Tennessee Judicial Nominating Commission

Application for Nomination to Judicial Office

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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.

Circuit Judge, 22nd Judicial District, Part II; State of Tennessee

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

1979 BPR # 6535

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, BPR # 6535, licensed May 5, 1979, license 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).

May 1998 – present Circuit Judge, 22nd Judicial District, Part II

May 1982 – May 1998 Courtney, Fleming and Holloway (at the time I left, the name was Fleming, Holloway, Flynn and Sands), Columbia, Tennessee

Sept. 1979 – May 1982 Lovell, Holloway and Sands (at the time I left, the name was Lovell and Holloway), Columbia, Tennessee

Sept. 1978 – Sept. 1979 Law Clerk; Honorable James W. Parrott, Eastern Division Court of Appeals; Knoxville

Jan. 1977 – Sept. 1978 Law Clerk; Kramer, Johnson, Rayson, McVeigh and Leake; Knoxville

March 1975 – February 1976, Atlantis Aquarium, Nashville

1968 – 1973 Giant Foods, Columbia, Tennessee (part-time during high school and full-time in summers during high school and college)

1964 – 1967 mowed yards for individuals and an apartment complex

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.

Continuously employed

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.

Circuit Judges in the 22nd Judicial District hear all civil and criminal cases filed in the Circuit and Chancery Courts for Maury, Giles, Lawrence and Wayne Counties. We allocate our court day to approximately 45% criminal, 25% chancery, including domestic relations; and 30% civil.

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.

I took and passed the Bar Exam while working as a clerk for Judge James W. Parrott. As part of my responsibilities, I prepared a summary of the cases prior to oral arguments. Following oral

arguments, the three judges would meet to discuss and divide up the cases. After the meeting, Judge Parrott would assign certain cases to me to work on. I reviewed the record, read transcripts and briefs, and did research. I would discuss the case with Judge Parrott and under his direction, I would write the opinion and submit it for his review.

My one year clerkship with Judge Parrott ended August 31, 1979. I decided to return home to Columbia and practice law. Before leaving Knoxville, Bobby Sands told me he wanted to practice in Columbia and we decided to practice together. At about the same time, Bob Jones was appointed Circuit Judge, leaving his former partner, George Lovell, with office space. The three of us formed the firm Lovell, Holloway and Sands. At first, I took whatever came in the door. At that time, the 22nd Judicial District did not have a Public Defender. Bobby Sands and I were appointed to numerous criminal cases in General Sessions and Circuit Court. I represented dozens of defendants over the first few years of practice. I tried numerous jury trials and filed the appeal in a few cases. Other than appointed criminal cases, my practice was primarily civil, including domestic relations. I also began to represent debtors in bankruptcy. Bankruptcy cases filed for debtors living in southern Middle Tennessee were held in Columbia. Shortly after I began representing debtors, the FDIC closed three nearby banks creating a boom in the number of people seeking legal assistance in dealing with the FDIC and often bankruptcy protection. I filed cases in Chapters 7, 13 and 11. Soon debtor bankruptcy became an important part of my practice. I continued to represent court appointed criminal defendants, and whatever civil cases came my way.

In 1982, I was offered a job by the firm Courtney and Fleming. This firm represented several large businesses, including the largest bank in the area. The firm also represented the City of Columbia and the City of Spring Hill. Although I was not primary counsel for either city or the bank, I often assisted in the representation. I became a partner one year later and the firm was renamed Courtney, Fleming and Holloway. By this time, the 22nd Judicial District had a Public Defender's office and I planned to stop doing criminal work. My plan did not work out. In September of 1982, Judge Joe M. Ingram appointed me to represent one of two nineteen year old cousins charged with three counts of first degree murder and one count of attempted first degree murder. Jerry Colley was appointed to represent the co-defendant. The case became known as the Duck River Sniper Case. When the State filed notice to seek the death penalty, co-counsel was appointed for each defendant. Because of the extensive pretrial publicity, we successfully moved to change the venue from Maury County to Giles County. Bobby Sands was one of the Assistant District Attorneys prosecuting the case. The trial began with extensive individual *voir dire*, primarily involving questions concerning the death penalty. My primary responsibility during *voir dire* was to attempt to rehabilitate prospective jurors who stated during the state's questioning that they could not impose the death penalty as a punishment for first degree murder. The state would then challenge that prospective juror for cause. If I could get the juror to answer they could consider both life and death as possible punishments in certain hypothetical situations, the challenge for cause would be denied and the state would usually be required to use one of its peremptory challenges to strike the juror. The strategy was to run the state out of peremptory challenges before the jury was selected thereby increasing the chances for a jury that would not impose the death penalty. The proof against the defendants was overwhelming, and after a two week trial, the defendants were found guilty on all counts. After a bifurcated sentencing trial, the jury sentenced the defendants to life on each of the three first degree murder counts. The trial judge ran the three life sentences consecutively and sentenced both defendants to a consecutive

twenty-five years on the attempted murder count. I handled the unsuccessful appeal to the Court of Criminal Appeals. Certiorari was denied by the Supreme Court.

After the Duck River Sniper Case, I again tried to stop doing criminal work. I would still get occasional appointments. My practice became what I would call a general small town civil practice. I appeared regularly in a variety of cases in the Circuit and Chancery Courts. I represented several businesses. I began representing creditors, including several banks in surrounding counties, in bankruptcy court.

In 1984, I was hired as (outside) General Counsel for the Columbia Power and Water Systems. I continued to represent CPWS until I went on the bench in 1998. Over the 14 years, I represented CPWS in all litigation that was not defended by our insurance companies. I defended Columbia Water System in a multi-million dollar class action lawsuit involving impact fees. Prior to construction of the automobile assembly plant in Spring Hill, I reviewed and made recommendations concerning the contract under which CWS would supply water to the Saturn plant. I filed approximately thirty condemnation cases for CWS in the name of the City of Columbia for the installation of a six mile water line and construction of a six million gallon reservoir to serve the Saturn plant and northern Maury County. I represented CWS in a lawsuit concerning rates filed by Maury County and the Maury County Water System. I handled negotiations and helped with the application when CWS acquired a license to operate a hydroelectric facility at the old Columbia Dam from the Federal Energy Regulatory Commission. The license protected the water rights for CWS. As it became apparent that the Tennessee Valley Authority was going to discontinue its efforts to close the Columbia Dam, I was asked by CWS to become involved with the process. TVA had condemned over 14,000 acres in Maury County and held several million dollars in trust accounts related to construction of the Normandy Dam and the Columbia Dam. I studied the original contracts between TVA and the waters systems and counties entered into before construction was begun. I represented CWS concerning Tennessee Valley Authority's plan to transfer title of the land to the Duck River Development Agency (DRDA). The plan called for TVA to keep the trust funds. Maury County, Columbia and CWS were against the land being turned over DRDA and wanted the trust funds, over fifty percent of which had been paid by CWS water customers, to be turned over with the land. On behalf of CWS, I worked with the city attorney and we drew up documents for the creation of a Public Trust. Although we were unsuccessful in getting the land and trust funds transferred to the Public Trust, we were successful in blocking the transfer to DRDA. Our efforts, in part, led to the land and several million dollars in trust funds being turned over to the state to be managed by the Tennessee Wildlife Resources Agency. Cable television was becoming a major industry and Charter Cable began installing lines in Maury County. At the request of CPS, I began attending the American Public Power Association Conference where cable television issues were a hot topic. CPS had an existing pole sharing agreement with Bellsouth that had been in place for several years. The agreement called for the two utilities to install and maintain an approximately equal number of poles so that the rental charges for use of the other's poles basically offset. Instead of installing poles, Charter Cable wanted to use existing CPS and Bellsouth poles and to pay only for the amount of pole space used. Disputes concerning rates for pole usage had led to major lawsuits across the country, and CPS wanted to avoid litigation if a reasonable agreement could be reached. Working with the attorneys for Bellsouth and Charter, a new pole sharing agreement was reached that satisfied all parties. Also around 1984, I was hired as (outside) General Counsel and Secretary for a large convenience store chain.

I handled the contracts for acquisition of real property, general corporate matters, and occasional litigation. Legal representation of these two clients became an increasing part of my practice over the next several years. I negotiated and helped draft the contract when the existing convenience store business and real property was sold to a wholly-owned subsidiary of Marathon Oil Company.

The boom related to the construction of the Saturn plant created numerous legal problems and opportunities. I represented an Alabama blasting subcontractor against a New York corporation that served as general contractor in litigation arising out of the construction of a six mile sewer line to the Saturn plant. The case was heard by a three member arbitration panel consisting of a general contractor, a blasting contractor and a civil engineer. My client had been hired to blast "high rock" at various places along the line. I was concerned because he had very few written records. He assured me that the records of the general contractor contained numerous errors. He was proven correct. The general contractor produced through discovery two four inch thick notebooks of records. During cross-examination, I asked the corporate president about numerous mistakes in the records my client had pointed out to me before the hearing. I asked the corporate president to close the first volume of the records and reopen it. He asked to what page, and I said any page. He opened the book and found two mathematical mistakes on the page. I asked him to do the same thing with the second binder, and the results were similar. He closed the second binder of records and announced that the corporation would pay the amount claimed by my client and all cost. The president contacted me about a month later and hired me to represent the corporation in its unresolved matters in Tennessee.

I successfully represented a land owner in a condemnation case filed by TVA. This was my first and only experience before a TVA three member hearing panel. I was able to discredit the appraiser hired by TVA. The panel accepted our expert's opinion as to damages and granted a substantial increase over the amount tendered.

Although I had not handled a criminal case in several years, in 1991, I was appointed to assist Bobby Sands, who was now back in private practice, in the representation of a co-defendant in another high profile, first degree murder case in which the state was seeking the death penalty. Bob Massey and Russ Parkes represented our client's twin brother. This Giles County case had extensive media coverage in Tennessee and northern Alabama. My primary responsibility was to cross-examine the state's key witness, the ex-wife of my client. After a two week trial, the jury found both defendants guilty of second degree murder. Bobby Sands handled the appeal.

Shortly before going on the bench, I handled two unrelated civil cases for a family business owned by personal friends, one of which was an attorney. The first was a blasting case filed against a major road contractor seeking compensation for damages to a large tobacco warehouse. The jury awarded approximately 57 times the settlement offer made by the insurance company of the contractor. The second suit filed against Maury County arose from certain actions by the head of the planning department. In a 54 page memorandum opinion, Judge Bill Cain awarded over $500,000.00 in damages. I argued the case before the Court of Appeals after I was sworn in as Circuit Judge and after Judge Cain was sworn in as an Appellate Judge. Over three years after oral arguments, the judgment against Maury County was reversed. The Supreme Court denied certiorari. It was a reminder to me that no matter how good your facts and witnesses are, and how bad the witnesses for the other side are, the law can still control the outcome. Because I knew a suit against a county official making discretionary decisions would be difficult, I

accepted the case on an hourly basis. After receiving my first bill, my clients ask me to convert the arrangement to a contingency fee, which I did. The only positive to come out of the case for my clients was the Maury County Executive terminated the planning official's employment the day after the trial concluded, in large part because Judge Cain made a specific finding that she testified falsely.

For the last 15 years, I have served as a Circuit Judge in Maury, Giles, Lawrence and Wayne Counties. I have presided over thousands of criminal and civil cases, including hundreds of jury trials. I sat with the Court of Appeals on one occasion. I have handled several cases by interchange from the 21st Judicial District. I currently have pending four unrelated cases filed against attorneys practicing in the 21st Judicial District. I have handled several cases from the 17th judicial district, including a retrial of a Lincoln County first degree murder case. I was assigned the case after the conviction was reversed by the Court of Criminal Appeals based on conflicts of interest of the judge and district attorney. The second trial was prosecuted by the Coffee County District Attorney, defended by appointed counsel from Giles County, tried by a jury selected in Bedford County and heard in Lincoln County. The jury found the defendant, who had already served five years, not guilty. I had made up my mind during deliberation that if the jury found the defendant guilty, I would grant a motion for judgment of acquittal pursuant Tenn. R. Crim. P. 29.

In the last few years, I have conducted judicial settlement conferences for other judges, primarily judges in my own district. I began conducting these conferences after completing the 40 hour course "Rule 31 Civil Mediation Training for Tennessee Judges" provided by the Institute of Conflict Management of Lipscomb University. I have held settlement conferences in several eminent domain cases arising from the construction of State Route 64 across Wayne, Lawrence, and Giles Counties. All but one of these cases settled at the conference or shortly thereafter. The case that did not settle was tried by a jury which returned a verdict for less than the tender and more than $30,000 less than the last offer the state made at the conference. (This verdict was set aside by the trial judge, and the case was later settled for the amount that had been offered at the settlement conference.)

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

Anyone who has defended someone facing the death penalty will know what I mean when I say the two capital cases, State v. Kelley and State v. Bondurant, were the most intense and important cases I handled. Both cases generated significant media attention and large crowds followed the trials. Both cases had co-defendants represented by outstanding attorneys from whom I learned a great deal. Jerry Colley, one of the preeminent criminal defense attorneys in southern Middle Tennessee at the time, was lead counsel for co-defendant William Carroll Kelley. My former and future partner, Bobby Sands, was one of the District Attorneys who prosecuted the Kelley case and was my co-counsel in the Bondurant case. Bob Massey and Russ Parkes represented the co-defendant in the Bondurant case.

As a Circuit Judge I have presided over numerous First Degree Murder and "A" felony jury trials. I have presided over several Medical Negligence jury trials. I have tried numerous civil jury trials and dozens of non-jury workers' compensation cases. Historically, Maury County was one of the leading phosphate mining areas in the United States. We had several large phosphate refining factories. As a side industry, we had one of the world's largest carbon electrode manufacturing facilities to serve the phosphate furnaces. These factories shut down to a large extent in the mid 1980s. Because the statute of limitations commences at the time of diagnosis, workers' compensation cases are still being filed by people who have not worked at the plant for 20 to 30 years. I have tried three leukemia cases and numerous lung disease cases in the last ten years. I tried a significant reconsideration workers' compensation case affecting numerous Saturn employees. The issue related to the 2005 change of employment when General Motors Corporation took over the Saturn Corporation. I found for various reasons, that this was not a change of employment. My decision was reversed in part by the workers' compensation panel.

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.

As stated above, I have conducted judicial settlement conferences in numerous condemnation cases related to the construction of State Route 64. I have conducted several divorce settlement conferences. I successfully conducted a multi-party boundary line dispute settlement conference for a Chancellor in Gibson County that was scheduled for a week-long trial. I recently settled a suit between two neighbors arising out of the operation of a private airport. Several lawsuits grew out of the dispute and litigation had been ongoing for years. The last pending case was scheduled for a two week trial. Mediation had failed and the attorneys asked me to do a judicial settlement conference. After getting nowhere for most of the morning, I found both parties were acting in bad faith and threw them out of my office. Before the lawyers left, I asked them to come back after lunch. My stunt got the attention of the litigants and the case was settled within two hours after the parties returned. I like doing judicial settlement conferences, but I try to limit the number I do so as not to compete with Rule 31 Mediators any more than necessary.

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.

None

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

attention of the Commission.

None

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 applied for the open Circuit Judge position created when Bill Cain was appointed to the Court of Appeals. I went through the judicial nominating process and was one of the three applicants whose name was submitted to Governor Sundquist. I was appointed on May 20, 1998.

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.

Bachelor of Arts in History with honors from the University of Tennessee, Knoxville in1974.

Doctor of Jurisprudence from the University of Tennessee College of Law in 1978.

PERSONAL INFORMATION

15. State your age and date of birth.

61, March 4, 1952

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

60 years. I was born in Florence, Alabama but moved to Tennessee before my first birthday.

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

Except for my years in undergraduate school and law school and the year I clerked for Judge Parrott, I have lived in Maury County since 1955. I moved back and began practicing in September of 1979 and have lived in Maury County continuously since then.

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

Maury

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.

None

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, other than I have paid some speeding tickets. My last speeding ticket was around 1987.

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.

No

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.

I was a plaintiff in a collection action on a note filed twenty-five to thirty years ago. I received a judgment. No money was ever collected.

A company that manages rental property I own sued in my name for past due rent ten to fifteen years ago. A judgment was obtained and has been paid.

Courtney, Fleming and Holloway was sued once over a UCC1 misfiled by one of our associates. I do not believe any attorney was named individually. I was the firm representative in Court and testified. The jury returned a verdict in the exact amount our insurance company offered before trial to settle the case. The verdict, less the deductible which the firm paid, was satisfied by our insurance carrier.

My wife and I were defendants in a suit in the early 1980s filed by a lumber company. A general contractor remodeling our home filed a chapter 7 bankruptcy over debts that had nothing to do with the work he was doing for us. After the contractor was discharged, the suit was settled amicably. I paid for the materials the contractor had charged at the lumber company and the complaint was dismissed.

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.

First Presbyterian Church of Columbia, Deacon 1984 – 1987, Elder 1988 - 1991

Kiwanis of Columbia, Director 1986 – 1987, President 1994 -1995

Boy Scouts of America, Scoutmaster 1980 to present, Middle Tennessee Counsel Executive Board 1986 – 1998 (estimate), Duck River District President 1986 (estimate)

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 person cannot be a professed atheist and belong to the Boy Scouts of America. Duty to God has been part of the Scout Oath since scouting was founded in England in1909 and in the United States in 1910. In my 33 years as a Scoutmaster, the issue came up one time. About 25 years ago, I had a scout who was having trouble reconciling his beliefs with the Scout Oath. He approached me after a meeting about his concerns. After discussing his beliefs, I told him I thought he was an agnostic and that there was no prohibition for an agnostic to be in scouts. He was relieved and went on to become an Eagle Scout. I plan to remain Scoutmaster of Troop111. I believe a requirement that a person believe in something spiritually higher than himself or herself is a valid requirement for membership in a private organization such as the Boy Scouts of America.

ACHIEVEMENTS

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

Maury County Bar Association, Member since 1979. President 1996

Tennessee Bar Association, Member since 1979 (I believe). Board of Governors June 2012 – June 2013

American Bar Association, Member since 2008. Delegate to the National Conference of State Trial Judges 2008, 2009 and 2010.

Tennessee Bar Foundation, Fellow since 1998 (I believe).

Tennessee Trial Judges Association, member since 1998.

Tennessee Judicial Conference, member since 1998; President June 2012 – June 2013; President-elect June 2011 -June 2012; Treasurer June 2009 – June 2010; Chairman, Legislative Committee June 2010 – June 2012; Vice Chairman, Judicial Academy June 2009 – present.

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

University of Tennessee College of Law, Dean's Advisory Council 2005 – 2010 (I believe)

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

none

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

none

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

1986 State Senate (Williamson, Maury, and Giles Counties) won Republican primary, lost in general election.

Tennessee Advisory Commission on Inter-governmental Relations, Commissioner 1986 to 1988, appointed by Governor Alexander.

Maury County Election Commission, (Republican) Commissioner 1991 – 1998 (I believe), appointed.

Circuit Judge, 22nd Judicial District, Part II, appointed by Governor Sundquist in May 1998, elected August 1998 and August 2006.

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

No. I have worked on certain political issues at the legislature. As attorney for the Columbia Water System, I worked with a registered lobbyist and met with several legislators concerning the 14,000 acres and millions of dollars TVA was abandoning after tearing down the Columbia Dam. In 2012, as chairman of the Legislative Committee of the Judicial Conference and as a member of the specially appointed five-person Committee on the Court of the Judiciary, chaired by Judge Jeff Bivins, I met with legislators seeking support for the bill that our committee drafted that created what is now the Board of Judicial Conduct. In 2013, as President of the Judicial Conference, I spent several days in the legislature working with Chancellor Daryl Fansler, President of the Trial Judges Association, and Chief Justice Gary Wade on the bill to redistrict the 31 Judicial Circuits in Tennessee. I have never been a registered lobbyist, but I have occasional done what I consider is essentially "lobbying".

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

Carter v. Leach, Maury Circuit No. 14047, 100%

Scott v. City of Mt. Pleasant, et al, Maury Circuit No. 14012, 100%

State v. Whitworth, Giles Circuit Nos. 15645 and 15935, 95%

ESSAYS/PERSONAL STATEMENTS

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

I really enjoyed clerking for Judge Parrott. That experience was one of the reasons I wanted to be a trial judge in 1998 and an appellate judge at this time.

I have really enjoyed being a Circuit Judge, but I believe a new challenge would be exciting. As a Circuit Judge, I take a lot of matters under advisement. After reading the file and any memoranda filed by the attorneys, I do my own research. In the last few years, I have started typing many of my orders or judgments.

I enjoy research and writing. I know the judges on the appellate court and do not believe I would have any problem working with them and handling my share of the caseload. With my experience in the practice of law and as a judge, I believe I could do the job well.

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

As a Circuit Judge for 15 years, I have not provided pro bono services. I often assist *pro se* litigants as much as I can without providing legal advice. For the first few years of my practice, I was appointed to help people who could not afford an attorney. In those days, Judge Ingram would often "appoint" young lawyers to represent people who needed help, often in a divorce or child support matter. After joined Courtney, Fleming and Holloway, I volunteered to accept clients referred to me by Legal Services. I provided free legal assistance to several local not-for-profit corporations. I served on the Maury County Election Commission for several years. As the only attorney on the Commission, I provided free legal research and advice when needed. When my church sought to acquire adjacent real property, I drafted the contract and handled the closing without charge.

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

The four appellate judges on the Middle Section Court of Appeals handle a diverse mixture of civil appeals. I believe my 15 years on the trial bench during which I presided over all types of cases has prepared me to be a civil appellate judge. I research and write regularly as part of my responsibilities as a Circuit Judge. Practicing in a somewhat rural county for 19 years required me to provide legal advice and representation to a variety of clients with different legal problems and needs. I believe my legal and judicial experience has prepared me to hear oral arguments and write opinions in almost any type civil case from day one. I have learned to make the best decision I can in tough cases and then to move on to the next case.

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

I have been a Scoutmaster for 33 years. Over 70 scouts have earned the rank of Eagle Scouts in my Troop during this time. Five of our Eagles are attorneys practicing in Middle Tennessee. I plan to stay active with Troop 111. In the past I have served on the Executive Board of the Middle Tennessee Council and as Chairman of the Duck River District. I have no plans to serve on the Council or the District at the present time.

I am a member of the Kiwanis Club of Columbia. I have served on the Board of Directors and was President in 1994. I plan to stay involved if my schedule permits. I am on senior status, so attendance requirements are relaxed.

I have no plans to become actively involved again in the following organizations:

United Way of Maury County. I served as Drive Chairman in 1982 and as President in 1986.

Maury County Chamber of Commerce. I was Vice President of Local Affairs in 1988.

Maury County Library Board. I was on the board from 1982 to 1986.

Maury County YMCA. I was on the original Capital Development Committee to raise funds to construct the building in 1997.

Maury County Public Education Foundation. I was a founding director.

Maury County Republican Party. I was Chairman in the early 1980s.

Mock Trial. I coached the Columbia Central High School team in the late 1980s.

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

I believe the diversity of my legal career has prepared me to be an appellate judge. I have been active in the Tennessee Judicial Conference and the Trial Judges Association. I know most of the appellate judges and trial judges in the state. Many are good friends; others are more of acquaintances. I was in law school with the Mike Catalano, Clerk of the Tennessee Appellate

Courts. I try to treat all attorneys and litigants that appear before me courteously and professionally. I have ruled against attorneys who are friends or former partners of mine, if the facts and the law do not support their position.

My wife and I have raised five children. My oldest son is married with two boys. He is a regional manager for a commercial roofing company headquartered in Atlanta. My daughter is a Pediatric Hospitalist at Vanderbilt Children's Hospital. Her first child is due June 9, my next son practices law in Franklin with Shell and Davies. He has one daughter. My next son does biomedical research at the University of Virginia. He plans to go to either medical school or work on his PhD in neuroscience at UVA. My youngest son starts law school at the University of Memphis this fall. My proudest life experience is raising five children with my wife and watching them find success and happiness as adults, including having grandchildren for my wife and me to spoil. As a Scoutmaster, I am proud my four sons are Eagle Scouts.

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

As a trial judge, I have never failed to uphold a law because I disagree with it. One example where I applied the law, but did not like the outcome occurred about a year ago in a jury trial of a defendant charged with three counts of selling over .5 grams of cocaine within a thousand feet of a school. The Defendant testified he was a small-time drug dealer selling enough to support his habit. He said he had never sold to children and had no idea the house of a confidential informant was within a thousand feet of a school. To get to the school you had to cross the informant's yard, cross a street, cross another yard, climb a fence, climb down an embankment, cross a railroad track, go up an embankment, cross another fence, cross another yard, cross another street to arrive an eight foot iron fence surrounding a 14 acre campus of a private school. The distance was approximately 870 feet as the crow flies. The jury found the defendant guilty. When I spoke to the jury after trial, they asked if we could get him into a rehab program. The pre-sentence report showed he had no prior felony convictions. With no discretion, I had sentenced him to the minimum: 15 years at 100%. In comparison to other criminal sentences I impose, I thought the sentence was much too harsh. Nevertheless that was the law and I followed the law.

REFERENCES

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

A. John Fleming, Maury County Register of Deeds, 1 Public Square, Columbia TN 38402, [redacted], 931-375-2101(o)

B. Waymon Hickman, First Farmers and Merchants Bank, 816 S. Garden St., Columbia TN

B. Waymon Hickman, First Farmers and Merchants Bank, 816 S. Garden St., Columbia TN 38401, 931-388-3145(o)

C. Enoch George, Maury County Sheriff, 1300 Lawson White Drive, Columbia TN 38401, 931-375-8601(o), [redacted]

D. Jim Parks, Principle, RealtyCorp, 219 West 7th St., Columbia TN 38401, 931-388-9100(o), [redacted]

E. Bobby Sands, Maury County General Sessions Judge, Maury County Courthouse, Columbia TN 38401, 931-375-1202(o), [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 Division, 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: MAY 31, 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.

Robert Lee Holloway, Jr.

Signature

MAY 31, 2013

Date

BPR # 6535

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

I was issued a Real Estate Affiliate Brokers license in 1973 or 1974 by the Tennessee Real Estate Commission. That license has been retired and not active since the late 1970s.

IN THE CIRCUIT COURT FOR MAURY COUNTY, TENNESSEE
AT COLUMBIA

TWYANNA CARTER and husband ANTHONY CARTER,	)	
Plaintiffs,	)	
VERSUS	)	**NO. 14047**
JAMES LEACH, M.D.	)	
Defendant.	)	

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Procedural History

Twyanna Carter and Anthony Carter (herein "Plaintiffs") filed a Complaint (the Complaint) on October 20, 2011. Exhibit 1 to the Complaint is the "Notice of Claim Pursuant to T.C.A. § 29-26-121", a copy of the U.S. Postal Service Certified Mail Receipt stamp dated April 5, 2011, and a copy of the Domestic Return Receipt addressed to Dr. Leach and signed by Liberty Hallmark on April 6, 2011. Exhibit 2 to the Complaint is the Certificate of Good Faith.

Dr. Leach filed his Answer on November 30, 2011, admitting the Notice of Good Faith was sent April 4, 2011.

Dr. Leach filed a Motion for Summary Judgment on December 19, 2012, supported by a statement of undisputed material facts, a memorandum of law, an affidavit of Dr. Leach, and portions of the deposition of Twyanna Carter. The Motion for Summary Judgment claims the cause should be summarily dismissed because the Plaintiffs (1) failed to strictly comply with Tennessee's Health Care Liability statutes, (2) failed to file within the statute of limitations, and (3) offered no proof Dr. Leach failed to comply with the applicable standard of care.

On December 31, 2012, Plaintiffs filed a Motion to Amend Complaint and a Proposed Amended Complaint (Amended Complaint) in an attempt to comply with subdivision (a)(2)(E) by attaching the Medical Records Release Authorization (HIPPA release) and to comply with subdivision (a)(4) by attaching the Affidavit of Afsoon Hagh, as attorney for the Plaintiffs.

On January 8, 2013, Defendant filed its response to Plaintiffs' motion, and filed a supplemental memorandum on January 18, 2012.

Plaintiffs filed their response to Defendant's motion for summary judgment on January 11, 2012, and a supplemental response on February 13, 2013.

Defendant filed a reply to Plaintiffs' response to the Motion for Summary Judgment on February 13, 2012.

The Motion for Summary Judgment was argued on February 15, 2013.

Holding

Requirements of Tenn. Code Ann. § 29-26-121. The stamp dated Certified Mail Receipt and a copy of the Domestic Return Receipt (green card) addressed to Dr. Leach and signed by Liberty Hallmark on April 6, 2011, were attached to the Complaint. The green card proves precisely what subdivision (a)(4) requires to be proven, *i.e.* the Plaintiff, who was asserting a potential claim for health care liability, mailed by certified mail, return receipt requested, the notice required by 121(a)(2) at least 60 days before the complaint was filed. Based on *Meyers v. AMISUB*, 382 S.W.3rd 300 (Tenn. 2012), the Court finds the word "shall" in subdivision (a)(4) is directory as it relates to demonstrating compliance with subdivision (a)(3)(B)(i). In cases where the green card is returned signed and dated by the health care provider and is filed with a complaint, filing an affidavit is not required to prove "the essence of the thing to be accomplished", effective service. *Meyers* at p. 309. Demonstrating effective service by certified mail is not a matter of substance when the green card is returned signed by the recipient and filed with the complaint. Defendant's Motion for Summary Judgment concerning the notice is denied.

Statute of Limitations. There is a genuine issue of material fact in dispute concerning when Defendant discovered her injury, and therefore denies summary dismissal based on the statute of limitations.

Standard of Care. The Affidavit of Dr. Kent G. Miller and the deposition of Dr. Heffington show there are genuine issues of material fact and that Defendant is not entitled to summary dismissal on that ground.

Summary Judgment Related to Tennessee's Health Care Liability Statutes

Notice Under Tenn. Code Ann. § 29-26-121

The Court finds the following facts undisputed for the purposes of summary judgment as they relate to Tenn. Code Ann. § 29-26-121:

1. Plaintiffs sent written notice of claim dated April 4, 2011, as required by subdivision (a)(1), at least 60 days before the Complaint was filed.

2. Plaintiffs' written notice of claim on its face appears to comply with the requirements of subdivision (a)(2).

3. The notice of claim states the HIPPA compliant medical authorization form was attachment (E).

4. The Certified Mail Receipt addressed to Dr. Leach is stamp dated April 5, 2011.

5. The answer admits notice was sent on or about April 4, 2011.

6. The Domestic Return Receipt was signed by Liberty Hallmark.

7. The Domestic Return Receipt show the date of delivery as April 6, 2011.

8. Plaintiffs did not file with the Complaint the affidavit required by subdivision (a)(4).

9. Plaintiffs did not file with the Complaint the HIPPA authorization.

10. Defendant admitted in his Answer that the Plaintiff sent a notice of claim on or about April 4, 2011.

Legal Analysis of Tenn. Code Ann. § 29-26-121

Defendant claims he is entitled to summary dismissal of the Complaint because the Plaintiffs failed to comply with the notice requirements of Tenn. Code Ann. § 29-26-121, which provides in the subsections pertinent to this motion, as follows:

> (a)(1) Any person, or that person's authorized agent, asserting a potential claim for health care liability shall give written notice of the potential claim to each health care provider that will be a named defendant at least sixty (60) days before the filing of a complaint based upon health care liability in any court of this state.
>
> (2) The notice shall include:
>
> (A) The full name and date of birth of the patient whose treatment is at issue;
>
> (B) The name and address of the claimant authorizing the notice and the relationship to the patient, if the notice is not sent by the patient;
>
> (C) The name and address of the attorney sending the notice, if applicable;
>
> (D) A list of the name and address of all providers being sent a notice; and
>
> (E) A HIPAA compliant medical authorization permitting the provider receiving the notice to obtain complete medical records from each other provider being sent a notice.

(3) The requirement of service of written notice prior to suit is deemed satisfied if, within the statutes of limitations and statutes of repose applicable to the provider, one of the following occurs, as established by the specified proof of service, which shall be filed with the complaint:

(A) Personal delivery of the notice to the health care provider or an identified individual whose job function includes receptionist for deliveries to the provider or for arrival of the provider's patients at the provider's current practice location. Delivery must be established by an affidavit stating that the notice was personally delivered and the identity of the individual to whom the notice was delivered; or

(B) Mailing of the notice:

(i) To an individual health care provider at both the address listed for the provider on the Tennessee department of health web site and the provider's current business address, if different from the address maintained by the Tennessee department of health; provided, that, if the mailings are returned undelivered from both addresses, then, within five (5) business days after receipt of the second undelivered letter, the notice shall be mailed in the specified manner to the provider's office or business address at the location where the provider last provided a medical service to the patient; or

(ii) To a health care provider that is a corporation or other business entity at both the address for the agent for service of process, and the provider's current business address, if different from that of the agent for service of process; provided, that, if the mailings are returned undelivered from both addresses, then, within five (5) business days after receipt of the second undelivered letter, the notice shall be mailed in the specified manner to the provider's office or business address at the location where the provider last provided a medical service to the patient.

(4) Compliance with subdivision (a)(3)(B) shall be demonstrated by filing a certificate of mailing from the United States postal service stamped with the date of mailing and an affidavit of the party mailing the notice establishing that the specified notice was timely mailed by certified mail, return receipt requested. A copy of the notice sent shall be attached to the affidavit. It is not necessary that the addressee of the notice sign or return the return receipt card that accompanies a letter sent by certified mail for service to be effective.

(b) If a complaint is filed in any court alleging a claim for health care liability, the pleadings shall state whether each party has complied with subsection (a) and shall provide the documentation specified in subdivision (a)(2). The court may require additional evidence of compliance to determine if the provisions of this section have been met. The court has discretion to excuse compliance with this section only for extraordinary cause shown.

> (c) When notice is given to a provider as provided in this section, the applicable statutes of limitations and repose shall be extended for a period of one hundred twenty (120) days from the date of expiration of the statute of limitations and statute of repose applicable to that provider. Personal service is effective on the date of that service. Service by mail is effective on the first day that service by mail is made in compliance with subdivision (a)(2)(B). In no event shall this section operate to shorten or otherwise extend the statutes of limitations or repose applicable to any action asserting a claim for health care liability, nor shall more than one (1) extension be applicable to any provider. Once a complaint is filed alleging a claim for health care liability, the notice provisions of this section shall not apply to any person or entity that is made a party to the action thereafter by amendment to the pleadings as a result of a defendant's alleging comparative fault. ...(Emphasis provided)

Tenn.Code Ann. § 29–26–121(a)(4) requires a plaintiff mailing notice of a potential claim for health care liability to do three things to demonstrate compliance with subdivision (a)(3)(B):

1. File with the complaint a "certificate of mailing from the United States postal service stamped with the date of mailing".

2. File with the complaint an "affidavit of the party mailing the notice establishing that the specified notice was timely mailed by certified mail, return receipt requested."

3. Attached a copy of the notice sent to the affidavit.

One important item that subdivision (a)(4) does not require to be filed with the complaint to demonstrate effective service is the original Domestic Return Receipt (green card) signed by the addressee, for the obvious reason that such a requirement would allow an addressee of certified mail to defeat effective service by simply refusing to sign the green card.

Meyers v. AMISUB

Both parties cited *Meyers v. AMISUB*, 380 S.W.3rd 300 (Tenn. 2012), to support their arguments as to the meaning of the word "shall" as used generally in Tenn. Code Ann. § 29-26-12, and specifically the meaning in regard to the affidavit mentioned in Tenn. Code Ann. § 29-26-121(a)(4).

On page 304 of *Meyers*, Justice Sharon Lee, writing for the unanimous Supreme Court, stated:

We hold that the statutory requirements that a plaintiff give sixty days pre-suit notice and file a certificate of good faith with the complaint are mandatory requirements and not subject to substantial compliance. The plaintiff's failure to comply with Tennessee Code Annotated section 29–26–122 by filing a certificate of good faith with his complaint requires a dismissal with prejudice.

On page 308-309 of *Meyers*, Justice Lee stated:

Tennessee Code Annotated section 29–26–121 expressly provides that "[a]ny person ... asserting a potential claim for medical malpractice *shall* give written notice of the potential claim to each health care provider that will be a named defendant at least sixty (60) days before the filing of a complaint based upon medical malpractice in any court of this state." Tenn.Code Ann. § 29–26–121(a)(1) (emphasis added). Tennessee Code Annotated section 29–26–122 expressly provides that "[i]n any medical malpractice action in which expert testimony is required by § 29–26–115, the plaintiff or plaintiff's counsel *shall* file a certificate of good faith with the complaint." Tenn.Code Ann. § 29–26–122(a) (emphasis added). The use of the word "shall" in both statutes indicates that the legislature intended the requirements to be mandatory, not directory. *Bellamy v. Cracker Barrel Old Country Store, Inc.*, 302 S.W.3d 278, 281 (Tenn.2009) (quoting *Stubbs v. State,* 216 Tenn. 567, 393 S.W.2d 150, 154 (1965) (" 'When 'shall' is used ... it is ordinarily construed as being mandatory and not discretionary.' ")).

To determine whether the use of the word "shall" in a statute is mandatory or merely directory, we look to see "whether the prescribed mode of action is of the essence of the thing to be accomplished." 3 Norman J. Singer & J.D. Singer, *Statutes and Statutory Construction* § 57:2 (7th ed.2008); *see also Holdredge v. City of Cleveland,* 218 Tenn. 239, 402 S.W.2d 709, 713 (1966) ("[A] provision relating to the essence of the thing to be done, that is, to matters of substance, is mandatory, and when a fair interpretation of a statute ... shows that the legislature intended a compliance with such provision to be essential to the validity of the act ..., the statute must be regarded as mandatory."). The essence of Tennessee Code Annotated section 29–26–121 is that a defendant be given notice of a medical malpractice claim before suit is filed. The essence of Tennessee Code Annotated section 29–26–122 is that a defendant receive assurance that there are good faith grounds for commencing such action. The requirements of pre-suit notice of a potential claim under Tennessee Code Annotated section 29–26–121 and the filing of a certificate of good faith under Tennessee Code Annotated section 29–26–122 are fundamental to the validity of the respective statutes and dictate that we construe such requirements as mandatory. (Emphasis supplied).

Post *Meyers* Cases

Since *Meyers* was published, a few Tennessee cases have addressed the requirements of Tenn. Code Ann. § 29-26-121.

In *Vaughn v. Mountain States Health Alliance*, E2012-01042-COA-R3CV, 2013 WL 817032 (Tenn. Ct. App. Mar. 5, 2013), the Eastern Section Court of Appeals affirmed the trial court's dismissal of a medical negligence case where the plaintiff failed to provide a HIPAA compliant medical authorization. Plaintiff's attempt to amend his complaint to provide a HIPAA compliant medical authorization and thereby take advantage of the relation back doctrine was futile.

In *Caldwell v. Vanderbilt Univ.*, M2012-00328-COA-R3CV, 2013 WL 655239 (Tenn. Ct. App. Feb. 20, 2013), the Middle Section Court of Appeals affirmed the trial court's dismissal of a medical negligence case where the plaintiff failed to file pre-suit notice and a certificate of good faith.

The facts of *Bullock v. Univ. Health Sys., Inc.*, E2012-00074-COA-R3CV, 2012 WL 5907495 (Tenn. Ct. App. Nov. 27, 2012), are similar to the facts in *Meyers*. *Bullock* was a re-filed medical negligence action where the plaintiff failed to give the sixty day notice of suit or file a certificate of good faith. The Eastern Section Court of Appeals affirmed the trial court's dismissal.

Abeyta v. *HCA Health Services of Tn, Inc.*, M2011-02254-COA-R3CV, 2012 WL 5266321 (Tenn. Ct. App. Oct. 24, 2012), was an involuntary commitment case involving numerous claims. Although the Western Section Court of Appeals reversed the dismissal of certain claims and remanded the case, the court affirmed the dismissal of the medical negligence claim because the plaintiff failed to file a certificate of good faith.

One federal case relied on Meyers in dismissing an action "for failure to comply with Tennessee's pleading requirements for a medical malpractice action". *Reed v. Speck*, 12-5172, 2012 WL 6176846 (6th Cir. Dec. 11, 2012).

Applying *Meyers* to the Facts in this Case

In this case, Plaintiffs failed to file with the Complaint the affidavit required by subdivision (a)(4). Instead, the Plaintiffs filed a copy of the U.S. Postal Service Certified Mail Receipt stamp dated April 5, 2011, which complies with requirement number 1, above; and

a copy of the Domestic Return Receipt addressed to Dr. Leach and signed by Liberty Hallmark on April 6, 2011, which is not required, but which indicates receipt of the notice by Defendant's office.

Analyzing the facts in this case using the reasoning of *Meyers*, leads the Court to this question: What "is of the essence of the thing to be accomplished" by requiring the filing of the affidavit?

Finding Regarding the Affidavit Required by Tenn. Code Ann. § 29-26-121 (a)(4)

In the face of the holding in *Meyers* and the cases cited above, the Court with a certain amount of trepidation holds that the word "shall" used in Subsection (a)(4) as it relates to filing an affidavit is directory under the facts in this case. In making this ruling the Court relies on the test set out in *Meyers:* "whether the prescribed mode of action is of the essence of the thing to be accomplished." *3 Norman J. Singer & J.D. Singer, Statutes and Statutory Construction* § 57:2 (7th ed.2008); *see also Holdredge v. City of Cleveland,* 218 Tenn. 239, 402 S.W.2d 709, 713 (1966). According to Subsection 121(a)(4), "the essence of the thing to be accomplished" is proof that "the specified notice was timely mailed by certified mail, return receipt requested."

This Court finds that attaching a copy of both the U.S. Postal Service Certified Mail Receipt stamp dated April 5, 2011; and the Domestic Return Receipt addressed to Dr. Leach and signed by Liberty Hallmark on April 6, 2011, fulfills precisely the goal that Subsection 121(a)(4) is trying to accomplish.

Finding Regarding the HIPPA Form Required by Tenn. Code Ann. § 29-26-121 (b)

Subsection (b) requires Plaintiff to do two things. First, the pleadings must state Plaintiff complied with subsection (a). Second, the Plaintiff must "provide the documentation specified in subsection (a)." Subsection (b) also allows courts "to require additional evidence of compliance" and "to excuse compliance" with § 29-26-121 "only for extraordinary cause shown."

Paragraph 3 of the Complaint states Defendant "received notice of this claim pursuant to T. C. A. § 29-26-121 by sending a notice to sue letter on April 4, 2011 and in compliance with T. C. A. § 29-26-121(a)(3)(b)." (*Sic*) Paragraph 4 of the Complaint states "Plaintiff's Counsel has attached a Certificate of Good Faith to the Complaint." The Complaint does not specifically state Plaintiff complied with Subsection (a).

The Court can deduce that notice of potential claim was sent more than sixty (60) days before the Complaint was filed from the stamped filing date and "Notice of Claim Pursuant to T. C. A. § 29-26-121", Exhibit 1 to the Complaint. Exhibit 1 states the information required to be included by subdivision (a)(2) was either provided or attached. The Court can deduce from the stamp dated Certified Mail Receipt and the copy of the Domestic Return Receipt (green card) addressed to Dr. Leach and signed by Liberty Hallmark on April 6, 2011 that Plaintiff complied with subdivision (a)(3)(B)(i).

Subsection (b) requires Plaintiff to "provide the documentation specified in (a)(2)". The Court finds that "documentation" to be the notice of potential claim. In Paragraph 3 of the Answer, Dr. Leach "admits that he was sent a notice of claim letter on or about April 4, 2011."

Obviously, the Plaintiff could have drafted the Complaint to avoid the deficiencies discussed above. Still however, the Court finds the Plaintiff satisfied the requirements of subsection (b). The Defendant is not entitled to summary dismissal on this issue.

Statute of Limitations

Tenn. Code Ann. § 29-26-121(a)(3) requires written notice to be provided to the health care provider "within the statutes of limitations". Tenn. Code Ann. § 29-26-121(c) provides that if written "notice is given to a provider as provided "in Tenn. Code Ann. § 29-26-121, "the applicable statutes of limitations ... shall be extended for a period of one hundred twenty (120) days from the date of expiration of the statute of limitations..." The Court must therefore determine when the statute of limitations accrued and expired.

In health care liability actions, Tenn. Code Ann. § 29-26-116(a)(1) provides a one (1) year statute of limitations from the date of the cause of action accrued. If the negligent act or omission is known to the plaintiff, the cause of action accrues on the date of the act or omission. If the alleged injury is not discovered within one (1) year from the date of the act or omission, § 29-26-116(a)(2) provides for a one (1) year statute of limitations from the date discovery. Section 29-26-116(a)(3) provides a maximum three (3) years statute of repose.

As part of a surgical procedure Dr. Leach installed a urethral sling on Mrs. Carter on June 26, 2009. According to the Complaint, Mrs. Carter got progressively worse. Dr. Leach performed a laparoscopy on July 31, 2009 and another laparoscopy on December 16, 2009.

Unhappy with Dr. Leach's care, Mrs. Carter began treatment with Dr. Stephen Heffington. (Dr. Heffington was deposed on February 5, 2013 and his deposition was filed as Exhibit 1 to Plaintiffs' Supplemental Response to Defendant's Motion for Summary

Judgment.) On June 10, 2010, Dr. Heffington performed an initial examination and some procedure while Mrs. Carter was under a general anesthetic. Dr. Heffington found "scar tissue from the sling placement and inflamation." (p.10, ll. 3 - 6) Mrs. Carter next saw Dr. Heffington on June 24th where the findings and possible treatment options were discussed. Also on June 24th . Heffington scheduled surgery for July 6th to excise the sling.

Dr. Heffington stated he definitely would have talked with Mrs. Carter on June 10th about what appeared to be a problem with the sling. (p. 134, ll. 4 - 15) Dr. Heffington almost immediately backed off his answer, stating:

> –if there was somebody with her that day. I am sorry. Like I say, if it had been a situation where somebody was picking her up, I may not have gone over anything with anybody that day. And that may be why she showed up a couple of weeks later. So I don't remember specifically who I reviewed with that day afterwards. (p.134, ll. 17 - 22)

Dr. Heffington then answered yes to the question: "Well, you certainly would have gone into more detail on the 24th?" (p.134, ll. 23 - 25).

In her affidavit (Exhibit 4 to Plaintiffs' Response to Defendant's Motion for Summary Judgment.), Mrs. Carter stated: "On June 24, 2010, I was informed by Dr. Heffington that the sling inserted by Dr. Leach had obstructed my urethra and was the cause of my abdominal and pelvic pain and urinary leakage."

As can be seen in the chart below, applying the provisions of Tenn. Code Ann. § 29-26-121, if Mrs. Carter "discovered" the injury on June 10, 2010 the complaint is time barred; if she "discovered" the injury on June 24, 2010, the complaint is timely filed.

Discovery	6/10/2010	Discovery	6/24/2010
Notice	4/5/2011	Notice	4/5/2011
1 year	6/10/2011	1 year	6/24/2011
121 (c)	+120 days	121 (c)	+120 days
S of L Expires	10/8/2011	S of L Expires	10/22/2011
Complaint filed	10/20/2011	Complaint filed	10/20/2011
TIME BARRED		TIMELY	

For the purposes of summary judgment, based on the vacillating nature of Dr. Heffington's deposition testimony as to when he talked with Mrs. Carter about the problems with her sling, and based on Mrs. Carter's affidavit testimony, the Court finds Mrs. Carter "discovered" her injury on June 24, 2010 and her complaint was timely filed.

Summary Judgment related to whether Dr. Leach Failed to Comply with the Applicable Standard of Care

The Affidavit of Dr. Kent G. Miller and the deposition of Dr. Heffington show there are genuine issues of material fact and that Defendant is not entitled to summary dismissal on that ground.

Legal Analysis Concerning Summary Judgment

Pursuant to *Tenn. R. Civ. P.* 56.04, it is appropriate for a court to grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

As our Supreme Court stated in *Hannan v. Alltel Pub'g Co.*, 270 S.W.3d 1,5 (Tenn. 2008), "the basic principles involved in determining whether a Motion for Summary Judgment should be granted" are set out in *Byrd v. Hall*, 847 S.W.2d 208 (Tenn. 1993).
Quoting from *Byrd*:

> Rule 56 comes into play only when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Thus, the issues that lie at the heart of evaluating a summary judgment motion are: (1) whether a *factual* dispute exists; (2) whether the undisputed fact is *material* to the outcome of the case; and (3) whether the disputed fact creates a *genuine* issue for trial.
>
> First, when the facts material to the application of a rule of law are undisputed, the application is a matter of law for the court since there is nothing to submit to the jury to resolve in favor of one party or the other. . .
>
> A disputed fact is material if it must be decided to resolve the substantive claim or defense at which the motion is directed.
>
> The test for a "genuine issue" [within the meaning of Rule 56] is whether a reasonable jury could legitimately resolve that fact in favor of one side of the other. If the answer is yes, then summary judgment is inappropriate; if the answer is no, summary judgment is proper because a trial would be pointless as there would be nothing for the jury to do and the judge need only apply the law to resolve the case.
> *Byrd* at 214-215.

In the "Analysis" section in *Hannan,* Justice Holder made the following statement in discussing *Byrd:*

> 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.

Denial of Summary Judgment

The Court denies summary dismissal for Plaintiffs' failure to attach the affidavit required under subdivision (a)(4). Dr. Leach is not entitled to judgment as a matter of law on that issue.

The Court denies summary dismissal for Plaintiffs' failure to attach the HIPPA form and Plaintiffs' failure to state specifically they had complied with subdivision (a)(2) as required under subsection (b). Dr. Leach is not entitled to judgment as a matter of law on that issue.

The Court finds there is a genuine issue of material fact in dispute concerning when Plaintiff discovered her injury, and therefore denies summary dismissal based on the statute of limitations.

SO ORDERED, this the_____ day of March, 2013.

ROBERT L. HOLLOWAY, JR.
CIRCUIT JUDGE, DIVISION II

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing Order was served on this _____ day of March, 2013, upon:

Luvell L. Glanton Afsoon Hagh Law Offices of Luvell Glanton 915 Jefferson Street, 2nd Floor Nashville, TN 37208	☐ ☐ ☐ ☐ ☐	U.S. Mail, postage prepaid Fed Ex, UPS or other Carrier Hand Deliver Facsimile Transmission E-Mail
Phillip North Renee Levay Stewart North, Pursell & Ramos, PLC 414 Union Street Bank of America Plaza, Suite 1850 Nashville, TN 37219	☐ ☐ ☐ ☐ ☐	U.S. Mail, postage prepaid Fed Ex, UPS or other Carrier Hand Deliver Facsimile Transmission E-Mail

Circuit Court Clerk/Deputy Clerk

IN THE CIRCUIT COURT FOR MAURY COUNTY, TENNESSEE
AT COLUMBIA

HARDIN FARRIEL SCOTT,	)	
	)	
Plaintiff,	)	
	)	
VERSUS	)	**NO. 14012**
	)	
CITY OF MT. PLEASANT;	)	
TENNESSEE MUNICIPAL LEAGUE	)	
RISK MANAGEMENT POOL, INC.;	)	
and ABIGAIL HUDGENS,	)	
ADMINISTRATOR OT THE	)	
SECOND INJURY FUND,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AS TO PERMANENT TOTAL DISABILITY AND THE LIABILITY OF THE SECOND INJURY FUND

Hardin Farriel Scott filed this workers' compensation case seeking permanent total disability benefits related to injuries to his neck, hip, right shoulder and right knee sustained in a motor vehicle accident on October 23, 2008.

HOLDING

Based on *Tenn. Code Ann.* §50-6-208(a), the Court finds Mr. Scott is permanently and totally disabled as a result of the injuries sustained in the motor vehicle accident without consideration of his prior injuries. Therefore, the employer is solely responsible for the workers' compensation benefits and any award.

SUMMARY OF FACTS

General information. Mr. Scott was 55 years of age at the time of the trial. He completed the eighth grade and obtained a GED when he was 26 or 27 years old on his third attempt. He worked as a welder at Custom Steel for 15 years. He then worked for 10 years at the Mt. Pleasant Fire Department beginning around 1987. He began work in law enforcement around 1997, first with the Maury County Sheriff's Department, then Spring Hill Police Department, followed by the Wayne County Sheriff's Department. He was hired by the Mt. Pleasant Police Department (MPPD) in April 2005. He worked for MPPD until

he retired following the motor vehicle accident. He successfully completed the police academy, the fire academy and first responder school.

Stipulations. The parties stipulated:

The compensation rate is $358.31.

Mr. Scott reached maximum medical improvement on March 16, 2011.

There was an underpayment of temporary total benefits of $4,242.19.

The injury is compensable.

Mr. Scott's prior back injuries. Mr. Scott had prior injuries to his back before being hired by MPPD.

In 1992, Mr. Scott was injured in a motor vehicle accident. Mr. Scott filed a tort action. A jury found the defendant to be 100% at fault and awarded Mr. Scott damages of $21,264.00. A trial exhibit showed medical bills of $5,364.83 including bills for x-rays of the lumbar spine and physical therapy.

In 1996, Mr. Scott sustained a non-worked related injury to his low back. On October 29, 1996, he underwent an L4/5 laminectomy.

In 1999, he injured his low back in the course and scope of his employment with the Maury County Sheriff's Department. He underwent an L5/S1 laminectomy on November 11, 1999, which proved to be unsuccessful, resulting in a decompression and fusion from L3 to S1 on January 11, 2000. His workers' compensation suit was settled for a 25% permanent disability to the body as a whole. (Exhibit 12)

MPPD was aware of the prior back injuries at the time Mr. Scott was hired. Exhibit 14 is a written summary of the employment interview dated April 12, 2005, and prepared by Tommy Goetz at the time Mr. Scott was hired. Tommy Goetz was a Captain with MPPD in 2005 and at the time of the trial was the Chief of Police for MPPD. The interview summary states "[Mr. Scott] did have a ruptured disc in his back when he was a fireman here. It has been no problem-". Exhibit 15 is a Medical Examination Report prepared by Kelly J. Williams, M.D. Dr. Williams performed a pre-employment examination of Mr. Scott on April 20, 2012. Dr. Williams found Mr. Scott to be "physically fit to perform strenuous activity

that may be necessary in police work."

Mr. Scott's prior knee injury. On May 30, 2008, Mr. Scott tore the meniscus in his right knee during an altercation in an arrest of a suspect. In June, Dr. Ronald G. Derr surgically removed a portion of the meniscus. Mr. Scott reached MMI on September 17, 2008 and Dr. Derr released him on October 23, 2008, the morning of the day he was involved in the motor vehicle accident. His workers' compensation case for the knee injury was settled on December 21, 2009, for a vocational disability of 5.2% based on 2.6 times the medical impairment of 2% to the lower extremity.

The October 23, 2008, motor vehicle injuries. After seeing Dr. Derr, Mr. Scott returned to work. He had lunch with Chief Goetz and then went to work radar on U.S. 43, the divided four lane by-pass around Mt. Pleasant. He clocked a vehicle at 85 miles per hour and pulled out in pursuit with his emergency lights activated. As he approached the intersection of Cross Bridges Road, his speed approached 80 miles per hour. A vehicle stopped at the stop sign began to pull out toward the median. Rather than stopping in the median, the vehicle continued into the north bound lanes and into Mr. Scott's path. Mr. Scott's patrol car hit the vehicle broadside, severely injuring Mr. Scott. The driver of the other vehicle was killed. Mr. Scott was transported by MedFlight to Vanderbilt Medical Center.

Injuries from the motor vehicle accident. He was first diagnosed with blunt chest-abdominal trauma and blunt shoulder and extremity injuries.

Dr. Phillip Kregor with Vanderbilt Orthopaedic Trauma, performed an "open reduction internal fixation of left transverse posterior wall acetabular fracture" on October 25, 2008. (Exhibit 1). In this procedure, numerous plates and screws were used to repair his hip. Dr. Kregor placed him at MMI on October 5, 2009 and assigned a 5% left lower extremity and 3% whole body permanent partial impairment with permanent restrictions, including sitting no more than 4 hours and standing or walking no more than 2 hours in an 8 hour day, lifting limited to no more than 20 pounds occasionally, and avoidance of squatting, crawling, climbing, working at heights. Dr. Kregor opined that he would be

reasonably expected to experience severe pain and severe fatigue and that his symptoms would often be severe enough to interfere with attention and concentration.

Mr. Scott next underwent a cervical discectomy and fusion of C4 to C7 by Dr. Steven Abram and Dr. Edward S. Mackey on December 15, 2008. Dr. Mackey placed him at MMI for the cervical spine on November 17, 2009 and assigned a 28% whole body permanent partial impairment with permanent restrictions, including no lifting over 5 pounds frequently with a maximum of 20 pounds: only occasional stooping, bending or twisting; no squatting, kneeling or climbing; and alternating sitting and standing with no overhead work. Dr. Mackey opined Mr. Scott had a spinal cord injury in addition to the multiple fractures of his spine and that Mr. Scott would have difficulty with a gait disorder.

Mr. Scott was next treated for his shoulder injury. Dr. Ronald Glenn performed arthroscopic surgery on the right shoulder, including subacromial decompression and acromioplasty, and articular debridement. Dr. Glenn assigned an 11% permanent partial impairment to the right upper extremity which he converted to a 7% whole body PPI. He also assigned significant work restrictions.

The motor vehicle accident aggravated the previous work related knee injury causing the arthritis to be much worse and more symptomatic according to Dr. Ronald Derr. Dr. Derr assigned a 20% permanent physical impairment to the right lower extremity on June 28, 2011.

4. Mr. Scott's present condition. Mr. Scott was in obvious pain in court. On several occasions he would have to stand and change positions or stretch. He had a significant and noticeable limp and difficulty in walking. He stated he has severe headaches in the back of his head 6 out of 7 days. He has difficulty sleeping and estimated he slept 4 or 5 hours per night. He has significant limitations in motion in his neck. He demonstrated how he turns to look to the right or left, which was basically turning at the waist to turn his head. He has shaking in his right hand. He stated he had very good results from his shoulder surgery. He said his hip hurts constantly and that he cannot remain in any one position for long.

Mr. Scott testified that before the motor vehicle accident he liked to dance, ride horses, ride motorcycles, fish and shoot pool. He testified he can no longer dance, ride horses or ride motorcycles and that he has not been fishing or shot pool since the accident. He said he cannot do many of the household chores and yard work he did before the accident.

Mr. Scott stated he had been in law enforcement for over 10 year when he was involved in the accident. He was full time with MPPD, usually working 16 to 20 hours per week overtime. He stated his back was fine after the 1999 surgery and did not limit or restrict his work. He testified after knee surgery he returned to work. He testified he had some tenderness as he started using his knee more and that's why he went back to Dr. Derr the morning of the accident.

Mr. Scott does not use prescription pain medicine. He stated he had seen too many people become addicted so he stopped taking the medications when the doctors allowed.

Mr. Scott testified he could not work as a welder, fireman or law enforcement officer in his condition.

Vocational Expert. Patsy Bramlett, CRC, LPC, was duly qualified as a vocational expert. She interviewed Mr. Scott, reviewed the medical records, and performed psychometric testing using the Wide Range Achievement Test-Four (WRAT-4). WRAT-4 scores were: Word Reading 3.9 grade level, 2nd percentile for his age; Spelling 4.7 grade level, 4th percentile for his age, and Math Computation 4.6 grade level, 5th percentile for his age. In the "Conclusion" to her report (Exhibit 13) she stated:

> Mr. Scott is a fifty four-year-old individual who has sustained severe injuries in a high-speed motor vehicle accident on the job while in the line and scope of his employment as a Police Officer. He has undergone multiple surgeries post-accident, but continues to experience chronic pan, which limits him to less than sedentary activities on a daily basis. His treating physicians have all assigned restrictions and limitations which would eliminate all reasonable job opportunities for him and are consistent with the limitations Mr. Scott has described to me. He requires daily bed rest and frequent rest breaks to manage his pain. He has an outwardly obvious severe gait and mobility impairment and is unable to ambulate effectively or perform weight-bearing activities for more than short periods of time. In my opinion, given the

combination of his physical limitations and associated pain, Mr. Scott is (without a doubt) permanent and totally disabled as a result of his automobile accident on October 23, 2008 and resulting impairments/restrictions. This equates to a Vocational Disability Rating of 100%. It is also my opinion that Mr. Scott would be totally and permanently disabled whether or not he had any pre-existing medical impairments or medical conditions (i.e. lower back impairment, right knee impairment, etc.). In my opinion, he is not a feasible candidate for vocational retraining or for vocational rehabilitation, based on his psychometric testing scores, which indicate that he has very marginal academic skills, with borderline functional illiteracy, as well as his severe physical imitations from the MVA which will preclude all work in the future.

MPPD Chief Tommy Goetz. Chief Goetz testified he had known Mr. Scott since the early to mid 1990's and that he was involved in the interview process when Mr. Scott was hired. He stated he was aware of Mr. Scott's ruptured disc and surgeries but that it had been no problem according to Mr. Scott. He said the medical examination found him to be able to perform strenuous police activities and that Mr. Scott was able to perform such duties during his employment until he was out with the knee injury and that he returned following knee surgery and was able to again perform his duties. Following Mr. Scott's return from knee surgery and as he began to use his knee more, Mr. Scott had some tenderness so he returned to Dr. Derr to follow-up. He testified after returning following knee surgery and before the motor vehicle accident, neither Mr. Scott nor any other officer expressed any concern about Mr. Scott being able to perform his duties.

Mr. Scott was never able to return to work following the accident. Chief Goetz and Mr. Scott reached an agreement that the best thing for Mr. Scott was for him to retire which he did on in November 2009.

Summary of prior and subject injuries. In their memorandum, the employer and their insurance carrier provided a the following chart of prior and subject injuries and medical impairments. The Court finds this chart accurately reflects the proof:

Injury	Date of Injury	MMI Date	Medical Impairment	Opining Doctor
Low back	October 27, 1999	April 17, 2000	10% WP	Dr. Mackey
Right knee	May 30, 2008	September 17, 2008	2% LE	Dr. Derr
Right shoulder	October 23, 2008	July 20, 2009	7% WP	Dr. Glenn

Left hip	October 23, 2008	October 5, 2009	3% WP	Dr. Kregor
Neck	October 23, 2008	November 17, 2009	28% WP	Dr. Mackey
Right Knee	October 23, 2008	March 16, 2011	20% LE	Dr. Derr

The Court also finds, as asserted by the employer and the insurance carrier in their memorandum, that "the total medical impairment relative to the October 28, 2008 motor vehicle accident equates to be a 41% to the whole body" and that "the total medical impairment for Plaintiff's low back and right knee injuries prior to the October 23, 2008 motor vehicle equate to be an *11%* to the whole body."

LEGAL ANALYSIS

Tenn. Code Ann. § 50-6-207(4) provides:

> (4) Permanent Total Disability.
>
> (A)(i) For permanent total disability as defined in subdivision (4)(B), sixty-six and two-thirds percent (66 ⅔ %) of the wages received at the time of the injury, subject to the maximum weekly benefit and minimum weekly benefit; provided, that if the employee's average weekly wages are equal to or greater than the minimum weekly benefit, the employee shall receive not less than the minimum weekly benefit; provided, further, that if the employee's average weekly wages are less than the minimum weekly benefit, the employee shall receive the full amount of the employee's average weekly wages, but in no event shall the compensation paid be less than the minimum weekly benefit. This compensation shall be paid during the period of the permanent total disability until the employee is, by age, eligible for full benefits in the Old Age Insurance Benefit Program under the Social Security Act, compiled in 42 U.S.C. § 401 et seq.; provided, that with respect to disabilities resulting from injuries that occur after sixty (60) years of age, regardless of the age of the employee, permanent total disability benefits are payable for a period of two hundred sixty (260) weeks. The compensation payments shall be reduced by the amount of any old age insurance benefit payments attributable to employer contributions that the employee may receive under title 42, chapter 7, title II of the Social Security Act, 42 U.S.C. § 401 et seq. Notwithstanding any statute or court decision to the contrary, the statutory social security offset provided by this section shall have no applicability to death benefits awarded to a deceased worker's dependents pursuant to this chapter;
>
> (ii) Notwithstanding any other law to the contrary and notwithstanding any agreement of the parties to the contrary, permanent total disability payments

shall not be commuted to a lump sum, except in accordance with the following:

(*a*) Benefits may be commuted to a lump sum to pay only the employee's attorney's fees and litigation expenses and to pay pre-injury obligations in arrears;

(*b*) The commuted portion of an award shall not exceed the value of one hundred (100) weeks of the employee's benefits;

(*c*) After the total amount of the commuted lump sum is determined, the amount of the weekly disability benefit shall be recalculated to distribute the total remaining permanent total benefits in equal weekly installments beginning with the date of entry of the order and terminating on the date the employee's disability benefits terminate pursuant to subdivision (4)(A)(i);

(iii) Attorneys' fees in contested cases of permanent total disability shall be calculated upon the first four hundred (400) weeks of disability only;

(iv) In case an employee who is permanently and totally disabled becomes a resident of a public institution, and provided further, that if no person or persons are wholly dependent upon the employee, then the amounts falling due during the lifetime of the employee shall be paid to the employee or to the employee's guardian or conservator, if adjudicated incompetent, to be spent for the employee's benefit; such payments to cease upon the death of the employee;

(B) When an injury not otherwise specifically provided for in this chapter totally incapacitates the employee from working at an occupation that brings the employee an income, the employee shall be considered totally disabled and for such disability compensation shall be paid as provided in subdivision (4)(A); provided, that the total amount of compensation payable under this subdivision (4)(B) shall not exceed the maximum total benefit, exclusive of medical and hospital benefits;

Tenn. Code Ann. § 50-6-208(a) applies to this case. Because of the date of Mr. Scotts' injury, *Tenn. Code Ann.* § 50-6-208(b) is not applicable. § 50-6-208(a) provides:

(a)(1) If an employee has previously sustained a permanent physical disability from any cause or origin and becomes permanently and totally disabled through a subsequent injury, the employee shall be entitled to compensation from the employee's employer or the employer's insurance

company only for the disability that would have resulted from the subsequent injury, and the previous injury shall not be considered in estimating the compensation to which the employee may be entitled under this chapter from the employer or the employer's insurance company; provided, that in addition to the compensation for a subsequent injury, and after completion of the payments for the subsequent injury, then the employee shall be paid the remainder of the compensation that would be due for the permanent total disability out of a special fund to be known as the second injury fund.

(2) To receive benefits from the second injury fund, the injured employee must be the employee of an employer who has properly insured the employer's workers' compensation liability or has qualified to operate under this chapter as a self-insurer, and the employer must establish that the employer had actual knowledge of the permanent and preexisting disability at the time that the employee was hired or at the time that the employee was retained in employment after the employer acquired knowledge, but in all cases prior to the subsequent injury.

(3) In determining the percentage of disability for which the second injury fund shall be liable, no previous physical impairment shall be considered unless the impairment was within the knowledge of the employer as prescribed in subdivision (a)(2).

(4) Nothing in this section shall be construed to limit the employer's liability as provided by law for aggravation of preexisting conditions or disabilities in cases where recovery against the second injury fund is not applicable

In *Allen v. City of Gatlinburg*, 36 S.W.3d 73, 76 (Tenn. 2001), the Tennessee Supreme Court instructed trial courts how to proceed in cases involving the second injury fund:

> Under either subsection (a) or (b), it is essential that the trial court determine the extent of disability resulting from the subsequent injury without consideration of the prior injury. *Cf. Perry*, 938 S.W.2d at 407. In other words, the trial court must find what disability would have resulted if a person with no preexisting disabilities, in the same position as the plaintiff, had suffered the second injury but not the first. This is expressly required by subsection (a), which states, "such employee shall be entitled to compensation from the ... employer ... only for the disability that would have resulted from the subsequent injury, and such previous injury shall not be considered in estimating the compensation to which such employee may be entitled...." Tenn.Code Ann. § 50–6–208(a)(1).

The Court allows the late filing of the unreported Special Workers' Compensation Appeals Panel case *Garrett v. Brown*, 2011 WL 899613. However, the Court does not find *Garret* controlling. The Court relies on the precedent set out by the Tennessee Supreme Court in *Allen* and will make finding based the clear instructions in that opinion.

FINDINGS

The Court makes the following findings:

1. Mr. Scott was a very credible witness.

2. MPPD was aware of Mr. Scott's prior back injury before he was hired as a police officer.

3. MPPD was aware of the knee injury which occurred during the course and scope of his employment with MPPD.

4. Before the motor vehicle accident, Mr. Scott worked in law enforcement for approximately 9 years after his1999 back injury and approximately 8 years following the decompression and fusion from L3 to S1.

5. Based on the extent of the permanent injuries to his hip, neck and shoulder; the enhanced injury to his knee; the extensive restrictions that have been assigned; and the constant pain and headaches he suffers, Mr. Scott is totally incapacitated from working at an occupation that would bring him an income and is totally disabled as that term is defined in *Tenn. Code Ann.* §50-6-207(4)(B).

6. Pursuant to *Tenn. Code Ann.* §50-6-208(a), without considering the prior injuries and disabilities, or in other words assuming Mr. Scott had no prior disabilities, Mr. Scott was permanently and totally disabled as a result of the injuries he received in the motor vehicle accident.

7. Because the motor vehicle accident rendered Mr. Scott permanently and totally disabled, without considering the prior impairment, the employer is responsible for the entire award and the Second Injury Fund is not responsible for any part of the award.

entire award and the Second Injury Fund is not responsible for any part of the award.

8. Mr. Scott shall receive all benefits provided under *Tenn. Code Ann.* §50-6-207(4)(A)(i).

9. The award is commuted to lump sum to the extent allowed under *Tenn. Code Ann.* §50-6-207(4)(A)(ii).

10. Mr. Scott shall receive the underpayment of temporary total benefits of $4,242.19.

PREPARATION OF ORDER

The Court directs the three attorneys to discuss this memorandum to insure all issues raised have been dealt with. If no other issues remain, Plaintiff's attorney shall prepare a Final Judgment incorporating this memorandum by reference and setting out the amount of the Plaintiff's attorney's fees, the amount of the lump sum to be paid, social security language if needed, and a discretionary cost award if the parties agree as to the amount. Cost are taxed to the Employer, MPPD, and its insurer.

This the _____ day of April, 2012.

ROBERT L. HOLLOWAY, JR.
CIRCUIT JUDGE, DIVISION II

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing Order was served on this _____ day of April, 2012, upon:

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Ginger Hobgood, Administrative Assistant
to Judge Robert L. Holloway, Jr.

IN THE CIRCUIT COURT FOR GILES COUNTY, TENNESSEE
AT PULASKI

STATE OF TENNESSEE,	)	
	)	
Plaintiff,	)	
	)	
VERSUS	)	**NO. 15645 and 15935**
	)	
JAMES CHAD WHITWORTH,	)	
	)	
Defendant.	)	

ORDER DENYING MOTION TO SUPPRESS IN REGARDS TO DEFENDANT'S PRE-TRIAL MOTIONS NOS. 13, 15 and 20

Three Pre-Trial Motions filed by the Defendant were argued on April 23, 2013 and taken under advisement by the Court.

Defendant's Pre-Trial Motion No. 13 regarding AT&T Records

On August 17, 2011, Investigator Joey Turner (Turner) obtained from Judge John Damron a Judicial Subpoena for the records of three telephone numbers.

Tenn. Code Ann. § 40-17-123 establishes the procedure for seeking and issuing Judicial Subpoenas "for the production of books, papers, records, documents, tangible things, or information and data electronically stored". Subsection123(c), which lists the information required to be in the affidavit, states:

> (c) An affidavit in support of a request to compel the production of books, papers, records, documents, tangible things, or information and data electronically stored shall state with particularity the following:
> (1) A statement that a specific criminal offense has been committed or is being committed and the nature of the criminal offense;
> (2) The articulable reasons why the law enforcement officer believes the production of the documents requested will materially assist in the investigation of the specific offense committed or being committed;
> (3) The custodian of the documents requested and the person, persons or corporation about whom the documents pertain;
> (4) The specific documents requested to be included in the subpoena; and
> (5) The nexus between the documents requested and the criminal offense committed or being committed. (Emphasis supplied).

Subsection 123(d)(1), which lists the requirements for issuance, states:

> (d)(1) Upon preparing the affidavit, the law enforcement officer shall submit it to either a judge of a court of record or a general sessions judge who serves the officer's county of jurisdiction. The judge shall examine the affidavit and may examine the affiants under oath. The judge shall grant the request for a subpoena to produce the documents requested if the judge finds that the affiants have presented a reasonable basis for believing that:
> (A) A specific criminal offense has been committed or is being committed;
> (B) Production of the requested documents will materially assist law enforcement in the establishment or investigation of the offense;
> (C) There exists a clear and logical nexus between the documents requested and the offense committed or being committed; and
> (D) The scope of the request is not unreasonably broad or the documents unduly burdensome to produce.

The sworn Application for Judicial Subpoena signed by Turner stated in part:

> (1) I have reason to believe, based on personal knowledge or from information received by another law enforcement officer that a specific criminal offense has been committed or is being committed. To wit: Between 2005 and 2011 there has been a relationship between a 16 year old ...and her step-father, Chad Whitworth. In 2008 this relationship turned sexually active. Further investigation reveals there have been extensive messages, conversations, and pictures exchanged involving the victim and the step-father. Also these phone records may indicate the mother, Laurie Whitworth knew about the relationship and failed to intervene. This crime occurred within the city limits of Pulaski, Tennessee, and (2) that production of the requested documents will materially assist in the investigation of such offenses and that a sufficient nexus exists between the documents requested and such offenses exists because: The subscriber of the above phone number has suspected involvement in the incident and these documents will assist in the investigation of and the prosecution of said individuals.

The Court finds the application satisfies the requirements of Tenn. Code Ann. § 40-17-123. The application contained information to show the "specific criminal offense" of incest had been committed, there were "articulable reasons" as to why the documents sought would "materially assist in the investigation", the custodian was AT&T Custodian of Records, that the records pertained to Mr. Whitworth, Mrs. Whitworth and the minor victim; the specific documents requested, were the "account subscriber information and call detail records for 931-638-1609, 931-972-2576, and 615-336-2440" for "January 1, 2009 thru

August 14, 2011", and there was "nexus between the documents and the criminal offense.

The Court also finds the application contained sufficient information from which Judge Damron could determine that a reasonable basis for the issuance of the subpoena was provided.

The Defendant's Pre-Trial Motion No. 13 regarding AT&T Records is DENIED.

Defendant's Pre-Trial Motion No.15 to Suppress Evidence received via Yahoo! Search Warrant

The Defendant claims the affidavit executed by Turner failed to provide sufficient probable cause for Judge Jim T. Hamilton to issue a search warrant. The affidavit states in part:

> This affidavit is made by Investigator Joey Turner. I now testify herein, based upon information received from another State Agency, as well as personal investigation, unless otherwise stated, which your affiant believes to be true, and is as follows:
>
> A complaint was lodged with the State of Tennessee, Department of Children's Services on July 29, 2011. This complaint was given to the Affiant by Ms. Anita Broussard, Investigator with Children's Services. The referral was then forwarded to the Pulaski Police Department by Ms. Broussard. The referral made reference to a sexual relationship between 16 year old Aidan Murrah and her 34 year old, Step-Father, Chad Whitworth. Upon investigation the Affiant learned this relationship started in 2005 and has continued through 2011. The relationship began as kissing, touching, petting and grew into daily sexual intercourse. The Affiant learned from the victim there were Yahoo email accounts set up between she and her step father. Correspondence and photographs were shared between Ms. Murrah and Mr. Whitworth in regards to their relationship through these email accounts. The Affiant has also learned the mother; Laurie Whitworth also had a Yahoo email account and possibly shared correspondence concerning this relationship with Mr. Whitworth. The victim told the Affiant her mother used her email account to activate a Spybubble account (spy ware) to intercept text messages between she and her stepfather.
>
> Based on 13 years of law enforcement experience, and attending numerous specialized courses in investigations, your Affiant believes based on his knowledge, training and experience that evidence of violations of Tenn. Code Ann. §39-17-1003 Sexual Exploitation, §39-13-532 Statutory Rape by an Authority Figure will be found on the premises to be searched. Specifically, I believe that Yahoo! will be able to provide the subscriber information to help identify the user with the email addresses **aidanmurrrah@yahoo.com, chad_whitworth@yahoo.com,** and **lbmurrah@yahoo.com** as to whether

> or not they are a minor or an adult. All information noted in this affidavit for search warrant has been related to Affiant by the person(s) and/or source(s) attributed or referenced. Affiant further believes in good faith that the information provided herein to be true and correct. Because the sole purpose of this affidavit is to establish probable cause that a criminal offense has occurred, not every relevant fact known to me, or to other investigators, is included within. Rather, only those facts necessary to establish probable cause have been discussed.
>
> Furthermore, He therefore complains and asked that a warrant issue to search the above named **Yahoo! A company doing business in Tennessee and with corporate offices at 701 First Avenue, Sunnyvale, CA, 94089.**
>
> (Emphasis appears in affidavit)

Defendant argues the 16 year old victim was an accomplice and therefore a criminal informant, and the affidavit failed to state facts sufficient to show the information she provided was reliable. Defendant contends the veracity prong of the *Aguilar-Spinelli* test was not met. *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) and *Spinelli v. United States,* 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969).

Accomplice at Trial

Victim could be charged with an offense. Tennessee has long recognized that if a victim could be charged with the offense, the victim is an accomplice whose trial testimony must be corroborated to convict another defendant of that offense. In *Shelley v. State (State Report Title: Shelly v. State)*, 95 Tenn. 152, 31 S.W. 492 (1895), the Tennessee Supreme Court found that the alleged victim of a several-month, consensual, incestuous, sexual relationship was an accomplice whose testimony had to be corroborated to support the conviction. In *State v. Burda*, M200602523CCAR3CD, 2009 WL 1181349 (Tenn. Crim. App. May 4, 2009), the defendant was charged with sexual exploitation of a minor for sending sexually explicit photographs of himself to a minor. Because the minor had sent sexually explicit photographs of herself to the defendant, an offense for which she could have been charged, she was found to be an accomplice. In *Sherrill v. State*, 321 S.W.2d 811, two boys age 10 and 11 were found to be accomplices whose testimony had to be corroborated to convict the defendant charged with crimes against nature. *Sherrill* was statutorily abrogated in 1991 when the legislature enacted Tenn. Code Ann. § 40-17-121. Now, a victim less than thirteen (13) years of age cannot be considered to be an accomplice to sexual penetration or sexual contact.

Voluntary consent. When a minor at least thirteen (13) years of age cannot be charged with the offense, the minor could still be considered an accomplice if the minor voluntarily consented to the sexual activity. *State v. Scott,* 207 Tenn. 151, 338 S.W.2d 581 (Tenn.1960). In *State v. Collier*, W2010-01606-CCA-R3CD, 2012 WL 2849495 (Tenn. Crim. App. July 11, 2012), appeal granted (Jan. 8, 2013), a fourteen year old victim of aggravated statutory rape was found to be an accomplice for the purposes of trial thereby requiring corroboration before a defendant could be found guilty.

Non-consensual offenses. In non-consensual sexual offenses, such as rape, the victim is not an accomplice. *Montgomery v. State,* 556 S.W.2d 559, 560 (Tenn.Crim.App.1977). Tenn. Code Ann. § 40-17-121. In *State v. Pitts*, 01C01-9701-CC-00003, 1999 WL 144744 (Tenn. Crim. App. Mar.18,1999), a victim who "suffers from a mental disease or defect which renders that person temporarily or permanently incapable of appraising the nature of his conduct" was found not to be an accomplice to a consensual sexual offense. In *Pitts*, the Court of Criminal Appeals stated:

> It is well-established that a conviction may not be based solely upon the uncorroborated testimony of an accomplice. *State v. Bigbee,* 885 S.W.2d 797, 803 (Tenn.1994); *State v. Harris,* 839 S.W.2d 54, 75 (Tenn.1992); *State v. McKnight,* 900 S.W.2d 36, 47 (Tenn.Crim.App.1994). Appellant relies on *State v. Schimpf,* 782 S.W.2d 186, 196 (Tenn.Crim.App.1989), for the proposition that "a child, even though legally incapable of consenting to a crime, may nevertheless be an accomplice, thus necessitating corroboration of his testimony." Appellant urges this Court to extend this "victim-accomplice" rule to this case so that we should find that the victim, notwithstanding his inability to appreciate the nature of his conduct, was a willing participant and, thus, an accomplice to any sexual activity.

Statutory rape by an authority figure. One of the criminal offenses mentioned in the affidavit is statutory rape by an authority figure and sexual exploitation. The offense of statutory rape by an authority figure was created by the general assembly in 2006 and designated a Class C felony. Tenn. Code Ann. § 39-13-532(a) states:

> (a) Statutory rape by an authority figure is the unlawful sexual penetration of a victim by the defendant or of the defendant by the victim when:(1) The victim is at least thirteen (13) but less than eighteen (18) years of age; (2) The defendant is at least four (4) years older than the victim; and(3) The defendant was, at the time of the offense, in a position of trust, or had supervisory or disciplinary power over the victim by virtue of the defendant's legal, professional, or occupational status and used the position of trust or

> power to accomplish the sexual penetration; or (4) The defendant had, at the time of the offense, parental or custodial authority over the victim and used the authority to accomplish the sexual penetration.(b) Statutory rape by an authority figure is a Class C felony and no person who is found guilty of or pleads guilty to the offense shall be eligible for probation pursuant to § 40-35-303 or judicial diversion pursuant to § 40-35-313. (emphasis supplied)

This Court has not found a case involving whether or not a victim of statutory rape by an authority figure can be an accomplice at trial. In *State v. Kendall*, E200801587CCAR3CD, 2009 WL 2382282 (Tenn. Crim. App. Aug. 4, 2009), the defendant was convicted of several counts of statutory rape by an authority figure. The defendant confessed so corroboration of the victim's testimony was not an issue on appeal. The case dealt primarily with sentencing. In discussing the sentence imposed by the trial court, the Court of Criminal Appeals made the following statement:

> The defendant preyed upon the vulnerable victim at a time when she was completely dependent on him and began a sexual relationship that remained undetected for nearly two years. Although the victim divulged the sexual contact to a friend, she initially denied it to authorities out of a desire to protect her cousin, the defendant's minor son, from the loss of his father. Both the victim and her mother testified that the victim suffered frequent nightmares brought on by the abuse and that the events have caused the victim to avoid close personal relationships with others. These facts support the imposition of consecutive sentences in this case

In *State v. Holt*, E2010-02128-CCA-R3CD, 2012 WL 826523 (Tenn. Crim. App. Mar. 13, 2012, the Court of Criminal Appeals stated:

> The statute regarding statutory rape by an authority figure does not require that a defendant used his or her position of authority to *force* the sexual penetration; instead, the statute states only that the defendant used his or her power to *accomplish* the sexual penetration. *See State v. Bryan Dale Farmer,* No. M2007–01553–CCA–R3–CD, 2008 WL 3843847, at *7 (Tenn.Crim.App., at Nashville, Aug. 18, 2008) (stating that the defendant used his position as a teacher or coach to accomplish the offense of sexual battery by an authority figure), *perm. app. denied,* (Tenn. March 2, 2009). Accordingly, if the evidence shows that a defendant used his or her position to cultivate an improper relationship with the victim and to bring about or bring to completion sexual penetration with the victim, then this evidence is sufficient to support the conviction for statutory rape by an authority figure. *See id.* at *8.

Sexual exploitation. Turner's affidavit also makes reference to sexual exploitation. Tenn. Code Ann. § 39-17-1003 provides in part:

> **§ 39-17-1003. Sexual exploitation** (a) It is unlawful for any person to knowingly possess material that includes a minor engaged in:(1) Sexual activity; or (2) Simulated sexual activity that is patently offensive.(b) A person possessing material that violates subsection (a) may be charged in a separate count for each individual image, picture, drawing, photograph, motion picture film, videocassette tape, or other pictorial representation....

Based on *State v. Burda*, *supra*, a minor 13 years of age or older can be an accomplice of a defendant charged with sexual exploitation if the minor voluntarily sent sexually explicit materials of himself or herself. Under such facts, the minor victim could be charged with sexual exploitation.

The cases discussed above have to do with whether or not a victim is an accomplice for the purpose of testifying at the criminal trial of a defendant. However, just because a victim is later found to be an accomplice at trial does not mean that same victim was a criminal informant at the time the victim provided information that led to the issuance of a search warrant. The two terms are not synonymous.

Criminal Informant versus Citizen Informant in an Affidavit for a Search Warrant

State v. Jacumin, 778 S.W.2d 430 (Tenn.1989) is perhaps the leading Tennessee case dealing the application of the two-pronged test of *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) and *Spinelli v. United States,* 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969) to criminal informants. For an affidavit based on information received from a criminal informant to satisfy this test, it must contain facts sufficient to show the informant's "basis of knowledge" and to establish the "veracity" of the informant. In *Jacumin*, the Tennessee Supreme Court rejected the "totality of circumstances approach voiced by the Supreme Court of the United States in *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)", holding instead the *Aguilar–Spinelli* standard, as long as it was not applied "hypertechnically", was the appropriate standard to test probable cause for the issuance of a search warrant based on information from a criminal informant.

In *State v. Bowling*, 867 S.W.2d 338, 342-43 (Tenn. Crim. App. 1993), the Court of Criminal Appeals discussed two-prong *Aguilar–Spinelli*:

> Essentially, the first prong "inquire [s] as to how the informant concluded the criminal activity [had taken] place: 'How does he [or she] know that?' The second 'prong' inquire[s] into the informant's veracity: 'Why do I believe him [or her]?' " Raybin, *Criminal Practice and Procedure,* § 18.58, p. 584.

In *Stout v. State*, W2011-00277-CCA-R3PD, 2012 WL 3612530 (Tenn. Crim. App. Aug. 23, 2012), appeal denied (Jan. 8, 2013), the Court of Appeals discussed the difference between a criminal informant and citizen informant:

> A person from the criminal milieu is one who is "intimately involved with the persons informed upon and with the illegal conduct at hand." *State v. Melson,* 638 S.W.2d 342, 354 (Tenn.1982) (internal citations and quotations omitted). Criminal informants generally supply information to law enforcement personnel not "in the spirit of concerned citizen, but often ... in exchange for some concession, payment, or simply out of revenge against the subject." *State v. Smith,* 867 S.W.2d 343, 347 (Tenn.Crim.App.1993) (quotations omitted). In contrast, citizen informants are either the "victims of the crime or have otherwise seen some portion of it." *Melson,* 638 S.W.2d at 354 (internal citations and quotations omitted). A citizen informant "is a witness to criminal activity who acts with an intent to aid the police in law enforcement because of his concern for society or for his own safety. He does not expect any gain or concession in exchange for his information." *Smith,* 867 S.W.2d at 347 (quotations omitted).

Therefore, a known citizen informant is not subject to the two-prong *Aguilar-Spinelli* test. The court in *Stout v. State*, *supra*, further explained the distinction between criminal informants and citizen informants:

> Tennessee law recognizes a distinction between "citizen informants, or bystander witnesses, and criminal informants, or those from the criminal milieu." *State v. Cauley,* 863 S.W.2d 411, 417 (Tenn.1993) (internal citations and quotations omitted). Information provided by known citizens is presumed to be reliable. *Id.* (emphasis added). If the warrantless arrest is based in part on information from an informant from the criminal milieu, the officers must be able to demonstrate that the informant: (1) has a basis of knowledge; and (2) is credible or his information is reliable. (emphasis supplied)

Prerequisites for Issuance of a Search Warrant

In *State v. Saine*, 297 S.W.3d 199, 205-06 (Tenn. 2009), the Tennessee Supreme Court discussed the prerequisites for issuance of a search warrant:

> A sworn and written affidavit containing allegations from which a magistrate may determine whether probable cause exists is an "indispensable prerequisite" to the issuance of a search warrant. *State v. Henning,* 975

S.W.2d 290, 294 (Tenn.1998). The affidavit must present facts from which a " 'neutral and detached magistrate, reading the affidavit in a common sense and practical manner' " may determine the existence of probable cause for issuance of the search warrant. *Carter,* 160 S.W.3d at 533 (quoting *Henning,* 975 S.W.2d at 294). "To ensure that the magistrate exercises independent judgment, the affidavit must contain more than mere conclusory allegations by the affiant." *Henning,* 975 S.W.2d at 294.To establish probable cause, the affidavit must show a nexus among the criminal activity, the place to be searched, and the items to be seized. *State v. Reid,* 91 S.W.3d 247, 273 (Tenn.2002); *State v. Smith,* 868 S.W.2d 561, 572 (Tenn.1993). In determining whether the nexus has been sufficiently established, we "consider whether the criminal activity under investigation was an isolated event or a protracted pattern of conduct [,] ... the nature of the property sought, the normal inferences as to where a criminal would hide the evidence, and the perpetrator's opportunity to dispose of incriminating evidence." *Reid,* 91 S.W.3d at 275; *see also Smith,* 868 S.W.2d at 572.

In determining whether probable cause supports the issuance of a search warrant, reviewing courts may consider only the affidavit and may not consider other evidence provided to or known by the issuing magistrate or possessed by the affiant. *Carter,* 160 S.W.3d at 533...

Findings of Fact as to YAHOO Search Warrant

The Court makes the following findings of fact:

Turner relied on information contained in an anonymous complaint filed with the Tennessee Department of Children's Services (DCS) on July 29, 2011.

Turner received the complaint from Anita Broussard, a DCS Investigator.

The complaint contained allegations of a sexual relationship between a 16 year old and her 34 year old step-father.

Turner began an investigation which led him to believe the relationship started in 2005.

Turner interviewed the victim and learned that she and the defendant had email accounts and they shared pictures and correspondence.

The victim was not a criminal informant and the two-pronged *Aguilar–Spinelli* did not apply.

The victim was a known citizen informant whose information was presumed reliable.

The victim may be proven to be an accomplice to some the charged offenses therefore requiring corroboration of her testimony before a defendant could be found guilty of the offense to which she is an accomplice, but that does not make her a criminal

informant at the time the search warrant is issued.

The victim could not be an accomplice to sexual offenses occurring before her thirteenth birthday.

Arguably, the victim could not be an accomplice to statutory rape by an authority figure.

Turner's affidavit contain significantly more than mere conclusory allegations. *State v. Henning, supra.*

Turner's affidavit states he has 13 years of law enforcement experience, and that based on his knowledge, training and experience that the YAHOO account may contain evidence of the named sexual offense.

Turner's affidavit shows "a nexus among the criminal activity, the place to be searched, and the items to be seized." *State v. Saine, supra; State v. Reid, supra.*

Turner's affidavit provided sufficient facts from which a "neutral and detached magistrate, reading the affidavit in a common sense and practical manner" could determine the existence of probable cause for issuance of the search warrant. *State v. Henning,* 975 S.W.2d 290, 294 (Tenn.1998).

Holding

Defendant's Pre-Trial Motion No.15 to Suppress Evidence received via YAHOO Search Warrant is DENIED.

Defendant's Pre-Trial Motion No. 20 to Suppress Evidence received via Mobistealth Search Warrant

The Defendant claims the affidavit executed by Turner failed to provide sufficient probable cause for Judge Stella Hargrove to issue a search warrant. The Mobistealth affidavit, which was issued on September 9, 2011, is in some ways similar to the YAHOO affidavit. Both affidavits reference the DCS complaint concerning a sexual relationship between a 34 year old step-father and a 16 year old step-daughter and the information about the email account provided by the victim. The Mobistealth affidavit further states:

> The victim told Affiant her mother used her email account to activate a spy ware account to intercept text messages between she and her stepfather. The affiant verified this information through a search warrant conducted on Yahoo on August 23, 2011. Records were found to indicate Ms. Murrah had an account with Mobistealth. Mobistealth is a company with designed software to intercept and store text message content from another person's

cell phone. In these emails Ms. Murrah talks with the helpdesk in regards to having trouble downloading information.

Findings of Fact as to Mobistealth Search Warrant

The Court finds:

The victim is not a criminal informant.

The victim was a known citizen informant whose information was presumed reliable.

Turner's affidavit contain significantly more than mere conclusory allegations. *State v. Henning, supra.*

Turner's affidavit states he has 13 years of law enforcement experience, and that based on his knowledge, training and experience that the Mobistealth account may contain evidence of the named sexual offense.

Turner's affidavit shows "a nexus among the criminal activity, the place to be searched, and the items to be seized." *State v. Saine, supra; State v. Reid, supra.*

Turner's affidavit provided sufficient information from which a "neutral and detached magistrate, reading the affidavit in a common sense and practical manner" could determined the existence of probable cause for issuance of the search warrant. *State v. Henning,* supra.

Holding

Defendant's Pre-Trial Motion No. 20 to Suppress Evidence received via Mobistealth Search Warrant is DENIED.

ENTERED this the _____ day of May, 2013.

ROBERT L. HOLLOWAY, JR.
CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I, the undersigned Clerk of the Circuit Court of Giles County, Tennessee, certify that I have forwarded a true copy of the foregoing Order by first class mail, postage prepaid, to:

Beverly White
Assistant District Attorney General
P. O. Box 304
Pulaski, TN 38478

Robert D. Massey
Attorney for Defendant
P.O. Box 409
Pulaski, TN 38478

John Colley
Attorney for Laurie Murrha Whitworth
P.O. Box 1476
Columbia, TN 38402-1476

this the _____ day of May, 2013.

_____
Circuit Court Clerk/Deputy Clerk