v. Ostrow*, 166 S.W.3d 713, 718 (Tenn. 2005). "Cause in fact and proximate cause are 'ordinarily [trier of fact] questions, unless the uncontroverted facts and inferences to be drawn from them make it so clear that all reasonable persons must agree on the proper outcome.'" *Hale v.*

Ostrow, 166 S.W.3d 713, 718 (Tenn. 2005)(quoting *Haynes v. Hamilton County*, 883 S.W.2d 606, 612 (Tenn.1994)).

The City argues first that Ms. Franklin cannot establish causation-in-fact for her claim for "physical pain and suffering and intrusion upon her body integrity and privacy of a past nature, including being raped." The Court, having reviewed the Complaint and presuming the facts alleged to be true, finds that there are no factual allegations of any acts or omissions by the City prior to Ms. Franklin's rape. At oral argument, Counsel for Ms. Franklin mentioned allegations regarding pending arrest warrants in existence at the time of Ms. Franklin's rape that had not be acted on by MPD. Such allegations are not the Complaint. Therefore, the Court finds that Ms. Franklin fails to state a claim for any negligent or reckless conduct causing her rape. Therefore, this portion of her Complaint fails to state a claim and must be dismissed.

Ms. Franklin, however, alleges other injuries. She alleges physical and mental suffering as a result of the negligent and reckless investigation. She also alleges emotional pain and suffering when learning that the man suspected of raping her in 2021 is the same man suspected of abducting and killing Eliza Fletcher in 2022. The City contends that Ms. Franklin cannot establish causation for these injuries. This argument is more akin to an argument for summary judgment. At this stage, Ms. Franklin must only make a short and plain statement showing that she is entitled to relief, including a demand for judgment for relief. Tenn. R. Civ. P. 8. Ms. Franklin has alleged acts and omissions of the City and alleged that those caused her physical and mental injuries. Her Complaint meets the requirements of Tenn. R. Civ. P. 8 and

therefore, states a claim upon which relief may be granted. This portion of the motion must be denied.

2. <u>GTLA</u>

As its third argument, the City contends that if there is a duty, then it is immune from suit under the Tennessee Governmental Tort Liability Act ("GTLA"), Tenn. Code Ann. § 29-20-201 *et. seq.*, as the investigation of the officers is a discretionary act. The Tennessee Supreme Court recently discussed the GTLA, its history and application in *Lawson v. Hawkins County, No. E2020-01529-SC-R11-CV*, 2023 WL 2033336 (Tenn. Feb. 16, 2023).

Sovereign Immunity "has been part of Tennessee jurisprudence for well over one hundred years." *Hughes v. Metro. Gov't of Nashville & Davidson Cnty.*, 340 S.W.3d 352, 360-61 (Tenn. 2011). It does not bar suit when the government consents to being sued. The legislature has the power to waive the protections of sovereign immunity. Tenn. Const. Art. I, § 17. The courts, no matter the facts, cannot waive immunity where the legislature has not. It is the distinct job of the legislature to make these policy decisions.

The General Assembly exercised their power by adopting the GTLA. *Hughes*, 340 S.W.3d at 360. The GTLA removes immunity for certain acts. Specifically, related to this matter, the GTLA removes immunity for "injur[ies] proximately caused by the negligent act or omission of any employee within the scope of his employment." Tenn. Code Ann. § 29-20-205. Ms. Franklin brought her claims pursuant to this section. The removal of immunity, however, is subject to certain exceptions, including discretionary decisions. Tenn. Code Ann. § 29-20-205(1).

The City contends that the actions or omissions of the officers investigating Ms. Franklin's report of kidnapping and rape amount to discretionary decisions. Therefore, the City contends that it is immune from this suit. The Tennessee Supreme Court adopted the "planning-operational test" to determine whether an action is discretionary. *Bowers v. City of Chattanooga*, 826 S.W.2d 427 (Tenn. 1992). Planning or policy making decisions are discretionary and do not give rise to tort liability. *Id.* at 430. Operational decisions are not discretionary and may give rise to tort liability. *Id.*

The determination of whether an action is discretionary or operational requires the consideration of many factors. *Id.* It depends on the type of decision at issue and not merely the identity of the decision maker. *Id.* Discretionary decisions involve the balancing of policy considerations. Because an action requires the exercise of choice or judgment, does not automatically designate it as discretionary. *Id.* at 431. If a decision comes after consideration or debate by those charged with the formulation of plans or policies, it strongly suggests it is a planning decision. *Id.* "These decisions often result from assessing priorities; allocating resources; developing policies; or establishing plans, specifications, or schedules." *Id.* A decision based upon preexisting laws, regulations, policies or standards, usually indicate that it is an operational decision. *Id.*

The Court concludes, at this time, that the Complaint contains sufficient allegations that the acts complained of could be operational in nature. MPD has a duty to investigate criminal activity. At the very least, MPD has a duty to reasonable respond to the report of a crime. The question of what is reasonable is typically reserved for the trier of fact. Taking the facts alleged in the complaint as true and giving Ms. Franklin the benefit of all reasonable inferences, the Court concludes that the Complaint alleges

sufficient operational acts or omissions to survive a motion to dismiss. As the case develops, the proof may show otherwise, including proof about the nature of the acts.[4]

In considering the GTLA issue, the Court must also consider the claim for reckless conduct brought by Ms. Franklin. Ms. Franklin has brought a claim for both negligence and reckless conduct. The Tennessee Supreme Court has recently clarified that these are two separate claims. *Lawson*, 2023 WL 2033336, at *4-6. In so clarifying, the Tennessee Supreme Court also held that the GTLA only removed immunity for negligence actions and not for claims of recklessness. *Lawson*, 2023 WL 2033336, at *6. Counsel for Ms. Franklin, at oral argument, conceded that based upon *Lawson*, the City would be immune from a claim for reckless conduct. Therefore, the Court must grant the Motion to Dismiss as to the claim for reckless conduct.[5]

3. PDD

Finally, the Court must address the arguments regarding the Public Duty Doctrine. The Tennessee Supreme Court provided the framework for consideration of the Public Duty Doctrine in *Chase v. City of Memphis*, 971 S.W.2d 380, 385 (Tenn. 1998):

> Both the GTLA and the public duty doctrine are affirmative defenses. Courts first look to the GTLA. If immunity is found under the GTLA, a court need not inquire as to whether the public duty doctrine also provides immunity. If, however, the GTLA does not provide immunity, courts may look to the general rule of immunity under the public duty doctrine. If

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[4] The City suggests that the police investigation involved "a balancing of factors, an assessing of priorities, and an allocation of available resources." The Court cannot make this determination without evidence.

[5] In *Haynes v. Perry Cnty.*, No. M2020-01448-COA-R3-CV, 2022 WL 1210462, at *4, the Tennessee Court of Appeals reached a different result, and allowed recklessness claims to proceed because the complaint in that case raised allegations under Tenn. Code Ann. § 8-8-302. Tenn. Code Ann. § 8-8-302 removes sovereign immunity for non-negligent claims against a deputy sheriff. Haynes, 2022 WL 1210462, at *4. In the case at bar, the Plaintiff's Complaint only alleges liability under the GTLA, which removes sovereign immunity for negligence, not recklessness. *See Lawson*, 2023 WL 2033336, at *4-6.

> immunity is then found under the public duty doctrine, the next inquiry is whether the special duty exception removes the immunity afforded under the public duty doctrine. The special duty exception, however, cannot be used to remove immunity afforded by the GTLA.

Because the City is immune from the reckless conduct claim in accordance with the GTLA and the recent Tennessee Supreme Court decision in *Lawson*, the Court need not address that claim further. The Court, however, must consider the defense of the Public Duty Doctrine as it relates to the negligence claim.

The public duty doctrine is an affirmative defense to a tort action against a municipality. *Ezell v. Cockrell*, 902 S.W.2d 394, 396 (Tenn. 1995). The public duty doctrine shields municipalities from suits for injuries caused by breach of a duty owed to the public at large. *Ezell*, 902 S.W.2d at 397. "The decision to arrest a suspect and properly secure him or her is a duty owed to the public at large." *Holt*, 2016 WL 1045537 at *4 (citing *Ezell,* 902 S.W.2d at 401; and Robert A. Shapiro, Annotation, *Personal Liability of Policeman, Sheriff, or Similar Peace Officer or His Bond, for Injury Suffered as a Result of Failure to Enforce Law or Arrest Lawbreaker,* 41 A.L.R.3d 700, 702 (1972)). The duty of the police to protect someone from crime falls within the police department's "general duty to preserve the peace, arrest lawbreakers, and provide police protection." *Eldridge v. City of Trenton,* No. 02A01-9503-CV-00041, 1997 WL 527303, at *4 (Tenn. Ct. App. Aug. 26 1997); see also *Hurd v. Flores*, 221 S.W.3d 14 (Tenn. Ct. App. 2006)(found no allegations than refusal to enforce applicable law and held public duty doctrine applied); *Hurd v. Woolfork*, 959 S.W.2d 578 (Tenn. Ct. App. 1997). It is a duty owed to the public rather than particular individuals. *Id.*

An exception to the public duty doctrine applies if a special relationship exists between the plaintiff and governmental employee giving rise to a special duty. *Ezell*,

902 S.W.2d at 402. The Tennessee Supreme Court has held that a special duty removes immunity in three specific circumstances:

> (1) a public official affirmatively undertakes to protect the plaintiff and the plaintiff relies upon the undertaking;
> (2) a statute specifically provides for a cause of action against an official or municipality for injuries resulting to a particular class of individuals, of which the plaintiff is a member, from failure to enforce certain laws; or
> (3) a plaintiff alleges a cause of action involving intent, malice, or reckless misconduct.

Ezell, 902 S.W.2d at 402. Ms. Franklin alleges that the officers' investigation amounts to reckless misconduct and that the officers affirmatively undertook to protect her and that she relied upon that undertaking. The Court will address each separately.

Affirmative Undertaking

At oral argument, counsel for Ms. Franklin argued that the first special duty exception applied. Counsel contended that the MPD affirmatively undertook a duty to investigate the crime and protect Ms. Franklin, and that Ms. Franklin relied upon the MPD by reporting the crime.[6]

In adopting the three exceptions to the public duty doctrine, the Supreme Court did not hold that "a special duty of care will be found simply based on a foreseeability analysis, or when an officer is only dealing with a small group of people...." *Kames v. Madison County*, No. W2009-02476-COA-R3-CV, 2010 WL 3716458 (Tenn. Ct. App. Sept. 23, 2010). The Tennessee Supreme Court declined to adopt a special exception when "circumstances where it is apparent to the public officer that his failure to act will likely subject an identifiable person to imminent harm." *Ezell*, 902 S.W.2d at 402; *see also Kames*, 2010 WL 3716458, at *4.

[6] This is not an argument made in Ms. Franklin's written response to the Motion to Dismiss.

The Tennessee Court of Appeals discussed the meaning of the affirmative undertaking exception in *Wells v. Hamblen County*, No. E2004-01968-COA-R3-CV, 2005 WL 2007197, at *5-7 (Tenn. Ct. App. December 19, 2005). The *Wells* court noted that the exception required "officials, **by their actions**, affirmatively undertake to protect the plaintiff..." *Id.* at *5 (emphasis original). The *Wells* court explained that this language differed from other exceptions that the *Ezell* court considered and rejected. *Id.*

In *Wells*, the plaintiff, sued Hamblen County after her boyfriend killed their three-year-old. *Id.* at *1. The *Wells* plaintiff reported to the deputy sheriff that her former boyfriend assaulted her. *Id.* She further reported that after the assault, he snatched their three-year-old from her car window. *Id.* In the past, he had assaulted her and made threats to kill her and her family. *Id.* She asked the deputy to go to his home and get the child, expressing fear for the child's safety. *Id.* The deputy told the plaintiff that he would serve a warrant on the boyfriend the following day for the assault and get the child at that time. *Id.* at *1. Before that occurred, the boyfriend murdered the child. *Id.* at *2. The complaint alleged that the deputy had an arrest warrant that was never served. *Id.* In affirming the dismissal of the complaint, the *Wells* court explained that the complaint did not allege any action that the deputy affirmatively undertook to protect the child. *Id.* at *7. Instead, the *Wells* court found that the plaintiff complained of failures of the deputy to act. *Id.* The *Wells* court held that failure to act was not included in the exception adopted in *Ezell*. *Id.*

This is similar to the facts and decision in *Hurd v. Flores*, 221 S.W.3d 14 (Tenn. Ct. App. 2006). In *Hurd*, the deceased became stuck in the mud along interstate 40. *Id.* at 18. A deputy responded and summoned a wrecker to remove the vehicle. *Id.* After

her vehicle was removed, the deceased offered to meet the tow truck driver at an ATM for payment. *Id.* at 19. The deceased, the tow truck driver and the deputy discussed the nearest ATM and determined that the closest one was in the opposite direction. *Id.* According to the deputy, his involvement ended at that time. *Id.* The three resumed driving on the interstate, all within a few car lengths of each other. *Id.* After approximately two and a half miles, the tow truck driver and the deceased pulled into an interstate crossover to turn around – an illegal act. *Id.* The deputy pulled in behind them, but did not attempt to stop them from turning around in the overpass. *Id.* Then, the deceased, pulled into oncoming traffic, colliding with other vehicles and died as a result. *Id.*

The deceased's parents brought a wrongful death action against the county contending that the deputy was negligent in allowing their deceased to use the overpass illegally. *Id.* at 19-20. The Court of Appeals held that the deputy's actions were operational and not discretionary. *Id.* at 27. Therefore, the action could proceed under the GTLA. *Id.* However, this did not stop the inquiry. *See id.* The court then had to address the public duty doctrine. *Id.* at 27-29. The parents argued that the deputy undertook an affirmative duty and therefore, the special exception applied. *Id.* at 28. The Court of Appeals found that there was nothing in the record to support a finding of affirmative undertaking to protect the deceased, that the only allegation was a refusal to enforce the law. *Id.* Accordingly, the *Hurd* court held that the affirmative undertaking special exception did not apply. *Id.*

Like *Wells* and *Hurd*, Ms. Franklin complains of the failures of MPD to act. For example, she complains of MPD's failure to arrest Abston, its failure to put a "rush" on

the sexual assault kit and other alleged failures to act. (See page 5 above). As explained in *Wells*, the Tennessee Supreme Court explicitly rejected promises, assurances, or any verbal communication" and instead required the action complained of to be some kind of affirmative action. *Id*. Perhaps the exception might be modified to include actions or inactions as allowed in negligence claims. But, it is not for this Court to modify the standard adopted by the Tennessee Supreme Court or predict what a higher court might do. Accordingly, this Court cannot find that the first exception applies.

Further, there are no allegations in the Complaint that Ms. Franklin relied upon the MPD. *See e.g., Hurd v. Woolfork,* 959 S.W.2d 578 (Tenn. Ct. App. 1997)("The complaints also contain no allegations that the decedents relied upon Sherriff Woolfork or his department to provide them with protection from Morris.) Counsel made numerous arguments orally that Ms. Franklin fled from Memphis in fear for her life; that she feared that based upon reporting the crime, Abston would retaliate and harm her; and that she relied upon MPD to protect her. Her Complaint, however, only contains the allegations that Abston threatened to kill her while kidnapping her before the rape. It does not contain any of the allegations or arguments made orally. Therefore, for this additional reason, the Court cannot find that the first special duty exception applies.

<u>Reckless Misconduct</u>

Ms. Franklin alleges that the officers' actions and inactions, including their failure to reasonably investigate her rape and kidnapping and failure to arrest Abston amounts to reckless misconduct. Recklessness occurs when one consciously disregards a substantial and unjustifiable risk of such a nature that its disregard constitutes a gross

deviation from the standard of care. *Haynes*, 2022 WL 1210462, at *4. Certainly, the factual allegations in the Complaint are sufficient to permit a finding that the officers consciously disregarded a substantial and unjustifiable risk of such a nature that its disregard constitutes a gross deviation from the standard of care. They are both concerning, and if left unexplained, disappointing.[7] To be clear though, nothing in this ruling should be taken as agreement or disagreement with the actions or inactions of MPD. That is not the role of the Court when addressing a motion to dismiss.

Unfortunately, for Ms. Franklin, the Tennessee Supreme Court in *Lawson* held that the GTLA does not remove immunity for claims of recklessness. *Lawson*, 2023 WL 2033336, at *6. "The special duty exception, however, cannot be used to remove immunity afforded by the GTLA." *Chase v. City of Memphis*, 971 S.W.2d 380, 385 (Tenn. 1998).[8] Consequently, based upon the law as it exists now, Ms. Franklin cannot apply the special duty exception for recklessness.

At oral argument, counsel for Ms. Franklin contended that while the claim for reckless misconduct is barred by the GTLA (in accordance with *Lawson*), the Court should allow it as a defense to the City's affirmative defense. The exception, however, requires "a cause of action" based upon reckless misconduct. *See Ezell*, 902 S.W.2d at 402. Because of the GTLA immunity, Ms. Franklin does not have such a cause of action. Perhaps in light of *Lawson*, the exception might be modified, or the public duty

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[7] In considering a Motion to Dismiss, the Court considers the factual allegations in the Complaint as true and gives them all reasonable inferences. There is no evidence before the Court nor is the Court making any factual findings at this time.

[8] In *Haynes*, the Court of Appeals also noted that the GTLA only moves immunity for negligence, not recklessness. That cause of action could proceed, however, because it was brought under Tenn. Code Ann. §8-8-302 as allowed against a county for actions against a deputy sheriff. *Haynes*, 2022 WL 1210462, at *4.

doctrine might be abolished altogether. But, that is not for this Court to do nor is it appropriate for this Court to predict what a higher court might do.

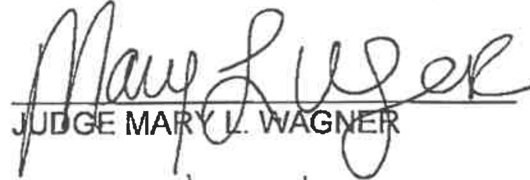
This is exactly the Catch-22 discussed by Justice Kirby in her concurrence to the *Lawson* opinion. This is especially true when considering the divergent results from the *Haynes* case, brought pursuant to Tenn. Code Ann § 8-8-302 for actions of a deputy sheriff, and this matter brought pursuant to the GTLA for the actions of a municipal police officer. It is not the role of this Court, and it would be wholly inappropriate, to create a remedy when one does not yet exist in the law.

Consequently, based upon the law as it exists now and the Complaint before this Court, the Court must find that Ms. Franklin cannot rely upon the reckless misconduct exception to the public duty doctrine. As such, the public duty doctrine provides the City with immunity from Ms. Franklin's negligence claims. And the Court must grant the Motion to Dismiss.

MOTION TO STRIKE

The City also brings a motion to strike certain allegations from Ms. Franklin's complaint alleging that they are immaterial, impertinent and scandalous. The City contends the Court should strike these allegations pursuant to Tenn. R. Civ. Pro. 12.06. The Court finds that these allegations are arguably related to Ms. Franklin's claims for emotional harm and reckless misconduct. Accordingly, the Court denies the motion to strike.

IT IS SO ORDERED ADJUDGED AND DECREED that for the reasons set forth above Defendant's Motion to Dismiss is granted and the Motion to Strike is denied. Costs of this matter are assessed against the Plaintiff, for which execution may issue.



JUDGE MARY L. WAGNER

Date: 3/22/2023

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the forgoing has been mailed via US Mail and sent via email to the email address of record to the following:

Gary K. Smith
Karen M. Campbell
1770 Kirby Parkway, Suite 427
Memphis TN 38138
Attorneys for the Plaintiff

Jeffrey S. Rosenblum
Matt May
6070 Poplar Avenue, Fifth Floor
Memphis TN 38119
Attorneys for the Plaintiff

Tannera George Gibson
Jonathan P. Lakey
Lani Lester
Patrick J. Hillard
130 N. Court Avenue
Memphis TN 38103
Attorneys for the Defendant

CLERK

Date: 3/22/2023

IN THE CIRCUIT COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

ERROL SHERROD

Plaintiff,

vs. **CT-002471-18**
Division VII

SMITH & NEPHEW, INC.

Defendants.

ORDER ON SMITH & NEPHEW'S MOTION FOR SUMMARY JUDGMENT

This cause came before Judge Mary L. Wagner upon Defendant Smith & Nephew, Inc.'s Motion for Summary Judgment. Based upon the Motion, Statement of Undisputed Facts, Memoranda in Support thereof, Plaintiff's Response and the entire record in this matter, the Court finds as follows:

BACKGROUND

This is a personal injury action filed by the Plaintiff, Erroll Sherrod on May 31, 2018. It is one of numerous claims brought across the country against the Defendant, Smith & Nephew, Inc. related to its hip implant products. Smith & Nephew marketed and sold products for hip replacement; specifically the hip socket, acetabulum, and the ball, and the femoral head. These products included the Birmingham Hip Resurfacing System ("BHR") Cup and the modular femoral head. Smith & Nephew's BHR system received Class III pre-market approval from the Food and Drug Administration ("FDA") pursuant to the Federal Food, Drug and Cosmetic Act. 21 U.S.C. § 360c. This pre-market approval related to a resurfacing procedure and not a total hip replacement.

With regard to Mr. Sherrod, the BHR cup was combined with a femoral head and two other components to perform a total hip replacement. Only the BHR cup had Class III pre-market approval as part of the BHR system. The femoral head utilized in Mr. Sherrod had 510(k) approval by the FDA. This combination of components and this specific use had not been approved by the FDA.

Mr. Sherrod brings the following causes of action:

- Count 1: Mr. Sherrod alleges that the Defendant was negligent in the design, manufacture, assembling, inspecting, testing, marketing, distributing and selling of the "BHR THR products in a defective and unreasonably unsafe condition."
- Count 2: Mr. Sherrod brings a claim for Strict Products Liability for defective design. He brings this claim based upon the "subject BHR THR products and related components that make up the hip implant used in Plaintiff in this case." As part of this claim, Plaintiff alleges failure to comply with the Federal Food, Drug and Cosmetic Act. Plaintiff alleges that he was injured as a direct and proximate result of the violations of federal statutory and regulatory standards of care. He asserts that this cause of action is based "entirely on the contention that Defendant, Smith & Nephew violated federal safety statutes and regulations, as well as conditions established in the Approval Order with which Defendant agreed to comply to obtain premarket approval of the device." He explains that he is "pursuing parallel state law claims based upon Defendant, Smith & Nephew's violations of the applicable federal regulations and Approval Order."
- Count 3: Mr. Sherrod brings a claim for Strict Products Liability for failure to warn. This claim is based upon the allegations that Smith & Nephew failed to provide adequate warnings about the defective and dangerous nature of the "BHR THR products."

- Count 4: Mr. Sherrod brings a claim for Strict Liability for Breach of Express Warranties. He again alleges that the "BHR THR products" were defective and unreasonably dangerous and therefore, Smith & Nephew breached warranties made impliedly and expressly.
- Count 5: Mr. Sherrod alleges that Smith & Nephew impliedly warranted that the "BHR THR products" were merchantable and fit for ordinary use and that Smith & Nephew breached these warranties because the BHR THR products were neither merchantable nor suited for intended use.
- Count 6: Mr. Sherrod brings a claim for negligent misrepresentation. He alleges that Smith & Nephew negligently misrepresented the BHR THR products unreasonable and dangerous side effects.
- Count 7: Mr. Sherrod brings a claim for unfair and deceptive trade practices. Mr. Sherrod alleges that he suffered injuries as a result of Smith & Nephew's deceptive conduct and violation of consumer protection laws.
- Count 8: Mr. Sherrod also brings a claim for misrepresentation by omission. He alleges that Smith & Nephew had a duty to disclose the defective nature of the BHR THR products. He further alleges that Smith & Nephew fraudulently concealed that the "BHR THR products" were defective, unsafe, and unfit for the purposes intended, and that they were not of merchantable quality.
- Count 9: Mr. Sherrod also brings a claim for constructive fraud. Related to this claim, he alleges a duty to disclose the defective nature of the BHR THR products. He alleges that Smith & Nephew falsely and fraudulently represented that the BHR THR products were safe and effective.

- Count 10: Mr. Sherrod also brings a claim for Negligent Infliction of Emotional Distress. In sum, he alleges that he has sustained emotional distress based upon Smith & Nephew's negligent manufacture, design, development, testing, labeling, marketing and selling of the BHR THR products and misrepresentation of their safety, quality and efficacy.
- Count 11: Mr. Sherrod brings a specific claim for violation of the Tennessee Products Liability Act. He alleges that the BHR THR products were defective and/or unreasonably dangerous.
- Count 12: Mr. Sherrod also brings a claim for violation of the Tennessee Consumer Protection Act. He alleges that Smith & Nephew's actions as described constitutes unfair and deception trade practices.
- Count 13: Related to the other claims, Mr. Sherrod seeks punitive damages.

UNDISPUTED MATERIAL FACTS

The Court finds the following are undisputed material facts:

1. Plaintiff Erroll Sherrod's Complaint alleges that he underwent right total hip arthroplasty on December 18, 2008. Mr. Sherrod alleges that he was implanted with a BHR acetublar cup and a Modular Femoral Head.
2. Mr. Sherrod then underwent left total hip arthroplasty on April 2, 2009. Mr. Sherrod alleges that he was implanted with a Birmingham Hip Resurfacing System Cup and a Modular Femoral Head. Mr. Sherrod makes claims under Tennessee State law that the BHR acetabular cup implanted in him was defective and caused him injury.

3. Mr. Sherrod makes claims under Tennessee state law that the BHR acetabular cup implanted in him was defective and dangerous.[1]

4. The BHR acetabular cup implanted in Mr. Sherrod is a component of the Birmingham Hip Resurfacing ("BHR") system. The BHR System is a Class III medical device which received Pre-Market Approval from the Food and Drug Administration ("FDA") on May 9, 2006 for resurfacing surgery. Only the BHR acetabular cup was implanted in Mr. Sherrod, not the entire BHR System. Additionally, it was not utilized for a resurfacing surgery but in an off-label use for a total hip arthroplasty. [2]

SUMMARY JUDGMENT STANDARD

Summary Judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." TENN. R. CIV. P. 56.04. The moving party may satisfy this burden 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 Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 264¬65 (Tenn. 2015). "The nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* at 265 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). "The nonmoving party must demonstrate the

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[1] Mr. Sherrod does not dispute this fact as set forth by Smith & Nephew. He asserts in his response that he has other claims. This is not a disputed fact but rather relates to the legal definition of device for purposes of preemption as discussed below.

[2] Mr. Sherrod disputed fact No. 4 from Smith & Nephew's Statement of Facts. The Court has restated this fact to better reflect what the parties agree are the undisputed facts. Plaintiff's dispute centers around the legal effect of preemption based on the one component-- BHR acetabular cup – being used in an off label (aka non-approved) manner. This legal issue will be addressed below.

existence of specific facts in the record, which could lead a rational trier of fact to find in favor of the nonmoving party." *Id.* Summary 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. TENN. R. CIV. P. 56.04, 56.06.

CONCLUSIONS OF LAW

Preemption Defined

The Medical Device Amendments of 1976 and FDA Device Classification

In 1976, Congress enacted the Medical Device Amendments ("MDA") to regulate state obligations on medical devices and impose new federal oversight on those devices. The MDA created tiers of federal requirements for certain devices based on the inherent risk levels of those devices. *See* 21 U.S.C. § 360c. Class I devices are subject to the lowest level of federal oversight, Class II devices are subject to special controls, like the § 510k process, and Class III devices are subject to the highest level of oversight and must go through the premarket approval ("PMA") process. *Id.*

The PMA process involves rigorous review of Class III devices in which manufacturers must submit details on the safety and efficiency of their devices for FDA review. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 477 (1996). A manufacturer's application for PMA review of a device includes a number of materials, including a statement of all of the device's components, ingredients, and properties, as well as a sample of the proposed labelling specifying the conditions of use that the FDA will use to evaluate the device's safety and effectiveness in order to ensure that the labelling is not misleading. *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 318 (2008). FDA review for each submission takes on average 1,200 hours. *Lohr*, 518 U.S. at 477. Upon finding that there is a "reasonable assurance of its safety and effectiveness", the FDA will grant PMA for

that device. 21 U.S.C. § 360c(a)(1)(C). Once a device has received premarket approval, the MDA forbids the manufacturer to make, without FDA permission, changes in design specifications, manufacturing processes, labeling, or any other attribute, that would affect safety or effectiveness. § 360e(d)(6)(A)(i). *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 319 (2008). If a manufacturer desires to make any changes, those changes must similarly be pre-approved. *Id.*

Unlike Class III devices, Class I and Class II devices are not subject to the same kind of rigorous review. Because these devices carry lower risk levels than Class III devices, they are subjected to the limited review of what is known as the § 510(k) process under 21 U.S.C. § 360(k). The process requires that manufacturers who intend to market a new device submit a "premarket notification" to the FDA for FDA review. *Lohr*, 518 U.S. at 478. Unlike the average 1,200-hour PMA review, § 510(k) review only takes an average of 20 hours. *Id.* at 479. Under this § 510(k) process, so long as the device is "substantially equivalent" to a pre-existing device, the manufacturers may market it without any further regulatory analysis. *Id.* at 478.

The MDA Express Preemption Provision

As a result of the MDA's comprehensive approach to federal oversight on medical devices, limited room has been left for additional regulation at the state level. This is made especially clear in the statute's express preemption provision. The provision states:

> [N]o State . . . may establish or continue in effect with respect to a device intended for human use any requirement which is different from or in addition to, any requirement under this Act . . . and which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this Act.

21 U.S.C. § 360k(a). Because the FDA only grants PMA after a determination that a device is reasonably safe and effective after rigorous review, and because the FDA requires manufacturing of PMA devices to not deviate from the specifications in the PMA application, the MDA's express

preemption provision applies to PMA devices. *Riegel*, 552 U.S. at 323. On the other hand, because devices that have gone through the § 510(k) process are not reviewed for safety or efficacy, but rather only for "substantial equivalence," those devices do not receive the same kind of express preemption protections from the statute as PMA devices. *Shuker*, 885 F.3d at 766; *Lohr*, 518 U.S. at 494.

Express preemption principles applies regardless of how the device is used by third parties, i.e doctors. *Shuker*, 885 F.3d at 769 (citing 21 U.S.C. 396 and *Caplinger v. Medtronic, Inc.*, 784 F.3d 1335, 1343-45 (10th Cir. 2015)); see also *White v. Medtronic, Inc.*, 808 Fed. Appx. 290, 295 (6th Cir. 2020). Off label use is expressly contemplated by the Federal Food, Drug and Cosmetic Act. *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 350 (2001). The FDA's granting of PMA for a device does not limit physicians' decisions on off-label uses of the device because off-label use is "an accepted and necessary corollary of the FDA's mission to regulate . . . without directly interfering with the practice of medicine." *Id.* (quoting *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 350 (2001)).

Express preemption does not apply to "parallel claims." Parallel claims are claims based on state requirements that incorporate federal requirements and do not add other requirements or differ from the federal requirements. *Shuker*, 885 F.3d at 768; *Lohr*, 518 U.S. at 494-495. While certain state law claims that parallel federal requirements may proceed, violation of the FDCA does not support a state law claim. *White*, 808 Fed. Appx. at 294 (citing *Buckman*, 531 U.S. at 353).

Shuker v. Smith & Nephew addressed the issue of applying the express preemption provision to a "hybrid system." A "hybrid system" is a device made up of Class II components as well as at least one Class III component. 885 F.3d at 768. Particularly, *Shuker* addressed situations

whether express preemption analysis should be done at the system level or at the component level when hybrid systems are used. *Id.* at 772. The Federal Food, Drug, and Cosmetic Act ("FDCA") defines "device" as "an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including any component, part, or accessory" of that article. 21 U.S.C. § 321(h). The *Shuker* Court relied on this definition as well as the FDCA's provision for off-label use of components and FDA guidance on assuring safe and effective performance of devices and components. Considering this, *Shuker* concluded that express preemption applied to Class III components of hybrid systems. F.3d at 772-774. Upon concluding that the preemption provision applied to Class III components of hybrid systems, the Third Circuit reformulated the *Riegel* two-step test for express preemption by looking at (1) whether the federal government has requirements applicable to a component of a hybrid system, and (2) whether a plaintiff's claims are based on state requirements with respect to that component that are different from or in addition to the federal requirements, and that relate to safety and effectiveness. *Shuker*, F.3d at 774 (citing *Riegel*, 552 U.S. at 321-322). If both parts of the test are met, then the express preemption provision applies. *Id.*

The Western District of Tennessee used the same framework in the case *Hafer v. Medtronic, Inc.* in trying to decide whether preemption applied when a Class II component was substituted into a Class III system and implanted into the plaintiffs in a manner different than that which was approved during the PMA process. 99 F. Supp. 3d 844, 853 (W.D. Tenn. 2015). The court first determined what the device is, based on the statutory definition in 21 U.S.C. § 321(h). *Id.* at 858. The Western District Court clarified in its analysis that it would not assume that every component under a PMA is covered by the preemption protections; however, if the component involved in a dispute is the primary component of a device that received the most attention during

the PMA review process, it is subject to those federal requirements and protections. *Id.* The court then used the two-step *Riegel* test for express preemption. *Id.* In *Hafer*, the court found that the heart of the plaintiffs' issue was the "off-label" use of the Class III components, rather than the use of the Class II device. *Id.* The court also discussed how if federal requirements apply to a device, then off-label use alone would not remove federal preemption and quoted § 360k(a)(1), which makes it clear that "the question is not whether there are federal requirements applicable to a particular use of a device; the question is whether there are federal requirements applicable to 'the device.'" *Id.* at 857.

Similarly, the Sixth Circuit also addressed *Shuker* in *White v. Medtronic, Inc.* when it rejected the plaintiff's argument that preemption applies to a system in favor of the Third Circuit's reasoning that preemption applies at the component-level of a hybrid system. 808 Fed. Appx. 290, 294-295 (6th Cir. 2020). The Sixth Circuit explained that although the plaintiff's claims centered around the off-label use of the device, the regulatory scheme of the FDCA specifically contemplated off-label use when it passed the MDA. *Id.* at 296. This echoes the Western District of Tennessee's conclusion that off-label use alone would not prevent federal preemption. *Hafer*, 99 F. Supp. 3d at 857.

Analysis

1. *Whether the Federal Government has established requirements applicable to the components at issue?*

The first question this Court must address is "whether the Federal Government has established requirements applicable" to the specific "device" at issue. *Riegal*, 552 U.S. at 321. Mr. Sherrod strenuously argues that as a hybrid system with only one compenent of four receiving Class III PMA status, that the express preemption principles should not apply. The Court disagrees based upon the undisputed material facts and the allegations in the Complaint.

The *Shuker* Court's reframing of this question with regard to hybrid systems is logical given the statutory definition of device. A "device" is defined as "an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including any component, part, or accessory" of that article. 21 U.S.C. § 321(h). The plain language of §321(h) includes any "component, part or accessory" of the medical device at issue. This analysis is consistent with *White v. Medtronic, Inc.* 808 Fed. Appx. 290, 294-295 (6th Cir. 2020); and *Hafer v. Medtronic, Inc.* 99 F. Supp. 3d 844, 853 (W.D. Tenn. 2015). Therefore, as restated, this Court must determine whether the federal government has requirements applicable to a component of a hybrid system.

Mr. Sherrod had a total hip replacement done where the BHR acetabular cup was combined with three other components including a femoral head. The femoral head had received FDA approval under § 510(k). The BHR acetabular cup is a component of the BHR device that received Class III PMA. This is an undisputed fact.

Additionally, it is clear that Mr. Sherrod's claims are based primarily on the Class III acetabular cup. First, in the undisputed facts, Mr. Sherrod admits that he makes claims that the acetabular cup implanted in him was defective and caused him injury. Additionally, his Complaint consistently relies upon the BHR – Class III device components – to allege the claims. Mr. Sherrod alleges that he was injured by a Class III medical device. (Complaint Paragraph 36). He makes specific allegations with regard to the acetabular cup. (Complaint Paragraphs 41 and 42). Finally, Mr. Sherrod's alleged injury resulted from metal ions released into his body as a result of the metal in the BHR acetabular cup coming into contact with the metal femoral head. Without the metal components of the BHR acetabular cup, there would be no injury.

Here, the acetabular cup that was used in Mr. Sherrod's surgery received approval as a component of the Class III BHR system. This means that the FDA engaged in a rigorous review of the acetabular cup as a part of the BHR system, and the FDA found that there was a "reasonable assurance of its safety and effectiveness." *See* 21 U.S.C. § 360c(a)(1)(C). Additionally, the Class III status of this component means that Smith & Nephew cannot engage in marketing or use of the product that is in a manner "inconsistent with . . . the [premarket] approval order for the device." *Shuker v. Smith & Nephew*, 885 F.3d 760, 766 (3rd Cir. 2018) (quoting 21 C.F.R. § 814.80). Therefore, it is easy to see that the federal government, via the FDA's approval, established requirements that are applicable to this Class III component of the hybrid system used in Mr. Sherrod's surgery. Therefore, the answer to the first question - whether the federal government has requirements applicable to a component of a hybrid system – is yes.

2. *Whether Mr. Sherrod's claims are based on state requirements that are different from or in addition to the federal requirements?*

Next, the Court must address the second question in the preemption analysis: whether Mr. Sherrod's claims are based on state requirements with respect to that component that are different from or in addition to the federal requirements, and that relate to safety and effectiveness. *Shuker*, F.3d at 774 (citing *Riegel*, 552 U.S. at 321-322). If the answer to this question is in the affirmative, then the claims are expressly preempted.

To answer this question, the Court must first discuss the Tennessee Products Liability Act as it relates to Mr. Sherrod's claims. The Tennessee Products Liability Act ("TPLA") is a broad encompassing act. Tenn. Code Ann. § 29-28-101 et seq. The TPLA broadly defines "product liability action" as

> all actions brought for or on account of personal injury, death or property damage caused by or resulting from the manufacture, construction, design, formula, preparation, assembly, testing, service, warning, instruction, marketing, packaging

> or labeling of any product. . . [and] all actions based upon the following theories: strict liability in tort; negligence; breach of warranty, express or implied; breach of or failure to discharge a duty to warn or instruct, whether negligent, or innocent; misrepresentation, concealment, or nondisclosure, whether negligent, or innocent; or under any other substantive legal theory in tort or contract whatsoever.

Tenn. Code Ann. § 29-28-102(6). The TPLA was written to provide the exclusive remedy for injuries caused by products. *Johnson v. Electrolux Home Prods., Inc.* No. 2:09-CV-142, 2011 WL 4397494 at *4 (E.D. Tenn. Aug. 31, 2011); adopted by 2011 WL 4433114.

Mr. Sherrod sets forth twelve different claims, plus a claim for punitive damages, as described above. His claims include:

- Negligent design, manufacture, assembling, inspecting, testing, marketing distributing and selling the BHR THR products in a defective and unreasonably safe condition. (Count 1);
- Strict Liability for defective design (Count 2);
- Strict Products liability for failure to warn (Count 3);
- Strict Liability for Breach of Express Warranties due to defective and unreasonably dangerous BHR THR product (Count 4);
- Breach of warranty (Count 5);
- Negligent Misrepresentation (Count 6);
- Unfair and Deceptive Trade Practices (Count 7);
- Misrepresentation by omission for failure to disclose the defective nature of the BHR THR products (Count 8);
- Constructive fraud for not disclosing the defective nature of the BHR THR products (Count 9);
- Negligent Infliction of Emotional Distress sustained as a result of the negligent manufacture, design, development, testing, labeling, marketing, and selling of the BHR THR products (Count 10);
- Violation of the Tennessee Products Liability Act (Count 11); and
- Violation of the Tennessee Consumer Protection Act (Count 12).

Regardless of the theory of liability, Mr. Sherrod's claims are subsumed by the plain language of the TPLA. The TPLA requires a finding of "defective condition or unreasonably dangerous." Tenn. Code Ann. § 29-28-105.[3] In addition to the TPLA requiring a finding of defectiveness or

[3] Tenn. Code Ann. § 29-28-105(a) provides: "A manufacture or seller of a product shall not be liable for any injury to a person or property caused by the product unless the product is determined to be in a defective condition or unreasonably dangerous at the time it left the control of the manufacturer or seller.

dangerousness, many of Mr. Sherrod's claims themselves explicitly refer to the defective or dangerous device as a basis for that claim. See Counts 1, 3, 4, 6, 8, 9, 10, and 11. If this Court deems the device defective or unreasonably dangerous, it would impose requirements on the device different from or in addition to the federal regulations. See *Riegel*, 552 U.S. at 319; and *In re Smith & Nephew Birmingham Hip Resurfacing*, 300 F.Supp.3d 732, 743 (D. Md. 2018). "In sum, allowing state tort law claims to proceed that would require finding a device unreasonably dangerous would undermine Congress's decision to leave such questions to the FDA. Such products liability laws add to, or are different from, federal regulations and are therefore expressly preempted." *In re Smith & Nephew Birmingham Hip Resurfacing (BHR) Hip Implant Prod. Liab. Litig.*, 300 F. Supp. 3d 732, 743 (D. Md. 2018). Because all of Mr. Sherrod's claims require a finding of defectiveness or dangerousness, the Court finds that all of Mr. Sherrod's claims are expressly preempted.

To the extent that Mr. Sherrod's claims for failure to warn, deceptive practices or violation of the Tennessee Consumer Protection Act are not subsumbed by the Tennesse Products Liability Act, Plaintiff will not be able to demonstrate that these claims are not expressly preempted. As part of the PMA process, the FDA approved and authorized the labeling and advertising of the BHR acetabular cup component. Smith & Nephew cannot change, modify or alter this information in any way without approval from the FDA. A state requirement limiting labeling or requiring warnings about off-label use of Class III PMA device components would create requirements that are different from or in addition to the federal requirements; and thus, would be expressly preempted.

Mr. Sherrod strenuously emphasizes that the BHR acetabular cup implanted in him as part of a total hip replacement constituted an "off-label" use. This off-label use, however, does not

affect the preemption analysis. Off-label use is expressly contemplated by the FDCA. *Buckman*, 531 U.S. at 350. For states to limit or restrict the off-label use of a Class III PMA device or to require certain disclosures, labeling or advertising, would create state requirements that are in addition to or different from the federal requirements.

Because all of Mr. Sherrod's claims would create state requirements that are in addition to or different from the federal requirements, all of Mr. Sherrod's claims are expressly preempted.

This matter is strikingly similar to *White v. Medtronic, Inc.*, 808 Fed. Appx. 290 (6th Cir. 2020). In *White*, the plaintiff brought claims against Medtronic on behalf of his deceased Wife. *Id.* at 291. Medtronic designed, manufactured and sold the Infuse device. *Id.* at 290. The Infuse device is a Class III device that received PMA. *Id.* The FDA approved it as comprised of two components and inserted from an anterior approach. *Id.* Doctors, however, inserted only one component of the Infuse device into Mr. White's wife from a posterior approach. *Id.* at 291. Mr. White sued Medtronic for negligence, negligence per se, failure to warn, breach of warranty, violations of the Michigan consumer protection laws, design defect, manufacturer defect and fraud. *Id.* at 292. These same claims have been brought in this matter by Mr. Sherrod. Like Smith & Nephew, Medtronic argued that all of the claims should be dismissed as preempted. *Id.*

Like Mr. Sherrod, Mr. White argued that the device inserted into his Wife was not a Class III PMA device and therefore, preemption did not apply. *Id.* at 294. He contended that only one component of the device was inserted and it was not inserted in the approved manner. *Id.* Here Mr. Sherrod argues that the BHR acetabular cup was only one component of the PMA device and that is was inserted in an off-label manner. The 6th Circuit, citing *Shuker*, rejected this argument. *Id.* at 294-95. For the same reasons, and as described above, this Court rejects Mr. Sherrod's similar argument.

Second, Mr. White, similarly to Mr. Sherrod, argued that his state law claims parallel the federal law. *Id.* at 295. The 6th Circuit noted that Mr. White had not identified any parallel statute. *Id.* Additionally, the 6th Circuit explained that the gravamen of Mr. White's claim centered on the off-label use of the Infuse device and allegations that Medtronic failed to provide his wife or her doctors proper information as to the risks and dangers of off label use. *Id.* at 296. The 6th Circuit held that White's state law claims premised on off label use sought to impose requirements different from or in addition to the federal ones, and as such were preempted. *Id.* Similarly, Mr. Sherrod's claims center on off label use of the BHR acetabular cup- a component of the BHR Class III PMA device. As discussed, any state law claims premised on this use would impose requirements different from or in addition to the federal ones. As such, these claims are preempted.

Parallel Claims

Parallel claims are not expressly preempted. To the extent a state law claim seeks to impose duties that parallel federal duties, but do not depend solely on federal law, they may proceed. Smith & Nephew contends that Mr. Sherrod has not idenitifed any parallel claims. This Court agrees. The only reference to parallel claims is within Count 2 of his Complaint. In his response to the Motion for Summary Judgment, Mr. Sherrod only alleges that he provides sufficient detail to establish parallel claims, without identifying the basis of those claims.

The Court finds that the parallel claim asserted in the Complaint is not actually a parallel claim. Mr. Sherrod contends that "he is pursuing parallel state law claims based upon Defendant, Smith & Nephew's violations of the applicable federal regulations and Approval Order." (Paragraph 46). He goes on to contend that based upon these violations of federal statutes and regulations, that Smith & Nephew is strictly liable in tort. He asserts that "under Tennessee law, a money damages remedy exists for violation of the Act and regulations promulgated thereunder

which results in an unreasonably dangerous product proximately causing injuries." (Paragraph 48). Mr. Sherrod provides no citation to this Tennessee law. In other words, Mr. Sherrod alleges that Smith & Nephew violated the FDCA, created a defective and dangerous device, and thus, is liable for his injuries. Mr. Sherrod is seeking to enforce the FDCA, as well as prove the device to be dangerous and defective. The United States Supreme Court has made clear that violations of the FDCA will not support any state law claims. *Buckman Co. v. Plaintiff's Legal Committee*, 531 U.S. 341, 353 (2001). As such, there can be no state law parallel claims to enforce the FDCA.

In his response to the Summary Judgment, Mr. Sherrod seems to argue that the claims are parallel because they involve a hybrid system composed of Class III PMA components and non-Class III compenonts used in an off-label manner. For the reasons discussed above with regard to hybrid systems, Class III components and off-label use, the Court finds that this is not a parallel claim.

Because Plaintiff's evidence is insufficient to show the existence of any parallel claims, the Defendant is entitled to summary judgment on any alleged parallel claims.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that Defendant Smith & Nephew, Inc.'s Motion for Summary Judgment is granted. Any other pending motions ared denied as moot and this is a final judgment.[4] Costs of this matter are assessed against the Plaintiff for which execution may issue.

JUDGE MARY L. WAGNER

DATE

[4] The Court recognizes that in preparation for trial both sides filed a number of motions in limine. Those motions have not been heard. Given this Court's ruling on the summary judgment, those motions are now moot.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been served on the following:

Glen G. Reid
Mark Vorder-Bruegge, Jr.
Mathew M. Lubozynski
Meghan M. Cox
6070 Poplar Avenue, Suite 300
Memphis TN 38119
greid@wyattfirm.com
mvorder-bruegge@wyattfirm.com
mlubozynski@wyattfirm.com
mcox@wyattfirm.com

Douglas J. Moore
Mary Pierce Britton
400 Paydras Street, Suite 2700
New Orleans LA 70130
dmoore@irwinllc.com
bbritton@irwinllc.com

Alex C/ Davis
1205 E. Washington Street Suite 100
Louisville, Kentucky 40206
alex@jonesward.com

Tim Edwards
200 Jefferson Ave, Suite 1250
Memphis TN 38103
tedwards@bbfpc.com

____
Clerk

Date:____________________

IN THE CIRCUIT COURT OF TENNESSEE FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS, SHELBY COUNTY

CHRISTIAN JONES, a minor by and through His Next of Friend and Mother, DEKENYA PARKER

Plaintiff,

v.

Cause No. CT-000377-18
Div. VII

STATE OF TENNESSEE

Defendant.

ORDER MOTION TO DISMISS

This cause came to be heard before the Honorable Mary L. Wagner on April 13, 2021 on the Motion to Dismiss filed by the State of Tennessee. The State argues that this matter should be dismissed for two reasons: (1) for failure to file a Certificate of Good Faith in compliance with Tenn. Code Ann. § 29-26-122(a); and (2) for failure to demonstrate compliance with the pre-suit notice requirements of Tenn. Code Ann. § 29-26-121. The Court having considered the Motion, the Response, and the Memoranda of Law in support of each, finds as follows:

Procedural History

This is a Health Care Liability action stemming from injuries alleged to have been sustained by the minor during his birth on August 26, 2013. On December 20, 2016, the Plaintiff filed a document titled "*Complaint*" with the Division of Claims Administration ("DCA"). This "*Complaint*" looks very similar to a Health Care Liability Complaint for a lawsuit, but it did not include a Certificate of Good Faith, or allegations or proof of compliance with the pre-suit notice requirements. On March, 23, 2016, the DCA transferred the matter to the Claims Commission

pursuant to Tenn. Code Ann. § 9-8-402(c). On April 7, 2017, the Claims Commissioner entered an *Initial Order Governing Proceedings*. In pertinent part, it provided:

> III. A formal complaint should be filed with the Clerk's Office and served upon the Commissioner and opposing counsel within thirty days of transfer of any claim to the Commission.

Thereafter, on or about April 10, 2016, the Plaintiff filed a "*Formal Complaint*" with the Claims Commission. This "Formal Complaint" is identical to the "Complaint" except that it does include the Certificate of Good Faith and the allegations and proof of pre-suit notice.

Legal Conclusions

The State contends that this matter should be dismissed for two reasons. First, the State submits that Plaintiff failed to comply with Tenn. Code Ann. § 29-26-122 because she did not file a Certificate of Good Faith with her "*Complaint*." Second, the State argues that Plaintiff failed to substantially comply with the pre-suit notice requirements in Tenn. Code Ann. § 29-26-121(a)(3), -121(a)(4) and -121(b). The State contends that this matter should be dismissed for either one of these two reasons. The Court will address each of these separately.

Section 122- Certificate of Good Faith

Tennessee law is clear that a Certificate of Good Faith must be filed with the complaint in any health care liability action in which expert testimony is required.

> (a) In any health care liability action in which expert testimony is required by § 29-26-115, the plaintiff or plaintiff's counsel shall file a certificate of good faith with the complaint. If the certificate is not filed with the complaint, the complaint shall be dismissed, as provided in subsection (c), absent a showing that the failure was due to the failure of the provider to timely provide copies of the claimant's records requested as provided in § 29-26-121 or demonstrated extraordinary cause.

Tenn. Code Ann. § 29-26-122(a). Further, section 122(c) provides that "[t]he failure of a plaintiff to file a Certificate of Good Faith in compliance with this section shall, upon motion, make the

action subject to dismissal with prejudice." Tenn. Code Ann. § 29-26-122(c). A plaintiff cannot cure this deficiency by an amendment to the complaint. It is equally clear that these requirements apply to Health Care Liability claims made against the State and brought pursuant to Tenn. Code Ann. § 9-8-401 et seq. as required. Tenn. Code Ann. § 29-26-101(b).

The State argues that Plaintiff was required to file a Certificate of Good Faith with her "*Complaint*" filed on December 20, 2016 with the DCA. The State further argues that even if the "*Complaint*" is simply written notice of a claim pursuant to Tenn. Code Ann. § 9-8-402, that Plaintiff was still required to submit a Certificate of Good Faith at that time because "[a]ll other actions are commenced by filing a written notice of claim (see T.C.A. § 9-8-402 for requirements) with the Division of Claims and Risk Management." Tenn. Comp. R. & Regs. 0310-01-01-.01(2)(b). The State relies on *West v. AMISUB (SFH), INC.*, No. W2012-00069-COA-R3-CV, 2013 WL 1183074 (Tenn. Ct. App. March 21, 2013), to support their argument. In sum, the issue this Court must address is when must a plaintiff file a Certificate of Good Faith when pursuing a Health Care Liability Claim against the State under Tenn. Code Ann. § 9-8-401 et seq.

In a case involving statutory construction, "[s]tatutes that relate to the same subject matter or have a common purpose must be read in pari materia so as to give the intended effect to both." *In re Kaliyah S.*, 455 S.W.3d 533, 552 (Tenn. 2015). A basic principle of construction "is to ascertain and give effect to the legislative intent without unduly restricting or expanding a statute's coverage beyond its intended scope." *Moreno v. City of Clarksville*, 479 S.W.3d 795, 804 (Tenn. 2015) (quoting *Owens v. State*, 908 S.W.2d 923, 926 (Tenn. 1995)). A court must avoid a statutory construction that would defeat or frustrate the purpose of a statute. *West v. AMISUB (SFH), INC.*, 2013 Tenn. App. LEXIS 191, at *15 (Tenn. Ct. App. Mar. 21, 2013). A court should look to the text of the statute and should read the statute "naturally and reasonably, with the presumption that

the legislature says what it means and means what it says." *Moreno*, 479 S.W.3d at 804 (quoting *In re Kaliyah S.*, 455 S.W.3d 533, 552 (Tenn. 2015)). The law must be rendered intelligible and avoid absurdities. *West*, 2013 Tenn. App. LEXIS at *15 (quoting *Roberts v. Cahill Forge & Foundry Co.*, 181 Tenn. 688, 184 S.W.2d 29, 31 (Tenn. 1944)). Finally, a court should "presume that the General Assembly was aware of the state of the law when the statutes were enacted and that it did not intend to enact a useless statute." *Haley v. State*, 2013 Tenn. App. LEXIS 634, at *23 (Tenn. Ct. App. Sept. 25, 2013) (citing *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 527 (Tenn. 2010)).

Proceedings before the Tennessee Claims Commission are to be conducted in accordance with the Tennessee Rules of Civil Procedure and any "amendments and interpretations where applicable except where specifically modified by these rules." Tenn. Comp. R. & Regs. R. 0310-1-1-.01. It is clear from the regulations that Tennessee Rule of Civil Procedure 3 does not apply and that "[c]laims before the Commission are commenced in the manner described in T.C.A. §§ 9-8-301 et seq. and 401 et seq. especially 402. *Id.* at (2). Additionally, "[a]ll other actions are commenced by filing a written notice of claim (see T.C.A. § 9-8-402 for requirements) with the Division of Claims Administration." Tenn. Comp. R. & Regs. R. 0310-1-1-.01(2)(b). To proceed with a claim against the State, the claimant must first give written notice to the DCA.

The Tennessee Supreme Court discussed this process in *Moreno v. City of Clarksville*, 479 S.W.3d 795, 805 (Tenn. 2015). When the initial written notice of claim is provided to the DCA it begins a settlement period. *See* Tenn. Code Ann. § 9-8-402(c); *Moreno v. City of Clarksville*, 479 S.W.3d 795, 805 (Tenn. 2015). "[T]he written notice contains much the same information as a formal complaint." *Moreno*, 479 S.W. 3d at 804. During this settlement period, the State is not

expected to answer nor is the claimant entitled to discovery. *Id.* at 805. If the DCA does not honor or deny the claim within 90 days, it is automatically transferred to the Claims Commission.

When the claim is transferred to the Claims Commission, the settlement period ends, and the adjudication period begins. *Id.* Once the matter is transferred to the Claims Commission, the claimant has thirty days to file a complaint. If such a complaint has already been filed with the Division of Claims Administration, then this requirement is satisfied. Tenn. Comp. R. & Regs. R. 0310-1-1-.01(2)(d)(3.). To adjudicate a claim, the notice of claim alone will not suffice. *Moreno*, 479 S.W. 3d at 805.

In *Moreno v. City of Clarksville* 479 S.W.3d 795 (Tenn. 2015), the Tennessee Supreme Court addressed a similar issue. *Moreno* did not involve a health care liability claim but discussed issues involving the Claims Commissions Act and the comparative fault statute. More specifically, the court discussed issues regarding whether the written notice served as "an original complaint" sufficient to satisfy the requirements under the comparative fault statute *Moreno*, 479 S.W.3d at 802 (Tenn. 2015). After discussing the differences between the settlement period and the adjudication period, the *Moreno* court held that the notice of claim is not "the original complaint" under Tenn. Code Ann. § 20-1-119.

Similarly, to *Moreno*, this Court holds that it is the transfer to the Claims Commission and the filing of a formal complaint, i.e. the beginning of the adjudication phase, which triggers the requirement under Tenn. Code Ann. § 29-26-122 for a Certificate of Good Faith. In pertinent part, Tenn. Code Ann. § 29-26-122 provides:

> (a) In any health care liability action in which expert testimony is required by § 29-26-115, the plaintiff or plaintiff's counsel shall file a certificate of good faith with the complaint. If the certificate is not filed with the complaint, the complaint shall be dismissed, as provided in subsection (c), absent a showing that the failure was due to the failure of the provider to

timely provide copies of the claimant's records requested as provided in § 29-26-121 or demonstrated extraordinary cause.

Tenn. Code Ann. § 29-26-122(a).

The Court of Appeals examined this language in *West v. AMISUB (SFH), INC.*, No. W2012-00069-COA-R3-CV, 2013 WL 1183074 (Tenn. Ct. App. March 21, 2013). While helpful, *West* is not outcome determinative in this matter. In *West*, the plaintiff filed a "civil warrant" in General Sessions Court and failed to comply with the pre-suit notice and certificate of good faith requirements under the Health Care Liability Act, then called the Tennessee Medical Malpractice Act. *West,* 2013 WL 1183074 at *1. The plaintiff argued that because he was not filing a complaint, but a civil warrant, he was not required to file a Certificate of Good Faith. *Id.* at *4.

In addressing this issue, the West court considered the plain language of the then Medical Malpractice Act.[1] The *West* court first noted that Section 122 required a Certificate of Good Faith "in *any medical malpractice action.*" *Id.* at *5 (emphasis original). The *West* court also reasoned that Tenn. Code Ann. § 29-26-101 defined a medical malpractice action as "*any civil action*...alleging that a health care provider or providers have caused an injury...." *Id.* (emphasis original). Finally, the *West* court considered Section 121's requirement for pre-suit notice and noted the wording "*in any court in this state.*" (emphasis original). In considering this statutory text, the *West* court reasoned that Black's law dictionary defined "complaint" as "[t]he initial pleading that starts a civil action and states the basis for the court's jurisdiction, the basis for the plaintiff's claim, and the demand for relief." *Id.* Utilizing this, the *West* court held, "that the certificate of good faith requirement under the TMMA applies to 'any medical malpractice action'

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[1] In 2011, the Tennessee General Assembly Passed the Civil Justice Act ("CJA"). With the passage of the CJA, medical malpractice actions were transformed into Healthcare liability actions. Tenn. Code Ann. § 29-26-101. Other than the title of the actions, the operative language of the statute considered in *West* remain the same. The CJA did clarify that the requirements for a Health care liability action also apply to claims against the State to the extent such requirements do not conflict with The Tennessee Claims Commission Act. Tenn. Code Ann. § 29-26-101(b) and (d).

filed 'in any court of this state,' not only those actions commenced by filing a 'complaint' in Circuit Court." *Id.* at *17.

Using the reasoning of *West* and *Moreno*, this Court holds that a Certificate of Good Faith is not required until the matter is before the Claims Commission with the filing of a formal Complaint. As held in *West*, a certificate of good faith is required in any health care liability action that is filed "*in any court of this state.*" *Id.* Black's law dictionary defines "court" as "1. A place where justice is judicially administered; the locale for legal proceedings 2. The building where the judge or judges convene to adjudicate disputes and administer justice 3. A tribunal constituted to administer justice[.]" COURT, Black's Law Dictionary (11th ed. 2019). As held in *Moreno*, it is the Claims Commission, and not the DCA, which is the adjudicative body for claims against the State. Per *Moreno*, the adjudication phase does not begin until the matter is transferred to the Claims Commission and a formal complaint is filed. It is the Claims Commission which is the "court" for health care liability claims against the State.

The Court recognizes that Plaintiff's written notice of claim is styled as "Complaint." As noted by Justice Kirby, the written notice of claim contains much of the same information as a formal complaint. *Moreno*, 479 S.W.3d at 804. There are no requirements for the format of a written notice of a claim. There are requirements under Tenn. R. Civ. Pro. Rules 8 and 10 and the Health Care Liability Act for a formal complaint. These requirements must be met when the matter is transferred to the Claims Commission. Upon the transfer to the Claims Commission, the Plaintiff has thirty days to file a formal complaint in compliance with the Claims Commission Regulations unless the Plaintiff has already done so. Tenn. Comp. R. & Regs. 0310-01-01-.01(2)(d)(3.) This is not only reflected in the rules of the Claims Commission, but also in the *Initial Order Governing Proceedings* entered by Commissioner Hamilton.

Plaintiff's "Complaint" filed with the DCA as her written notice of claim did not meet the requirements for a Complaint in a Health Care Liability Action. It did not include a Certificate of Good Faith as required by Tenn. Code Ann. § 29-26-122 or the pre-suit notice allegations and proof as required by Tenn. Code Ann. § 29-26-121. Plaintiff, however, was not required to meet these requirements at that time. As such, upon transfer to the Claims Commission, and the beginning of the adjudication phase, Plaintiff was entitled to file a formal complaint that satisfied all legal requirements of a "complaint" before a court. Plaintiff did so.

The facts of this case are similar to those in *Haley v. State*, 2013 Tenn. App. LEXIS 634 (Tenn. Ct. App. Sept. 25, 2013). The *Haley* case involved a health care liability claim, then called a medical malpractice claim, and the plaintiff filed a written notice of claim with the DCA pursuant to Tenn. Code Ann. 9-8-402(a). *Haley v. State*, 2013 Tenn. App. LEXIS 634, at *2 (Tenn. Ct. App. Sept. 25, 2013). Then, after receiving notice from the DCA that the claim was being transferred to the Claims Commission, the plaintiff filed a complaint as required by the regulations. *Id.* at *8-10. With the complaint, the plaintiff attached a certificate of good faith but failed to attach pre-suit notice or comply with Tenn. Code Ann. § 121(a)(2). The issue before the *Haley* court was whether Ms. Haley's written notice of claim to the DCA was effective compliance with the pre-suit notice requirements of Tennessee Code Annotated section 29-26-121. *Id.* at *22. Ultimately, the court found no conflict with the plaintiff providing pre-suit notice per section 121 at the same time that the plaintiff filed a written notice of claim pursuant to Tenn. Code Ann. § 9-8-402. It would be inconsistent for this Court to require a Certificate of Good Faith to be filed with the written notice of claim, if the written notice of claim can equate to the pre-suit notice required under Tenn. Code Ann. § 29-26-121. A plaintiff is not required to provide a Certificate

of Good Faith with the pre-suit notice, but instead only with the complaint filed before a "court" to adjudicate the matter.

In making this holding, this Court does not ignore the matter of *Sumner v. Campbell Clinic, P.C. et al*, 498 S.W.3d 20 (Tenn. Ct. App. 2016). The *Sumner* case is distinguishable. In *Sumner* the Court of Appeals considered what triggered waiver under Tenn. Code Ann. § 9-8-307(b). The statutory language at issue provided "[c]laims against the state filed pursuant to subsection (a) shall operate as a waiver of any cause of action, based on the same act or omission, which the claimant has against any state officer or employee." *Sumner v. Campbell Clinic, P.C. et al*, 498 S.W.3d 20, 29 (Tenn. Ct. App. 2016) (quoting Tenn. Code Ann. § 9-8-307(b)). The *Sumner* court held "[c]considering the statutory scheme as a whole, we are compelled to conclude that the filing of a notice of claim in the Division of Claims Administration constitutes a '[c]laim[] against the state filed pursuant to subsection (a)." *Id.* at 29 (quoting Tenn. Code Ann. § 9-8-307(b)). The *Sumner* Court recognized that "[a]lthough there is no question that a formal complaint must be filed in the Claims Commission if that entity is to ultimately adjudicate a claim to finality, the recognition of this proposition does not in any way affect the waiver that is triggered under Tennessee Code Annotated section 9-8-307(b)." *Id.* at 33. Pursuing a claim under Title 9 – i.e. filing a written notice of claim with the DCA – and thus, triggering a waiver under Title 9, does not equate to the filing of a complaint and initiating an action before a court, pursuant to the Health Care Liability Act. This is also consistent with *Moreno*.

For all of these reasons, this Court finds that Plaintiff complied with Tenn. Code Ann. § 29-26-122 by filing the Certificate of Good Faith with the "Formal Complaint" when the claim was transferred to the Claims Commission for adjudication. Therefore, the Court denies the Motion to dismiss with regard to Plaintiff's compliance with Tenn. Code Ann. § 29-26-122.

Section 121 – Prior Suit Notice

The State contends that Plaintiff has not substantially complied with the with the pre-suit notice requirements in Tenn. Code Ann. § 29-26-121(a)(3), -121(a)(4), and -121(b). The State contends that Plaintiff failed to file a certificate of mailing and an affidavit of the party mailing the notice that establishes that pre-suit notice was timely sent. Tenn. Code Ann. § 29-26-121(a)(3) and (a)(4). Additionally, the State contends that the complaint did not contain a statement that the prior suit notice requirements were met or provide documents as required by Tenn. Code Ann. § 29-26-121(b). Therefore, the State contends that this matter should be dismissed.

It is equally important to note what the State does not contend. The State does not assert that the Plaintiff did not provide timely pre-suit notice. The State does not contend that the pre-suit notice was not fully effective. In fact, the State admits that the proper pre-suit notice was provided. Further, the State admits that the Plaintiff is fully in compliance with Tenn. Code Ann. § 29-26-121 with the filing of the "Formal Complaint." The State merely contends that filing the "*Formal Complaint*" was too late in the length of time to be considered substantial compliance. This Court disagrees.

First, as held above, the "Formal Complaint" initiated the adjudication phase of this case and is therefore, the leading pleading. With that filing, the Plaintiff was fully in compliance with Section 121. Accordingly, dismissal is not warranted.

Moreover, even if the "Formal Complaint" is not the leading pleading, Plaintiff has substantially complied. The State contends that this matter is similar to *Travis v. Cookeville Regional Medical Center*, No. M2015-01989-COA-R3-CV, 2016 WL 5266554 (Tenn. Ct. App. Sept. 21, 2016). The Court agrees that the time periods are similar. In *Travis*, the plaintiff filed a supplement to his Complaint over 60 days after filing his Complaint, purporting to demonstrate

pre-suit notice. Here, the "Formal Complaint" was filed over three months after the original "Complaint." That, however, is where the similarities end.

With the supplement, the *Travis* plaintiff attached a HIPAA release with no signatures. The Court of Appeals held that this was not substantial compliance. *Travis v. Cookeville Reg'l Med. Ctr.*, No. M201501989COAR3CV, 2016 WL 5266554, at *9 (Tenn. Ct. App. Sept. 21, 2016). The Court of Appeals reasoned that despite the supplement, the complaint still did not contain a statement alleging compliance with the pre-suit notice requirements. *Id.* More importantly, the Court of Appeals held that the Travis plaintiff's supplement, submitted two months after the filing of his complaint, still did not establish compliance because the HIPAA form was not signed. *Id.* In this matter, Plaintiff does include the required allegation regarding compliance in the "Formal Complaint." Further, Plaintiff's proof of pre-suit notice demonstrates that Plaintiff gave timely and effective pre-suit notice, a fact not disputed by the State.

The Court believes this to be more similar to *Thurmond v. Mid-Cumberland Infectious Disease Consultants, PLC*, 433 S.W.3d 512, 516 (Tenn. 2014). Although, the Court recognizes that the time period – 5 days in *Thurmond* – is different than the present case. Ultimately, though, like *Thurmond*, the Plaintiff demonstrated full and effective compliance with the pre-suit notice requirements as required by Section 121. Therefore, this Court finds substantial compliance under Tenn. Code Ann. § 29-26-121.

For these reasons, the Court denies the Motion to dismiss with regard to Plaintiff's compliance with Tenn. Code Ann. § 29-26-121.

IT IS SO ORDERED ADJUDGED AND DECREED, that the State of Tennessee's Motion to Dismiss is denied.

HONORABLE MARY L. WAGNER

DATE:______________________________

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of this Order has been forward to the following, by US Mail and Email as listed below:

Timothy R. Holton
John R. Holton
296 Washington Avenue
Memphis TN 38103

Joann Coston-Holloway
877 Jefferson Ave
Memphis TN 38103

Joseph M. Clark
Samantha Bennett
Natalie Bursi
40 S. Main Street Suite 2900
Memphis TN 38103

CLERK

Date:____________________________

1

IN THE CIRCUIT COURT OF TENNESSEE FOR THE
THIRTIETH JUDICIAL DISTRICT AT MEMPHIS, SHELBY COUNTY

SHAYNNE BRADLEY, as the Limited Conservator for PRINCE D. BRADLEY

Plaintiff,

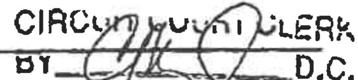
v.

SUPPORT SOLUTIONS OF THE MID-SOUTH, LLC

Defendants.

Cause No. CT-002389-16
Div. VII

FILED
JAN 03 2018



CIRCUIT COURT CLERK
BY ______ D.C.

ORDER ON DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

This matter came to be heard on Defendant's Motion for Judgment on the Pleadings. The parties originally argued the Motion on April 21, 2017. Due to the fact that Plaintiff raised a constitutional challenge, the proceedings were stayed in accordance with Tenn. R. Civ. P. Rule 24.04 to provide notice to the Attorney General. The Attorney General intervened for the limited purpose of defending the constitutionality of Tenn. Code Ann. § 28-1-106 as amended in 2016. The Plaintiff, Defendant and the Attorney General further briefed the issues and argued these matters on November 14, 2017. Based upon the Defendant's Motion for Judgment on the Pleadings, Plaintiff's Response to Defendant's Motion to Dismiss, the State of Tennessee's Memorandum of Law in Support of the constitutionality of Tenn. Code Ann § 28-1-106, and all of the parties' supplemental briefs and memoranda of law, the Court finds as follows:

Background

This matter began on June 10, 2016 when the Plaintiff, Shayanne Bradley, as the Limited Conservator for Prince D. Bradley, her son, brought this action against Support Solutions of the Mid-South LLC. The Complaint alleges that the Probate Court of Davidson County adjudicated Mr. Bradley incompetent on November 12, 2008. Ms. Bradley alleges that her son sustained injuries in February 2013 and September 2013 while residing in a group home managed by the Defendant.

Pre-Suit Notice

Defendant's Motion first contends that this Complaint should be dismissed because Plaintiff's pre-suit notice did not substantially comply with Tenn. Code Ann. § 29-26-121. The Tennessee Supreme Court recently addressed a similar issue in *Bray v. Khuri*, 523 S.W.3d 619 (Tenn. 2017). The parties agreed that *Bray* addresses this issue and that the Plaintiff's compliance or non-compliance with Tenn. Code Ann. § 29-26-121 is no longer a basis for dismissal.

Statute of Limitations

Defendant next contends that pursuant to Tenn. Code Ann. § 28-1-106, Plaintiff's claims have expired and therefore, should be dismissed. In its original Motion, Defendant argued that Plaintiff was not entitled to a tolling of the statute of limitations because in accordance with Tenn. Code Ann. § 29-26-121(c)(2)(2016), required Plaintiff, as the conservator for her son, to bring these claims and prohibited her from relying on the tolling of the statute of limitations[1]. In

[1] In its original Motion and Memorandum in Support of Defendant's Motion for Judgment on the Pleadings, Defendant does not dispute Mr. Bradley incompetency. At the second oral argument, the Defendant contended that Mr. Bradley had not been adjudicated incompetent. Also of note, the State of Tennessee contends in its brief (pg 1) that the Davidson County Court adjudicated Mr. Bradley incompetent.

response, Plaintiff argued that Tenn. Code Ann. §29-26-121 as amended in 2016 was an unconstitutional taking of a vested property right.

Because of Plaintiff's argument, the State of Tennessee Attorney General intervened in this matter. The State contends that, as originally argued by the Plaintiff, Tenn. Code Ann. § 29-26-121(c)(2) applied to this case would result in an unconstitutional taking of a vested property right. The State, however argues that Tenn. Code Ann. § 28-26-121(a) and (c) provide two different tolling provisions; one applicable to persons who have been adjudicated incompetent and one applicable to persons who lack capacity. Therefore, the State argues that subsection (a) – adjudicated incompetent – applies to this matter and the Court need not address the constitutional issue.

In response to the State, the Defendant then argued that Mr. Bradley had not been adjudicated incompetent in 2013; therefore, Tenn. Code Ann. § 29-26-121, as it existed in 2013, would not have applied to toll this matter and Mr. Bradley's right to bring an action would have expired in 2014. Accordingly, the first question this Court must address is whether Mr. Bradley was adjudicated incompetent at the time that this cause of action accrued in 2013.

Defendant contends that to be adjudicated incompetent, a court must use the magic language of "incompetent." In the alternative, Defendant contends that the 2008 Probate Court Order does not rise to a finding of incompetence. On December 13, 2007, Kathleen Clinton as Director of the Middle Tennessee Regional Office, Division of Mental Retardation Services for the State of Tennessee filed a Petition for Appointment of a Limited Guardian to be converted to a Limited Conservator Upon the Majority of the Respondent. On November 12, 2008, the Circuit Court for Davidson County, Tennessee entered an Agreed Order appointing Limited Conservator for Respondent (Mr. Bradley). In this Order, the Circuit Court accepted the report

of the Guardian ad Litem and found that Mr. Bradley "is a disabled person under T.C.A. § 34-1-101(7) and is in need of a limited conservator."[2]

The issue of the terminology of "adjudicated incompetent" is an interesting one. In 1993, the Tennessee General Assembly amended the conservatorship statute. Prior to 1993, the creation of a conservatorship or limited guardianship required a judicial determination of incompetence. Tenn. Code Ann. § 34-4-202, -302 (Repealed 1992); *See In the Matter of Conservatorship of Ellen P. Groves*, 109 S.W.3d 317, 330-31 and FN28 & FN 29 (Tenn. Ct. App. 2003). Instead, with the amendment, courts are required to make a finding of "disability" as defined in Tenn. Code Ann. § 34-1-101(7). Since 1993, "conservatorship proceedings have focused on the capacity of the person for whom a conservator is sought." *In the Matter of Conservatorship of Ellen P. Groves*, 109 S.W.3d at 331. "[T]he threshold question…is whether the person for whom a conservator is sought is disabled or incapacitated." *Id.* The conservatorship statutes "do not define the concept of incapacity and do not identify particular illnesses or disabilities deemed to be disabling or incapacitating." *Id.* The inquiry focuses on the diagnosis and the effect of that illness, injury or condition of the capacity of the person. *Id.*

Accordingly, this Court finds that a finding of disability pursuant to Tenn. Code Ann. § 34-1-101(7) amounts to an adjudication of incompetency as required by Tenn. Code Ann. § 28-1-106 (2008) and (2016). Therefore, because Mr. Bradley had been found to be a disabled person as defined by Tenn. Code Ann. § 34-1-101(7), Tenn. Code Ann. § 28-1-106 (2008) applies and the statute of limitations tolled in this matter.

That brings the Court to the application of Tenn. Code Ann. § 28-1-106(c)(2016). In 2016, the Tennessee General Assembly amended Tennessee Code Annotated § 28-1-106, adding

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[2] Tenn. Code Ann. § 34-1-101(7)(2013) provides " 'Disabled person' means any person eighteen (18) years of age or older determined by the court to be in need of partial or full supervision, protection and assistance by reason of mental illness, physical illness or injury, developmental disability or other mental or physical incapacity."

section c. The amendment was effective on April 27, 2016, the date of enactment. The State argues that subsection (c) applies to a different set of persons, those who lack capacity and not to those who have been adjudicated incompetent. Therefore, the State contends this Court can address this matter under subsection (a) and there is no need to address the constitutional arguments. Defendant argues that subsection (c)(2) was intended to apply to persons with conservators and therefore, if Mr. Bradley had been adjudicated incompetent, (c)(2) would apply. Plaintiff contends that (c)(2) would amount to an unconstitutional taking of Mr. Bradley's vested property rights. The Attorney General agrees that, if applied to this matter, (c)(2) raises constitutional concerns.

Tennessee Code Annotated §28-1-106, as amended in 2016, provides:

> (a) If the person entitled to commence an action is, at the time the cause of action accrued, either under eighteen (18) years of age, or adjudicated incompetent, such person, or such person's representatives and privies, as the case may be, may commence the action, after legal rights are restored, within the time of limitation for the particular cause of action, unless it exceeds three (3) years, and in that case within three (3) years from restoration of legal rights.
>
> (b) Persons over the age of eighteen (18) years of age are presumed competent.
>
> (c)(1) If the person entitled to commence an action, at the time the cause of action accrued, lacks capacity, such person or such person's representatives and privies, as the case may be, may commence the action, after removal of such incapacity, within the time of limitation for the particular cause of action, unless it exceeds three (3) years, and in that case within three (3) years from removal of such incapacity, except as provided for in subdivision (c)(2).
>
> (2) Any individual with court-ordered fiduciary responsibility towards a person who lacks capacity, or any individual who possesses the legal right to bring suit on behalf of a person who lacks capacity, shall commence the action on behalf of that person within the applicable statute of limitations and may not rely on any tolling of the statute of limitations, unless that individual can establish by clear and

convincing evidence that the individual did not and could not reasonably have known of the accrued cause of action.

(3) Any person asserting lack of capacity and the lack of a fiduciary or other representative who knew or reasonably should have known of the accrued cause of action shall have the burden of proving the existence of such facts.

(4) Nothing in this subsection (c) shall affect or toll any statute of repose within this code.

(d) For purposes of this section, the term "person who lacks capacity" means and shall be interpreted consistently with the term "person of unsound mind" as found in this section prior to its amendment by Chapter 47 of the Public Acts of 2011.

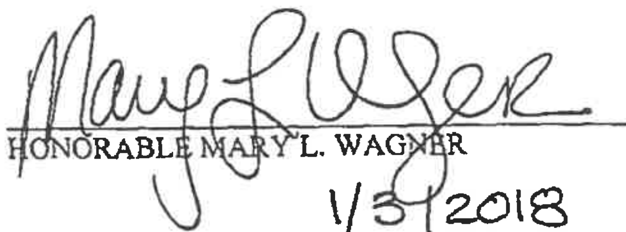
In construing statutes, the Court must "adopt a construction which will sustain a statute and avoid constitutional conflict if any reasonable construction exists that satisfies the requirements of the Constitution." *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 529 (Tenn. 1993). "[W]here the legislature includes particular language in one section of a statute but omits it in another section of the same statute, it is generally presumed that the legislature acted purposely in the subject included or excluded" *State v. Pope*, 427 S.W.3d 363, 368 (Tenn. 2013). Further, courts should apply a specific statutory provision over a more general one. *Washington v. Robertson Cnty.*, 29 S.W.3d 466, 475 (Tenn. 2000).

The Court has at issue the construction of section (a) and (c) from Tenn. Code Ann. § 28-1-106(2016). Section (a) operates to toll the statute of limitations for persons "adjudicated incompetent". There are no exceptions to Section (a). Section (c) tolls the statute of limitations for persons "who lack capacity" except as provided in subsection (c)(2). Tenn. Code Ann. § 28-1-106 (c)(1)(2016). The exception provided in subsection (c)(2) requires "[an]y individual with court-ordered fiduciary responsibility towards a person who lacks capacity, or any individual who possesses the legal right to bring suit on behalf of a person who lacks capacity" to bring the

suit within the statute of limitations and prohibits reliance on the tolling provision provided in (c)(1). If subsection (c)(1) does not apply, section (c)(2) does not become an issue.

Therefore, the Court must determine whether Tenn. Code Ann. §28-1-106(a) or (c)(1) applies to this matter. Again, (a) addresses individuals who have been adjudicated incompetent while (c) addresses individuals who lack capacity. The terms "adjudicated incompetent" is a more specific provision than simply one who lacks capacity. Therefore, the Court finds that section (a) applies to this matter and the Court does not need to address the Constitutionality of Tenn. Code Ann. §28-1-106(c)(2) as applied to this matter.

IT IS THEREFORE ORDERED ADJUDGED AND DECREED, that Defendant's Motion for Judgment of the Pleadings is denied.



HONORABLE MARY L. WAGNER

1/3/2018

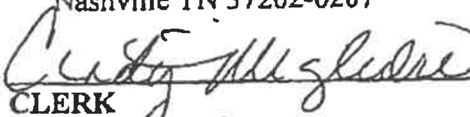
CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of this Order has been forward to:

Richard M. Carter
Rebecca K. Hinds
6410 Poplar Ave suite 1000
Memphis TN 38119-4839
Attorneys for Defendant

Parke S. Morris
25 Dr. M.L. King Jr. Ave
Suite 208
Memphis, TN 38103
Attorney for the Plaintiff

Taylor W. Jenkins
Assistant Attorney General for the State of Tennessee
PO Box 20207
Nashville TN 37202-0207



CLERK

Date: 1/3/18