The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: JoeDae L. Jenkins

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(including county) 38103

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Email

INTRODUCTION

The State of Tennessee Executive Order No. 41 hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application 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 Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website www.tncourts.gov). The Council 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 document.) Please read the separate instruction sheet prior to completing this document. Please submit original (unbound) completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with electronic or scanned signature via email to debra.hayes@tncourts.gov, or via another digital storage device such as flash drive or CD.

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Administrator for the Office of the General Sessions Court Clerk for Shelby County Tennessee.

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

1990. TBPR # 014223.

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.

1990. TBPR # 014223. Active.

1983. MS Bar # 3072. 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).

a. **Central Mississippi Legal Services- June 1983 – November 1983;**
b. **USAF – March 1983- March 1988;**
c. **JoeDae Jenkins, Attorney, April 1988 – 1996;**
d. **Charles Carpenter, PC, 1997 – 2000;**
e. **JoeDae Jenkins, Attorney, 2000 – 2014; and**
f. **Office of General Sessions Clerk, Administrator, 2014-Present.**

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.

N/A.

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.

Prior to my appointment as an Administrator with the Clerk of General Sessions Court, I was a general practitioner. I am not an active practitioner at this time except for some remaining cases to be closed. My major emphasis was in the area of probate law: decedent estates, conservatorships, and guardianships. That area comprised approximately 90% of my caseload. The remaining work in my practice was under the category of general litigation and personal injury.

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

During the course of my legal career, I have practiced in the following areas: Consumer Law, Contracts, Corporations, Domestic Law, Employment Discrimination, Family law, Federal Torts, General Business, Government Tort Liability (Defense), Juvenile Court, Real Estate, Voting Rights, Securities, Municipal and County Government, Personal Injury, Medical Malpractice, and Workers Compensation.

An example of the type of cases I handled in Circuit court may be described as follows: One case involved the wrongful death of a severely mentally retarded male arising out of an automobile accident. The case is significant in establishing damages for the life of one who has no pain and suffering and no employment history. Liability was hotly contested as well. However, a great result was achieved through mediation where an amicable settlement was reached. In another case, the facts involved serious, permanent personal injuries to plaintiff arising out of an automobile accident. The case had been pending for 7 years when I was brought into the case. There were multiple tortfeasors and several attempts at mediation had failed. The case is significant in that the case was unable to settle because the Plaintiff felt he was not being treated with dignity. Plaintiff had lost confidence in the justice system. I was able to work with the Plaintiff and restore his confidence in the justice system. Thereafter, we were able to resolve the case.

I also bring to your attention several appellate cases in which I successfully served as the trial lawyer and the appellate lawyer: First, Rebecca Trezevant Hutter vs. City of Memphis, 1997

Tenn. App. LEXIS 17 (Tenn. Ct. App. 1997), is a case that established that certain street maintenance can be the result of "planning" decisions and involve the exercise of a discretionary function under Tenn. Code Ann. § 29-20-205(1), and consequently, the city retains governmental immunity where an individual is injured as a result of such maintenance. I served as the trial lawyer and conducted the appeal. Another case is Bob Patterson vs. Jim Rout, 2002 Tenn. App. LEXIS 543 (Tenn. Ct. App. 2002), where the court clarified the limitations of the executive government of Shelby County to control the salaries of appointed personnel made by county constitutional officers. Finally, Patterson v. Wharton, 2006 Tenn. App. LEXIS 305 (Tenn. Ct. App., 2006), involved a dispute regarding whether the Chancellor has the authority to set the amount of the attorney fee paid for the prosecution of a salary petition under Tenn. Code Ann. § 8-20-101, et seq. The Court found that the Chancellor has the authority to award an attorney fee and set the amount.

I have also had some limited experience in the area of Employment Security (both Employer and Employee), EEOC-Employment Discrimination (both Plaintiff and Defense) and Social Security claims.

I have also enjoyed a fairly significant practice in real estate closings.

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

N/A

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

I served as Substitute Judge for the Shelby County Probate Courts and Memphis City Courts.

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

I have served in a fiduciary capacity as a Conservator, Guardian, Guardian Ad Litem, Administrator, and Administrator Ad Litem.

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

I served as a staff attorney for the City of Memphis for 12 years providing defense involving automobile accidents and in drafting major contractual documents. I also represented the Shelby County Trustee for approximately 6 years handling all salary petitions and appeals. As a Contracting officer with the United States Air force, I negotiated multi-million dollar contracts with Defense contractors for satellite equipment and support services for launch activities.

13. List all prior occasions on which you have submitted an application for judgeship to the Governor's Council for Judicial Appointments or any predecessor 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.

Chancellor, Chancery Court 30th Judicial District; 2002; not submitted.

Judge, Circuit Court 30th Judicial District; 2009; submitted.

EDUCATION

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

University of Mississippi Law Center: 1980-1983, J.D.

Memphis Theological Seminary: 2007-2009. No degree sought at the time.

PERSONAL INFORMATION

15. State your age and date of birth.

57, April 22,1958.

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

1989-Present.

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

1989-Present.

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

Shelby.

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

a) Branch of Service: Air Force.
b) Dates of active duty: November, 1983 – March, 1988.
c) Rank/rate at separation: Captain.
d) Decorations, honors, or achievements: Acquisition Management Course, Defense Fundamentals of Incentive Contracting, Defense Fundamentals of Incentive Contracting, Defense Contract Negotiations Course, Systems Level Contracting Course, Nominated Air Force Systems Command Contracting Officer of the Year, Space Division Contract Directorate Company Grade Officer of the Year, Contracting Officer Warrant, Squadron Officer School, Regular Officer, Meritorious Service Medal.
e) Separation Status: Honorable Discharge

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

No.

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

No.

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

My best recollection is two (2) to three (3). All were dismissed except the one pending now. It involves a complaint that essentially alleges insufficient communication.

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.

Yes. JoeDae L. Jenkins v. Willyn Taylor Jenkins, Docket # 162650-1 R. D. Circuit Court of the 30th Judicial District at Memphis. Filed May 18, 1999 and concluded January 30, 2002. Winstead vs. Oak Grove M.B. Church, JoeDae Jenkins, et al., docket # CT-0001118-14. Circuit Court of the 30th Judicial District at Memphis. Filed January 09, 2014. Dismissed against JoeDae Jenkins on December 18, 2014.

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

Oak Grove M.B. Church, Trustee, 1999-2002; Children's Minister 2008-2009; Asst. Pastor Current

NAACP, Board Member-1998-2002; Vice President-1998-2000
Kiwanis Club of Memphis
Independent Pall Bearers Society
Phi Beta Sigma

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

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

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

No.

ACHIEVEMENTS

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

Mississippi Bar Association
Ben F. Jones Chapter of NBA: Vice President- 1994; President- 1995
National Bar Association (NBA)
Memphis Bar Association: 2001 – 2002 Bench Bar CLE Co-Chair
2002 – 2003 Bench Bar Co-Chair

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

Reginald Heber Smith Community Lawyer Fellowship

Board of Professional Responsibility Panel Member.

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

N/A.

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.

N/A

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.

2010, Candidate for Judge, Circuit Court, 30th Judicial District at Memphis, Elective. See number 13 above.

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

No.

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

Attached are the appellate briefs for Tuggle v. Shelby County Government and Patterson v. Wharton. I completed 100% of the effort in both cases. See Attachment 1.

ESSAYS/PERSONAL STATEMENTS

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

I believe my experiences in practicing law could benefit and strengthen the local court. Additionally, I am a public servant at heart and sitting as judge would allow me to continue to be active in the law and be a full time public servant.

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

As an undergraduate student, I led the effort to provide equal treatment in housing for black fraternities on the campus of the University of Mississippi resulting in the first fraternity house for African Americans. As a law school student, I was instrumental in obtaining equal funding for the extracurricular activities of the Black Law Students Association.

As a Contracting Officer with the Air Force, I was called upon to ensure that small

business and minorities obtained a fair portion of the contracts I let. As a private practitioner, I have allowed my practice to lend itself to cases involving equal protection issues, both fees generating and pro bono.

I am a supporter of the NAACP and served as the chair of its legal redress committee, which discusses and takes appropriate local action on certain equal protection issues brought before it.

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)***

Division 3, like the other eight kindred courts, handles civil matters consistent with Tenn. Code Ann. § 16-10-101, et seq. The current judges manage the Shelby County Circuit Court very well. The docket is relatively large, but consistent with an urban population. I view my selection as enhancing an already good system. I offer the perspective of the small firm and solo practitioner with a wealth of experience across a very broad spectrum of law. I possess the temperance and patience needed by a judge, along with the requisite decisiveness for ruling in cases.

Our system of jurisprudence greatly depends upon the fair and impartial treatment of litigants. I am able to tolerate and respect different beliefs, cultures, lifestyles, and choices, which do not abridge the legal rights of others. I will squarely uphold and apply the law so as to reflect a credit to our system of jurisprudence.

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 plan to continue my membership with the organizations with which I now have a membership. I do not currently serve in a capacity that would create a conflict. However, because of the enormous responsibility of a Judge, I do not foresee being able to take any further leadership positions in the near future.

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

Quite often, I find myself in a position where my assistance is requested to find resolutions to disputes. For example, many church members seek to avoid the court system. I have settled disputes ranging from poor workmanship to attempts to reclaim property or money owed. From these situations, I have learned a great deal about human behavior together with how strong an impact cultural differences, education, income, and belief systems play in legal disputes.

As a Contracting Officer with the United States Air Force, I was required to resolve policy conflicts, contractor problems, budget issues, and technical inconsistencies in an environment of highly trained professionals who strongly advocated their position. Except for those contracts

requiring congressional approval, it was my responsibility, as the Contracting Officer, to manage the issues levied by departments, agencies, contractors, vendors, executive department and congressional representatives. The job put me in contact with people from all walks of life and I am a more rounded individual for it. The judicial system reflects the many different situations and problems that individuals face daily. These situations and problems come to a focal point in the courtroom. I embrace the opportunity to review alternatives to my thoughts on the facts and law. In the end, as Judge, I would provide a rational basis for my decisions. Because I have these experiences and characteristics, I believe I would be a credit to the Bench.

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 Judge, I would uphold and apply the law as appropriate. I do not have an experience that would support my response. However, as a citizen there are many laws of which I disagree with the substance of the law. I abide by the law. If the law was a real burden, I would hire a lawyer to challenge the law. But, I do not see where Judges have the latitude to pick and choose the laws they enforce.

REFERENCES

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

A. Gregorio Barnett,
B. Travis Green, Chief Administrator.
C. Darrel O'Neal, Esquire.
D. James Mason, Insurance Employee.
E. Donald Kinnard, Postal Employee.

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] _Circuit Court of Tennessee for the 30th Judicial District of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended questionnaire with the Administrative Office of the Courts for distribution to the Council 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 Council may publicize the names of persons who apply for nomination and the names of those persons the Council nominates to the Governor for the judicial vacancy in question.

Dated: November 30, 2015.

JoeDae L. Jenkins
Signature

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

THE GOVERNOR'S COUNCIL FOR JUDICIAL APPOINTMENTS
ADMINISTRATIVE OFFICE OF THE COURTS

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

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

WAIVER OF CONFIDENTIALITY

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

JoeDae L. Jenkins

Type or Print Name

JoeDae L. Jenins

Signature

11/30/15

Date

014223

BPR #

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

Mississippi, #3072

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN DISTRICT AT JACKSON

DEBORAH TUGGLE,

Plaintiff/Appellee,

v. **Law No.02A01-9606-CV-00147**

(Circuit Court Docket No. 62811 T.D. 8)

SHELBY COUNTY GOVERNMENT,

Defendant/Appellant.

BRIEF OF APPELLEE, DEBORAH TUGGLE

JoeDae L. Jenkins (#014223)
Attorneys for Appellee
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Memphis, TN 38103
(901) 523-7788

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DESIGNATION OF REFERENCES

1. References to the technical record shall be R. , followed by the volume and page.

2. References to the deposition of Rommel Childress, M. D., dated, April 19, 1995, shall be Childress Depo., followed by the page .

3. References to the deposition of Rommel Childress, M. D., dated, February 14, 1996, shall be Childress Depo., Vol. 6, followed by the page .

4. References to the deposition of Mark S. Harriman, M.D., dated, March 8, 1995, shall be Harriman Depo., followed by the page .

5. References to the deposition of Joseph C. Boals, M.D., dated, December 21, 1995, shall be Boals Depo., followed by the page .

6. References to the deposition of Gregory Cates, Ph.D., dated, February 26, 1996, shall be Cates Depo., followed by the page .

7. References to the Regional Medical Center shall be The Med.

TABLE OF AUTHORITIES

CASES

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STATEMENT OF ISSUES PRESENTED FOR REVIEW BY APPELLANT

1. Whether the Plaintiff sustained any permanent disability or impairment which arose out of and in the course of her employment with the Defendant, Shelby County?

2. If the Plaintiff sustained any disability arising out of and in the course of her employment, whether the award for such was excessive?

STATEMENT OF THE CASE

1. On July 5, 1994, Plaintiff, Deborah Tuggle, filed an action in the Circuit Court For the Thirtieth Judicial District of Tennessee at Memphis, Tennessee, alleging that she sustained a compensable injury on July 31, 1993, while working as a nursing assistant at Oakville Health Care Center, a division of Shelby county Government and sought statutory benefits under the Tennessee Workers' Compensation Act. (R. Vol. 1, 2-4).

2. Defendant answered, admitting the occurrence of the July 31, 1993, accident, but denied that it was liable for any permanent disability payment, or benefits. (R. Vol. 1, 6,7).

3. The cause was tried before the Honorable George H. Brown, Division 6. The judgment of the Court was that Plaintiff sustained a forty-five (45%) percent permanent disability to the body as a whole totaling $41,463.80, twenty-one weeks and two days (21.2) of temporary total disability totaling $4,895.29, past medical expenses in the amount of $1,329.00. (R. Vol. 1, 16-19).

4. Notice of appeal was filed by the Defendants on March 14, 1996. (R. Vol. 1, 20). On April 15, 1996, in order to stay execution of the judgment pending appeal, Defendant paid $15,000.00 over to the Plaintiff. (R. Vol. 1, 23, 24).

STATEMENT OF FACTS

Plaintiff, Deborah Lois Tuggle, was born December 2, 1953 (R. Vol.2, pages 11,12). Plaintiff, at the time of the injury was 40 years. She completed her high school education and some college schooling at Shelby State. She obtained a nursing assistant certification from Rice College in 1984. On or about January 15, 1985, she became employed with Oakville Health Care Center, a facility under the control of Shelby County Government, as a certified nursing assistant(R. Vol.2, page 12). Her duties consisted of "total patient care, feeding the patients, washing their faces, bathing them, turning them, drying them, getting them up for PT, transporting them to PT, taking their monthly weight…everything…because they were incompetent to take care of themselves." (R. Vol.2, page 12, 13). Her rate of pay at the time of the injury was $8.66 per hour. (Trial Exhibit 8).

On Saturday, July 31, 1993, Plaintiff was weighing a patient named Richard Hardy. While she had the patient on the scale, " he pulled away…[I] was trying to keep him from falling… that's when I hurt my shoulder, my arm, and my back. And my neck…. "The incident was immediately reported to Murline Alexander. (R. Vol.2, page 13, lines 14-19). An incident report was completed by Murline
Alexander. (R. Vol.2, page 50, lines 1-15; Trial Exhibit 6).

Plaintiff was referred to Eastwood Hospital Emergency Room for treatment. On August 5, 1993, Plaintiff's condition was no better and she was given an appointment to see Dr. Kevin B. Ragsdale.(R. Vol. 2, page 14). Dr. Ragsdale referred her to physical therapy at HealthSouth and prescribed muscle relaxers. He treated her for her back. She complained of numbness in the shoulder and arm area on both upper extremities to Dr. Ragsdale. (R. Vol.2, page 15). She also complained of numbness to the physical therapist at HealthSouth. On August 6, 1993, the evaluation and history taken by the therapist indicates Ms Tuggle complained of "intermittent pain between shoulder blades and lumbar region, constant pain in the right shoulder and radiating pain and numbness [of the] right upper extremity, hand and third digit…[and] occasional numbness of the left extremity." On August 17, 1993, she complained that her "arms felt heavy." On

September 2, 1993, she reported "decreased sensation on the right upper extremity." On September 9, 1993, Ms Tuggle complained of numbness in the right shoulder , arm…pain in shoulder and arm…." On September, 14, 1993, she reported "numbness in the right shoulder arm and left extremity….pain [in the] right shoulder and upper extremity." (R. Vol.2, page 15, lines 8-19 through page 16 lines 1-4 ; Trial Exhibit 1).

On or about September 8, 1993, Defendant directed Plaintiff see Dr. Harriman for a second opinion and required this second opinion as a condition of continuing On-the-Job Injury (OJI) compensation.(R. Vol.2, page 17, lines 10-25, page 18, lines 1-10; Trial Exhibit 2). The reason she was changed to doctor Harriman was because Ms Savage felt Ms Tuggle was not progressing the way she should have been, and she wanted another doctor to look and see if there was something different that could be done so she could progress better. (R. Vol.2, page 82, lines 21-25; page 83, lines 1-4). Plaintiff was examined by Dr. Harriman on September 14, 1993. (Harriman Depo., page 7). Dr. Harriman found very little wrong with the Plaintiff although she complained of numbness to him. He requested a MRI examination. (Harriman Depo., page 8). The MRI revealed no significant abnormality and on September 27, 1993, Dr. Harriman recommended the Plaintiff return to work. (Harriman Depo., page 9).

Plaintiff returned to work on September 27, 1993, and in the process of turning a patient, she began to experience pain in the arm, back and neck which she reported to Murline Alexander, nurse, and Mary Andrews, assistant supervisor of nursing. (R. Vol. 2, page 19). Plaintiff proceeded to report to Eastwood hospital and was advised that the Employer refused to pay for medical treatment and as a result the hospital declined to treat Plaintiff. (R. Vol. 2, page 20). Payment for the emergency room visit made by Plaintiff to Eastwood Hospital on September 27, 1993 was refused because there was no incident report on file with Ms Simpson.(R. Vol.2, page 72, lines 20-25; page 73, lines 1-6).

On September 28, 1993, Plaintiff presented to The Med complaining of problems with her back, neck, shoulder and numbness in the arms. Plaintiff was advised to return for re-evaluation before returning to work (R. Vol. 2, pages 21, 22; Trial Exhibit 3). Plaintiff returned to The Med for a neurology consult with Dr. Iqbal on October 25,1993.

The chief complaint was numbness in the arms, back problems, neck pain. She was advised to be evaluated before returning to work. Subsequently, the Plaintiff advised Francis Simpson of her limited ability and gave her a copy of the doctor's certificate. Francis Simpson advised Plaintiff that while she had a position for her, she had to bring a statement from The Med stating what was wrong with her.(R. Vol. 2, page 23,24; Trial Exhibit 3).

Plaintiff was re-evaluated by Dr. Iqbal on October 25, 1993, November 1, 1993, and November 15, 1993. On October 25, 1993, she was advised to avoid heavy work, like lifting until the cause of her weakness was determined. Diagnostic tests, including and EMG, were conducted on November 23, 1993 revealing a bilateral carpal tunnel disorder. On December 6, 1993 Dr. Iqbal sent her to physical therapy, and recommended exercises to prevent muscle atrophy. Plaintiff was seen at The Med on December 7, 1993, December 10, 1993, December 13, 1993, December 28, 1993, and April 18, 1994. (R. Vol. 2, pages 24, 25; Trial Exhibit 3).

On November 17, 1993, plaintiff wrote Ms Simpson advising that her carpal tunnel condition was related to the July 31, 1993 incident and that she would take a leave of absence as Ms Simpson had suggested in a prior conversation with Ms Tuggle. Ms Simpson did not seek to provide her additional medical treatment once she was advised of the carpal tunnel. (R. Vol. 2, page 75, lines 22-25; page 76, lines 1-4).

On December 10, 1993, Ms Tuggle advised Ms Simpson's office to contact her doctor to find out information regarding her situation. (R. Vol. 2, page 76, lines 17-21; Trial Exhibit 9).

On January 28, 1994, at the request of Shelby County Risk Management, Dr. Harriman made another examination of Ms Tuggle to evaluate the carpal tunnel and back issues. (Harriman Depo., page 10; R. Vol. 2, page 83, lines 9-14).). After examination, Dr. Harriman didn't feel that there was anything going on with Ms Tuggle's neck or shoulder. He didn't specifically examine her for carpal tunnel. (Harriman Depo., page 11, lines 14-19).

Plaintiff was paid temporary total disability compensation from July 31, 1993 through September 15, 1993. On March 18, 1994, Ms Tuggle returned to work

performing a “light duty” job, but it was the same work duties as she had been doing for the last nine years (R. Vol. 2, page 27, lines 5-8; 16-25). She was paid $6.72 per hour until on November 18, 1994, when she was involuntarily put on medical leave without pay by the employer because she was unable to perform a full load of work (R. Vol. 2, page 28, lines 4-20; page 39, lines 23-25; Exhibit 9). Plaintiff was terminated in July, 1995. (R. Vol. 2, page 28, lines 24-25).

On March 8, 1994, Ms Simpson wrote Plaintiff indicating a light duty position was available. (R. Vol. 2, page 62, lines 15-24, Trial Exhibit 9). Ms Simpson did not investigate the carpal tunnel (R. Vol. 2, page 68, lines 10-15; Trial Exhibit 9; page 78 lines 17-22). Plaintiff worked from March 18, 1994 through November 18, 1994. (R. Vol. 2, page 62). On several occasions Ms Tuggle sought assistance from Ms Simpson to clearly define what she could and couldn’t do.(R. Vol. 2, page 70, lines 1-8). The light duty Ms Tuggle performed involved the same duties she performed as a certified nursing assistant, handling up to 12 patients. (R. Vol. 2, page 86, lines 20-25; page 87, lines 1-4).

On June 3, 1994, Plaintiff sought the assistance of Rommel Childress, M.D., for a second opinion. (R. Vol. 2, page 27, lines 1-4; Childress Depo., page 6, line 13). Her chief complaint at the time was neck pain, back pain, and bilateral wrist and hand pain. She gave him a history of the July 31, 1993 injury. No prior problems of this nature were revealed. Plaintiff gradually developed increasing pain and discomfort in her wrist and hands. The EMG nerve conduction study performed by The Med indicated carpal tunnel syndrome on the right and left (Childress Depo., page 6, lines 17-25; page 7, lines 1-2).

The clinical diagnosis revealed mild cervical spasm with rotation to about 30 degrees to either side, lateral bending to 5 degrees, lumbar mobility with forward flexion to 85 degrees with mild spasm of the lumbar spine, percussion or tapping over the median nerve bilaterally caused some tingling sensation of the hand. The examination showed that acute flexion of the wrist caused some discomfort in the hands with tingling particularly on the right. (Childress Depo., page 7, lines 9-22).

Dr. Childress’ impression was that she had a history of acute cervical and lumbar spine strain and a carpal tunnel syndrome with aggravation due to work activities. On

June 23, 1994, Dr. Childress reports that Plaintiff continued to have arm, neck and lower back difficulty along with numbness in both hands (Childress Depo., page 8, lines 17-25). She had lower back pain with decreased mobility in forward flexion less than 60 degrees. (Childress Depo., page 9, lines 2-4) On August 8, 1994, Dr. Childress reports that Ms Tuggle missed work on August 7, 1994 due to increased pain in the back and wrist. She was returned to work on August 9, 1994. (Childress Depo., page 9 lines 15-25). Dr. Childress felt that a carpal tunnel release surgery may be indicated. (Childress Depo., page 10, lines 1-2).

On the August 29, 1994, doctor visit, Ms Tuggle reported missing work on Friday and Saturday due to increased pain and difficulty with her arms, neck, and back, all attributable to increased work activities such as assisting patients in and out of whirlpool baths. (Childress Depo., page 10, lines 3-20). Upon examination she had spasm in the cervical and lumbar spine and she was continued on light duty. (Childress Depo., page 11, lines 1-2).

On September 9, 1994, her back discomfort continued with increased numbness and tingling in the hand which was aggravated by work activity. Dr. Childress' exam revealed median nerve symptoms with acute flexion of the wrist and with tapping over the median nerve at the wrist. (Childress Depo., page 11 lines 9-11).

At the next visit, November 4, 1994, Ms Tuggle continued to have the symptoms described above. (Childress Depo., page 12, lines 10-25).

Dr. Childress' diagnosis was acute and chronic cervical and lumbar spine strain with carpal tunnel syndrome and aggravation of carpal tunnel syndrome and her back and neck difficulties from work-related activities. (Childress Depo., page 13, lines 22-25; page 14, line 1). He opines that the injury was caused by the July 31, 1993 incident and aggravated by the continued activities at work which continued to put a strain on her extremities, back and spine (Childress Depo., page 14, lines 2-13). The carpal tunnel developed gradually with increasing pain and discomfort in her wrist and hands following her injury. (Childress Depo., page 24, lines 12-18). She was temporarily totally disabled on the several occasions she missed work. (Childress Depo., page 14, lines 14-24). A permanent impairment rating of seven (7%) percent to the body as a

whole related to her neck and back was assigned. A ten (10%) percent impairment rating to the body as a whole was assigned to the carpal tunnel syndrome. The combined rating equates to a sixteen (16%) percent impairment rating to the body as a whole. (Childress Depo., page 15, lines 8-25).

Regarding future medical requirements, Dr. Childress' opinion is that there is a requirement to have further treatment. Ms Tuggle reached maximum medical improvement upon the last office visit, or November 4, 1994. (Childress Depo., page 16, lines 1-24). He further thought that she should have a sedentary job which did not require excessive strain on her back or wrists. (Childress Depo., page 17, lines 5-21).

Dr. Childress' bill for reasonable and necessary services rendered amounts to $1,054.88. (Childress Depo., page 18, lines 1-7; Exhibit 2 to Depo.; Childress Depo., Vol.7., pages 5- 6). The radiological bill of Albert Morris, M.D., amounting to $ 275.00 was considered reasonable, necessary and in line with what local providers charge for similar services. (Childress Depo., Vol.7, page 6). The bill and services of The Med and UT Medical Group rendered on September 29, 1993, November 1, 1993, November 23, 1993 and December 28, 1993, amounting to $1,329.00 were considered reasonable, necessary and in line with what local providers charge for similar services. (Childress Depo., Vol.7, pages 7-10).

Patricia Blurton, Director of Nursing, commencing September, 1994, testified that she worked with plaintiff for two and half months, and there were periods Ms Tuggle was absent due to illness. On November 18, 1994, Ms Tuggle advised her that she was unable to care for more than three or four patients under her classification as health aide, the light duty position. (R. Vol. 2, page 55, lines 11-25; page 56, lines 1-3). Plaintiff was offered a leave of absence. (R. Vol. 2, page 57, lines 13-18). Dr. Childress provided a statement as to what type of work Ms Tuggle could tolerate. The statement was given to Ms Blurton who, in turn, gave it to Frances Simpson, Director of Personnel. Ms Blurton did not attempt to provide medical care for the Plaintiff (R. Vol. 2, page 58, lines 6-23). According to the testimony of Ms Simpson, an injured employee, such as Ms Tuggle, may chose the doctor they want to go to. (R. Vol. 2, page 6, lines 3-11; page 8, lines 11-13). Ms Simpson was aware that Ms Tuggle was being treated for carpal tunnel

syndrome at The Med. (R. Vol. 2, page 61, lines 21-25; page 62, lines 1-11; page 74, lines 17-23). Ms Simpson first knew that Ms Tuggle's carpal tunnel was related to the July 31, 1993 incident when she read a note from Dr. Harriman where she had been sent to him after seeing Dr. Ragsdale and she was complaining of carpal tunnel. (R. Vol. 2, page 75, lines 13-20).

Dr. Harriman saw her again on February 10, 1995, at the request of Shelby County. (Harriman Depo., page 12, line 2). His examination was limited to the upper extremities which had not changed much. (Harriman Depo., page 12, lines 17-18). He found that there were few, if any, physical examination findings consistent with carpal tunnel. He did not review any test performed by The Med or Dr. Childress. (Harriman Depo., page 13, lines 19-25). He could not make a diagnosis. (Harriman Depo., page 14, line s 1-2). He did not order her records because he was not asked to see her for carpal tunnel. (Harriman Depo., page 15, lines 5- 11). Dr. Harriman admits that an EMG and /or nerve conduction study would pinpoint a carpal tunnel disorder. (Harriman Depo., page 17, lines 7-17).

Ms Tuggle was terminated on July 25, 1995. (R. Vol. 2, page 28, lines 24-25; page 29, lines 1-2).

On November 28, 1995, at the request of the Shelby County, Ms Tuggle submitted to an independent medical examination with Joseph C. Boals, M.D. The history taken by him indicates a work incident on July 31, 1993, causing injury to the wrist and hands, back and right shoulder. She was treated by Dr. Ragsdale initially. Although there was some improvement, her arms became worse with increased tingling. (Boals Depo., pages 6-7). Examination by Dr. Boals was limited to the neck, right shoulder, both upper extremities, low back and right lower extremity. Both upper extremities showed a positive Phalen's test bilaterally and a negative Tinel's confirming the carpal tunnel syndrome. (Boals Depo., page 10, lines 4 -18). Exam of the low back indicated mild restriction of motion in flexion extension. (Boals Depo., page 10, lines 18-23). Dr. Boals made three diagnoses: 1. Acute cervical and lumbar strain, remote healed with ongoing pain syndrome; 2. Shoulder contusion, old, healed; 3. Bilateral carpal tunnel syndrome. (Boals Depo., page 11, lines 5-11).

An impairment rating of 10 percent was assigned to both upper extremities. (Boals Depo., page 12, lines 21-24). There was no history indicating a preexisting carpal tunnel problem. (Boals Depo., page 21, lines 16-21). Converted to the body as a whole, the impairment ratings to the upper extremities equals twelve (12%) percent. (Boals Depo., page 22, lines 10-15).

Dr. Boals was further of the opinion that Ms Tuggle should have the carpal release surgery. (Boals Depo., page 15, lines 4-9). His opinion regarding future medical treatment is that Ms Tuggle may need surgery, post-operative care, and therapy. (Boals Depo., page 22, lines 16-25; page 23, lines 1-2).

Plaintiff was evaluated by Gregory Cates, a vocational expert, to determine the extent of Ms Tuggle's vocational loss. He is of the opinion that her previous work was medium semiskilled. Based on Dr. Childress' opinion that she should do light work and ideally sedentary work, Dr. Cates opined her loss of vocational potential is approximately thirty-five (35%) percent. (Cates Depo., page 13, lines 3- 13).

Dr. Cates' bill totals $700.00 for the evaluation and the deposition fee. (Cates Depo., page 15).

The trial court rendered a judgment for the Plaintiff and made the following findings of fact and conclusions of law:

1. Plaintiff, Deborah Tuggle, is an adult resident citizen of Shelby County, Tennessee. Plaintiff is a 40 year old female with a high school education. Plaintiff is a certified nursing assistant and has been in the employ of Defendant since 1984. Plaintiff has no other marketable job skill. Her rate of pay at the time of the injury was $8.66 per hour.

2. Shelby County Government is a political subdivision of the state of Tennessee. Defendant Shelby County Government operates Oakville Health Care Center, a nursing facility for handicapped and incompetent patients located in Shelby County, Tennessee.

3. On July 31, 1993, while performing her duties in the course and scope her job as a certified nursing assistant at Oakville Health Care Center, Deborah Tuggle, Plaintiff, sustained an injury to her back, neck,

and arms. The Plaintiff was injured while attempting to put a patient on the scales to be weighed. The injury was reported to the employer immediately. The Plaintiff complained of neck and back injuries, but did not complain of any arm or wrist problems immediately. The Plaintiff is not a skilled health care provider and as such a lay person in the field of medicine made the complaints known to her employer regarding her condition.

3. Plaintiff was initially treated at Eastwood Hospital. She was subsequently seen by Dr. Ragsdale, an orthopedic surgeon, who referred her to HealthSouth for physical therapy. Plaintiff made various complaints regarding pain and numbness. On or about September 9, 1993, Defendant required the Plaintiff to see Dr. Harriman who ultimately released the Plaintiff to return to work on September 27, 1993.

4. On September 27, 1993, Plaintiff returned to work and attempted to perform her duties, but was unable to do so because of severe pain. After reporting the pain to her supervisor, Plaintiff reported to Eastwood Hospital for treatment. Treatment was denied because it had not been approved by the Defendant.

5. On September 28, 1993, Plaintiff presented to The Regional Medical Center complaining of pain in the neck and back and numbness in the arm. Plaintiff was treated by the physicians at The Regional Medical Center until April 18, 1994. She was diagnosed with Carpal Tunnel Syndrome, bilaterally. A working diagnosis for her back problem was not developed.

6. Plaintiff made various attempts to have the Defendant provide her with medical care. Plaintiff was unable to perform the duties of her normal job and with the consent and upon the advice of her physician, requested light duty. Defendant provided Plaintiff with a light duty job on March 14, 1994 at the rate of $5.00 per hour.

7. On or about April 18, 1994, Plaintiff was advised that surgery was required to alleviate her syndrome, but that the Regional Medical Center could not perform the surgery because it was a workers' compensation matter.

8. On June 03, 1994, Plaintiff sought a second opinion and treatment from Rommel Childress, M.D. Dr. Childress opined that the July 31, 1993 event have triggered the Carpal Tunnel Syndrome. Dr. Childress opined further that Plaintiff sustained a permanent impairment as a result of the July 31, 1993 injuries. His diagnosis was that she had Acute Cervical Strain and Lumbar Strain and bilateral carpal tunnel syndrome with some aggravation with work activities. He assigned a combined physical impairment rating of sixteen (16%) percent to the body as a whole. Dr. Childress is also of the opinion that Plaintiff will require surgery to treat her condition. The treatment rendered by Dr. Childress was reasonable and necessary for the type of condition suffered by Plaintiff. The cost of Dr. Childress' treatment was a total of $1,054.00 which is line with what other physicians in the local area charge. The interpretation of a CT scan by Dr. Albert Morris was reasonable and necessary. The cost of the radiology bill of $275.00 from Dr. Albert Morris for interpreting the CT scan performed by Dr. Childress is also in line with the charges of local physicians in the area. Plaintiff continues under Dr. Childress' care.

9. Plaintiff had difficulty performing the light duty tasks and was ultimately given a medical leave without pay on November 18, 1994. She was terminated on July 25, 1995.

10. Joseph Boals, M.D. , at the request of both parties, conducted an independent medical examination on the Plaintiff. He opined that she did have carpal tunnel syndrome bilaterally, acute cervical and lumbar strain with ongoing pain syndrome, and shoulder contusion. He was of the opinion that she would need surgery to relieve her carpal tunnel syndrome.

Rating only the carpal tunnel injury, he provided a physical impairment rating of twelve (12) percent to the body as a whole for Plaintiff.

11. Mark Harriman, M.D., opined that there was not much going on with Plaintiff.

12. Plaintiff was evaluated by C. Gregory Cates, Ed.D, a vocational expert, who after interviewing Plaintiff, considering her education, work experience and medical records, opined that Plaintiff sustained a thirty-five(35%) percent loss of vocational opportunity in the labor market.

13. At the time of the injury, Plaintiff's average weekly wage was $230.91.

14. The Plaintiff has outstanding medical bills from Rommel Childress in the amount of $1,054.00, Albert Morris in the amount of $275.00 which were incurred after January 1994 and of which the Defendant had notice. Also outstanding are the bills of the Regional Medical Center in the amount of $595.00 and University of Tennessee Medical Group in the amount of $ 795.00 which were incurred prior to January, 1994, without notice to the employer.

15. Defendant paid Plaintiff temporary total disability from July 31, 1993 to September 26, 1993.

16. On July 31, 1993, Plaintiff sustained an accidental injury while performing duties in the course and scope of her employment with Shelby County Government. Carpal Tunnel Syndrome is an ailment which does not immediately manifest .

17. The treatment provided by The Regional Medical Center, Rommel Childress, and Albert Morris was reasonable and necessary and the charges for such services were in line with what other local providers charge for similar services.

18. The injury has caused Plaintiff to have a permanent partial disability of forty-five (45%) percent to the body as a whole which equals 180 weeks of compensation payments or $41,463.80 which shall be paid

to the plaintiff in a lump sum within thirty days from the date of entry of this judgment.

19. Plaintiff was temporarily, totally disabled from September 27, 1993 through March 14, 1994 and should be compensated for 21.2 weeks or $4,895.29 which is immediately due and payable, including interest on the accrued amount at the statutory rate for each day beyond the date of the entry of this judgment.

20. Plaintiff is likely to incur future medical expense for the treatment of her injuries. Defendant shall be responsible for and shall pay all future medical expenses reasonably incurred by Plaintiff which are necessary as a result of said workers compensation injuries.

21. Plaintiff's attorney, JoeDae L. Jenkins, is entitled to attorneys fees in the amount of 20% of the permanent partial disability award and the temporary total disability award in the total amount of $9,271.81.

22. Defendant shall pay all medical expenses incurred by the Plaintiff after January 1, 1994, for a total of $1,329.00; said expenses shall be paid within 30 days from the date of entry of this judgment.

(R. Vol., pages 16-19).

STANDARD OF REVIEW

The standard of review is de novo with a presumption of correctness of the finding of fact, unless the preponderance of the evidence is otherwise. Tennessee Code Annotated, Section 50-6-225(3)(2). The trial court's award of workers' compensation must be affirmed unless the evidence preponderates against the ruling of the trial court. White v. Werthan Industries, 824 S.W. 2d 158 (Tenn. 1992).

ARUGUMENT

The Appellant does not challenge that the Plaintiff sustained a compensable injury on July 31, 1993 and that Defendant was given notice of the injury. Defendant has merely taken the position that the carpal tunnel syndrome is not related and that no impairment or disability should be assigned to any other injuries Plaintiff sustained on July 31, 1993. Appellant's argument is without merit, devoid of factual support which would support even a colorable claim, and this appeal is therefore frivolous.

A. CARPAL TUNNEL SYNDROME

The employer's first report of injury, dated August 2, 1993, evidences that Ms Tuggle was injured on July 1, 1993.

Her carpal tunnel disorder symptoms began to appear over the next 30 thirty days and continued. At trial Ms Tuggle testified, without contradiction, that she complained of numbness in the shoulder and arm area on both upper extremities to Dr. Ragsdale and to her Physical Therapist. (R. Vol. 2, page 15). The notes of the physical therapist provide additional evidentiary support of these complaints. They indicate she complained of numbness as follows: 1) on August 6, 1993, the evaluation and history indicates she complained of constant pain in right shoulder, radiating pain and numbness of the right upper extremity, hand and third digit and occasional numbness of the left extremity; 2) on August 18, 1993, she complained that her "arms felt heavy"; 3) she reported decreased sensation on the right upper extremity on September 2, 1993; and 4) on September 9, 1993 and September, 14, 1993 she complained of numbness. (R. Vol. 2, page 15, lines 8-19 through page 16 lines 1-4 ; Trial Exhibit 1). These notes and reports are forwarded to the attending physicians and are, ordinarily, a part of the medical file.

Dr. Childress, Ms Tuggle's treating physician, concurred with the carpal tunnel diagnosis made at The Med and elaborated as to how it quite probably manifested.

Dr. Boals concurred with the carpal tunnel diagnosis, although he was uncertain about its etiology. He did state, as Appellant has cited, that" Well, one would think that if the trauma caused it, there would be complaints made of some type of pain in the wrist. And then, those complaints would continue until the time that diagnosis was made, so if that is documented, then one would say, yes, the accident caused it…For example…those symptoms and numbness come on within three or four weeks…and then, you have a very

persistent amount of symptoms…." (Depo Dr. Boals, page 17, lines 24-25; page 18, lines 1-16).[1] The notes of the therapist fits this description for determination of etiology precisely. The inescapable conclusion according to two experts who actually diagnosed the carpal tunnel syndrome is that the carpal tunnel injury was caused by the July 31, 1993, incident.

Appellant relies heavily on the testimony of Dr. Harriman who repeatedly failed to diagnose Ms Tuggle's carpal tunnel problem. He failed to diagnose the ailment in September, 1993, notwithstanding the existence of classic symptoms for carpal tunnel disorder which were documented in the physical therapist notes. He was requested to evaluate her carpal tunnel disorder in January, 1994, and failed to make the diagnosis even with knowledge that an EMG had already confirmed the diagnosis. In fact, Dr. Harriman's testimony is that he didn't specifically examine her for carpal tunnel. (Harriman Depo., page 11, lines 14-19). Then, upon a third request for his examination and opinion on February 10, 1995, he limited his examination to the upper extremities. (Harriman Depo., page 12, lines 17-18). He found few, if any, physical examination findings consistent with carpal tunnel. He had not reviewed the EMG test results performed by The Med. (Harriman Depo., page 13, lines 19-25). Simply put, he could not make a diagnosis. (Harriman Depo., page 14, lines 1-2). He did not order her records because he was not asked to see her for carpal tunnel. (Harriman Depo., page 15, lines 5-11). Dr. Harriman admits that an EMG and /or nerve conduction study would pinpoint a carpal tunnel disorder. (Harriman Depo., page 17, lines 7-17).

The Appellee maintains that causation is clear in this case, there being no trustworthy evidence to contradict the opinion of Dr. Childress. This Court has steadfastly stated that any causal connection may be sufficient and any reasonable doubt as to whether an injury was one arising out of the employment relationship is to be resolved in favor of the employee. White v. Werthan Industries, 824 S.W.2d 158 (Tenn. 1992). No doubt has been raised in this case. Additionally, the trial judge may, when there is a difference of opinion between experts, accept the opinion of one or more experts over the opinions of another or others, Johnson v. Midwesco, 801 S.W.2d 804

[1] The HealthSouth physical therapist notes and reports were not provided to Dr. Boals for his evaluation.

(Tenn. 1990). Moreover, medical evidence must be considered in conjunction with the testimony of the employee and other lay witnesses. Thomas v. Aetna Life Insurance Company , 812 S.W. 2d 278 (Tenn. 1991).

The findings of the trial judge are more than supported by a preponderance of the evidence and should not be disturbed.

Appellant's argument is without merit, devoid of factual support which would support even a colorable claim, and this appeal is therefore frivolous.

B. NECK AND BACK INJURY

The Appellant concedes that Ms Tuggle complained of pain in her back and shoulder area. Appellant argues that Dr. Harriman, nor Dr. Boals, found any permanent impairment. Dr. Harriman's opinion, at least in this case, can hardly be regarding as being a reliable source upon which to base the Court's judgment.

Dr. Boals' made three diagnoses and the carpal tunnel disorder has been discussed above. His first diagnosis relates to the cervical and lumbar area which he opined was healed but had an ongoing pain syndrome. His second diagnosis was a suspected shoulder contusion, old, healed with no objective findings. Based upon a one time visit, understandably, Dr. Boals was hesitant to declare complaints amounting to chronic back and shoulder problems as being associated with any permanent impairment. He simply had not followed her for a sufficient amount of time as would be required for him to rendered an opinion on her back and neck. The trial judge, sitting in review of all the facts and differing opinions, had much more information to rely upon. The trial judge had Ms Tuggle's corroborated testimony of consistent and persistent complaints regarding her back which continues through the present. The records of The Med were available to the judge, documenting her back and neck problems. Additionally, there is the opinion of Dr. Childress who treated Ms Tuggle over a period of six months, noting the complaints[2] she made and the fact that she had no previous problem of neck and back pains. Dr. Childress felt that Plaintiff had sustained a permanent impairment rating of

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[2] According to Dr. Childress, there were both subjective complaints and objective clinical findings upon which he relied to form his opinion. See pages 7, 8, 9, 10, 11, 12, 13, 37 of Dr. Childress' deposition.

seven (7%) percent to the body as a whole as a result of the back, neck and shoulder problems. This opinion is permissible under the *American Medical Association, Guides to the Evaluation of Permanent Impairment, Fourth Edition (AMA Guide)*, when there is a documented injury associated with spasm with a requirement for medication, loss of work time, the physician follows the patient for at least six months, objective[3] symptoms, complaints of pain and there is a pain syndrome.[4] (Childress Depo, page 38, lines 3-18). The Appellant cites Erwin v. Memphis Publishing Co., Workers Compensation Appeals Panel, June 18, 1996, as authority to challenge Dr. Childress' opinion.

This case is of little value to analyzing the case sub judice. It stands for the proposition that the appeals tribunal has the duty of conducting an independent examination of the record to determine where the preponderance of the evidence lies. In Erwin, the panel exercised it duty and disagreed with the trial judge.

We are not here privy to the deposition of Dr. Childress in Erwin. In the instant case, it was incumbent upon the Appellant to ask the pertinent and specific questions of Dr. Childress to impeach his credibility regarding the impairment rating. The Appellant during Dr. Childress' deposition need only have asked to be shown the references he relied upon. The Appellant did not do so. Instead, there were a series of questions, more or less, inquiring as to whether the opinions were based on the guidelines. To each query the Appellant received an affirmative answer. No specific question, designed to locate a reference in the *AMA Guide* or to otherwise indicate the absence of a support reference for the proffered opinion, was asked by Appellant. (Childress Depo., pages 38-41).

In making an assessment of disability the trial judge should look to lay witnesses, as well a medical testimony. Thomas v. Aetna Life Insurance Company, 812 S.W. 2d 278 (Tenn. 1991). The judge may select from among the differing opinions of experts that are

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[3] Id.

[4] *American Medical Association*, *Guides to the Evaluation of Permanent Impairment, Fourth Edition*, Chapter 3.

available. Johnson v. Midwesco, 801 S.W.2d 804 (Tenn. 1990). The greater weight of the evidence suggests that the findings of the trial judge were correct and therefore should be allowed to stand.

Appellant's argument is without merit, devoid of factual support which would support even a colorable claim, and this appeal is therefore frivolous.

C. DISABILITY AWARD IS NOT EXCESSIVE

None of the factors cited by the Appellant to reduce the award of the trial judge are bona fide.

The Appellant seeks to utilize Ms Tuggle's efforts to re-train and re-enter the job market as a basis for reducing the award of forty-five (45%) percent disability. Because such a reduction is a penalty and inconsistent with the public policy to encourage rehabilitation, the evidence of Ms Tuggle's re-training for another job cannot be used to reduce the benefits awarded by the trial judge. Harlan v. McClellan, 572 S.W. 2d 641 (Tenn. 1978).

Dr. Childress makes it plain that Ms Tuggle should have employment that doesn't aggravate her problems and that sedentary work is ideal for her and that retraining is the best course of action. (Childress Depo., page 17, lines 5-21). Certainly this opinion is a limitation on physical restriction and is inconsistent with the duties of a nurse's assistant. See Horton v. Lasco, 1996 Tenn. Lexis 175 (Tenn. 1996).

The Appellant also suggests that the trial judge, in making an award of permanent disability, is limited to the opinion of the vocational expert. To the contrary, the trial judge is not bound by the opinions of the vocational expert. Holder v. Wilson Sporting Goods Co., 723 S.W. 2d 104 (Tenn. 1987).

Additionally, the statute provides that permanent disability shall be a product of the impairment rating and a statutory multiplier. In the event that the employee is no longer
working with the employer whose employment caused the injury, the multiplier can be as high as six (6). Tennessee Code Annotated, Section 50-6-241.

The award made by the trial judge is well within the judge's discretion and is well supported by the evidence adduced at trial. Appellant's argument is without merit, devoid of factual support which would support even a colorable claim, and this appeal is therefore frivolous.

CONCLUSION

The overwhelming weight of the evidence supports the judgment of the trial court. There is no issue on appeal which reaches even a colorable claim. The judgment of the trial court should, therefore, be affirmed. Appellee requests this Court affirm the judgment below taxing interest according to law, together with costs of this appeal assessed to the Appellant. The Appellee further requests that the Court award expenses and attorney fees incurred for the defense of this frivolous appeal.

Respectfully Submitted,

____

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Certificate of Service

I, JoeDae L. Jenkins, hereby certify that a copy of the Brief of Appellee, Deborah Tuggle, has been served upon Carroll C. Johnson, Counsel for Defendants/Appellants, 1698 Monroe Avenue, Memphis, TN 38018, by placing a copy in the United State mail, postage prepaid, this _____ day of ______, 1996.

____

JoeDae L. Jenkins

IN THE COURT OF APPEALS OF TENNESSEE,
WESTERN SECTION, AT JACKSON

BOB PATTERSON, TRUSTEE OF SHELBY COUNTY, TENNESSEE,	)	
Petitioner/Appellee,	)	
vs.	)	No. W2005-02494-COA-R3-CV
A C WHARTON, JR., MAYOR OF SHELBY COUNTY, TENNESSEE,	)	
Respondent/Appellant.	)	

BRIEF OF APPELLEE

Appealed from the Chancery Court Of Tennessee
For The Thirtieth Judicial District At Memphis

The Honorable Walter L. Evans, Chancellor

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STATEMENT OF THE ISSUE

Whether the trial court erred in setting a reasonable rate of compensation for attorney fees for the prosecution of a petition brought pursuant to Tennessee Code Annotated §8-20-101(c)?

STATEMENT OF THE CASE

Pursuant to Tennessee Code Annotated §8-20-101(c), Appellee, the Shelby County Trustee (hereinafter Petitioner) filed a petition against Respondent, the Shelby County Mayor (hereinafter Respondent) seeking authority to employ additional deputies and assistants to conduct the office of the Shelby County Trustee. Petitioner and the Respondent entered into a consent order on the petition to employ additional deputies and assistants. Thereafter, Petitioner petitioned the Court for an award of attorney fees calculated upon the rate of $250 per hour.

Respondent objected as to the rate per hour only, citing a Shelby County Board of Commissioners resolution which limits the rate of compensation paid to attorneys for the filing and arguing of salary petitions to $100 per hour.

The trial court opined it did not have the authority to exceed the rate set by the board of commissioners and, thus, awarded attorney fees based upon a rate of $100 per hour.

The Petitioner then filed a Motion to Modify The Previous Order Of The Court requesting the court to invoke its authority to set a reasonable rate of compensation at $250 per hour.

Based upon the Petitioner's affidavits, the trial court granted the motion and established a reasonable rate of $250 per hour.

The Respondent appealed from the trial court's decision regarding the rate per hour.

STATEMENT OF THE FACTS

1. On August 17, 2003, the Shelby County Board of Commissioners passed the Shelby County Budget for fiscal year 2003-2004. (Record Volume 1, Page 31).

2. Appended to the fiscal year 2003-2004 budget were various resolutions, including the following:

> ...
> That each office, department, and Elected Official which receives appropriations from the County Government shall adhere to the budget as finally approved by line item from said entity.[1]
>
> ...
> The rate of compensation paid to attorneys for the filing or arguing of salary petitions by limited to $100 per hour. In the event of a salary petition the elected official shall submit a monthly report of legal fees incurred to the Chairman of the Budget Committee of this Commission.[2]
> ...

[1] Seemingly, this statement was meant for those offices, departments, and elected officials who were in agreement with the budget. It also assumes that no petition is filed pursuant to Tennessee Code Annotated §8-20-101.
[2] No minutes or records exist to support the resolution. See Affidavit of JoeDae L. Jenkins Regarding Resolution Submitted By Respondent. (Record Volume 3, Page 4).

(Record Volume 1, Page 30).

3. After approval of the budget, the Petitioner requested a letter of agreement with the Respondent, but received no response. (Record Volume 3, Page 2, ¶6).

4. On September 16, 2003, pursuant to Tennessee Code Annotated §8-20-101(c), the Petitioner filed a petition in the Chancery Court of Tennessee for the Thirtieth Judicial District at Memphis (Shelby County) seeking authority to employ additional deputies and assistants to conduct the office of the Shelby County Trustee for fiscal year 2003-2004. (Record Volume 1, Page 2).

5. On March 21, 2005, the parties entered into a Consent Order Approving Petition To Employ Additional Deputies and Assistants, Make Pay Increases, Make Contribution To Insurance And Pension Plans. (Record Volume 1, Page 16).

6. On March 29, 2005, the Trustee filed a Motion for Permission to Pay Attorney Fees,[3] (Record Volume 1, Page 20), together with the Affidavit of JoeDae L. Jenkins, attorney for the Trustee, which included an itemized statement of services rendered and billed at a rate of $250 per hour.[4] (Record Volume 1, Page 22).

[3] The motion was inadvertently styled as an amended motion.
[4] The Affidavit is included in the Record at Page 22. The itemized billing is inexplicably absent.

7. On April 8, 2005, the Respondent responded that there was no challenge to the number of hours of service rendered by Petitioner's counsel. (Record Volume 1, Page 25, ¶3). However, Respondent objected to the rate per hour upon which the fee was calculated. Respondent asserted the rate should be $100 per hour as stated in the resolution appended to the Shelby County Budget. (Record Volume 1, Page 24, ¶ 2; Pages 27, 30).

8. On April 15, 2005, the trial court, relying upon the resolution submitted by the Respondent, opined it did not have the authority to exceed the rate of compensation other than as stated in the Resolution and entered its Order On Attorney's Fees setting the rate of compensation at $100 per hour. (Record Volume 1, Page 34).

9. On May 13, 2005 the Petitioner filed a Motion To Modify The Previous Order Of The Court Dated April 15, 2005, requesting the court to invoke its authority to set a rate of compensation that is fair and reasonable without regard to the Resolution. (Record Volume 1, Pages 36, 37, ¶ 5).

10. On May 31, 2005, the Respondent filed a reply maintaining that the resolution was the controlling authority which limited the rate of compensation on such attorney fees to no more than $100 per hour. (Record Volume 1, Page 38).

11. On June 30, 2005, Petitioner filed the Affidavit of Bob Patterson Regarding Attorney Fees which states in pertinent part:

> ...
>
> 3. I retained JoeDae L. Jenkins...The agreed upon rate of pay was $250 per hour for services rendered, together with out of pocket expenses...The agreement between JoeDae L. Jenkins and me is still in force.
>
> 4. This Court under docket number 00-1654-01 and No. 01-1906-02, previously entered an order recognizing Mr. Jenkins' billing rate of $250.
>
> 5. The attorney fees incurred for the prosecution of the salary petition for fiscal year 2003-2004 were included in the budget (Fiscal Year 2003-2004) which was presented to, and passed by, the Shelby County Commission...of pay.
>
> 6. The Mayor's office did not sign a letter of agreement.... In order to receive the proper credits for the funds expended in the operation of my office, my only recourse was to pursue the statutory procedure outlined in Tennessee Code Annotated §§8-20-101, et seq.
>
> 7. ...JoeDae L. Jenkins, filed and has successfully prosecuted the salary petition for fiscal year 2003-2004. I consider the time spent absolutely necessary and reasonable. My office benefits from his services and well as the entire county...
>
> 8. ...in as much as the budget was only approved by the County Commission, but rejected by the County Mayor, such a resolution cannot be binding on, and thereby to limiting of, my pursuit to obtain the resources necessary for performing my constitutional duties to the citizens of Shelby County and to the State of Tennessee. Indeed, if this resolution was given its potential, the limiting effect on prosecuting a salary petition will be a very serious and unconstitutional chilling effect on the ability of elected officials to hire additional deputies as authorized by state law.

> 10. I queried other lawyers of similar reputation, experience, skill and ability as Mr. Jenkins regarding whether I could employ them to handle my salary petitions at the rate of $100 per hour. The resounding and consistent response was that they would not handle the salary petition for my office for $100 per hour....

(Record Volume 3, Pages 1-3).

12. On July 5, 2005, upon argument of counsel for the parties, and upon consideration of the Affidavits of JoeDae L. Jenkins and Bob Patterson, the trial court decided to reverse its prior decision. It determined that the court did have jurisdiction to set reasonable fees for the services rendered in the prosecution of salary petitions. (Record Volume 2, Page 23, line 24-25; Page 24, lines 1-6).

13. The trial court specifically considered the agreement between the Petitioner and his attorney for a rate of compensation of $250 per hour. (Record Volume 2, Page 24 lines 15-19).

14. The trial court recognized that the proposed rate of $100 per hour would frustrate the elected official's efforts in bringing salary petitions. (Record Volume 2, Page 17, lines 5-12; Page 19, lines 9-13).

15. The trial court observed that the limitation in the budget was specifically targeted to attorney fees for the

"filing and arguing" of salary petition. (Record Volume 2, Page 22, lines 24-25; Page 23, lines 1-8).

16. The trial court noted that, "One hundred dollars an hour is less than any attorney that I know or heard about recently that's in private practice charging for services rendered." (Record Volume 2, Page 15, lines 4-25).

17. The trial court recognized that it had previously granted fees for JoeDae L. Jenkins at the rate requested. (Record Volume 2, Page 16, lines 7-12; Record Volume 3, Page 1, ¶4).

18. The trial court also found and concluded that the rate of $250 per hour is reasonable. (Record Volume 2, Page 24, lines 14-15).

19. On August 26, 2005, the Court entered its Order Granting Motion To Modify The Previous Order Of The Court Dated April 15, 2005 setting a rate of $250 per hour. (Record Volume 1, Page 62).

20. On September 20, 2005, the parties entered into a consent order correcting the number of hours spent. (Record Volume 1, Page 63).[5]

21. On October 19, 2005, the Respondent appealed to this court. (Record Volume 1, Page 64).

[5] This order has no bearing on the issue before this Court.

LAW AND ARGUMENT

I. Standard of review

The Appellate Court's review of the trial court's findings of fact "shall be de novo upon the record of the trial court, accompanied by a presumption of correctness of the finding, unless the preponderance of the evidence is otherwise." T.R.A.P. 13(d); Dulaney v. McKamey, 856 S.W.2d 144, 146 (Tenn. App. 1992); Bowden v. Ward, 257 S.W.2d 913, 916 (Tenn. 2000); Nash-Putnam v. McCloud, 921 S.W.2d 170, 174 (Tenn. 1996).

II. Argument

The trial court was within its discretion to set a reasonable rate of compensation for an attorney who prosecutes a petition pursuant to Tennessee Code Annotated §8-20-101(c).

A. Attorney's Fees Are Cost To Be Paid Out of The Fees Collected by the Official.

Tennessee Code Annotated §8-20-107 provides,

> The cost of all cases shall be paid out of the fees of the office collected by such officers, and they and each of them shall be allowed a credit for the same in settlement with the county trustee.

In Jenkins v Armstrong, 211 S.W.2d 908(Tenn. 1947), this court considered the authority possessed by the Chancellor in

setting a solicitor's fee who rendered services on behalf of the petitioning elected official seeking to hire additional deputies and assistants.

In considering the issue, this Court noted,

> "The action of the Chancellor in allowing a fee...seems, likewise, to have been well within his authority and discretion...the filing of such petition and the prosecution thereof toward the relief sought...is also, when filed in a proper case, as contemplated by the statutes, for the benefit of the office and its proper administration." Id at 910.

The Jenkins court clarified the issue even more by stating,

> "It is certainly a necessary expense or "cost"; for none could contend that the petitioner could properly file and prosecute toward the relief sought, without the employment of legal assistance." Id.[6]

The Jenkins court unequivocally concluded that such fees and expenses are an "expense" or "cost" of a proper administration of the office.[7] Id.

The statutory scheme[8] anticipates the employment of legal assistance in the prosecution of salary petitions. If indeed, the petition is properly before the Court, it is a benefit to the proper administration of the elected official's office and

[6] Similarly, the Respondent's position to limit the rate of compensation to $100 per hour would render the Petitioner without legal assistance. (Record Volume 3, Page 3, ¶ 10).
[7] Notwithstanding the resolution of the County Judge in Jenkins, Id. at page 909, or the resolution of the Shelby County Commission in the instant case, the Chancery Court has jurisdiction to enter such orders regarding the cost of the case as is necessary.
[8] Tennessee Code Annotated §§8-20-101, et seq.

to the county as a whole. The Chancellor's authority to set a fee is "unquestioned." Id.

The appropriate finding was made that the rate of $250 per hour is reasonable. The Jenkins court concluded the matter by affirming the decree and declaring the Chancellor was well within both the spirit and letter of the law. Id.

The same must be said of the case at bar. The trial court has the jurisdiction to settle disputes between Petitioner, a county elected official, and the County Mayor regarding hiring additional deputies and assistants.[9] Such disputes will invariably involve disagreements regarding attorney fees. This too is within the province of the trial court.

In the instant case the trial court made the following observations and findings which support its ruling. First, the trial court noted that,

> "One hundred dollars an hour is less than any attorney that I know or heard about recently that's in private practice charging for services rendered."

(Record Volume 2, Page 15, lines 4-25).

Moreover, the trial court recognized that it had previously granted fees for Petitioner at the rate requested. (Record Volume 2, Page 16, lines 7-12; Record Volume 3, Page 1, ¶4).

[9] Tennessee Code Annotated §8-20-101(c).

Additionally, the trial court further observed that the proposed rate of $100 per hour would frustrate the elected official's efforts in bringing salary petitions. (Record Volume 2, Page 17, lines 5-12; Page 19, lines 9-13).[10]

The trial court inquired as to the rational basis for the limitation on attorney fees and the specific targeting of the "filing and arguing" of salary petitions, but did not receive a satisfactory response from Respondent.(Record Volume 2, Page 22, lines 24-25, Page 23, lines 1-8).

The trial court also considered the agreement between the Petitioner and his attorney agreeing to a rate of compensation at $250 per hour (Record Volume 2, Page 24, lines 15-19).

After due consideration of the Affidavit of Bob Patterson, Shelby County Trustee, Regarding Attorney Fees, the Affidavit of JoeDae L. Jenkins Regarding Resolution Submitted By Respondent, and the Arguments Of Counsel, the court found that the rate of $250 per hour was reasonable.[11](Record Volume 2, Page 24, lines 14-15). These are appropriate matters for the Chancellor to consider in setting the amount of the fee.

The case at bar is on square with Jenkins, Id. The parties occupy the same relative positions. The issues arise out of Tennessee Code Annotated §8-20-101 relating to the hiring of

---

[10] Petitioner is unable to engage counsel at $100 per hour. (Record Volume 3, page 3, ¶ 10).
[11] Respondent's counsel acknowledged that the rate requested was reasonable. (Record Volume 2, Page 19, line 1).

additional deputies and assistants. Both Jenkins and the case at bar involve a resolution purporting to be the controlling authority for the controversy before the trial court. The elected officials in each instance are to pay for the operation of their offices out of the fees collected. Finally, the issue of the Chancellor's authority is raised in both cases.

Clearly, Jenkins, Id, is the case law which governs the issue before this court and it provides that the trial court has the discretion to set a reasonable fee pursuant to Tennessee Code Annotated §8-20-107. The trial court's decision should be affirmed.

B. The Trial Court's Authority To Set Attorney Fees Pursuant To Tennessee Code Annotated §8-20-107 Cannot Be Limited By The Commission's Resolution or Budgetary Process.

1. There was no encroachment on a legislative prerogative by the trial court.

The Respondent argues that, notwithstanding Tennessee Code Annotated §8-20-107, it is the prerogative of the county board of commissioners[12] to establish the limits of the compensation that may be paid to attorneys prosecuting petitions pursuant to Tennessee Code Annotated §8-20-101. Essentially, Respondent maintains that the doctrine of the separation of powers prevents the court from exercising its jurisdiction under Tennessee Code

[12] The Shelby County Board of Commissioners is not a party to this action.

Annotated §8-20-107 because it is the duty of the county legislative body to adopt budgets and appropriate funds.[13] Therefore, Respondent argues, that any judiciary function which affects the budget is an encroachment on the legislative function.

First, this position should not be able to stand in light of Tennessee Code Annotated §5-9-406 which states,

> The provisions of this part shall not apply with respect to offices that operate on fees collected by such offices.

The application of this provision should conclude the argument advanced by the Respondent.

If indeed the foregoing statute does not end the controversy, the Respondent next suggests that "it is undisputed in the record that the Petitioner did not comply" with the resolution's requirement to submit a monthly report of legal fees. This issue was not raised below, is not conceded herein, and was not developed factually, upon affidavit or otherwise by the Respondent. Still, this mere administrative task cannot be an impediment to the trial court's authority to decide such issues brought before it. Hickman v. Wright, 210 S.W.447, 450 (Tenn. 1918); State v. Mallard, 40 S.W.3d 473, 483(Tenn. 2001).

[13] Tennessee Code Annotated §5-9-404(a).

There is no dispute that the Shelby County Board of Commissioners has the authority to appropriate funds for county purposes. State ex rel. Weaver v. Ayers, 756 S.W.2d 217, 225 (Tenn. 1988). Weaver is distinguishable from the case at bar as to parties, facts, and issues.

Respondent further argues that the trial court improperly substituted its judgment for that of the county legislature, citing Fallin v. Knox County Board of Commissions, 656 S.W.2d 338, 342 (Tenn.1983).[14] Fallin, like Weaver, Id, is not on point with the case at bar as to parties, facts, or issues. Its application to the issues before this court is of little use. To the same effect is the Respondent's reliance upon In re Englewood Mfg. Co., 28 F.Supp 653, 656(D.Tenn.1939).

Respondent next cites Dennis v. Sears, Roebuck & Co., 446 S.W.2d 260, 266 (Tenn.1969), for the proposition that the trial court should enforce the Shelby County Board of Commissioners resolution without question. The trial court indeed would have committed a grave error had it allowed the county legislature to usurp the authority vested in it by Tennessee Code Annotated §8-20-101(c) and 8-20-107. It is the duty of the judiciary to protect the powers that are vested with it. Hickman v. Wright, 210 S.W.447, 450 (1918); State v. Mallard, 40 S.W.3d 473, 483 (Tenn. 2001).

[14] None of the cases cited involve Tennessee Code Annotated § 8-20-101.

The Respondent suggests that the trial court's inquiry into the basis for the resolution was improper. However, by argument and the Affidavit of JoeDae L. Jenkins Regarding Resolution Submitted By Respondent this issue was brought before the court as no record existed to explain or clarify the language in the resolution.

Contrary to Respondent's assertions, the Shelby County Board of Commissioners is not empowered to limit the rate of compensation for attorneys properly prosecuting a suit pursuant to Tennessee Code Annotated §8-20-101. The power is exclusively within the province of the trial court.

2. The order does not amend the county budget.

Respondent argues that the appended resolution, limiting the rate of compensation, is part of the budget and that because it was not followed by the trial court, the trial court's ruling amended the budget. Of necessity, this argument must rest upon the assumption that the Shelby County Board of Commissioners had the authority to resolve salary petition disputes under Tennessee Code Annotated §8-20-101 in the first place; and, therefore, authorizes it to resolve other disputes, e.g. attorney fees, flowing from the petition. This point has been discussed, infra. Taken to its ultimate conclusion, Respondent's position would require the Chancellor to make a

request to amend the budget to the Shelby County Board of Commissioners in order to award a fee in excess of the limits arbitrarily set by the commissioners.

Additionally, Respondent cites Tennessee Code Annotated §5-9-407(b) as the method of amending the budget for the trial court or Petitioner. However, Tennessee Code Annotated §5-9-406 provides that Tennessee Code Annotated §§5-9-401, et seq., does not apply to "offices that operate on fees collected by such offices." The Petitioner's office operates on fees collected by his office.

There was no amendment to the county budget by the trial court's order. Neither was there a substitution of judgment by the court or usurpation of authority by the trial court.[15]

3. The Petitioner has authority to contract for legal services to bring petitions pursuant to Tennessee Code Annotated §8-20-101(c).

The Respondent asserts that the Petitioner below was without authority to contract for legal services to file and prosecute the petition to employ additional deputies and assistants. As a basis therefor, the Respondent cites the Shelby County Charter, §3.03(N) which provides that the Mayor has the sole authority to enter into contracts for Shelby County.

[15] It is the board of commissioners who seek to usurp the court's authority delegated by the general assembly. See State v. Mallard, Id, and Hickman v. Wright, Id.

This authority is not disputed. The Respondent's analysis would, of course, cause a serious conflict wi Tennessee Code Annotated §§8-20-101, et seq. The scheme of these statutes anticipates the hiring of counsel to prosecute the petitions for the elected officials. Jenkins, Id at 910.

The cases cited by Respondent are not applicable to the case at bar. Stone River Utilities, Inc. v. Metro. Gov't of Nashville, Davidson County, 981 S.W.2d 175 (Tenn.App. 1998), involved the reliance of the contractor on an unauthorized verbal contract made by an employee of a public utility operated by a board. In J. A. Kreis & Co. v. City of Knoxville, 237 S.W. 55 (1921), the issue concerned a contractor who relied upon a city employee's verbal amendment to a contract. In the case of Napoleonic Promotions, Inc. v. City of Memphis, 1995 WL 370233 (Tenn.App.1995), the court considered the issues arising a contractor's attempt to forge an agreement with the city based upon arrangements made with an employee of the city.

In each instance, the court ruled that the employees did not have the requisite authority to enter into contract on behalf of the governmental entity. The cases cited are firm on the legal principles cited therein. However, these principles do not apply to the case before the court.

No employee of the county board of commissioners, or the County Mayor, has made a contract for legal services in the

instant case. The cost of the attorney fee will be paid out of the fees collected. The Petitioner is not a contractor to the board of commissioners, or the county mayor; nor is his attorney a contractor to the board of commissioners or the county mayor. Rather, Petitioner is an elected official holding a state constitutional office attendant with the responsibilities, duties, and liabilities of that office. Petitioner has not contracted on behalf of Shelby County, but on behalf of the office of the Shelby County Trustee. As anticipated by Tennessee Code Annotated §8-20-101 and confirmed by Jenkins, Id, it is the elected official's obligation to hire counsel to assist him in obtaining the resources necessary for the performance of these duties and responsibilities.

The general assembly has appropriately given the elected official the authority to contract for legal services to obtain funding for the proper administration the office. It is obvious that the elected official would run into opposition from either the county legislative body or the county executive. Hence, the general assembly did not vest judicial authority over such cases with the county legislature or the county executive. The determination of the facts, issues and other matters properly resolved by the judiciary were left to the Chancery Court and properly so. See State v. Mallard, 40 S.W.3d 473, 483(Tenn. 2001) whereat the Tennessee Supreme Court stated,

> ...the legislature can have no constitutional authority to enact rules, either of evidence or otherwise, that strike at the very heart of a court's exercise of judicial power, see People v. Jackson, 69 Ill. 2d 252, 371 N.E.2d 602, 604, 13 Ill. Dec. 667 (Ill. 1977) ("If the power is judicial in character, the legislature is expressly prohibited from exercising it."). Among these inherent judicial powers are the powers to hear facts, to decide the issues of fact made by the pleadings, and to decide the questions of law involved. See Morrow v. Corbin, 122 Tex. 553, 62 S.W.2d 641, 645 (Tex. 1933). As an essential corollary to these principles, any determination of what evidence is *relevant*, either logically or legally, to a fact at issue in litigation is a power that is entrusted solely to the care and exercise of the judiciary. See Opinion of the Justices, 141 N.H. 562, 688 A.2d 1006, 1016 (N.H. 1997). Indeed, a "court's constitutional function to independently decide controversies is impaired if it must depend on, or is limited by, another branch of government in determining and evaluating the facts of the controversies it must adjudicate." Id. Consequently, any legislative enactment that purports to remove the discretion of a trial judge in making determinations of logical or legal relevancy impairs the independent operation of the judicial branch of government, and no such measure can be permitted to stand.

Also consider Hickman v. Wright, 210 S.W. 447, 450 (Tenn. 1918) in which the Court stated,

> It is next insisted that the act is unconstitutional, because it undertakes to delegate legislative power, and also attempts to impose nonjudicial duties upon the judiciary of the State by attempting to saddle upon the judges and chancellors below, and appellate judges on appeal, without any statutory limitation or rule to guide them, the raw political function and duty of fixing the number and salaries of all the deputies of all the county officers in all of the

> counties to which the act applies, in violation of both section 1 and section 2 of article 2 of our State Constitution.
>
> The act does not provide for any deputies whatever, but by section 6 and section 7 it is provided that, when the officer is unable to perform the duties of the office by putting in his full time, then he may file a petition before the circuit or criminal judge, or the chancellor, as the case may be, etc., asking for the appointment of a deputy or deputies. To this proceeding the county judge or chairman shall be made a party, and, after hearing the evidence, the court shall determine how many deputies shall be appointed and the salaries they are to receive.
>
> Article 11, section 9, of the Constitution of Tennessee provides that "The legislature shall have the right to vest such powers in the courts of justice, with regard to private and local affairs."
>
> As to the policy of delegating to the courts the authority to determine the number of deputies and the salaries they are to receive this court has nothing to do; but if the legislature sees proper to confer this power on the courts, then under the foregoing provision of the Constitution we think it has a right to do so, and that it would not be a wrongful delegation of power, and would not be imposing nonjudicial duties on the courts.

In summary, the general assembly authorized Petitioner to bring a petition pursuant to Tennessee Code Annotated §8-20-101(c) with the inherent power to hire an attorney to prosecute the petition.

4. <u>The trial court's order does not intrude on the county legislature's budget process, nor does the order erroneously interpret the anti-fee statute.</u>

Finally, Respondent argues, and repetitiously so, that the trial court's order is an improper intrusion on the county legislature's budgeting process and that the ruling is an improper interpretation of the anti-fee statute or Tennessee Code Annotated §§8-20-101, et seq.

As to the Respondent's claim that the trial court's order is an improper intrusion[16] on the County legislature's budgeting process, Petitioner has already addressed this issue, infra at page __. Moreover, there are no facts in the record to support the arguments advanced by the Respondent.

Regarding Respondent's argument that that the trial court's order is an improper interpretation of the anti-fee statute, or Tennessee Code Annotated §§8-20-101, et seq., this issue too has been discussed, infra at pages ___.

The general assembly has seen fit to delegate this authority to the trial court by virtue of Tennessee Code Annotated §§8-20-101, et seq. <u>Hickman v. Wright</u>, 210 S.W. 447, 450. In the exercise of this delegated power, the court also is seized with the powers that are inherent to its proper function. That is, courts have the power to hear facts, decide issues of

[16] There was not a shortfall of funding. (Record Volume 3, Page 2-3, ¶ 5).

fact and decide questions of law. State v. Mallard, 40 S.W.3d 473, 483.

While Patterson v. Rout, 2002 WL 1592674 (Tenn. App. 2002), no perm. app. requested, does not directly address the issue currently before the court, it is instructive. This court stated,

> In addressing this issue, we are called upon to interpret the provisions of the Civil Service Merit Act and Tenn. Code Ann. § 8-20-112. When interpreting a legislative provision, this Court's primary objective is to effectuate the purpose of the legislature. Lipscomb v. Doe, 32 S.W.3d 840, 844 (Tenn. 2000). Insofar as possible, the intent of the legislature should be determined by the natural and ordinary meaning of the words used, and not by a construction that is forced or which limits or extends the meaning. Id. Likewise, the [*8] Court must seek to ascertain the intended scope, neither extending nor restricting that intended by the legislature. State v. Morrow, 75 S.W.3d 919 , 2002 WL 27513, at *2 (Tenn. Jan. 11, 2002) (citing State v. Sliger, 846 S.W.2d 262, 263 (Tenn. 1993)). Our interpretation must not render any part of a legislative act "inoperative, superfluous, void or insignificant." Id. (citing Tidwell v. Collins, 522 S.W.2d 674, 676-77 (Tenn. 1975)). Rather, we seek to give effect to the legislature's over-arching purpose. Merrimack Mut. Fire Ins. Co. v. Batts, 59 S.W.3d 142, 151 (Tenn. Ct. App. 2001).

Id. at page 3.

The clear meaning and purpose of Tennessee Code Annotated §8-20-107 is to give the presiding trial Judge the discretion to tax the cost of litigation against the fees generated by the

elected official's office. The trial court then may properly award a reasonable attorney fee and order that it be paid out of the fees collected by the elected official.

The trial court's setting of fees does not interfere with the budgetary process any more than does the trial court's decision relative to authorizing the hiring of additional deputies and assistants over the objection of the board of commissioners or the county Mayor. If this were allowed, the board of commissioners, or county mayor, could arbitrarily set the limit for the number of employees and salaries and completely frustrate Tennessee Code Annotated §8-20-101(c). This was not the intent of the general assembly. It recognized the prospect of a dispute in these matters and properly placed them under the jurisdiction of the Chancery Court for resolution. There is no question regarding the Chancery Court's authority to resolve the issues of fact and law arising out of a petition filed pursuant to Tennessee Code Annotated §8-20-101(c), including the setting of a reasonable attorney fee.

III. CONCLUSION

The decision of the trial court should be affirmed there being no legal or factual basis to disturb the trial court's ruling.

Respectfully submitted,

____

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Certificate of Service

I certify that I have forwarded a copy of the foregoing Brief of Appellee, postage pre-paid, to Robert B. Rolwing, attorney for Respondent, at Suite 660, 160 North Main Street, Memphis, TN 38103.

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JoeDae L. Jenkins

Date: _____________