Tennessee Judicial Nominating Commission

Application for Nomination to Judicial Office

Rev. 26 November 2012

Name: John D. Kitch

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INTRODUCTION

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

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

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

I am self-employed as a solo practitioner.

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

1976; BPR# 4569

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

Tennessee, 1976; BPR# 4569. My license is currently active.

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

No.

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).

Organization	Address	Position	Dates
Hon. Joe Henry	Tennessee Supreme Court Nashville, TN	Law clerk	1976 (two months during 3rd year of law school)
Bill Hodde	Ste. 305 1994 Gallatin Road N. Madison, TN 37115	Associate	1976-1978

Although I have been in a number of associations, listed below, for all practical purposes I have been a solo practitioner since 1978 and even when occupied in the other matters listed below I have continued to practice full-time as a solo.

Holland, Lynn & Smith	Parkway Towers & 65 Music Square W. Nashville, Tennessee 37203	Association member	1978-1982
Vanderbilt Law School	Nashville, TN	Lecturer in Law	1980-1990
Kitch, Parsons & Detring	2300 Hillsboro Road Nashville, Tennessee 37212	Association member	1982-1984
Solo practice	2300 Hillsboro Road Nashville, Tennessee 37212	Sole practitioner	1984-1986
Southeastern Paralegal Institute	2416 21st Avenue S. Nashville, Tennessee 37212	Faculty member	1985-1991
Tennessee Department of Education	Nashville, TN	Admin. Law Judge	1986-1990
Kitch & Addlestone	2300 Hillsboro Road Nashville, Tennessee 37212	Association member	1986-1988
Kitch, Deas, Klein & Cannon	2300 Hillsboro Road Nashville, Tennessee 37212	Association member	1988-1992
Solo practice	2300 Hillsboro Road Nashville, Tennessee 37212	Sole practitioner	1992-2000
Kitch & Axford	2300 Hillsboro Road Nashville, Tennessee 37212	Association member	2000-2005
Nashville School of Law	4013 Armory Oaks Drive Nashville, TN 37204	Faculty member	1999-present
Solo practice	2300 Hillsboro Road Nashville, Tennessee 37212	Sole practitioner	2005-present

I served as the Tennessee agent for service of process for National Registered Agents, Inc., from January 2009 through December 2012. In this role I was served with service of process and then I forwarded the papers to the appropriate recipient.

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 been employed continuously as a lawyer since September 11, 1976.

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

My practice is a general civil practice, which includes the following areas: appellate practice in state and federal courts (~20%); litigation in federal and state courts for both plaintiffs and defendants (~30%); litigation before administrative agencies, most notably the Tennessee Department of Education (~25%); and preparation of wills and handling probate matters, including conservatorships (~25%).

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

During my 36 years in practice I have represented both plaintiffs and defendants in all manner of civil cases. I have represented individuals, businesses, governmental entities and public school systems. These cases have been in tort cases and contract disputes, and my work for public school systems has involved my appearing in more than 50 cases before an Administrative Judge involving the complicated statutory and regulatory schemes of the Individuals with Disabilities Education Act and § 504 of the Rehabilitation Act of 1973.

I have tried or settled cases in General Sessions courts, Circuit Courts, Chancery Courts and the United States District Court for the Middle District of Tennessee. I have pursued appeals for both appellants and appellees in the Court of Appeals, the Court of Criminal Appeals and the Tennessee Supreme Court, as well as in the Sixth Circuit Court of Appeals. I have not practiced criminal law although I have handled criminal appeals, both by appointment by the Court of Criminal Appeals and by private employment by litigants. As a solo the vast majority of these cases have been without a second chair or other assistance and the research, writing, trial preparation and trial presentations have been my own.

I have not handled transactional matters or regulatory matters, other than to represent a few individuals before the Tennessee Psychology Board in licensure issues.

At last count I have appeared in 50 cases in the appellate courts of Tennessee. I believe in all of them I served as lead counsel. I have done the research, written the briefs and in all but a very few cases I have argued the matter before the court. These appeals have been in tort cases, divorce cases, boundary line disputes, contract cases and more.

As a sole practitioner for over 36 years whatever I have done as a lawyer I have done on my own. While I have had the ongoing support of my family, friends and colleagues, what has come out of my office has been my own work product. I have had to be a generalist in the law to some extent, acting in many ways as does a primary care physician. Naturally, there are areas of the law in which I do not practice, such as criminal law or bankruptcy law, and like the primary care physician faced with a patient needing brain surgery I have had the wisdom to refer those matters to colleagues in whose skills I trust. Regardless, I take pride in the fact that in this highly competitive world of the practice of law I have been successful as a sole practitioner. I am not rich, but I have made a living and have supported my family.

I believe that having been a solo my work ethic, my adherence to deadlines and my timeliness in completing my projects will translate well to the relative isolation of a Court of Appeals judge.

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

Doe v. Tullahoma, 9 F.3d 455 (6th Cir. 1993). This was a case tried in about 1991 under the Individuals with Disabilities Education Act before a Tennessee Department of Education administrative law judge. It establisbed that Tennessee's requirement for providing educational services to students with disabilities was no higher than that required by federal law. The case was appealed to the U.S. District Court for the Middle District of Tennessee, where I prevailed, then to the Sixth Circuit Court of Appeals, where I also prevailed, and then to the United States Supreme Court, which denied review.

Payne v. Board of Education, 88 F.3d 392 (6th Cir. 1996). This case also was tried under the Individuals with Disabilities Education Act initially before a Tennessee Department of Education administrative law judge. It established that before an attorney's fee may be awarded under the Act the opposing party must be considered to have prevailed, and where the school system had acceded to the student's requests through the Individualized Education Plan process the student had not prevailed within the meaning of the Act. The case was appealed to the U.S. District Court for the Middle District of Tennessee, where I prevailed, then to the Sixth Circuit Court of Appeals, where I also prevailed

Guzman v. Alvares, 205 S.W.3d 375 (Tenn. 2006): This case established that the long-standing doctrine of marriage by estoppel cannot be used to legitimize a bigamous marriage. I wrote the Court of Appeals brief, the application for permission to appeal, and the Supreme Court brief with some input from trial counsel, and I argued the case at both appellate levels. I prevailed at all levels.

Silva v. Buckley, M2002-00045-COA-R3-CV, 2003 WL 23099681 (Tenn. Ct. App. December 31, 2003) *Tenn. R. App. P. 11 application denied* (2004): This case established that the Supreme Court Rule 8 factors in setting an attorney's fee may be used prospectively as well as retroactively to determine the reasonableness of the fee. I wrote the brief with some input from trial counsel, and I argued the case; I also wrote the opposition to adversary counsel's application for permission to appeal; the application was not granted. I prevailed at all appellate levels.

Avery v. Avery, M2000-00889-COA-R3-CV, 2001 WL 775604 (Tenn. Ct. App. July 11, 2001): In this divorce case I persuaded the Court of Appeals to reverse the trial court, thus establishing that $2.3 million in assets was my client's separate property and not partnership property, as the trial court had ruled. I wrote the brief with some input from trial counsel, and I argued the case. I prevailed.

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

I served as a Tennessee Department of Education, Division of Special Education, administrative law judge from 1986 through 1990. This position was by appointment of the Commissioner of Education. My duties included hearing and deciding cases brought under the Individuals with Disabilities Education Act, § 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act by parents of public school students, and the students themselves, against public school systems.

I also served as a hearing panel member for the Board of Professional Responsibility from 1999 through 2005. This position was by appointment of the Tennessee Supreme Court. My duties involved sitting on a three-lawyer panel, often as the chair, and trying and deciding cases of alleged lawyer misconduct.

These cases were significant only to the parties. I have not served as a mediator or arbitrator.

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

I have served as guardian ad litem approximately 20 times, attorney ad litem and conservator in Davidson County and as guardian ad litem in Williamson County. My positions as conservator have been as conservator of the person for inmates at the Lois DeBerry Special Needs facility in cases initiated by the Tennessee Department of Correction and once as temporary conservator of the person and property of a ward, for which I was bonded.

I have served as President, First Vice President and twice as a member of the Board of Directors of the Nashville Bar Association. I also have served as President and Trustee of the Nashville Bar Foundation. Finally, I have served as a board member and officer of Sigma Pi Fraternity, International. In all three organizations I served in a fiduciary capacity.

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

As President of the Nashville Bar Association I initiated the Lawyer to Lawyer program. This is an on-line mentoring program through the NBA website where seasoned lawyers in practice 15 years or more stand ready to respond to inquiries from new lawyers with fewer than 7 years in practice. Each senior lawyer lists the areas in which he or she is willing to advise and the protégés can either e-mail or telephone a senior lawyer of his or her choice to ask a question in that area. There is no required ongoing relationship. I am especially proud of this initiative because of the number of new lawyers hanging out a shingle without a natural mentor – a partner in a firm, a relative who is a lawyer – who can benefit from the wisdom of an older lawyer.

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

I have applied for this same position twice, both in 2007. I do not know the precise dates of the meetings during which my application was considered but I believe one was the summer and the other was the late fall. My name was not submitted to the Governor.

EDUCATION

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

Manchester College, North Manchester, Indiana, 1964-1965, no declared major, no degree; I left because I wasn't ready for college and even had I been this college was not right for me.

Purdue University, West Lafayette, Indiana, 1969-1973, Political Science, Bachelor of Arts. I was President of the Purdue Chapter of Sigma Pi Fraternity, International, Interfraternal Council Vice President, and was selected as a member of Omicron Delta Kappa, a national undergraduate leadership society.

Vanderbilt Law School, Nashville, Tennessee, 1973-1976, Law, Doctor of Jurisprudence. I was the brief writer for the National Moot Court team which placed third in the nation in 1975.

PERSONAL INFORMATION

15. State your age and date of birth.

I am 66 years old and was born July 26, 1946.

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

39 years.

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

35 years.

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

Davidson County.

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

I served on active duty with the United States Army as an enlisted man from January 11, 1966 through January 10, 1968 as a Pershing missile crewman and microwave radio operator, stationed for 18 months in Wackernheim, Germany. My rank at separation was Specialist Fourth Class. I received the National Defense Service Medal, a decoration for service in the U.S. Army during certain specified periods, one of which included my service on active duty. I received an honorable discharge in January 1972.

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

No.

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

No.

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

I have never been disciplined.

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.

The only cases in which I have been a party were the few times I sued a former client for a fee, none of which have occurred within at least 5 years. In each of those cases I received a judgment. The only case of substance (for more than a few thousand dollars) was in the Chancery Court for Davidson County, Case #06-2858-II. I received a default judgment.

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

St. David's Episcopal Church
Vestry member, 2004-2006
Choir president, 2005

Sigma Pi Fraternity, International
General Counsel, 2012-present
Immediate Past International President, 2006-present
International President, 2004-2006
International Vice President, 2002-2004
International Treasurer, 2000-2002
International Secretary, 1998-2000

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

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

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

a. Yes, Sigma Pi Fraternity, International, a collegiate based Greek-letter men's fraternity. I was initiated in 1970 at Purdue University.

b. I do not intend to resign my membership. Sigma Pi Fraternity is dedicated to advancing truth and justice, promoting scholarship, and developing character in both college-age men and university alumni who are members. My involvement with the fraternity after college, especially during my time as an international officer, has enabled me to promote these ideals in young men, thus preparing them to be honest, forthright and productive members of society. I do not believe that my dedication to these principles and my desire to help develop young men as citizens are inconsistent in any way with nomination and selection as a member of the Court of Appeals.

However, I would resign my position as General Counsel for the obvious reasons.

ACHIEVEMENTS

a. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any

offices which you have held in such groups. List memberships and responsibilities on any committee of professional associations which you consider significant.

American Bar Association
- Member, GP|Solo Editorial Board, 2011
- Vice-Chair, Solo and Small Firm Committee of the General Practice, Solo and Small Firm Section, 1997-99
- Member, Litigation Section
- Member, General Practice, Solo and Small Firm Section

Tennessee Bar Association
- Member, Litigation Section

Nashville Bar Association
- Immediate Past President 2013
- President 2012
- President Elect 2011
- First Vice President 1997
- Member, Board of Directors 1995-97, 2009-2013
- Past Chair and Current Member, Appellate Practice Committee
- Past Chair and Current Member, Solo and Small Office Practice Committee
- Past Chair and Current Member, Ethics and Professionalism Committee
- Past Member, Law Office Management Committee
- Past Member, Colleagues Committee

Nashville Bar Foundation
- President, 1999, 2000; Trustee, 1997-98

Harry Phillips American Inn of Court
- Master of the Bench Emeritus and Executive Committee Member, 2004-present; Master of the Bench, 1996-2004; Barrister, 1993-1996

Lawyer's Association for Women, Marion Griffin Chapter
- Member, Board of Directors and co-editor of newsletter "L.A.W. Matters", 1996-97
- Member, 1996-present

Tennessee Council of School Board Attorneys
- President, 1996-1997
- Member, 1996-present

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

American Bar Association Sole Practitioner of the Year, 1997 (Inaugural Award)

"Best of the Bar," Appellate Practice, Nashville Business Journal, 2008, 2009

Fellow, Nashville Bar Foundation, 1994

Recipient, Nashville Bar Association President's Award, 1990.

Profiled in *The American Bar Association Journal,* October 1991 issue, *Linda, John and Rebecca's Excellent Adventure.*

AV rating, Martindale-Hubbell

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

Author, "Red Flags: Avoiding the Bad Client," SOLO, the newsletter of the American Bar Association's General Practice, Solo and Small Firm Division, published Fall 2010.

Author, "Practice Interrupted: Preparing for Disaster, Disability and Death," October/November 2010 edition of the American Bar Association's *GP/Solo* magazine.

Author, "Ethics for School Board Lawyers: Representation Within the Bounds," *Tennessee School Boards Association Journal,* Vol. 20, No. 1, Winter 2003.

Author, "Proving and Disproving Punitive Damages," *Litigation,* The Journal of the Section of Litigation of the American Bar Association, Vol. 21, No. 2, Winter, 1994 (reprinted in the Third Edition of the Trial Practice volume of the American Bar Associations' *Litigation Manual,* 1999).

d. 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.

I have taught Law Office Management at the Nashville School of Law since 1999. I have presented several CLE courses, including a Nashville Bar Association Lunch and Learn titled "Overcoming Overwhelming," and a co-taught program on planning for disability, disaster and death to the Solo Committee of the Lawyers' Association for Women. I also have participated in several programs as a member of the Harry Phillips American Inn of Court.

I also have served as a guest lecturer at the Belmont University School of Physical Therapy, presenting a segment on employment law.

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

None.

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

In approximately 1978 I was registered as a lobbyist for Lamar Outdoor Advertising for one year. In that role I never actually lobbied the legislature.

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

Please see the attached. The work is mine and mine alone.

ESSAYS/PERSONAL STATEMENTS

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

My purpose in seeking this position is to have an even greater impact on the law and its consumers than I have had as a practicing lawyer. I was a student of the law even before I began law school. My father and grandfather were lawyers and I learned from them the importance of a lawyer's commitment to the rule of law. I have remained faithful to that commitment my entire career and now I want to do more.

While I certainly have enjoyed the intellectual challenges of the law as a lawyer I aspire to the greater intellectual challenge of the Court of Appeals. As a Court of Appeals judge I can use the talents I have to more effectively help preserve and protect the rule of law in Tennessee and maintain the confidence of the citizens of Tennessee in the judicial process.

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

I never have turned away a client because of who he or she was or what he or she believed in. My clients have been of all races, genders, ages, cultures and national origins. I have always tried to live up to the oath I took as an attorney in 1976, and as appropriate to this question I

consistently have honored the portion of that oath which stated "I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed ...." I have donated for many years to the Nashville Pro Bono program and I take nearly all cases referred to me by that organization. In addition, I have taken on private clients for free when they did not have the ability to pay but when they needed my help.

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

I am asking to be appointed to the Middle Section of the Tennessee Court of Appeals which has four sitting judges. This court hears cases on appeal from civil trial courts in the Middle Grand Division of the state.

I believe I have the necessary characteristics to maintain the excellence of the Court. I have long practiced as a solo and this would translate easily to the comparative isolation of a member of the Court. I work hard, I get things done on time, and I do good work. I study and analyze the issues in a case, I research thoroughly, and I write well.

I also believe that I enjoy a good reputation as a lawyer among the members of the bench and bar and believe that would work to maintain the trust and confidence in which the Court is held.

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

I am a confirmed member of St. David's Episcopal Church. I have served as a member of the Vestry, I currently sing in the choir and I have helped with legal issues affecting the church. I would expect to continue to participate in all facets of the church's mission.

I am a 43 year member of Sigma Pi Fraternity, International, a collegiate based Greek-letter men's fraternity. I have held nearly every office in the Fraternity, including international president, and I currently serve as General Counsel, an unpaid position. I believe in the Fraternity's goals of taking boys and making them men. I would expect to continue helping that effort, although I would resign as General Counsel if appointed to the Court.

As a member of the Court I would seek opportunities to speak publicly about the rule of law and its place in society in any appropriate public forum, including schools. Part of the issues I see about the perception of the law, lawyers and judges arises from a general lack of understanding of the importance of the law as the best problem-solving and dispute-resolving mechanism available. I attribute that to the erosion of civics and government classes in schools. I would hope that by making myself available to speak I could establish or reinforce the notion that we have a system that works well and should be respected.

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

I have been on this Earth for 66 years. During that time I have served in the United States Army as an enlisted man, have worked as a farm hand, have worked for a telephone company, have tended bar, and have worked in a factory, among other employments, both before and during college and law school. I have paid my own way through college and law school. I have been married to the same wonderful woman for 34 years, have three children and three granddaughters, and have made a good living practicing law as a solo for the vast majority of my career. I have set high personal and professional standards for myself and I have tried to meet them. I have had to work hard to succeed, and I am comfortable with my life.

My talents include among others a strong work ethic, a solid knowledge of the law, a near-obsession for timeliness, good research and writing skills, fairness, personal integrity and a reasonable degree of patience.

As a solo I have learned good principles of time management, since there has been no one else to cover for me in my practice and I have had to manage by myself. I also have learned to focus on the task at hand and work on it in solitude, an asset I believe would translate well to the judgeship I seek.

m. 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)***

Absolutely, although I rarely have disagreed with the substance of the laws of Tennessee. Even if I did disagree a judge's duty is to sustain the rule of law by abiding by the laws that are in place at the time, and I would honor that duty.

However, one example is the grandparent visitation statute. As a grandparent myself I respectfully disagree with the difficulties the statute places on grandparents' desiring to visit grandchildren when for some reason the parents of the children do not want the visitation to occur. Nonetheless, I have been involved in such cases, albeit from the grandparents' side, and have adhered to the law in addressing them.

If I were to be appointed to the Court I would follow the law as written unless I were satisfied that the law in question was not constitutional. In that case I would write what I believed and then would abide by what the Supreme Court might say about my decision.

REFERENCES

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

A. Robert L. Echols, attorney at Bass, Berry and Sims, 150 Third Avenue North, Suite 2800, Nashville, Tennessee 37201, 615-742-2771, [redacted]
B. Sandy Garrett, Chief Disciplinary Counsel, Board of Professional Responsibility, 10 Cadillac Drive, Suite 220 Brentwood, Tennessee 37027, 615-361-7500, [redacted]
C. Paul Ney, attorney at Waddey and Patterson, 1600 Division Street, Suite 500, Nashville, Tennessee 37203, 615-242-2400, [redacted]
D. Fr. Eric S. Greenwood, Jr., Rector, St. David's Episcopal Church, 6501 Pennywell, Nashville, Tennessee 37205, 615-352-0293, [redacted]
E. John T. (Jack) Chenoweth, IT specialist with Aramark, [redacted], 615-712-6148 (W), [redacted]

AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the Court of Appeals of Tennessee, Middle Section, and if appointed by the Governor, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended questionnaire with the Administrative Office of the Courts for distribution to the Commission members.

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

Dated: June 4, 2013.

Signature

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

TENNESSEE JUDICIAL NOMINATING COMMISSION

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

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

WAIVER OF CONFIDENTIALITY

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

John D. Kitch
Printed Name

Signature

June 4, 2013
Date

4569
BPR #

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IN THE SUPREME COURT OF TENNESSEE
SITTING AT NASHVILLE

CASE NO. M2003-02902-COA-R3-CV

HIMELDA FUENTES GUZMAN,
Plaintiff-Appellee

V.

SALVADOR GUZMAN ALVARES,
Defendant-Appellant

ON APPEAL FROM THE TENNESSEE COURT OF APPEALS
MIDDLE SECTION (WESTERN SECTION SITTING)

BRIEF OF THE APPELLANT SALVADOR GUZMAN ALVARES

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ORAL ARGUMENT REQUESTED

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INTRODUCTION

MAY IT PLEASE THE COURT:

This is an appeal by Salvador Guzman Alvares from a decision of the Middle Section of the Court of Appeals (Western Section sitting). The parties will be designated as Ms. Fuentes Guzman and Mr. Alvares respectively.[1]

The case arises out of a divorce action filed by Ms. Fuentes Guzman and a counter-petition for annulment filed by Mr. Alvares.

References to the technical record will be indicated by the abbreviation "*T.R. p.* _____." References to exhibits will be indicated by the abbreviation "*Ex.* # _____." References to the transcript will be indicated by the abbreviation "*Tran. Vol.* _____, *p.* _____, *lines* _____."[2]

[1] The name Mr. Alvares has used since emigrating to the United States is Salvador Alvarez Guzman. However, he is designated as Salvador Guzman Alvares in the style of the appeal, so in this brief he will be designated Mr. Alvares to minimize confusion.

[2] The volume number used for each volume of trial transcript will be the Roman numeral handwritten on each volume by the Clerk, not the volume number used by the court reporter. Thus, for example the first volume of trial transcript will be Volume III.

STATEMENT OF ISSUES

1. WHETHER THE COURT OF APPEALS DECISION IN THIS CASE UNCONSTITUTIONALLY VIOLATES THE SEPARATION OF POWERS CLAUSES OF THE TENNESSEE CONSTITUTION BY INVADING THE EXCLUSIVE PROVINCE OF THE TENNESSEE LEGISLATURE TO PASS LAWS GOVERNING MARRIAGE AND DIVORCE.

2. WHETHER THE COURT OF APPEALS DECISION IN THIS CASE, FINDING A MARRIAGE BY ESTOPPEL DESPITE THE EXISTENCE OF A BIGAMOUS MARRIAGE, IS IN CONFLICT WITH STATUTORY AUTHORITY, CONTROLLING AUTHORITY FROM THIS COURT, AND OTHER DECISIONS OF THE INTERMEDIATE APPELLATE COURTS.

3. WHETHER THE COURT OF APPEALS DECISION IN THIS CASE INCORRECTLY APPLIES THE DOCTRINE OF MARRIAGE BY ESTOPPEL AND MISINTERPRETS THE REQUIREMENTS OF EQUITABLE ESTOPPEL GENERALLY.

STATEMENT OF THE CASE

The relevant proceedings in this case are as follows:[3]

On September 26, 2002, Ms. Fuentes Guzman filed for divorce against Mr. Alvares, alleging as grounds adultery, inappropriate marital conduct, and irreconcilable differences. *T.R. 1-6.* She previously had filed for divorce March 1, 1995, alleging irreconcilable differences and inappropriate marital conduct. *Ex. #129; Tran. Vol. VII, p. 832, 5-14.* In both of these divorce petitions she swore under oath that the marriage to Mr. Alvares was her first and also that no prior marriage ever had been annulled.

Mr. Alvares filed an Answer and Counterclaim for Annulment on November 14, 2002, alleging as grounds that Ms. Fuentes Guzman had a prior subsisting marriage when the purported marriage between Ms. Fuentes Guzman and Mr. Alvares took place and asking that the "marriage" between the parties be annulled. *T.R. 24-46.* On December 19, 2002, Ms. Fuentes Guzman filed a document titled Affirmative Defenses and Answer to Counterclaim for Annulment. *T.R. 59-63.*

Ms. Fuentes Guzman filed a Motion to Amend Complaint for Divorce on January 14, 2003, seeking to substitute an Amended Complaint which stated that the marriage was her second, not her first as the original sworn complaint had said. *T.R. 64.* Mr. Alvares filed a response to the motion. *T.R. 65-66.* On February 18, 2003, the trial court permitted Ms. Fuentes Guzman to amend the paragraphs concerning the number of marriages but denied permission to substitute the proposed Amended Complaint for the original. *T.R. 83-84.* The Amendment to the Divorce Bill was filed March 7, 2003. *Ex. #130.*

[3] Proceedings lacking relevance to the core issues in this appeal, such as motions and orders not germane to the outcome, are omitted for purposes of readability.

On October 29, 2003, Ms. Fuentes Guzman was granted a divorce from Mr. Alvares on grounds of adultery, the trial court having declared a marriage by estoppel between the parties. The trial court then distributed the property accumulated during the parties' time together and set up a trust "for the benefit of Ms. Guzman" to pay her money during her lifetime, and to be distributed to the children after her death. The trial judge further awarded joint custody of the children with Ms. Fuentes Guzman the primary residential parent. *T.R. 210-218.* A Permanent Parenting Plan was entered addressing the children of the parties. T.R. 205-209. A substituted Permanent Parenting Plan was filed recently. *Supplemental T.R. 1.* Subsequently the trial court granted Ms. Fuentes Guzman her discretionary costs. *T.R. 279-280.*

Mr. Alvares appealed to the Court of Appeals. The Western Section of the Court, sitting for the Middle Section, entered judgment on July 12, 2005, affirming the trial court in all significant respects, although the Court of Appeals modified the division of "marital" assets. A petition for rehearing was filed by Ms. Fuentes Guzman but was denied by order filed August 19, 2005.

STATEMENT OF FACTS

The following facts are relevant to the issues before the Court:

Ms. Fuentes Guzman was married to Lorenzo Leon Covarrubias in 1982 in a civil ceremony in Mexico. *Ex. #8; Ex. #127, pp. 86, 87, 89, 92, 94, 99, 100.* Ms. Fuentes Guzman admitted that this was a legal marriage under Mexican law. *Tran. Vol. III, p. 26, 17-21, p. 27, 1-3; Brief of Appellant, p. xli.* Both expert witnesses on Mexican law confirmed the legality of the marriage. *Tran. Vol. III, p. 119, 22 – p. 120, 1; p. 156, 8-12, p. 157, 2-8.*

Mr. Covarrubias filed for divorce on September 24, 1985, in Jalisco, Mexico. Ms. Fuentes Guzman was served with process. *Tran. Vol. III, p. 27, 20-23.* On April 2, 1986, the Court of First Justice found a divorce appropriate and sent the proceedings to the Supreme Court of Jalisco for final review, as is required before a divorce is final. *Tran. Vol. III, p. 120, 16-23.* On March 6, 1987, a final divorce judgment was issued, approving the Court of First Justice's ruling. *Ex. #9; Tran. Vol. III, p. 133, 12 – p. 135, 10.* The uncontroverted testimony of an expert witness on Mexican law established that the legal date of Ms. Fuentes Guzman's divorce was March 6, 1987, the date of the Supreme Court's final divorce judgment, and until then she still was married to Mr. Covarrubias. *Tran. Vol. III, p. 160, 20 – p. 161, 23.*

Ms. Fuentes Guzman and Mr. Alvares purported to marry in a civil ceremony on August 2, 1986, in Degollado, Jalisco, Mexico, six months before the grant of the divorce to Mr. Covarrubias by the Supreme Court of Jalisco. The marriage certificate, signed by Ms. Fuentes Guzman and Mr. Alvares, attested that there were no legal impediments prohibiting the celebration of a legal civil marriage under the laws of the State of Jalisco, Mexico. *Ex. ##3, 98.* On the same day as the civil ceremony, the purported marriage was solemnized by a priest in a Catholic Church wedding ceremony. This service followed the publication of the parties' intent to marry by the Church on the preceding three (3) Sundays during the celebration of church services. The parties' intent to marry in the church is evidenced by a comprehensive document, signed by the parties, which also states that there were no existing impediments preventing this

marriage in the Catholic Church. On this document, sworn to be true before a notary, Ms. Fuentes Guzman expressly denied having been previously married, either civilly or in the Church. *Ex. #125; Tran. Vol. VI, p.798, 22 – p. 810, 20.*

Mr. Alvares testified that prior to his purported marriage to Ms. Fuentes Guzman he did not know that Ms. Fuentes Guzman had been married before. *Tran. Vol. VIII, p. 1057, 14-20; p. 1080, 20-24.* He first learned of the prior subsisting marriage in October of 2002, following Ms. Fuentes Guzman's filing for divorce. When Mr. Alvares heard rumors about a prior marriage, he went to Mexico and discovered that Ms. Fuentes Guzman had been married when she purported to marry him. *Tran. Vol. VIII, p. 1082, 9 – p. 1088, 23.* The trial court found that Mr. Alvares did not know of any impediment to marriage at the time he and Ms. Fuentes Guzman purportedly married: "While there is some evidence Mr. Guzman knew of Mrs. Guzman's prior marriage, there is no evidence either party knew it subsisted at the time their wedding took place." *T.R. Vol. II, pp. 199-200, 212.* Mr. Alvares would not have gone through a marriage ceremony with Ms. Fuentes Guzman had he known of her prior marriage. *Tran. Vol. VIII, p. 1065, 16-23.*

Ms. Fuentes Guzman admitted that she did not tell Mr. Alvares of her prior marriage, *Tran. Vol. VII, p. 833, 3-5,* and by way of explanation for not disclosing this fact and for falsely swearing[4] that she never had been married before, Ms. Fuentes Guzman testified that she had "always felt" that her marriage to Mr. Alvares was her first, *Tran. Vol. VII, p. 834, 9-13,* that her first marriage didn't "count that as a marriage because it was never fulfilled," *Tran. Vol. VII, p. 836, 2-4,* and that she didn't consider herself married the first time "according to our custom." *Tran. Vol. VII, p. 836, 17-23.* Incredibly, she testified that she didn't even remember she had been married before, *Tran. Vol. VII, p. 836, 10-13, p. 837, 6-22,* although she had earlier testified that she was fully aware that her marriage to her first husband was legal. *Tran. Vol. III, p. 26, 17-21, p. 27, 1-3.*

[4] This occurred before the priest when she purported to marry Mr. Alvares and twice in sworn divorce petitions. *Tran. Vol. VII, p. 832, 5-14; Ex. #125; Tran. Vol. VI, p.798, 22 – p. 810, 20; Ex. #129, Tran. Vol. VII, p. 832, 15 – p. 833, 2.*

On March 1, 1995, Ms. Fuentes Guzman filed for divorce from Mr. Alvares for the first time, swearing under oath in the Complaint that she had not been married before, that she never had been divorced, and that no prior marriage had been annulled. This divorce action was resolved by a reconciliation. *Ex. #129; Tran. Vol. VII, p. 832, 5-14.* On September 26, 2002, Ms. Fuentes Guzman again filed for divorce and again swore under oath that her marriage to Mr. Alvares was her first and only marriage, that she never had been divorced, and that no prior marriage had been annulled. *T.R. 1-6; Tran. Vol. VII, p. 832, 15 – p. 833, 2.* Mr. Alvares counterclaimed, asking for an annulment based on Ms. Fuentes Guzman's prior subsisting marriage. Through counsel, Ms. Fuentes Guzman admitted that Mr. Alvares is legally entitled to an annulment, although she continues to maintain her entitlement to a divorce. *Tran. Vol. III, p. 26, 3-15.*

SUMMARY OF THE ARGUMENT

The Tennessee Constitution vests the establishment of the public policy of law of marriage and divorce solely in the Tennessee Legislature, and the Court of Appeals decision employing the doctrine of marriage by estoppel for the sole purpose of granting a divorce and a division of "marital" assets is an unconstitutional infringement on that exclusive power in violation of the Separation of Powers Clauses of the Tennessee Constitution. The Legislature has decreed that no marriage is valid if prohibited, and that a second marriage cannot occur before the dissolution of a first marriage. Since Ms. Fuentes Guzman was still married to another man when she purported to marry Mr. Alvares, the claimed marriage to Mr. Alvares was void *ab initio*.

Further, the Court of Appeals decision is in direct opposition to controlling statutory authority, controlling case authority from this Court, and decisions of the intermediate appellate courts. Principles of *stare decisis* require that the long-standing rule that a second marriage cannot be contracted during the existence of a first marriage remains the law of Tennessee.

Finally, equitable principles are not available to apply marriage by estoppel or equitable estoppel, on which marriage by estoppel is based. Marriage by estoppel is only rarely applied and never for the sole purpose of creating a marriage to then grant a divorce and divide assets. Additionally, Ms. Fuentes Guzman did not prove all the elements of estoppel. First, Mr. Alvares said or did nothing that was a misrepresentation upon which Ms. Fuentes Guzman could rely; moreover, Ms. Fuentes Guzman was aware of the true facts or could have learned them herself. Secondly, Ms. Fuentes Guzman is barred by the clean hands doctrine from accessing the courts because she made false statements under oath three times, including twice when she filed for divorce. Therefore, she may not invoke principles of estoppel, as equitable remedies are unavailable to her.

ARGUMENT

I.
THE COURT OF APPEALS DECISION IN THIS CASE UNCONSTITUTIONALLY VIOLATED THE SEPARATION OF POWERS CLAUSES OF THE TENNESSEE CONSTITUTION BY INVADING THE EXCLUSIVE PROVINCE OF THE TENNESSEE LEGISLATURE TO ENACT LEGISLATION CONCERNING MARRIAGE AND DIVORCE.

The Tennessee Constitution provides that "The powers of the Government shall be divided into three distinct departments: the Legislative, Executive and Judicial." *Tenn. Const. Art. II § 1.* It further states that "No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted." *Tenn. Const. Art. II § 2.* The power to authorize divorces is expressly granted to the legislature: "The Legislature shall have no power to grant divorces; but may authorize the Courts of Justice to grant them for such causes as may be specified by law; but such laws shall be general and uniform in their operation throughout the State." *Tenn. Const. Art. II § 4.* The Court of Appeals opinion in the case *sub judice* is an unconstitutional invasion of the province of the Legislature in that it effectively creates common law marriage under the guise of marriage by estoppel for the sole purpose of granting a divorce and dividing property, all in direct contravention of clear statutory authority.

"In Tennessee, marriage is controlled by statute, and common-law marriages are not recognized." *Martin v. Coleman*, 19 S.W.3d 757, 760 (Tenn. 2000). This has been the case in Tennessee for at least 174 years. *See Grisham v. State*, 10 Tenn. 589, 1831 WL 1031, *3 (Tenn. Err. & App. 1931) (copy attached) ("This common law marriage, . . . [is] merely a void act in reference to the constitution of a valid marriage in this state . . .."). This Court has recognized that "Marriage is a status that is subject to the legislative power of the State, 'Marriage, being of vital public interest, is subject to the state and to legislative power and control, with respect to its

inception, duration and status, conditions, and termination, except as restricted by constitutional provision.'" *Crawford v. Crawford*, 277 S.W.2d 389, 391 (Tenn. 1955). The determination of public policy regarding marriage and divorce, including dealing with assets acquired during marriage,[5] is squarely within the realm of the Legislature, and the courts cannot determine policy with regard to marriage and divorce because there is a clear constitutional and statutory declaration on the subject. *See Griffin v. Shelter Mutual Insurance Company*, 18 S.W.3d 195, 200 (Tenn. 2000).

The Tennessee Legislature has decreed that "No marriage shall be valid, whether consummated by ceremony or otherwise, if the marriage is prohibited in this state." *Tenn. Code Ann. §36-3-306.* Additionally, "A second marriage cannot be contracted before the dissolution of the first." *Tenn. Code Ann. §36-3-102.* This is an unambiguous legislative declaration that in cases such as the case *sub judice,* where Ms. Fuentes Guzman was legally married at the time she purported to marry Mr. Alvares, there is no legal marriage and the marriage is void *ab initio*. Courts must "presume that the legislature says in a statute what it means and means in a statute what it says there," *Limbaugh v. Coffee Medical Center*, 59 S.W.3d 73, 83 (Tenn. 2001), and it is a court's role to "ascertain and give effect to 'the legislative purposes and intent without unduly restricting or expanding a statute's coverage beyond its intended scope.' *[Citations omitted.]*" *Id.* Thus, the Court of Appeals unconstitutionally infringed upon the legislature's exclusive prerogatives by creating what is in effect a common-law marriage, solely for the purpose of granting a divorce and dividing assets, in direct conflict with the statutes' clear language making a bigamous marriage void *ab initio* and of no force or effect.

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[5] "Because 'marital property' is a legal fiction created by statute, *see* Tenn.Code Ann. § 36-4-121(b) (2001), 'the concept has no real meaning outside of the realm of marital dissolution.' *[Citation omitted]*. Thus, 'marital property' is only considered in the context of an equitable division of property resulting from the dissolution of a valid marriage. *Arms v. Stanton*, 43 S.W.3d 510, 513 (Tenn.Ct.App.2000)." *Falk v. Falk*, 2005 WL 127077 (Tenn. Ct. App.) (copy attached). Neither the trial court or the Court of Appeals found a partnership, *Bass v. Bass*, 814 S.W.2d 38 (Tenn. 1991), and therefore both erred in awarding Ms. Fuentes Guzman any part of Mr. Guzman's property.

Ms. Fuentes Guzman was legally married to Lorenzo Leon Covarrubias on April 4, 1982 in a civil ceremony at San Jose de la Paz, Jesus Maria, Jalisco, Mexico. *Ex. #8; Ex. #127, pp. 86, 87, 89, 92, 94, 99, 100.* Ms. Fuentes Guzman admitted at trial and in her brief to the Court of Appeals that this civil ceremony served as a legal marriage. *Tran. Vol. III, p. 26, 17-21, p. 27, 1-3; Brief of Appellant, p. xli.* Both expert witnesses on Mexican law confirmed the legality of the marriage. *Tran. Vol. III, p. 119, 22 – p. 120, 1; p. 156, 8-12, p. 157, 2-8.*

Mr. Covarrubias filed for divorce on September 24, 1985, in Jalisco, Mexico. Ms. Fuentes Guzman was served with process. *Tran. Vol. III, p. 27, 20-23.* On April 2, 1986, the Court of First Justice found a divorce appropriate and sent the proceedings to the Supreme Court of Jalisco for final review, as is required under Mexican law before a divorce is final. *Tran. Vol. III, p. 120, 16-23.* On March 6, 1987, a final divorce judgment was issued, approving the Court of First Justice's ruling. *Ex. #9; Tran. Vol. III, p. 133, 12 – p. 135, 10.* The uncontroverted testimony of an expert witness on Mexican law established that the legal date of Ms. Fuentes Guzman's divorce was March 6, 1987, the date of the Supreme Court's final divorce judgment, and until then she still was married to Mr. Covarrubias. *Tran. Vol. III, p. 160, 20 – p. 161, 23.*

Ms. Fuentes Guzman and Mr. Alvares purported to marry in a civil ceremony on August 2, 1986, in Degollado, Jalisco, Mexico, six months before the grant of divorce to Mr. Covarrubias by the Supreme Court of Jalisco. *Ex. #125; Tran. Vol. VI, p.798, 22 – p. 810, 20.* Thus the second marriage of Ms. Fuentes-Guzman was an impermissible bigamous marriage within the meaning of *Tenn. Code Ann. §36-3-306* and was invalid within the meaning of *Tenn. Code Ann. §36-3-102*; therefore, the Court of Appeals's creation of a marriage by estoppel is unconstitutional as a direct invasion of the Legislature's policy statement that such a purported marriage is invalid.

II.

THE COURT OF APPEALS DECISION IN THIS CASE, FINDING A MARRIAGE BY ESTOPPEL DESPITE THE EXISTENCE OF A BIGAMOUS MARRIAGE, IS IN CONFLICT WITH STATUTORY AUTHORITY, CONTROLLING AUTHORITY FROM THIS COURT, AND OTHER DECISIONS OF THE INTERMEDIATE APPELLATE COURTS.

In addition to its unconstitutional invasion of the province of the Legislature, the decision of the Court of Appeals creates a conflict in Tennessee appellate courts concerning the proper treatment of a bigamous marriage. This conflict is between the case now before this Court and several cases of this Court and the Court of Appeals, both reported and unreported.[6] Until the Court of Appeals rendered its decision in the case *sub judice*, the law of Tennessee was clear: a marriage allegedly contracted while there was a prior subsisting marriage of one of the parties was void *ab initio*, of no force or effect, and could not be ratified, even after the first marriage was terminated. The decision of the Court of Appeals in the case at bar places this long-standing rule in doubt, and this Court should accept this Application in order to resolve this conflict over an important question of law.

Stability and the ability to plan one's affairs in compliance with the law are the foundations of principles of *stare decisis:*

> [W]henever a judicial decision . . . "has been submitted to and for some time, acted under, and is not manifestly repugnant to some rule of law of vital importance in the system, it should not lightly be departed from, nor for purposes which are not of the highest value to the community." *[Citation omitted].*
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> Generally, well-settled rules of law will be overturned only when there is obvious error or unreasonableness in the precedent, changes in conditions which render the precedent obsolete, the likelihood that adherence to precedence would cause greater harm to the community than would disregarding stare decisis, or an inconsistency between precedent and a constitutional provision.

In Re Estate of McFarland, 167 S.W.3d 299, 305-06 (Tenn. 2005).

[6] While unpublished decisions of the Court of Appeals are not binding on trial courts they remain persuasive authority. *In Re E.N.R.*, 42 S.W.3d 26, fn 2 (Tenn. 2001).

None of the *McFarland* exceptions apply in this case and long-standing case authority requires continued adherence to controlling legal authority on the point. Such controlling authority in direct conflict with the Court of Appeals decision is found in *Pewitt v. Pewitt*, 240 S.W.2d 521 (Tenn. 1951). In *Pewitt* the Court relied on two Supreme Court cases, one from 1917 and the other from 1893,[7] in holding that in a divorce action where the putative wife was married to another man at the time she married the putative husband, her purported second marriage "was an adulterous relation rather than a marriage relation" because "the marriage ceremony through which she and Pewitt went was a nullity" as "she was incapable of entering into the marriage contract." *Id. at 526.* Further, on rehearing the Court held that the putative Mrs. Pewitt could not avail herself of equitable principles to obtain alimony and noted the distinction between a long-term relationship where the parties were capable of entering into a legal marriage and one where they were not:

> The petition to rehear seems to overlook the distinction made, on the one hand, between marriage not entered into in the manner required by law between parties *capable of entering into the marriage contract*, and, on the other hand, such marriage ceremonies between parties, one or both of whom were incapable of entering into such contract . . .. On the other hand, as pointed out in the opinion now under attack, . . . such a presumption [of a valid second marriage] cannot be indulged in those cases where either of the parties was incapable of entering into the second marriage.

Id. at 527 (emphasis in original). This Court then refused to grant the putative Mrs. Pewitt equitable relief:

> The conclusion which this Court reached, borrowing an expression used by this Court in a recent case, "is not so much the will of the Court, as it is the will of the law"; and so, with reference to the earnest appeal as to equity, we can only respond that "equity follows the law". "Where there is no legal liability, equity can create none". *[Citation omitted.]* Equity cannot apply a remedy where there is no right. *[Citation omitted.]*

Id. at 528.

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[7] *McKee v. Bevins*, 197 S.W. 563 (Tenn. 1917); *Scurlock v. Scurlock*, 22 S.W. 858 (Tenn. 1893).

This clear, plain statement of the law, predicated on statutory authority in effect at the time and long-standing Supreme Court precedent, retains its vitality under principles of *stare decisis* and consistently has been followed by the intermediate appellate courts until the Court of Appeals decision *sub judice*. Shortly after the *Pewitt* decision the Western Section of the Court of Appeals stated "There is no doubt that in this state, a bigamous marriage is void *ab initio*. This, because, as the Supreme Court has pointed out, the parties lack the capacity to marry." *Taliaferro v. Rogers*, 248 S.W.2d 835, 837 (Tenn. Ct. App. 1951), *cert. denied* (1952). Similarly, "A valid second marriage cannot be contracted before the dissolution of the first marriage. T.C.A. § 36-3-102. A marriage so contracted is void *ab initio*, and is not validated by a subsequent dissolution of the former marriage." *Al-Haddad Brothers v. Intersparex Ledden KG*, 1993 WL 4858, *4 (Tenn. Ct. App.) (copy attached). The Court of Appeals also has stated that "The prior subsisting marriage prevents the establishment of a valid subsequent marriage and thus there could be no marriage by estoppel." *Decker v. Meriwether*, 708 S.W.2d 390, 392 (Tenn. Ct. App. 1985), *perm. app. denied* (1986).

The recent cases of *Falk v. Falk*, 2005 WL 127077 (Tenn. Ct. App.) (copy attached), decided by the same section of the Court of Appeals as in the case now before this Court, and *Emmit v. Emmit*, 2005 WL 428290 (Tenn. Ct. App.) (copy attached), decided by the Eastern Section, conflict with the case *sub judice*. In *Falk*, the Western Section correctly articulated the law in Tennessee regarding a bigamous second marriage:

> Before we address the propriety of the trial court's order granting a divorce to the parties, we will first address the validity of the underlying marriage in the case at bar. It is undisputed that, at the time the parties participated in their marriage ceremony, Mrs. Falk was still legally married to Mr. Bond and remained married to Mr. Bond for three and one-half additional months. Therefore, although Mrs. Falk's divorce from Mr. Bond eventually finalized, her marriage to Mr. Falk on July 15, 1995 was, by law, bigamous. Section 36-3- 102 of the Tennessee Code expressly states that "[a] second marriage cannot be contracted before the

> dissolution of the first." Tenn. Code Ann. § 36-3-102 (2001). In line with the long-standing public policy of this state, a bigamous marriage is a void marriage. *Old Republic Ins. Co. v. Christian*, 389 F.Supp. 335, 337 (E.D.Tenn.1975); *Sellars v. Davis*, 12 Tenn. (4 Yer.) 503 (1833); *Taliaferro v. Rogers*, 248 S.W.2d 835, 837 (Tenn.Ct.App.1951). Void marriages are void *ab initio* and are neither given recognition by the courts nor are such marriages capable of ratification by the parties. *Coulter v. Hendricks*, 918 S.W.2d 424, 426-27 (Tenn.Ct.App.1995); *Taliaferro*, 248 S.W.2d at 837. Until Mrs. Falk's marriage to Mr. Bond was formally dissolved, she lacked the legal capacity to marry. *Taliaferro*, 248 S.W.2d at 837. After the California divorce became final, Mrs. Falk was free to enter into a valid marriage. However, she made no further attempt to validly solemnize this marriage.[8] Furthermore, Mrs. Falk cannot rely on principles of common law marriage based on the parties' continued habitation, as it is well settled that common law marriages cannot be established in Tennessee. *Crawford v. Crawford*, 277 S.W.2d 389, 391 (Tenn.1955); *Smith v. N. Memphis Savings Bank*, 89 S.W. 392, 392-93 (Tenn.1905). Thus, we conclude that the parties' purported marriage was void from its inception and, as such, constituted a legal nullity.

Falk v. Falk, 2005 WL 127077 (Tenn. Ct. App.). Similarly, in *Emmit v. Emmit*, 2005 WL 428290 (Tenn. Ct. App.), the Eastern Section of the Court of Appeals faced similar facts and recognized the same principles:

> In the instant case, the plaintiff married Mr. Emmit when she was still married to Mr. Medley. . . Since the plaintiff's marriage to Mr. Medley was not annulled as she believed, her marriage to Mr. Emmit was void. Tenn.Code Ann. § 36-3-102 (2001) unambiguously provides that "[a] second marriage cannot be contracted before the dissolution of the first." The public policy of Tennessee dictates that bigamous marriages are void. *Taliaferro V. Rogers*, 248 S.W.2d 835, 837 (Tenn. Ct App. 1951). Such marriages are void *ab initio* because, until the first marriage is dissolved, the parties lack the capacity to marry. *Id.* Consequently, such marriages are neither recognized by the courts nor capable of ratification by the parties. *Coulter v. Hendricks*, 918 S.W.2d 424, 426-27 (Tenn. Ct. App. 1995). . . In light of the foregoing principles, we find that the marriage between the plaintiff and Mr. Emmit is void *ab initio*. . . Consequently, she was legally married at the time of her marriage to Mr. Emmit and, therefore, at that time, she could not contract a second valid marriage. As a court may annul a void, bigamous marriage, *Estes v. Estes*, 250 S.W.2d 32, 34 (Tenn.1952), we hold that an annulment was proper under the facts of the case before us.

Emmit v. Emmit, 2005 WL 428290 (Tenn. Ct. App.).

[8] Similarly, in the case at bar no subsequent marriage ceremony occurred after Ms. Fuentes Guzman's first marriage had been dissolved.

Thus, in *Pewitt, Falk, Emmit,* and the case *sub judice*, there was a prior subsisting marriage at the time one of the parties to that marriage purported to marry another person. In both *Emmit* and the case at bar, the person still married believed the former marriage had been dissolved, when it in fact had not. Thus, the Court of Appeals's argument in the case at bar that Ms. Fuentes-Guzman believed her first marriage to have been annulled does not alter the fact that her purported marriage to Mr. Alvares was bigamous and void *ab initio.* In both *Falk* and *Emmit* the Court of Appeals found that the second marriage was void *ab initio* and of no force and effect, and in *Emmit* the Court declined to find principles of estoppel appropriate. Those holdings are correct, and the Court of Appeals in the case at bar must be reversed to honor principles of *stare decisis* and bring consistency to the law of Tennessee.

The Court of Appeals in this case attempted to distinguish *Falk* and *Emmit*, *Falk* by arguing that in that case the wife had full knowledge of her prior subsisting marriage and that the issue of marriage by estoppel was not raised, and *Emmit* by merely stating that the facts in *Emmit* did not present the "exceptional" circumstances necessary for marriage by estoppel to be invoked. However, all the cases cited above correctly determined that knowledge of the prior subsisting marriage was immaterial; it was the legal existence of the prior subsisting marriage, not knowledge of its continued existence, that rendered the subsequent marriage void *ab initio.*

III.
THE COURT OF APPEALS DECISION IN THIS CASE INCORRECTLY APPLIES THE DOCTRINE OF MARRIAGE BY ESTOPPEL AND MISINTERPRETS THE REQUIREMENTS FOR EQUITABLE ESTOPPEL GENERALLY.

The Court of Appeals decision, affirming the trial court's creation of a marriage by estoppel, improperly applied that doctrine to the case *sub judice*. Counsel for Mr. Alvares has found no case in Tennessee where marriage by estoppel ever has been invoked for the sole purpose of granting a

divorce and then dividing so-called "marital assets," and Mr. Alvares respectfully submits that it is improper to do so in this case under general principles of equitable estoppel or marriage by estoppel. "[T]he doctrine of [marriage by] estoppel [is] virtually nonexistent in this state, . . .," *Latshaw v. Latshaw*, 787 S.W.2d 9, 11 (Tenn. Ct App 1989), *perm. app. denied* (1990), and is applicable only in exceptional cases. *Martin v. Coleman*, 19 S.W.3d 757, 760 (Tenn. 2000). The Applicant respectfully submits that, despite the Court of Appeals's conclusory statement that this case is "exceptional,"[9] the only true exceptionality is that Ms. Fuentes Guzman was legally married at the time she purported to marry Mr. Alvares, and as discussed in preceding sections of this Application controlling case authority prohibits the use of equitable principles where, as in the case at bar, the marriage under discussion is bigamous. *Pewitt v. Pewitt*, 240 S.W.2d 521, 527-28 (Tenn. 1951).

Moreover, estoppels are not favored in the law and the party seeking to invoke the doctrine, in this case Ms. Fuentes Guzman, has the burden of proving each element of estoppel. *Buchholz v. Tennessee Farmers Life Reassurance*, 145 S.W.3d 80, 85 (Tenn. Ct. App. 2003), *perm. app. denied* (2004). In the case *sub judice* several elements of estoppel are missing, and therefore the doctrine was invoked erroneously by the Court of Appeals. This Court has defined equitable estoppel as

> . . . the principle by which a party who knows or should know the truth is absolutely precluded, but [sic] at law and in equity, *from denying, or asserting the contrary of, any material fact which, by his words or conduct, affirmative or negative, intentionally or through culpable negligence, he has induced another, who was excusably ignorant of the true facts and who had a right to rely upon such words or conduct, to believe and act on them thereby*, as a consequence reasonably to be anticipated, charging [sic] his position in such a way that he would suffer injury if such denial or contrary assertion were allowed.

[9] In distinguishing *Emmit v. Emmit*, 2005 WL 428290 (Tenn. Ct. App.), the Court of Appeals stated "While, in *Emmit*, this Court found that the purported wife was not estopped to deny her second marriage based on a mistaken belief in the annulment of her first marriage, *Emmit*, 2005 WL 428290, at *1, we believe that the facts present in *Emmit* did not present the 'exceptional' circumstances where marriage by estoppel is applied." *Court of Appeals Opinion, p. 7.*

Lawrence County v. White, 288 S.W.2d 735, 738 (Tenn. 1956) (*emphasis added*); *see also Union Trust Company v. Williamson County Board of Zoning Appeals*, 500 S.W.2d 608, 616-17 (Tenn. 1973).

This Court has set out the elements required for the invocation of equitable estoppel:

> The doctrine of equitable estoppel requires evidence of the following elements with respect to the party against whom estoppel is asserted: (1) Conduct which amounts to a *false representation of material facts*, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) Intention, or at least expectation that such conduct shall be acted upon by the other party; (3) Knowledge, actual or constructive of the real facts. *[Citations omitted.]* Equitable estoppel also requires the following elements with respect to the party asserting estoppel: (1) *Lack of knowledge and of the means of knowledge of the truth as to the facts in question;* (2) *Reliance on the conduct of the party estopped*; and (3) *Action based thereon of such a character as to change his position prejudicially.*

Osborne v. Mountain Life Insurance Company, 130 S.W.3d 769, 774 (Tenn. 2005) (*emphasis added*). In the context of marriage by estoppel it is necessary for the party claiming estoppel to be "not only destitute of knowledge of the facts, *but without available means of obtaining such knowledge; for there can be no estoppel where both parties have the same means of ascertaining the truth.*" *Rambeau v. Farris*, 212 S.W.2d 359, 361 (Tenn. 1948) (*emphasis added*).

The threshold reason that Ms. Fuentes Guzman cannot invoke equitable estoppel or marriage by estoppel is that Mr. Alvares, the party purported to be estopped, made no false representation of any material fact on which Ms. Fuentes Guzman relied in believing she was married. The trial court found as fact that Mr. Alvares did not know of any impediment to marriage at the time he and Ms. Fuentes Guzman purportedly married: "While there is some evidence Mr. Guzman knew of Mrs. Guzman's prior marriage, there is no evidence either party knew it subsisted at the time their wedding took place." *T.R. Vol. II, pp. 199-200, 212.* The record contains no evidence

that Mr. Alvares did or said anything that was false, and therefore principles of estoppel cannot be invoked.

Further, Ms. Fuentes Guzman was not excusably ignorant of the true facts regarding her first marriage, as she had the means of discerning the truth. She knew that she was married before, to Lorenzo Leon Covarrubias. *Ex. #8; Ex. #127, pp. 86, 87, 89, 92, 94, 99, 100.* She admitted at trial and in her brief to the Court of Appeals that this marriage occurred and that the civil ceremony served as a legal marriage. *Tran. Vol. III, p. 26, 17-21, p. 27, 1-3; Brief of Appellant, p. xli.* She knew Mr. Covarrubias had filed for divorce because she was served with process. *Tran. Vol. III, p. 27, 20-23.* She even knew where the clerk's office was because she went there to check on the status of her marriage, although there is nothing in the record indicating that she ever asked *when* her first marriage had been dissolved. She did not lack knowledge or the means of knowledge of the truth as to whether her first marriage had been terminated, *Osborne v. Mountain Life Insurance Company*, 130 S.W.3d at 774.

Finally, the Court of Appeals erred in granting Ms. Fuentes Guzman equitable relief in the face of the clear and undisputed fact that on at least three occasions she stated under oath that she never had been married when she knew she had been married to Mr. Covarrubias, and twice she stated under oath that no marriage had been annulled. When she purported to marry Mr. Alvares in the Church, before the divorce from Mr. Covarrubias was final, she signed a comprehensive document, sworn to be true before a notary. In that document Ms. Fuentes Guzman expressly denied having been previously married, either civilly or in the Church. *Ex. #125; Tran. Vol. VI, p.798, 22 – p. 810, 20.* On March 1, 1995, when Ms. Fuentes Guzman filed for divorce from Mr. Alvares for the first time, she swore under oath in the Complaint that she never previously had

been married, that she never had been divorced, and that no prior marriage had been annulled. *Ex. #129; Tran. Vol. VII, p. 832, 5-14.*

On September 26, 2002, Ms. Fuentes Guzman again filed for divorce and again swore under oath that her marriage to Mr. Alvares was her first and only marriage, that she never had been divorced, and that no prior marriage had been annulled. *T.R. 1-6; Tran. Vol. VII, p. 832, 15 – p. 833, 2.* Even if, as the Court of Appeals found, she thought the prior marriage had been annulled, she falsely swore in choosing not to disclose the annulment on her sworn divorce petition.

Therefore, she is barred from accessing the courts under the Court of Appeals decision in *Inman v. Inman*. In *Inman* the Court of Appeals recognized that perjurious conduct by a party closed the courthouse to that party, barring Mr. Inman from any relief because of his false swearing in his answers to interrogatories:

> Husband's repeated perjury attacks the very foundation of our judicial system. The courts of this state should not and will not condone this type of conduct. Once a litigant has committed perjury and subsequently is caught red-banded, to allow him to seek and obtain the judicial relief sought tells the world that it is unnecessary for a litigant to speak the truth in a court of law. . . The door to the courthouse must be closed in order to protect the integrity of the court. Courts cannot condone such behavior. We are of the opinion that once perjury has been found to exist, "the doctrine of unclean hands repels the unclean plaintiff at the steps of the Courthouse." *Farmers and Merchants Bank v. Templeton*, 646 S.W.2d 920, 924 (Tenn. App. 1982).

Inman v. Inman, 1989 WL 122984, *5 (Tenn. Ct. App.) (copy attached), *aff'd in part, rev'd in part on other grounds*, 811 S.W.2d 870 (Tenn. 1991). Similarly, Ms. Fuentes Guzman should be estopped from receiving equitable relief for the same reasons.

CONCLUSION

For all these reasons the Supreme Court should reverse the decision of the Court of Appeals, and the Court should declare that the parties never were married, that there is no marital property to be divided, and that each party should receive his or her own property.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has transmitted a true and accurate copy of the foregoing document to Robert A. Anderson, 2021 Richard Jones Road, Suite 350, Nashville, Tennessee 37215 by postage prepaid mail this ___ day of _____, 2005.

APPENDIX I
CASES NOT CITED TO THE SOUTHWEST REPORTER

IN THE CIRCUIT COURT FOR THE STATE OF TENNESSEE
18TH JUDICIAL DISTRICT, SITTING AT GALLATIN

RONALD ELTON DENTON, Plaintiff	]	
v.	]	No. 83CCI-2011-CV-781 Judge Rogers
ACE AUTO SALVAGE, INC, and Owner, BAHMAN BARATI, Individually, Defendants	]	

DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Come the Defendants and submit the following Brief in Support of Their Motion for Summary Judgment:

I.
INTRODUCTION

This is a slip and fall case occurring at Ace Auto Salvage in Sumner County, Tennessee. The Plaintiff went to Ace Auto Salvage on January 11, 2011, after a big snow a day or two earlier with several inches still on the ground, and after being discouraged from going onto the salvage yard chose to do so anyway. After going up the hill the Plaintiff fell as he was attempting to come back down, injuring his wrist.

The Plaintiff contends that the Defendants were negligent and caused the injury. The Defendants deny the allegations and affirmatively allege absence of duty, absence of a breach of duty, and absence of either legal or factual cause of the injury. They also allege comparative fault on the part of the Plaintiff, either 50% or more barring recovery or a lesser amount requiring a reduction of the amount of damages, if any.

II.
STANDARD FOR SUMMARY JUDGMENT

The standard for consideration of a motion for summary judgment as it existed at the time of filing of this case[1] is set forth in *Hannan v. Alltel Publishing Co.*, 270 S.W.3d 1 (Tenn. 2008):

> Summary judgment is appropriate when the moving party can show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; *Byrd v. Hall,* 847 S.W.2d 208, 214 (Tenn.1993). In *Byrd,* this Court set out the basic principles involved in determining whether a motion for summary judgment should be granted. The moving party has the ultimate burden of persuading the court that "there are no disputed, material facts creating a genuine issue for trial ... and that he is entitled to judgment as a matter of law." *Byrd,* 847 S.W.2d at 215. If the moving party makes a properly supported motion, the burden of production then shifts to the nonmoving party to show that a genuine issue of material fact exists. *Id.* To meet its burden of production and shift the burden to the nonmoving party, the moving party must either affirmatively negate an essential element of the nonmoving party's claim or establish an affirmative defense. *Id.* at 215 n. 5. If the moving party does not satisfy its initial burden of production, the court should dismiss the motion for summary judgment. *See id.* at 215. Summary judgment should be granted only when, with the facts viewed in favor of the nonmoving party, it is clear that no genuine issue of material fact exists. *Id.* at 210-11.

Hannan v. Alltel Publishing Co., 270 S.W.3d 1, 5 (Tenn. 2008). The Court followed by summarizing the test for granting a summary judgment, that the moving party seeking to shift the burden to the non-moving party "must either: (1) affirmatively negate an essential element of the nonmoving party's claim or (2) show that the nonmoving party cannot prove an essential element of the claim at trial." *Id.*, at 9.

III.
UNDISPUTED MATERIAL FACTS AS TO WHICH THERE ARE NO GENUINE ISSUES

The incident which is the subject of this lawsuit occurred on January 11, 2011 at Ace Auto Salvage at approximately 3:00 or 3:30 p.m. *Defendants' Concise Statement ¶ 1.* The Plaintiff had visited Ace Auto Salvage previously between three and five times. *Defendants'*

[1] Had this case been filed on or after July 1, 2011, the standard now contained in Tenn. Code Ann. § 20-16-101 would apply to this motion.

Concise Statement ¶ *2.* It had snowed as much as six to eight inches a day or two before the incident but at the time of the incident it had stopped snowing. *Defendants' Concise Statement* ¶ *3.* The Plaintiff admitted and the Defendant Bahman Barati confirmed that the Defendants could not have done snow removal at all due to the nature of the terrain. *Defendants' Concise Statement* ¶ *4.* This is because the area where the Plaintiff apparently fell is unimproved, uneven rough terrain and is not paved. *Defendants' Concise Statement* ¶ *5.*

On the day the Plaintiff fell he had come into the Ace Auto Salvage office looking for a car part. *Defendants' Concise Statement* ¶ *6.* Mr. Barati told the Plaintiff that he shouldn't go looking for the part because it was too snowy. *Defendants' Concise Statement* ¶ *7.* The Plaintiff responded that he had to have the part right away and left the office. *Defendants' Concise Statement* ¶ *8.* The Plaintiff then walked up the snow-covered hill between 100 and 150 yards to look for a car part. *Defendants' Concise Statement* ¶ *9.* Going up the hill the Plaintiff had slipped a number of times but had not fallen. *Defendants' Concise Statement* ¶ *10.* On his way back down the hill the Plaintiff slipped and fell, injuring himself. *Defendants' Concise Statement* ¶ *11.* The slope of the hill the Plaintiff had gone up and tried to come back down was about a 30 degree angle. *Defendants' Concise Statement* ¶ *12.*

The Plaintiff attributes his fall to the snow and ice and ruts. *Defendants' Concise Statement* ¶ *13.* It was apparent that there was snow and ice on the ground, that there were ruts where the Plaintiff had walked and that the Plaintiff had seen them in his previous trips to Ace Auto Salvage. *Defendants' Concise Statement* ¶¶ *14, 15.*

IV.
DISCUSSION

1. THE DEFENDANTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE THE DEFENDANTS OWED NO DUTY TO THE PLAINTIFF AND THEREFORE THE DEFENDANTS HAVE NEGATED AN ESSENTIAL ELEMENT OF THE PLAINTIFF'S CASE.

This is a negligence case. Therefore in order to hold the Defendants liable the Plaintiff must prove the existence of a duty owed to the Plaintiff by the Defendants, a breach of that duty by the Defendants, cause in fact, legal or proximate cause, and injury to the Plaintiff as a result. *Estate of French v. Stratford House*, 333 S.W.3d 546, 554 (Tenn. 2011); *Hale v. Ostrow*, 166 S.W.3d 713, 716 (Tenn. 2005). The existence of a duty is a matter for the Court to determine as a matter of law. *Giggers v. Memphis Housing Authority*, 277 S.W.3d 359, 365 (Tenn. 2009). Breach of duty, cause in fact, proximate or legal cause and damages are factual issues. *West v. East Tennessee Pioneer Oil Co.*, 172 S.W.3d 545, 553 (Tenn. 2005). Under the applicable test the Defendants are entitled to summary judgment because they have affirmatively negated one of the essential elements of the Plaintiff's claim by establishing that there was no duty owed to the Plaintiff; therefore they have shown that the Plaintiff cannot prove one or more of the essential elements of his claim at trial. *Hannan v. Alltel Publishing Co.*, 270 S.W.3d 1, 5 (Tenn. 2008).

The mere happening of an accident on someone's property provides no basis for liability. *Friedenstab v. Short*, 174 S.W.3d 217, 219 (Tenn. Ct. App. 2004) (no liability to a housekeeper who slipped and fell at the bottom of a homeowner's basement stairs). A landowner or occupier of premises is not an absolute insurer of the safety of a person coming onto the premises but has only a duty to maintain the premises in a reasonably safe condition and warn of potential dangers if for some reason those dangers cannot be remedied:

> Owners and occupiers of business premises are not insurers of the safety of their customers, potential customers, or the general public. *McClung v. Delta Square*

> *Ltd. P'ship*, 937 S.W.2d 891, 902 (Tenn.1996); *Basily v. Rain, Inc.*, 29 S.W.3d 879, 883 (Tenn.Ct.App.2000). They have only a duty to use reasonable care to protect their customers from unreasonable risks of harm. *Rice v. Sabir*, 979 S.W.2d 305, 308 (Tenn.1998); *Hudson v. Gaitan*, 675 S.W.2d 699, 703 (Tenn.1984). This duty includes maintaining the premises in a reasonably safe condition either by removing or repairing potentially dangerous conditions or by helping customers avoid injury by warning them of the existence of dangerous conditions that cannot, as a practical matter, be removed or repaired. *Blair v. Campbell*, 924 S.W.2d 75, 76 (Tenn.1996); *Basily v. Rain, Inc.*, 29 S.W.3d at 883.

Plunk v. National Health Investors, 92 S.W. 3d 409, 413 (Tenn. Ct. App. 2002); *See also Eaton v. McClain*, 891 S.W.2d 587, 594 (Tenn. 1994).

The Defendants owe no duty to the Plaintiff under the doctrine of primary implied assumption of the risk because the Plaintiff was fully aware of the inherent risks in climbing an ice- and snow-covered hill. In its *Perez v. McConkey* decision in 1994, the Supreme Court of Tennessee described the doctrine as follows:

> In its primary sense, implied assumption of risk focuses not on the plaintiff's conduct in assuming the risk, but on the defendant's general duty of care. The doctrine of primary implied assumption of risk 'technically is not a defense, but rather a legal theory which relieves a defendant of the duty which he might otherwise owe to the plaintiff with respect to particular risks.' *Armstrong v. Mailand*, 284 N.W.2d 343, 351 (Minn. 1979); *see also Blackburn v. Dorta*, 348 So.2d 287, 291 (Fla. 1977) ("primary assumption of risk ... is subsumed in the principle of negligence itself."). Clearly, primary implied assumption of risk is but another way of stating the conclusion that a plaintiff has failed to establish a prima facie case by failing to establish that a duty exists.

Perez v. McConkey, 872 S.W.2d 897, 902 (Tenn. 1994).

The *Perez* Court explained that, under the doctrine of primary implied assumption of risk, a defendant has no duty to protect a plaintiff from inherent risks associated with an activity:

> Implied assumption of risk, in its primary sense, applies to bar recovery when a plaintiff has assumed known risks inherent in a particular activity, such as observing a baseball game from an unscreened seat. In this situation, an assumption of risk defense is simply an alternative manner of stating that the plaintiff has failed to establish a cause of action, because the defendant has no duty to protect the plaintiff from the inherent risk.

Perez, 872 S.W.2d at 900. The *Perez* Court concluded that the legal concept providing that a defendant has no duty to protect a plaintiff from inherent risks associated with an activity should no longer be analyzed under assumption of risk principles and instead shall be analyzed under the common law concept of duty. *See Perez*, 872 S.W.2d at 905 ("While we agree that those situations described by commentators as involving the concept of primary implied assumption of risk will preclude recovery under a scheme of comparative fault, the same result will be obtained, without any unnecessary confusion, if Tennessee courts use the common- law concept of duty to analyze the issues.").

The Plaintiff knew that there was a substantial accumulation of ice and snow on the rutted terrain, *Defendants' Concise Statement* ¶¶ *3, 14,* and he was fully aware of the nature of the terrain, having visited the premises as many as five times before. *Defendants' Concise Statement* ¶¶ *2, 15*. Despite having been warned not to go onto the lot because it was snowy, *Defendants' Concise Statement* ¶ *7*, the Plaintiff insisted and went up the hill, where he fell and injured himself. *Defendants' Concise Statement* ¶¶ *8, 9*. Thus, because he knowingly confronted an inherent risk there was no duty owed to him by the Defendants and an essential element of he Plaintiff's case has been negated.

Additionally, while in premises liability cases the the Supreme Court has established that the "open and obvious" rule is no longer an absolute bar to a plaintiff's recovery, *Coln v. City of Savannah*, 966 S.W.2d 34, 46 (Tenn. 1998), the Court also "stress[ed] that duty remains a separate component of a plaintiff's negligence action," *Id.*, at 42, and that "[T]he determination of whether a duty is owed requires a balancing of the foreseeability and gravity of the potential harm against the burden imposed in preventing that harm." *Id.*, at 39. In the case now before the Court that balancing establishes that the Defendants owed no duty to the Plaintiff.

Judge, now Justice, Koch has stated in two separate cases that "[d]angerous conditions created by the natural accumulation of snow or ice are considered to be among the 'normal hazards of life.'" *Clifford v. Crye-Leike Commercial, Inc.*, 213 S.W.2d 849, 853 (Tenn. Ct. App. 2006); *Bowman v. State*, 206 S.W.3d 467, 473 (Tenn. Ct. App. 2006). "[I]t would not be feasible or fair to impose a duty on a landowner to continuously remove snow or ice in the middle of an ongoing winter storm." *Clifford*, at 853. In determining whether efforts to remove an accumulation were reasonable, "the courts should consider, among other things, (1) the length of time the accumulation has been present, (2) the amount of the accumulation, (3) whether the accumulation could, as a practical matter, be removed, (4) the cost of removal, and (5) the foreseeability of injury." *Bowman*, at 474. In our case numbers (1) and (2) are relevant,[2] but number (3) is the most important. It is undisputed that the Defendants could not have removed the accumulation. The Plaintiff admitted and the Defendant Bahman Barati confirmed that the Defendants could not have done snow removal at all, *Defendants' Concise Statement ¶ 4.* Therefore there was no duty owed and summary judgment should be granted.

2. THE DEFENDANTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE THE PLAINTIFF WAS 50% OR MORE RESPONSIBLE FOR HIS OWN INJURY AS A MATTER OF LAW AND THEREFORE THE PLAINTIFF CANNOT PROVE AN ESSENTIAL ELEMENT OF HIS CASE AT TRIAL, THAT OF FACTUAL OR LEGAL CAUSATION.

Assuming for the sake of argument that there is a duty in our case, then comparative fault principles are to be considered. *Coln v. City of Savannah*, 966 S.W.2d 34, 42 (Tenn. 1998). As stated earlier in this brief, the "open and obvious" rule is no longer an absolute bar to a plaintiff's recovery, *Id.* at 46, but the openness and obviousness of the alleged dangerous condition is a factor to consider under principles of comparative fault:

[2] It had snowed as much as six to eight inches a day or two before the incident but at the time of the incident it had stopped snowing. *Defendants' Concise Statement ¶ 3.*

> When an invitee is injured because of dangers that are obvious, reasonably apparent, or as well known to the injured party as to the owner or operator of the premises, liability, if any, should be determined in accordance with the principles of comparative fault analysis and the general negligence law of this state.

Reed v. McDaniel, W2009-01348-COA-R3-CV, 2010 WL 623619, *5 (Tenn. Ct. App. Feb. 23, 2010) (copy attached), *quoting Cooperwood v. Kroger Food Stores, Inc.*, 02A01-9308-CV-00182, 1994 WL 725217 (Tenn. Ct. App. Decedent. 30, 1994). In *Reed* the Court was faced with a plaintiff walking on a weak second story floor and injuring himself when he fell through. There, as in our case, the plaintiff had been warned[3] but chose to go ahead and walk on the floor, even though he knew it was dangerous. The Court of Appeals applied the principles of *Perez v. McConkey*, 872 S.W.2d 897, 905 (Tenn. 1994), where the Supreme Court held that primary implied assumption of the risk was still viable and that assumed risk should be analyzed under principles of comparative fault:

> [A]ttention should be focused on whether a reasonably prudent person in the exercise of due care knew of the risk, or should have known of it, and thereafter confronted the risk; and whether such a person would have behaved in the manner in which the plaintiff acted in light of all the surrounding circumstances, including the confronted risk.

Applying those principles the Court of Appeals stated that "there is no dispute that [the plaintiff] knew and appreciated the dangerous condition of the building when he undertook to walk on the second floor...." and as a result affirmed summary judgment in favor of the defendant, stating:

> A reasonable fact finder could only conclude that, by choosing to walk across the floor, knowing of the danger, [the plaintiff] did not act reasonably. We can only surmise that any reasonable fact finder could only conclude that [the plaintiff] was primarily responsible for his own injuries, thus barring his ability to recover under *McIntyre*.

Reed at *5.

[3] In *Reed* the Court of Appeals reached its decision without regard to whether there had been a warning. *Reed* at *5.

The same principles, applied to our case, require the same result, summary judgment in favor of the Defendants. The Plaintiff knew that there was a substantial accumulation of ice and snow on the rutted terrain, *Defendants' Concise Statement* ¶¶ *3, 14,* and he was fully aware of the nature of the terrain, having visited the premises as many as five times before. *Defendants' Concise Statement* ¶¶ *2, 15*. Despite having been warned not to go onto the lot because it was snowy,[4] *Defendants' Concise Statement* ¶ *7*, the Plaintiff insisted and went up the hill, where he fell and injured himself. *Defendants' Concise Statement* ¶¶ *8, 9.* As in *Reed* and based on the *Perez* and *Coln* principles, the Plaintiff was at least 50% at fault as a matter of law, the Defendants have shown that the Plaintiff cannot prove an essential element of his case at trial, that of either factual or legal cause, and the Defendants are entitled to summary judgment.

RESPECTFULLY SUBMITTED:

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CERTIFICATE OF SERVICE

The undersigned certifies that he has provided a true and accurate copy of the foregoing document to Devon J. Sutherland, 700 Johnny Cash Parkway, Suite 201, Hendersonville, Tennessee 37075 by postage prepaid mail this ____ day of _____, 2012.

[4] *See* fn 3.