Tennessee Judicial Nominating Commission

Application for Nomination to Judicial Office

Rev. 25 August 2011

Name: Russ Heldman

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INTRODUCTION

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

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website http://www.tncourts.gov). The Commission requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the word processing document.) Please read the separate instruction sheet prior to completing this document. Please submit the completed form to the Administrative Office of the Courts in paper format (with ink signature) ***and*** electronic format (either as an image or a word processing file and with electronic or scanned signature). Please submit seventeen (17) paper copies to the Administrative Office of the Courts. Please e-mail a digital copy to debra.hayes@tncourts.gov.

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Self-Employed; Attorney at Law, Rule 31 Mediator, Civil and Family, Former Circuit Court Judge, 21st Judicial District. 218 Fourth Avenue, North; Franklin, Williamson County, Tennessee 37064; (615) 599-9420; (615) 599-9421 (Facsimile) – russ@heldmanlaw.com

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

1982. BPR 9989

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

Tennessee. Board of Professional Responsibility 9989

October 1982. 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).

Law Clerk; Chief Justice William H. D. Fones, Tennessee Supreme Court; 1982-1983.

Associate Attorney; Hollins, Wagster and Yarbrough, Nashville, Tennessee; 1984-1990.

Associate Attorney; Heiskell, Donolson, Bearman, Adams, Williams & Kirsch; Nashville, Tennessee; 1991-1993.

Partner; Williams & Heldman; Franklin, Tennessee; 1994-1998.

Circuit Court Judge; Division I, 21st Judicial District; State of Tennessee; September 1, 1998 – August 31, 2006.

Special Judge; Tennessee Court of Appeals; Middle District, State of Tennessee; 2003.

Associate Attorney; Hollins, Wagster, Yarbrough, Weatherly and Raybin; Nasvhille, Tennessee; October 1, 2006 – June 1, 2008.

Russ Heldman, Attorney at Law; Former Circuit Court Judge; Franklin, Tennessee; July 1, 2008 – 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.

Not Applicable.

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

Currently, I am a general practitioner, principally, within walking distance of the Williamson County Courthouse. I also sublease a small office space in Nashville for use for my Davidson County mediations. I employ one legal assistant, and one office assistant, and on occasion utilize a young attorney in Franklin to assist me in various cases on a contractual basis. A regular, large percentage of my practice is in civil mediation. (approximately 40%). The remaining portion of my practice is comprised of: family/family law and litigation, including appeal, (40%), personal injury and business litigation, including appeals (15%), and criminal defense, including appeals (5%).

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

special note in trial courts, appellate courts, and administrative bodies.

I have had a broad experience as a licensed attorney from 1982 to September 1, 1998, and from September 1, 2006 to present. In the interim, September 1, 1998 through August 31, 2006, I served as one of the Circuit Judges of the 21st Judicial District, State of Tennessee. That experience is discussed in answer to Question 10.

As an attorney, I have represented clients in Tennessee civil, criminal, chancery, probate and juvenile courts, in several mid-state counties, and occasionally in west and east state counties. I have also represented clients in the Tennessee Court of Appeals and Tennessee Court of Criminal Appeals, as well as in the Tennessee Supreme Court. I have also had significant trial experience in the Middle District Court for the State of Tennessee, and appellate experience in the Sixth District Court of Appeals prior to 1998. One case in which I was involved was taken by the United States Supreme Court by way of *Writ of Certiorari*, and remanded to the Sixth Circuit Court of Appeals. Since my judicial term expired in 2006, most of my litigation has been in Williamson, Davidson, and Maury County Courts; however, I have had occasion to appear in Rutherford, Cheatham and Dickson County Courts as well.

As a trial attorney, I have handled many personal injury and intentional tort cases (both plaintiff and defendant), commercial litigation, involving a variety of business disputes, real estate litigation, litigation involving insurance companies and insurance issues, many various types of family law cases, both divorce and post-divorce cases, juvenile court cases of many types, criminal cases, including two death penalty appeals, probate litigation, employer/employee litigation, and worker's compensation litigation. Many of my cases have involved issues of civil and criminal constitutional law. Prior to 1998, I handled several cases in the federal courts, including civil rights and criminal cases.

My personal involvement in all these types of cases includes initial client contact, developing case and trial strategy, seeking settlement through alternative dispute resolution means, mainly mediation, and case closure. I have written and filed numerous complaints, answers, motions, briefs, orders, and trial exhibits. The most interesting and rewarding aspects of my personal involvement in these cases have been developing good relationships with my clients and learning new and interesting subject matters within the litigation process. One of the best examples, I believe, is my work representing parents in an action against an airplane company for the wrongful death of their son, wherein I spent countless hours with a pilot expert learning how a pilot should fly a plane under the reasonable person standard involving the due care required of pilots flying passenger planes. *Cappello v. Duncan Aircraft Sales of Florida, Inc.*, 79 F. 3d 1465 (6th Cir. 1996). This was one of two of my cases arising out of an airplane crash involving the band of a popular country music singer. Not only did it involve working with pilot and air traffic control experts, it involved extensive investigation and travel all over the United States to prepare the case for trial. I have been involved in wrongful death and severe injury cases; however, this case was most taxing but most rewarding in obtaining a result satisfactory to my clients. I believe I have an exceptional ability to learn new subject matters necessary to incorporate into competent representation of my clients. This served me extremely well as a Circuit Court Judge in the past and would serve me well in the future in this position.

Listed below is a summary by Westlaw reference of some of the cases I have briefed and handled in the Tennessee appellate courts. These demonstrate a broad range of experience requiring the assimilation of many different topics and subject matters, including a broad variety of different areas of law and procedure. On five (5) occasions I was appointed by the Tennessee Supreme Court to represent indigent defendants in appeals before that Court. Two of those cases involved death penalty appeals wherein I represented defendants on death row, *State v. Duncan,* 713 S.W. 2d 327 (Tenn. 1986) and *State v. Johnson*, 743 S.W. 2d 154 (Tenn. 1987). In the other three (3) cases, I prevailed upon the Court to make advancements in issues of criminal law and procedure: *State v. Taylor,* 739, S.W. 2d 227 (Tenn. 1987); *State v. Prince*, 781 S.W. 2d 846 (Tenn. 1989); and *Fletcher v. State*, 951 S.W. 2d 378 (Tenn. 1997). In the latter case the Court stated in a footnote: "The Court appreciates Mr. Heldman's willingness to accept this appointment and the excellent representation he has provided Mr. Fletcher."

I enjoy working at least 40-50 hours a week. This requires me getting to work early, often working into the early evening and often working on a Saturday. Mediations often require more than eight hours. As set forth earlier, I have worked in several different legal settings. I was law clerk of the Chief Justice of the State of Tennessee, an associate in a small eight person "boutique" trial firm, an associate in a large statewide law firm, partner in a small two man law firm, and operate my own solo practice. Significant among my career as a licensed attorney has been a volume of appellate court work I have been grateful to handle. Most trial attorneys within my realm of practice do not regularly handle appeals. My time as a law clerk for the Chief Justice taught me volumes about the practice of appellate work and this has served me well in generating business through the years as an appellate lawyer. It is also the seed, from which grew what Justice Fones referred to as the "judge bug" in me.

I have been mentored by some of the best judges and lawyers in the history of the State of Tennessee:

Chief Justice William H. Fones, and Justice Frank Drowota, formerly of the Tennessee Supreme Court;

Maclin P. Davis, Jr., Nashville attorney, original member, Waller, Lansden, Dortch and Davis;

John J. Hollins, Sr., former Davidson County Assistant District Attorney, Nashville attorney and poet;

Edward M. Yarbrough, Nashville attorney, former United States Attorney for the Middle District of Tennessee;

Ernest W. Williams, Franklin attorney, former United States Attorney for the Middle District of Tennessee;

Robert L. Jackson, Nashville attorney and popular family law mediator; and

David Raybin, former Assistant Attorney General for the State of Tennessee; Former Davidson County Assistant District Attorney; Nashville attorney, author of *Tennessee Criminal Practice*

and Procedure, I-III, (West 1984-present).

I have learned principally from these men how to practice trial and appellate law, how to have productive and meaningful client relations, how to run a law practice, how to be a trial judge, how to be a mediator and how to have fun and enjoy the practice of law.

Included within my trial court experience should be a reference to my mediation experience, which is described in particular in answer to question 10. Since 2006, upon reentering the practice of law, I have served as civil mediator in over 400 cases. I have also resolved many cases on behalf of my clients, through the mediation process. I have settled, on behalf of my clients, over 50 cases in mediation since September 2006. In each of these cases, whether domestic or civil in nature, I must be prepared to try the case in order to obtain a successful settlement in mediation.

Significant among my practice as a licensed attorney has been providing legal representation to those who cannot afford my services, Also significant is the everyday opportunity to develop relationships of lasting value with other attorneys and law firm personnel, court personnel, and law enforcement personnel.

Appellate Court cases:

State v. Duncan, 698 S.W. 2d 63 (Tenn. 1985)

State v. Turner, 713 S.W. 2d 327 (Tenn. Crim. App. 1986)

State v. Wilson, 713 S.W. 2d 85 (Tenn. Crim. App. 1986)

Das v. State Farm Insurance Co., 713 S.W. 2d 318 (Tenn. App. 1986)

Crabtree v. Crabtree, 716 S.W. 2d 923 (Tenn. App. 1986)

State v. Hammond, 1986 WL 13051 (Tenn. App. Nov. 21, 1986)

Fernandez v. Fernandez, 1986 WL 6842 (Tenn. App. June 18, 1986)

Turner v. Tennessee, 664 F. Supp. 1113 (M.D. Tenn. 1987)

Curtis v. Reeves, 736 S.W. 2d 108 (Tenn. App. 1987)

Baker v. Baker, 1987 WL 10490 (Tenn. App. May 6, 1987)

Wolf v. Wolf, 1987 WL 11132 (Tenn. App. May 20, 1987)

Blackburn v. Murphy, 737 S.W. 2d 529 (Tenn. 1987)

Overstreet v. Minch, 1987 WL 14103 (Tenn. App. Aug 31, 1987)

State v. Taylor, 739 S.W. 2d 227 (Tenn. 1987)

State v. Johnson, 743 S.W. 2d 154 (Tenn. 1987)

Turner v. Tennessee, 858 F. 2d 1201 (6th Cir. 1988)

Kemp v. Kemp, 1988 WL 116368 (Tenn. App. Nov. 2, 1988)

Patterson v. Freeman, 1989 WL 100278 (Tenn. App. Aug. 30, 1989)

Allen V. Carlton, 1989 WL 106243 (Tenn. App. Aug. 30, 1989)

State v. Prince, 781 S.W. 2d 846 (Tenn. 1989)

Mimms v. Mimms, 1989 WL 146263 (Tenn. App. Aug. 18, 1989)

Haury and Smith Realty Co. v. Piccadilly Partners I, 802 S.W. 612 (Tenn. App. 1990)

Turner v. Tennessee, 940 F. 2d 1000 (6th Cir. 1991)

McNeil v. Barnett, 1990 WL 150022 (Tenn. App. Oct. 10, 1990)

McBurney v. Aldrich, 816 S.W. 2d 30 (Tenn. App. 1991)

Allstate Insurance Co. v. Dixon, 1991 WL 79549 (Tenn. App. May 17, 1991)

Renick v. Renick, 1991 WL 99514 (Tenn. App. June 12, 1991)

Creager v. Creager, 1992 WL 389188 (Tenn. App. Dec. 31, 1992)

Gray v. Gray, 885 S.W. 2d 353 (Tenn. App. 1994)

Layman v. Replogle, 1994 WL 228227 (Tenn. App. May 27, 1994)

Oldham v. ACLU, 910 S.W. 2d 431 (Tenn. App. 1995)

Cappello v. Duncan Aircraft Sales of Florida, Inc., 79 F. 3d 1465 (6th Cir. 1996)

State v. Gentry, 1996 WL 648523 (Tenn. App. Nov. 8, 1996)

Rubin v. Kirshner, 948 S.W. 2d 742 (Tenn. App. 1997)

Young v. Young, 971 S.W. 2d 386 (Tenn. App. 1997)

Mulle v. Yount, 1997 WL 764535 (Tenn. App. Dec. 12, 1997)

Fletcher v. State, 951 S.W. 2d 378 (Tenn. App. 1997)

Lampley v. Lampley, 1998 WL 44938 (Tenn. App. Feb. 6, 1998)

Hart v. Hart, 1998 WL 391774 (Tenn. App. July 1, 1998)

Wilson v. Wilson, 987 S.W. 2d 555 (Tenn. App. 1998)

Smith v. Kelley, 1998 WL 743731 (Tenn. App. 1998)

Helson v. Cyrus, 989 S.W. 2d 704 (Tenn. App. 1998)

Helson v. Cyrus, 1999 WL 166414 (Tenn. App. Mar. 29, 1999)

Richards v. Read, 1999 WL 820823 (Tenn. App. July 27, 1999)

Kinard v. Kinard, 986 S.W. 2d 220 (Tenn. App. 1998)

Gamble v. Gamble, 2007 WL 1452686 (Tenn. App. May 16, 2007)

Cornett v. Burton, 2008 WL 4998396 (Tenn. App. Nov. 24, 2008)

State v. Warfield, 2008 WL 4367580 (Tenn. Crim. App. Sept. 18, 2008)

Mason v. Mason, 2009 WL 257653 (Tenn. App. Mar. 3, 2009)

State v. Stephens, 2009 WL 2295610 (Tenn. Crim. App. June 23, 2009)

State v. Headley, 2009 WL 3103791 (Tenn. Crim. App. Sept. 29, 2009)

Wester v. McDow, 2009 WL 1034758 (Tenn. App. Apr. 6, 2009)

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

(1) *Turner v. Tennessee,* 940 F. 2d 1000 (6th Cir. 1991); *Turner v. Tennessee,* 858 F. 2d 1201 (6th Cir. 1988); *Turner v.* Tennessee, 664 F. Supp. 1113 (M.D. Tenn. 1987); *State v. Turner*, 713 S.W. 2d 327 (Tenn. Crim. App. 1986): This case involved the unusual issue of how to remedy a violation of the right to effective assistance of counsel during plea bargaining, and further the proper application of the due process protection against prosecutorial vindictiveness within the plea bargaining context. Along with Edward Yarbrough, I represented a defendant who had suffered a violation of his state and federal constitutional right to effective assistance of counsel during plea-bargaining. The aforementioned citations track the litigation of this issue through both the state and federal courts. I originally identified a remedy for this issue and wrote the trial and appellate court briefs on each occasion. These decisions provide valid legal precedent in this area of law.

(2) *Cappello v. Duncan Aircraft Sales of Florida*, 79 F. 3d 1465 (6th Cir. 1996): As referenced

earlier in answer to Question 8, this case involved a wrongful death trial in federal district court for damages for the wrongful death of a promising young man who was the band leader for a popular country music singer. The case took two (2) weeks to try and resulted in a jury verdict involving less than 100% liability against the target defendant. I successfully obtained reversal and a judgment of 100% liability against the target defendant in the United States 6th Circuit Court of Appeals. The Opinion discusses the various challenging tort and damage issues I addressed throughout the case.

(3) *Oldham v. ACLU*, 910 S.W. 2d 431 (Tenn.App. 1995): In this case, I represented a Tennessee high school principal in Sumner County Chancery Court. He sought a declaratory judgment concerning his obligation to allow student-led prayer at an upcoming high school graduation ceremony. The principal had been threatened by letter from an organization which stated that it would most likely pursue litigation against the school system if contacted by objecting students or families. The principal had been presented with requests for student-led prayer by some students and sought a judicial declaration of the issue to avoid a possible lawsuit. The principal had hoped to obtain an opinion but the courts said that the issue was not yet justiciable for declaratory judgment prior to the graduation ceremony. The case was significant, I thought, because of the incredible unity generated and state-wide support demonstrated by school officials, parents and students similarly situated. When I arrived in downtown Gallatin for the hearing I could hardly enter the courthouse due to the huge number of people there in the streets of the town square in support for the principal. I thought it was a remarkable case because of the unification of support from other Tennessee school officials, students and parents in support of my client and his willingness and courage to obtain an answer to an important constitutional question in the courts.

(4) *State v. Warfield*, 2008 WL 4367589 (Tenn.Crim.App. Sept. 18, 2008): This case involved an unusual circumstance where the trial judge found that the prosecutor had abused her discretion in choosing not to offer my client pre-trial diversion in a criminal matter. The State of Tennessee appealed the trial court's decision and the Tennessee Court of Criminal Appeals affirmed, finding that my client was worthy of pre-trial diversion under the circumstances. It is not often that the State of Tennessee appeals such an issue, and the case provides useful precedent for first-time offenders seeking pre-trial diversion in misdemeanor cases.

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.

Since September 1, 2006, I have served as a civil or domestic mediator in more than 400 cases. It is difficult to single out any specific cases because in all cases I have a commitment as a Rule 31 mediator to maintain the confidentiality of litigants and others who have paid me to mediate. Most of the mediations I have conducted have been domestic mediations. Most of these

domestic mediations involve the difficult decision of deciding parenting time with children among the parents. There are many attorneys in my area who have regularly employed me to provide mediation services and these attorneys are best able to speak to my methods and successes as a mediator. Occasionally I have also been employed to serve as Arbitrator, under private contract.

One of the most satisfactory experiences in my career is helping litigants to compromise and settle their differences through the private mediation process. I attempt in all my mediations to make the people for whom I am mediating believe and feel that their case is of utmost importance. Prior to mediation, I receive information about the case from both sides of the dispute from their attorneys, or from the litigants themselves. I familiarize myself with the case and the positions of both sides in preparation for the mediation. When the mediation begins, I spend a significant amount of time separately with both sides explaining to them the process of mediation and encouraging both sides to think in terms of compromise so that a negotiated settlement can be reached. Successful mediation requires being able to listen to and treat both sides fairly and neutrally, while at the same time offering ways to assist in resolving the mediated dispute. When the going gets tough, I like to remember the lyrics from a John Lennon song: "Well, I tell them there's no problem, only solutions." I enjoy the task of helping people "think outside the box" in settling their cases in mediation. My recent career as a civil mediator requires a talent very similar to what would be required of me as Circuit Judge.

Prior to September 1, 2006, I served as an eight-year term as one of four Circuit Court Judges of the 21st Judicial District, State of Tennessee (September 1, 1998-August 31, 2006). I presided over hundreds of cases in the Williamson, Hickman, Lewis and Perry County civil and criminal courts. During that time, I was privileged to have as my colleagues and fellow judges: Cornelia A. Clark, Donald Harris, Timothy L. Easter, Jeffrey Bivins, and Robert E. Lee Davies. I was also privileged to work with Circuit Court Clerks and their staffs, and Chancery Court Clerk & Masters and their staffs, in all four counties. A strength of the 21st Judicial District lies in the commitment of the judges to help each other when necessary and to handle cases in all courts, criminal, civil, chancery, domestic and probate. I did that for eight years and could do so again.

When I began my term in 1998, the dockets in the 21st Judicial District were in a demanding posture. The alternative of mediation for civil disputes was in its early stages. In 1997, before becoming judge, I became trained in mediation and desired to bring that into the judicial system in a productive way. As a judge, beginning in 1998, I encouraged the attorneys in the judicial district to become mediators by the use of the Rule 31 procedure in the Tennessee Supreme Court Rules, and regularly referred cases to mediation, both civil and domestic. As a result, I believe the district became more efficient in the resolution of pending civil cases. Also, the 21st Judicial District became rich with exceptional attorney mediators, and is still rich by the continued practice of those mediators. This all happened before mediation became statutorily mandated in most domestic cases.

There are so many cases over which I presided. It is difficult to select noteworthy cases. Most of my cases were resolved at the trial court level, and are archived by the courts of the 21st Judicial District; however, the following are certainly noteworthy for consideration:

(1) *Southwest Williamson County Community Association v. Saltsman,* Williamson Chancery No. 27222 (January 25, 2001): This is a case which took two (2) weeks to try and which involved a challenge by Williamson County residents and organizations seeking to have the Tennessee Department of Transportation construct State Route 840, a highway to run through southwest Williamson County, in accordance with its own standards and regulations peculiarly sensitive to environmental concerns. Because of the difficulty in explaining the impact of the highway design on the land in which it interfaced, the trial in part occurred outside of the courtroom and in the environmental areas proposed to be affected. As Judge, I sustained the request of the Plaintiffs and issued a ruling addressing itself to the standards of the Department of Transportation in constructing the highway. A preliminary issue was whether a Williamson County Chancery Court had subject matter jurisdiction to decide the merits of the case. The Tennessee Court of Appeals disagreed with the Plaintiff's position on the matter of subject matter jurisdiction and ultimately vacated the judgment. The appellate court never addressed the detailed merits of the case, relative to the proper construction of the highway. However, the case is significant and had a very positive impact on the future relations of the State and its citizens. Subsequent to this litigation, context sensitive design committee meetings were held to obtain the input of residents on the environmental and historical impact of proposed major road projects in Tennessee. For more information on the positive environmental and historical impact of this litigation, attorney Julian Bibb, 615-782-2200, of Stites and Harbison, Nashville, Tennessee, is available as a reference.

(2) *Town of Nolensville v. King*, 151 A.W. 3d 427 (Tenn. 2004): The issue in this case was whether a fine imposed by a municipal court judge contrary to Article VI, section 14 of the Tennessee Constitution, which prohibits the assessment of fines in excess of fifty dollars unless assessed by a jury, is nevertheless constitutionally permissible if the person so fined has a right to a de novo appeal and jury trial in a higher court. As trial judge, I held that Article VI, section 14 of the Tennessee Constitution prohibits a municipal court judge from imposing fines in excess of fifty dollars for the violation of a municipal ordinance, irrespective of any right afforded the defendant to obtain a jury trial upon appeal to a higher court. The Tennessee Court of Appeals reversed my decision; however, the Tennessee Supreme Court took the discretionary appeal and agreed with my original decision, reversing the Tennessee Court of Appeals, and affirming my decision on this very important issue of Tennessee constitutional law.

(3) *State v. Cothran*, 2005 WL 3199275 (Tenn. Crim. App. Nov. 29, 2005): I presided over this very difficult case which lasted approximately a week in Hickman County Criminal Court. The case involved a terrible motor vehicle accident wherein the Defendant lost control of his truck on I-40, crossed the median and collided head on into a minivan. Four people were killed and three seriously injured in the crash. Defendant was charged with a seventeen count indictment, including counts of vehicular homicide, and vehicular assault, based on intoxication. The trial involved intensive forensic issues and resulted in multiple convictions. The convictions were confirmed on appeal. During my tenure in the criminal courts, my experience was that most cases settled by plea agreement. This case was unusual and exhaustive but noteworthy because of the terrible tragedy that

underpinned the entire trial.

(4) *Henneberry v. Simoneaux*, 2006 WL 2450138 (Tenn. App. Aug. 22, 2006): In this case, I determined that there is no cause of action in Tennessee against a parent for the negligent supervision of a child who has had no specific tendency to engage in conduct similar to that causing the injury at issue. The Tennessee Court of Appeals agreed and affirmed my decision concerning liability for the alleged negligent parental supervision and control of a minor child. This decision clarified the Tennessee law in this area, when the parental liability statute, T.C.A. § 37-10-101, is not applicable.

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.

Not applicable.

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

Not applicable.

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

No prior occasions.

EDUCATION

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

1975-1976; University of the South; Sewanee, Tennessee; transferred.

1976-1979; Vanderbilt University, Nashville, Tennessee; B.A.; Major: English and Economics, Best Student Essay: "Relative Grounds": A Comparison of Hamlet to Stephan Daedalus in James Joyce's Ulysses, Vanderbilt Journal (1979); Graduated; *cum laude*.

1979-1980; University of Tennessee, College of Law; Knoxville, Tennessee; Best Appellate Court Brief Award, Best Oral Argument Award; transferred.

1980-1982; Vanderbilt University School of Law; Associate Editor, Vanderbilt Journal of Transnational Law, 1981-82.

1996-1997, 1999-2000; Vanderbilt University, Nashville, Tennessee; Masters of Liberal Arts and Science Degree.

2000; National Judicial College; Reno, Nevada.

PERSONAL INFORMATION

15. State your age and date of birth.

53 years of age. Birthday: November 25, 1956

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

All my life.

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

Since August 1986.

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

Williamson County, Tennessee.

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

Not Applicable.

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

No.

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

No.

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

No.

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

No.

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

No.

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

Yes: (1) *Taylor v. Heldman*, 2000 WL 1367960 (Tenn. Crim. App. 2000). As Hickman County Circuit Court Judge I granted a Motion to Dismiss an inmate's *Habeas Corpus* Petition. As a result, I and one of my colleagues were personally sued by the inmate for damages and other relief. The office of the Tennessee Attorney General represented me and the case was dismissed and affirmed by the Tennessee Court of Criminal Appeals. (2) *Ellis v. Heldman, Jackson, Chaffin, McMillan, Rogers, The Exchange Club, 2003*, 55 Fed. Appx. 742; 2003 U.S. App.

LEXIS 2234. (Feb. 6 2003). As Williamson County Circuit Court Judge, I was named as a Defendant along with a wife, attorney for wife, therapist, supervisor, and organization supervising parental visitation by a litigant of a divorce case pending in Williamson County Court. The Plaintiff represented himself pro se and the office of the Tennessee Attorney General represented me. According to the referenced opinion the case was dismissed on Motion to Dismiss. Plaintiff claimed that his constitutional right to parenting was violated in the state divorce case.

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

Tennessee Judicial Conference; Williamson County Bar Association; Davidson County Bar Association; Master, John Marshall American Inns of Court. I have attended Saint Bartholomew's Episcopal Church in Nashville, Tennessee for the past five years.

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

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

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

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

Member of Tennessee Judicial Conference, 2001 to present; Williamson County Bar Association, 2001 to present; Nashville Bar Association, 2007 to 2008; American Inns of Court, 2008 to present.

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

Highest grade point average, Master of Liberal Arts and Science program from Vanderbilt University, 2000.

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

"Foreign Defendants and Their Defective Products," Vanderbilt Journal of Transnational Law (1979)

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.

"How to Get Your Client Alimony in *Futuro*," Domestic Law Forum, Tennessee Trial Lawyers Association, April 5, 2007.

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.

Circuit Court Judge, Division I, 21st Judicial District, elected. September 1, 1998 – August 31, 2006.

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 which reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

Attached are two Opinions I wrote in their entirety while sitting as a Special Judge for the Tennessee Court of Appeals, Middle Section at Nashville, Tennessee, upon being asked to sit as Special Judge by then presiding Judge, Ben Cantrell: (1) *Brian C. Mayes v. Ronald R. LeMonte, Jr.*, 22 S.W. 3d 142 (Tenn. App. 2003); (2) *Dale Supply Company v. York International Corp., et al.*, 2003 WL 22309461 (Tenn. App. Oct. 9 2003). (3) Also attached is a portion of the Brief on Appeal in the case of *State v. Warfield*, 2008 WL 4367580 (Tenn.Crim.App. Sept. 18, 2008).

ESSAYS/PERSONAL STATEMENTS

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

I served as a Circuit Court Judge for the 21st Judicial District, State of Tennessee, for a full 8 year term beginning September 1, 1998 through August 31, 2006, after being elected in a contested Primary and later in a General Election. I thoroughly enjoyed serving the public as Circuit Court Judge for eight years and it was an extremely rewarding occupational experience. I would like to serve in this position again. I believe that my first 14 years of practicing law, as well as my prior experience as a Judge, and subsequent experience as an attorney and mediator since September 2006, all distinctly and uniquely give me the knowledge, training, and ability suitable to be an excellent trial court judge of the caliber to which the 21st Judicial District has become accustomed.

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

While a Circuit Court Judge, I attempted to treat every litigant fairly under the law. Furthermore, since 2006, I have conducted pro bono mediations to those who could not afford my services otherwise, and I have also provided many legal services without cost to those unable to pay. Furthermore, I believe conducting over 400 civil mediations since September 2006 demonstrates my commitment to providing a service of equal justice under the law, since a successful mediator must consistently demonstrate fairness, neutrality, patience, perseverance, and affability to participants in mediation.

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

The judges of the 21st Judicial District preside over civil and criminal courts of Williamson, Hickman, Lewis and Perry County, Tennessee. During my previous term, this practice required my being experienced to handle all types of civil and criminal cases. This practice is required today. Previously, I required or encouraged litigants to attend mediation as an alternative to litigation before mediation was mandatory in domestic cases and prevalent in civil cases as it is today. Subject to the approval and concurrence of the other Circuit Judges, I would implement the regular practice of judicial settlement conferences and have days scheduled in advance for litigants to utilize my services to assist them in settling cases assigned to the other Circuit Judges. Providing this option should reduce dockets and give litigants the option of lowering costs and expenses which can be onerous if their case has to be tried.

38. Describe your participation in community services or organizations, and what community

involvement you intend to have if you are appointed judge? ***(250 words or less)***

I have been a volunteer and fundraiser for Daystar Counseling Ministries, Nashville, Tennessee for the past ten (10) years. It is most likely that I will continue supporting this ministry. When my children attended Christ Presbyterian Academy, I often volunteered as a substitute English teacher. If appointed Judge, I would seek opportunities to teach law or literature in the community.

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

I was born and raised in Nashville, Tennessee. I attended Ensworth School in Nashville through sixth grade. Thereafter, I attended Montgomery Bell Academy and graduated in 1975. I have a great family, and a wealth of friends and supporters. Prior to my legal experience, I worked in the family food brokerage business, while in high school, college, and law school. I have been married for over twenty-eight years and with my wife raised three children who are now adults. This history has shaped me into a person who can establish and maintain good relationships with many different types of people. I believe I have a talent for communicating and understanding people. I am also an exceptional chess player and I attribute successes as a trial attorney to learning to play chess at an early age. I have read the complete dramatic works of William Shakespeare and can always find encouragement and guidance for life from these writings, in addition to other works.

I enjoy working hard and accomplishing the tasks that I take on until their completion. I believe that I have extraordinary strength and perseverance and a creativity that allow me to adapt through adversity in order to complete a task. I believe I have become an exceptionally good writer and an effective speaker. In one of my favorite songs Bob Dylan sings, "You can hang back or fight your best on the front line." I am not accustomed to hanging back.

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

Yes. As a licensed attorney, I am required to advise my clients on child support issues based on the Tennessee Child Support Guidelines. In many instances, it seems that the amount of child support set under the guidelines is insufficient realistically to provide for the children's expenses needed by the financially disadvantaged parent. Often time I am disappointed by the hardship created on clients or mediation participants by this law. Nevertheless, I routinely set aside my personal thoughts and follow the guidelines and advise my clients and those in mediation that they must submit to the support established by the guidelines.

REFERENCES

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

A. Ricky Watson, Chief of Police, City of Brentwood; Brentwood, Tennessee; 615-371-2200, ext. 301
B. The Honorable Ben Cantrell, Former Presiding Judge, Tennessee Court of Appeals, Attorney; Tune, Entrekin, and White, PC; Nashville, Tennessee; 615-244-2770
C. Dana Nicholson, Hickman County Circuit Court Clerk, Centerville, Tennessee, 2002 to present, 931-729-2211
D. Mary Pearce, Executive Director, The Heritage Foundation of Franklin and Williamson County; Franklin, Tennessee, 615-591-8500, ext. 15
E. Chaz Corzine, Partner/Manager, The Michael W. Smith Group, Franklin, Tennessee, 615-351-7788

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, 21st Judicial District** of Tennessee, and if appointed by the Governor, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended questionnaire with the Administrative Office of the Courts for distribution to the Commission members.

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

Dated: September 20, 2011.

Russ Heldman

Russ Heldman

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

TENNESSEE JUDICIAL NOMINATING COMMISSION

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

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information which concerns me, including 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, and I hereby authorize a representative of the Tennessee Judicial Nominating Commission to request and receive any such information.

Russ Heldman
Type or Printed Name

Russ Heldman
Signature

September 20, 2011
Date

9989
BPR #

Court of Appeals of Tennessee,
Middle Section, at Nashville.
Brian C. MAYES
v.
Ronald R. LEMONTE, Jr.

No. M2002–00625–COA–R3–CV.
April 9, 2003 Session.
June 6, 2003.
Permission to Appeal Denied by Supreme Court Dec. 15, 2003.

Background: Gas meter reader brought negligence action against dog owner for injuries received from dog bite. The General Sessions Court, Montgomery County, entered judgment for meter reader. Owner took de novo appeal and the Circuit Court, Montgomery County, John H. Gasaway, III, J., entered judgment for meter reader. Owner appealed.

Holdings: The Court of Appeals, Russ Heldman, Special Judge, held that:
(1) dog owner was negligent when he invited meter reader to come into yard to read meter before owner had placed dog in pen;
(2) trial court did not act in biased or prejudicial way in considering legal precedent;
(3) trial court's refusal to permit dog owner to present witness testimony as to dog's prior behavior did not show personal bias or prejudice as would warrant disqualification of judge; and
(4) fact that Circuit Court awarded meter reader more than General Sessions Court had awarded him was not evidence of personal bias or prejudice that would require disqualification of judge.

Affirmed and remanded.

West Headnotes

[1] Animals 28 66.5(1)

28 Animals
28k66 Injuries to Persons
28k66.5 Dogs
28k66.5(1) k. Duties and Liabilities in General. Most Cited Cases
(Formerly 28k68)

Dog owner was negligent when he invited gas meter reader to come into yard to read meter before owner had securely placed dog in pen, and thus owner was liable for injuries sustained by meter reader when he was bitten by dog; meter reader was concerned about dog and asked owner if dog would bite, owner said dog would not bite and motioned to meter reader to come into yard as owner held dog, owner was aware dog was acting strangely and in aggressive manner, and reasonable and prudent person in owner's circumstance would not have invited meter reader into yard until after insuring dog was in pen.

[2] Negligence 272 231

272 Negligence
272III Standard of Care
272k231 k. Due Care. Most Cited Cases

Negligence 272 233

272 Negligence
272III Standard of Care
272k233 k. Reasonable Care. Most Cited Cases

Duty rests on everyone to use due care under attendant circumstances, and "negligence" is doing what reasonable and prudent person would not do under given circumstances.

[3] Judges 227 49(1)

227 Judges
227IV Disqualification to Act
227k49 Bias and Prejudice
227k49(1) k. In General. Most Cited Cases

Trial judge should be disqualified when judge has personal bias or prejudice concerning party or party's lawyer, or personal knowledge of disputed evidentiary facts concerning proceeding.

[4] Judges 227 49(1)

227 Judges
227IV Disqualification to Act
227k49 Bias and Prejudice
227k49(1) k. In General. Most Cited Cases

Bias or prejudice, as would result in disqualification of judge, must stem from extrajudicial source, and not from what judge hears or sees during trial.

[5] Judges 227 49(1)

227 Judges
227IV Disqualification to Act
227k49 Bias and Prejudice
227k49(1) k. In General. Most Cited Cases

Impersonal prejudice resulting from judge's background experience does not warrant disqualification of judge.

[6] Judges 227 49(1)

227 Judges
227IV Disqualification to Act
227k49 Bias and Prejudice
227k49(1) k. In General. Most Cited Cases

Disqualification of trial judge was not warranted in negligence action arising out of injuries resulting from dog bite, where nothing in record supported dog owner's claim that improper exparte communication occurred between judge and counsel for dog bite victim regarding dog owner's defense strategy.

[7] Judges 227 49(1)

227 Judges
227IV Disqualification to Act
227k49 Bias and Prejudice
227k49(1) k. In General. Most Cited Cases

Trial court did not act in biased or prejudicial way in considering legal precedent, and thus disqualification of judge was not warranted in negligence action arising out of injuries received from dog bite; trial court received appellate court decisions submitted by dog owner, trial court was not required to consider any specific legal authorities in form of any certain appellate court opinions, and trial court applied applicable law to facts based on preponderance of evidence standard and on trial court's determination of credibility of witnesses.

[8] Judges 227 49(1)

227 Judges
227IV Disqualification to Act
227k49 Bias and Prejudice
227k49(1) k. In General. Most Cited Cases

Trial court's refusal to permit dog owner to present witness testimony as to dog's prior behavior, and limiting dog owner to presenting witnesses who witnessed circumstances pertaining to dog bite, did not show personal bias or prejudice as would warrant disqualification of judge in negligence action; it was within trial court's discretion to give pro se litigant advance notice that testimony about dog's behavioral history was irrelevant, dog owner testified that he had no prior complaints about viciousness of dog, and, in absence of any evidence of negative behavioral history, trial court could determine there was no need to for dog owner to rebut fact.

[9] Judges 227 49(1)

227 Judges
227IV Disqualification to Act
227k49 Bias and Prejudice
227k49(1) k. In General. Most Cited Cases

Fact that Circuit Court, on de novo appeal, awarded gas meter reader $5,000 for dog bite injuries, while General Sessions Court had only awarded meter reader $3,000, was not evidence of personal bias or prejudice that would require disqualification of Circuit Court judge in negligence action; Circuit Court judge was not bound by any rule from awarding larger judgment, and Circuit Court's judgment was proper under original pleading by civil warrant in General Sessions Court.

***143** Ronald R. LeMonte, Jr., Clarksville, Tennessee, Pro Se.

Brian C. Mayes, Clarksville, Tennessee, Pro Se.

RUSS HELDMAN, SP. J., delivered the opinion of the court, in which BEN CANTRELL, P.J., M.S., and PATRICIA J. COTTRELL, J., joined.

OPINION

RUSS HELDMAN, SP. J.

In this dog bite case, the trial court awarded a meter reader $5000 in compensatory damages against the dog owner. The dog owner claims on appeal that he was not negligent in handling his dog and that the sitting trial judge was biased and prejudiced against him. We affirm.

On January 17, 2001, the Montgomery County General Sessions Court awarded ***144** Brian C. Mayes $3000 in compensatory damages for a dog bite which Ronald R. LeMonte's, Jr. dog, Blackie, inflicted on Mayes' ankle on May 17, 2000. LeMonte took a *de novo* appeal to the Montgomery County Circuit Court, which found in favor of Mayes and awarded him $5000 in damages on December 13, 2001, after a bench trial.

In this *pro se* appeal, LeMonte raises two issues before this Court. First, he claims the Trial Court was biased and prejudiced against him and therefore the judgment should be reversed and a new trial granted. Second, LeMonte contends Mayes did not prove he was negligent, thereby exonerating him from any liability. We will address these issues in reverse order.

The following facts are undisputed by the parties. On May 17, 2000, Mayes entered LeMonte's fenced-in yard in order to read the meter, as was his profession with the Clarksville Gas and Water Department. When Mayes approached the fence, LeMonte's three dogs were barking and growling. A picture of the fence shows LeMonte prominently displayed a "Beware of the Dog sign." Mayes asked LeMonte whether the dogs would bite. He answered that they would not. Unconvinced, Mayes requested LeMonte hold the black dog before he entered and while he read the meter. According to Mayes, Blackie "was acting strange." Recognizing that all the dogs were acting more aggressive than usual, LeMonte agreed to hold Blackie.

Subsequently, Mayes entered the yard and began reading the meter. As Mayes read the meter, Blackie bit Mayes' ankle. Mayes' injuries from the bite required serious medical attention.

The only significant disputed fact in this case is whether LeMonte even told Mayes to stay out until Blackie was put into a pen. Mayes testified LeMonte had hold of Blackie and clearly motioned with his hand to enter the yard after he had hold of the dog. LeMonte asserted he did not have hold of Blackie and that he held up his hand in a motion to stop Mayes so he could grab Blackie and then put the dog inside a pen. Neighbor Mike Flood testified he saw someone holding up his hand in a stopping motion but was unaware of the identity of the individual.

The trial judge apparently accepted Mayes' testimony that LeMonte invited him in before the dog could be penned, which was as follows:

> "I first explained who I was and said I needed to read the water meter. I told him I needed to come in the fence. I also asked if the dogs would bite. He told me the dogs would not bite. I still wasn't convinced because the black lab, which was the dog that bit me, was growling and jumping on the fence with his hair sticking up. I knew this dog was acting strange, so I asked him if he could hold the dog while I came in the fence, so he held the dog. He told me to come on in. I opened the fence, came in and read the meter. As I was bent over reading the meter, the dog bit me on my right leg in between my calve and my ankle."

Concerning a pen to contain the dog, LeMonte admitted that he and his father had built a pen for all the dogs. There was also a "Beware of the Dog" sign. It is clear from LeMonte's own testimony that he knew the pen was available and that he believed the dog, Blackie, should have at least have been penned-up before Mayes entered and

read the meter. In fact, the testimony is replete with references to how threatening Blackie was acting while Mayes was outside the fence. Mayes testified that Blackie "was growling and jumping on the fence with his hair sticking up," that Blackie "was acting a lot more aggressive***145** than the other two dogs," and that Blackie "was acting strange." LeMonte himself testified Blackie was "barking and growling" and all the dogs were "acting more aggressive than usual."

Tenn. R.App. P. 13(d) establishes that this Court shall conduct a de novo review of findings of fact by the trial court in a non-jury trial, with the trial court's findings accompanied by a presumption of correctness, unless contrary to the preponderance of the evidence.

If the trial judge has not made a specific finding on a particular issue, this Court reviews the record to determine where the preponderance of evidence applies without applying a presumption of correctness. *Devorak v. Patterson,* 907 S.W.2d 815, 818 (Tenn.App.1995).

We also note that, as a general rule, this Court does not pass on the credibility of witnesses. The trial court, having seen and heard witnesses testify, is in the best position to determine their credibility. Implicit in the trial court's judgment are determinations of witness credibility. *Bowman v. Bowman,* 836 S.W.2d 563, 566 (Tenn.App. 1991). Since the trial court is in the best position to observe the witnesses and to assess their demeanor, this Court will not reevaluate the trial court's assessment of witnesses' credibility in the absence of clear and convincing evidence to the contrary. *Wells v. Tennessee Bd. of Regents,* 9 S.W.3d 779, 783 (Tenn.1999).

Accordingly, this Court therefore must accept that LeMonte invited Mayes into the fenced-in area before he had securely placed the dog into the pen.

With respect to the keeping of domestic animals, the applicable law has been stated as follows:

> "The owner or keeper of domestic animals is liable for injuries inflicted by them only where he has been negligent, the animals were wrongfully in the place where they inflicted the injuries, or the injuries are the result of known vicious tendencies or propensities.
>
> A person has a right to own or keep domestic animals of any kind provided they are so restrained as to not expose others engaged in their ordinary or lawful pursuits to danger. The owner or keeper of a domestic animal is bound to take notice of the general propensities of the class to which it belongs, and also of any particular propensities peculiar to the animal itself of which he has knowledge or is put on notice; and in so far as such propensities are of a nature likely to cause injury he must exercise reasonable care to guard against them and to prevent injuries which are reasonably to be anticipated from them."

McAbee v. Daniel, 60 Tenn.App. 239, 445 S.W.2d 917, 923 (1968).

[1] We believe this case is governed by general negligence principles, not that aspect of dog bite law which imposes liability on an owner where there are "injuries resulting from known vicious tendencies or propensities." *Id.*

[2] "A duty rests on everyone to use due care under the attendant circumstances, and negligence is doing what a reasonable and prudent person would not do under the given circumstances." *Dixon v. Lobenstein,* 175 Tenn. 105, 132 S.W.2d 215, 216 (1939); *Dooley v. Everett,* 805 S.W.2d 380, 383 (Tenn.App.1990).

We conclude that a reasonable and prudent person in LeMonte's circumstances would not have invited Mayes in to read the meter until after insuring that Blackie was put away. The evidence preponderates in favor of this

conclusion. Accordingly, LeMonte was negligent and the Trial Court was justified in assessing damages for such negligence.

***146** [3][4][5] The next issue is directed toward the alleged bias and prejudice of the trial judge towards LeMonte. A trial judge should be disqualified when "the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding." *Caudill v. Foley,* 21 S.W.3d 203, 214 (Tenn.App.1999).

> "Bias and prejudice are only improper when they are personal. A feeling of ill will or, conversely, favoritism towards one of the parties to a suit are what constitute disqualifying bias or prejudice.... Despite earlier fictions to the contrary, it is now understood that judges are not without opinions when they hear and decide cases. Judges do have values, which cannot be magically shed when they take the bench."

Id. See also, Wilson v. Wilson, 987 S.W.2d 555, 562 (Tenn.App.1998), as follows:

> Bias or prejudice in the disqualifying sense must stem from an extrajudicial source and not from what the judge hears or sees during the trial. *Id.* (Quoting *State ex rel. Wesolich v. Goeke,* 794 S.W.2d 692 (Mo.App.1990); *Jack Farenbaugh and Son v. Belmont Const. Inc.,* 194 Cal.App.3d 1023, 240 Cal.Rptr. 78 (1987)). Otherwise, any judge that makes a ruling adverse to one party would be open to a charge of bias. In addition "impersonal prejudice resulting from the judge's background experience does not warrant disqualification." *Alley v. State,* 882 S.W.2d [810] at 821 (Tenn.Crim.App.1994). Most trial judges, we suspect, have strong feelings about certain types of behavior or conduct. When the judge perceives that one party or the other has engaged in that conduct, the party should not be surprised that he/she has incurred the judge's wrath.

LeMonte, who was also representing himself at trial, lists the following reasons why he claims the trial court judge was biased and prejudice against him: 1) The trial judge was contacted by the trial attorney for Mayes before trial and informed of LeMonte's "defense strategy." 2) The trial judge accepted legal precedent (an appellate court opinion) submitted to him by the attorney for Mayes and did not accept or even "look at" LeMonte's legal precedent (four appellate court opinions). 3) The trial judge refused to hear testimony from LeMonte's witnesses who did not witness the dog bite incident but who could testify about the dog's "behavioral history." 4) The trial judge rested his decision on the testimony of Mayes' witnesses. 5) The Circuit Court judgment of $5000 was greater than the General Session Court's judgment of $3000.

[6] We find these claims to be without merit. Mayes has cited to no place in the record to show that there was any improper *ex parte* communication about "defense strategy" between the trial judge and the lawyer for Mayes. "This court has held on several occasions that where a party in its brief on appeal has advanced certain arguments or has set forth what he or she alleged to be facts without any citation to the record, this court is not under a duty to minutely search the record to verify these unsupported allegations." *Long v. Long,* 957 S.W.2d 825, 828 (Tenn.App.1997). This Court cannot assume an impropriety has occurred which is totally unsupported by anything in the Trial Court record.

[7] Concerning consideration of certain legal precedent, the record shows the Trial Court received LeMonte's dog bite opinions during the trial and told both sides that they could "argue that law later." There was closing argument and the trial judge ruled from the bench. There is ***147** nothing in the record remotely to suggest that the trial judge did not consider LeMonte's legal authorities. This Court is not aware of any rule which would require the trial judge to consider any specific legal authorities in the form of any certain appellate court opinions. All that is required is that the trial judge apply applicable law to the facts based upon the preponderance of the evidence standard and the trial judge's determination of the credibility of witnesses. That was done in this case and not done in a biased or prejudicial way.

[8] The trial judge did not do anything improper by failing to consider the testimony of witnesses who were not present to witness circumstances pertaining to the dog bite the day it happened. LeMonte was told the following by the trial judge before LeMonte began to present his defense:

> "You can put on evidence now, but it's going to have to be restricted. It's not about what everyone thinks about your pet, what they thought about the dog, whether it was vicious in the past, or whether it was the most gentle animal they've ever seen. That's not the issue. The issue is how you did handle your pets that day. Were you negligent or not? So if you got witnesses standing there watching what happened, that's fine, but if you got witnesses who want to talk about the dog and how they acted in the past, I'm not going to hear that because that's not the issue. The issue is whether you're negligent or not in the way you managed your dogs that day. All right, call your first witness."

The trial judge's statements to LeMonte were based upon a correct understanding of applicable law. It was within his discretion to give the *pro se* litigant advance notice of the fact that testimony about "behavioral history" was irrelevant to the ultimate determination, that is, whether LeMonte was negligent in his handling of Blackie. This is especially true in this case. Before LeMonte was told by the trial judge about the limitation on witnesses, LeMonte had already testified as Mayes' witness that he had received no prior complaints "in reference to aggressiveness or viciousness" of any of his dogs. Apparently, the trial judge was indicating to LeMonte that since Mayes had no negative "behavioral history" about the dogs to offer during his case in chief, it was not necessary for LeMonte to attempt to rebut that fact. Under the circumstances, we find nothing improper in what the trial judge did, certainly nothing which demonstrates a personal bias or prejudice against LeMonte.

Again, we defer to the trial judge on his assessment on the credibility of the witnesses. *See Bowman,* 836 S.W. 2d at 566. Therefore, it was proper for him to render judgment in favor of Mayes based upon the testimony of the witnesses called by Mayes, that is, LeMonte, Mayes himself and a witness to the ankle damage "within minutes of injury." This issue cannot support any claim of bias and prejudice of the trial judge against LeMonte.

[9] Finally, the trial judge was not bound by any rule from awarding a larger judgment against LeMonte as was awarded by the General Sessions Court below. The appeal was *de novo* and the Circuit Court judgment was proper under the original pleading by civil warrant in the General Sessions Court. The Tennessee Supreme Court has formerly decided whether a plaintiff's recovery on a *de novo* appeal to a Circuit Court is limited by the General Sessions Court's jurisdictional amount. *Ware v. Meharry Medical College,* 898 S.W.2d 181 (Tenn.1995). In that case, Plaintiff filed a warrant in Davidson County General Sessions Court to recover personal property. *Ware,* 898 S.W.2d at 182. The General Sessions Court dismissed***148** Plaintiff's warrant, but on appeal, the Circuit Court awarded Plaintiff $75,000 in damages. *Id.* Defendant appealed to this Court. *Id.* A majority of this Court reduced Plaintiff's judgment to $25,000. *Ware,* 898 S.W.2d at 181. On appeal, the Tennessee Supreme Court reversed our decision to reduce Plaintiff's judgment. The Court adopted the dissenting opinion of Judge William C. Koch, Jr., as its own rationale and held that a plaintiff's recovery in a Circuit Court was not limited by a General Sessions Court's jurisdictional limit. *Ware,* 898 S.W.2d at 186. Accordingly, the trial judge in the instant case cannot be deemed biased or prejudiced based on the increased judgment.

None of LeMonte's claims support a conclusion, much less a reasonable suspicion, that the trial judge acted in a biased or prejudicial manner against LeMonte.

The judgment of the Trial Court is affirmed. This case is remanded to the Circuit Court of Montgomery County, Tennessee, for proceedings consistent with this opinion. Costs taxed on appeal to appellant, Ronald R. LeMonte, Jr.

Court of Appeals of Tennessee.
DALE SUPPLY COMPANY,
v.
YORK INTERNATIONAL CORP., et al.

No. M2002-01408-COA-R3-CV.
April 9, 2003 Session.
Oct. 9, 2003.

Appeal from the Circuit Court for Davidson County, No. 02C432; Carol Soloman, Judge.
Ronald George Harris, Nashville, Tennessee, for the appellant, York International Corp.

John Anthony Wolf, Baltimore, Maryland, for the appellant, York International Corp.

Joel Randall Hooper, Brentwood, Tennessee, for the appellee, Dale Supply Company.

RUSS HELDMAN, SP. J., delivered the opinion of the court, in which BEN CANTRELL, P.J., M.S., and PATRICIA J. COTTRELL, J., joined.

OPINION

RUSS HELDMAN, SP. J.

***1** The sole determinative issue on appeal is whether an agreement which mandates arbitration in the event of claims or disputes "arising out of or relating in any way to the relationship of the parties or this Agreement, or the breach thereof," requires arbitration of tort claims including acts arising after the parties' contractual relationship ended. We hold that arbitration of claims of tortious interference with contracts or business relations is required under the terms of the parties' agreement and reverse the judgment of the trial court.

The sole determinative issue on appeal is whether an agreement which mandates arbitration in the event of claims or disputes "arising out of or relating in any way to the relationship of the parties or this Agreement, or the breach thereof," requires arbitration of tort claims including acts arising after the parties' contractual relationship ended. We hold that arbitration of claims of tortious interference with contracts or business relations is required under the terms of the parties' agreement and reverse the judgment of the trial court.

Plaintiff-Appellee, Dale Supply Company ("Dale Supply"), is a former distributor of products manufactured by Defendant-Appellant, York International Corporation ("York"). Following York's termination of the parties' Distributor Sales Agreement (the "Agreement"), Dale Supply filed a five count complaint in Davidson County Circuit Court and asserted claims against both York and Team Air Distributing, Inc. ("Team Air"), the company that succeeded Dale Supply as York's distributor in Middle Tennessee.

The first three counts named only York as a defendant. Dale Supply asserted that the termination was a breach of the Agreement and a violation of Tenn.Code. Ann 47-25-1301, *et seq.*; that York was liable for wrongful termination of the Agreement and that York was liable for misrepresentation because York allegedly misrepresented its intention in continuing its relationship with Dale Supply under the Agreement.

Claims in Counts IV and V asserted that York and Team Air tortiously interfered with Dale Supply's existing contracts with its customers and with Dale Supply's business relations with its customers and dealer. Specifically, Dale Supply alleged that York did this by terminating the Agreement with Dale Supply and by allowing Team Air to sell York products in Dale Supply's former distributorship territory to Dale Supply's former customers.

Relying on an arbitration clause in the Agreement, York responded to the Complaint on March 20, 2002, by filing a Motion To Stay Litigation And To Compel Arbitration, Or In The Alternative, To Dismiss. That motion asked the trial court to compel arbitration of all claims against York and to stay all proceedings. In the alternative, York sought dismissal of the Complaint against it on the ground that the trial court lacked subject matter jurisdiction to adjudicate Dale Supply's claims against York because of the arbitration clause.

***2** In its response to the Motion To Compel Arbitration, Dale Supply conceded that the Federal Arbitration Act applied to the Agreement and that the first three counts should be arbitrated. Nevertheless, Dale Supply asserted that the tort claims in Counts Four and Five of the Complaint should not be arbitrated on the ground that those claims did not arise out of the Agreement.

On May 8, 2002, the Davidson County Circuit Court granted York's motion in part and denied it in part. The trial court ordered Counts I and III to arbitration, but did not order arbitration of the tortious interference claims asserted in Counts IV and V, the trial court stating that the tort claims "shall proceed in this court." On June 6, 2002, York appealed the partial denial of its Motion To Compel Arbitration and filed a Notice of Appeal pursuant to Tenn.R.App.P.3, the Federal Arbitration Act ("FAA"), 9 U.S.C. 16 (1999 & Supp.2002), and the Tennessee Uniform Arbitration Act ("TUAA"), Tenn.Code. Ann. 29-5-319 (2001). On appeal, York asserts that the lower court erred in refusing to compel arbitration of all counts of the Complaint, including Counts Four and Five.

York is in the business of manufacturing residential and commercial heating and air conditioning products. York's HVAC products are sometimes distributed by independent distributors, and Dale Supply was one such distributor for York. In January 1980, Dale Supply entered into its first contract with York for the purchase, sale and distribution of residential and commercial York HVAC products, as well as related accessories and parts. York and Dale Supply entered into a subsequent Distributor Sales Agreement on December 16, 1997. That contract superseded any earlier agreement between the parties and was in force at the time of events giving rise to Dale Supply's lawsuit.

The Agreement governed the sale by York and the purchase and distribution by Dale Supply of residential and commercial HVAC products and related accessories and parts in specified counties in Tennessee. The Agreement contained a broad dispute resolution provision that required the parties to arbitrate all claims in the event of disputes, to-wit:

All claims, disputes, and controversies arising out of or relating in any way to the relationship of the parties or this Agreement, or the breach thereof, whether arising in tort, equity, contract or otherwise, or under any law of the United States or any state or municipality, shall, in lieu of court action, be submitted to arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and the award rendered by the arbitrator(s) shall be final and binding on the parties and judgment thereon may be entered in any court of competent jurisdiction. The site of the arbitration shall be York, Pennsylvania, unless another site is mutually agreed between the parties.

The distributorship relationship between York and Dale Supply continued in effect until terminated by York's giving Dale Supply sixty days' notice. The Agreement explicitly provided that it could be terminated by either party, without cause, upon sixty (60) days' notice. York then entered into a contract with Team Air to distribute York products in the geographic area previously assigned to Dale Supply and the lawsuit followed.

***3** In its tortious interference claims Dale Supply alleged that York and Team Air (1) contacted Dale Supply's customers who had placed orders with Dale Supply and offered those customers discounts, rebates, advertising and other incentives to induce them to end their existing business dealings with Dale Supply and take their business to Team Air; (2) used Dale Supply's proprietary information to invite Dale Supply's customers to a meeting during which they introduced Team Air as York's new distributor in the area; and (3) offered Dale Supply's dealers and customers substantial discounts, rebates, advertising and other incentives (which were more favorable than those offered or authorized by York to Dale Supply) to induce Dale Supply's dealers and customers to end their business relationships with Dale Supply and instead place their orders with Team Air. Dale Supply further alleged that as a result of York's incentives to Dale Supply's customers, it suffered a substantial loss of sales and profits that it otherwise would have realized under the Agreement.

The trial court split the resolution of the dispute between Dale Supply and York into two forums. The focus of this Court's inquiry is whether the tort claims in those two counts fall within the scope of the parties' arbitration agreement and therefore are to be arbitrated pursuant to the guiding principles of the FAA. This Court reviews this question of law *de novo,* without a presumption of correctness. *Pyburn v. Bill Heard Chevrolet,* 63 S.W.3d 351, 356 (Tenn.App.2001).

This Court is of the opinion that the FAA applies to the arbitration agreement contained in the parties' Distributor Sales Agreement. The FAA applies in all cases where there is "[a] written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract...." *See* 9 U.S.C. section 2; *see also Frizzell Constr. Co. v. Gatlinburg,* L.L.C., 9 S.W.3d 79, 83 (Tenn. 1999). Thus, the FAA governs the enforcement of any agreement to arbitrate in contracts that involve interstate commerce. This is an incontestable proposition, established by the United States Supreme Court and followed by both federal and Tennessee state courts. *See, e.g., Tennessee River Pulp & Paper Co. v. Eichleay Corp.,* 637 S.W. 2d 853, 855 (Tenn.1982); *Berkley v. H & R Block E. Tax Servs., Inc.,* 30 S.W.3d 341, 343 (Tenn.App.2000); *see also Volt Info. Sciences, Inc. V. Bd. Of Trs. Of Leland Stanford Jr. Univ.,* 489 U.S. 468, 476, 103 S.Ct. 1248, 1254 (1989) (interstate construction contract); *Southland Corp. v. Keating,* 465 U.S. 1, 11, 104 S.Ct. 852, 858 (1984) (interstate franchise agreement); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U .S. 395, 400, 87 S.Ct. 1801, 1804 (1967) (interstate agreement involving manufacture and sale of paint).

The parties' Agreement plainly involves interstate commerce. Dale Supply is a Tennessee corporation incorporated in Delaware and authorized to do business in Tennessee. The Agreement specifically notes that York's principal place of business is located in York, Pennsylvania. Clearly, the Agreement involved substantial reliance upon interstate transactions, including the flow of goods, services, reports and payments between Pennsylvania and Tennessee. The Complaint makes it clear that the Agreement called for the interstate sale and shipment of goods by York to Dale Supply, as well as the purchase and distribution of York goods by Dale Supply in a prescribed Tennessee territory. Since the Agreement between York and Dale Supply involves interstate commerce, case law arising under the FAA applies to interpret the scope of the arbitration clause to determine whether Dale Supply's tort claims in Counts Four and Five are arbitrable.

***4** The FAA creates a body of federal substantive law that is applicable in both state and federal courts. *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.,* 460 U.S. 1, 25 n. 32, 103 S.Ct. 927, 942 n. 32 (1983). Accordingly, once it is determined that a dispute involves interstate commerce, the FAA applies regardless of whether the case is pending in state or federal court. *Id,; see also Pyburn,* 63 S.W.3d at 356-57 (noting that since Congress did not want state and federal courts to reach different outcomes concerning the validity of arbitration, when the FAA applies, it preempts state law); *Tennessee River Pulp,* 637 S.W.2d at 858 (the FAA "has been held to be substantive rather than procedural and equally applicable in state and federal courts.")

In deciding whether a given dispute is within the scope of an agreement to arbitrate, this Court must take into

account the strong policy favoring arbitration, which requires that all doubts be resolved in favor of arbitration. *See e.g., Moses H. Cone Mem'l Hosp.,* 460 U.S. at 24-25, 103 S.Ct. at 941; *Daisy Mfg. CO.v. NCR Corp.,* 29 F.3d 389, 396 (8th Cir.1994)(citing *Moses H. Cone Mem'l Hosp.,* 460 Y, S, at 25-26, 103 S.Ct. At 941). Arbitration is an attractive dispute resolution mechanism "because it is a more expeditious and final alternative to litigation." *Arnold v. Morgan Keegan & Co., Inc.,* 914 S.W.2d 445, 449 Tenn.1996)(citing *Boyd v. Davis,* 897 P.2d 1239, 1242 (Wash.1995)). This Court recognizes that the "heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration." *Pyburn,* 63 S.W.3d at 357.

When a contract contains a broad arbitration clause, as here, in "the absence of any express provision excluding a particular grievance from arbitration ... only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." *Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 584-85, 80 S.Ct. 1347, 1354 (1960). "If the allegations underlying the claims 'touch matters' covered by the parties' contract, then those claims must be arbitrated, whatever the legal labels attached to them." *Tennessee Imports, Inc. v. Filippi,* 745 Supp. 1314, 1325-26 (M.D.Tenn.1990)(citing *Genesco, Inc. v. T. Kakiuchi & Co., Ltd.,* 815 F.2d 840, 847 (2d Cir. 1987); *Mitsubushi Motors Corp. v. Soler Chrysler-Plymouth,* Inc., 473 U.S. 614, 622 b,9, 624 n. 13m 105 S.Ct. 3346, 3351 n. 9, 3352 n. 13(1985).

The national policy favoring arbitration that is recognized by both federal and state law also withdraws the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration. *Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52, 56, 115 S.Ct. 1212, 1216 (1995) (citing *Southland,* 465 U.S. At 10, 104 S.Ct. At 858). When the parties agree to arbitration, the FAA ensures enforcement of the agreement, and the courts cannot require a judicial forum for the resolution of a claim that the parties contractually agreed to arbitrate. *Frizzell,* 9 S.W.3d at 84. Indeed, the very purpose of the FAA is to ensure that the arbitration agreement is enforced according to its terms. *Id.*

***5** The pivotal question for this Court is whether Dale Supply's claims for tortious interference in Counts Four and Five fall within the scope of the arbitration clause in the Distributor Sales Agreement, requiring them to be arbitrated pursuant to the parties' Agreement and the FAA. The answer to that question is "yes." The parties agreed to arbitrate "*all claims, disputes, and controversies arising out of or relating in any way to the relationship of the parties or this Agreement, or the breach thereof, whether arising in tort, equity, contract or otherwise ...* " This Court interprets that language plainly: that language unequivocally includes the tortious interference claims asserted in Counts Four and Five.

The fact that there are claims sounding in tort rather than contract does not remove them from the scope of the arbitration clause. In the clause under scrutiny, tort claims are specifically within the scope of the arbitration clause. Even without language in an arbitration agreement specifically including such claims, courts addressing the issue have universally found that expansive clauses, like the one between York and Dale Supply, encompass tort claims. *See e.g., American Recovery Corp. v. Computerized Thermal Imaging, Inc.,* 96 F.3d 88 (4th Cir.1996). It is immaterial whether the claims are couched in terms of tort, rather than breach of contract. *See, e.g., Sweet Dreams Unlimited, Inc. v. Dial-A-Mattress Internat'l Ltd.,* 1 F.3d 639, 643 (7th Cir.1993). The United States Court of Appeals for the Sixth Circuit has recognized that when language of an arbitration agreement is broad, all controversies, including tort claims, are subject to arbitration. *See Federated Dep't Stores, Inc. v. J.V.B. Indus., Inc.,* 894 F .2d 862, 869 (6th Cir.1990) (arbitration clause in agreement was broad enough to encompass a tort claim arising from an alleged breach of contract).

Other state courts applying both federal and state law have held that broad arbitration clauses, such as the one in this case, include tort claims. For example, one Florida court repeated the "axiom of federal and Florida law" that arbitration clauses such as the one here "are to be given broadest possible interpretation to accomplish the salutary purpose of resolving controversies out of court." *Royal Caribbean Cruises, Ltd. v. Universal Employment Agency,*

664 So.2d 1107, 1108 (Fla.Dist.App.1995) (citations omitted). "In common with apparently every other court which has interpreted this language," the court concluded that the plaintiff's tort claims (defamation, fraud, and business interference) were subject to arbitration pursuant to the parties' agreement to arbitrate "any controversy or claim arising out of or relating to this Agreement or the breach of any term of provision hereof." *Id.* at 1108-09. *See also Pittsburgh Logistics Systems, Inc. v. Professional Transportation & Logistics, Inc.*, 803 A.2d 776, 779 (Pa.Super.Ct.2002) (finding tortious interference claim within scope of agreement to arbitrate "all claims, disputes and other matters and questions arising out of or relating to this Agreement, or the breach thereof"); *Bass v. SMG, Inc.* 765 N.E.2d 1079, 1091 (Ill.App.Ct.2002) (following state and federal authority in favor of arbitration and finding tortious interference claims "enmeshed in the heart of the agreement" and therefore arbitrable).

***6** Dale Supply's tortious interference claims arise from or relate to the Distributor Sales Agreement and are therefore arbitrable. As long as the factual allegations underlying Dale Supply's tortious interference claims "touch upon" or have a significant relationship to the Agreement, they fall within the scope of the arbitration clause in the Agreement. *See e.g., American Recovery,* 96 F.3d at 94 ("the test for an arbitration clause of this breadth is not whether a claim arose under one agreement or another, but whether a significant relationship exists between the claim and the agreement containing the arbitration clause"). Because all of Dale Supply's tort claims against York arise out of and relate to the performance, termination or breach of the Agreement, they are subject to arbitration.

Dale Supply's tort claims are factually interwoven with, and certainly relate to, the Agreement. Dale Supply alleges that York interfered with its relationships with its customers and that York attempted to reduce Dale Supply's business by offering its customers and dealer inducements to cancel their existing orders and then place them with its new distributor in Dale Supply's former territory. Those claims, Dale Supply's relationship with York, its status as a distributor or York products, the expiration of that relationship, and the transfer of Dale Supply's sales territory to Team Air, all have their genesis in the Agreement. *See Sweet Dreams, 1 F.3d at 643.*

Fundamentally, the tortious interference claims by Dale Supply are premised on the allegation that, during the course of wrapping up its relationship with Dale Supply and in finding a new distributor to sell its products, York interfered with Dale Supply's right to sell York products to its customers. The alleged tortious interference is inextricably related to York's notice of termination of Dale Supply and its engaging of Team Air as the new distributor of York products. On January 3, 2001, York gave Dale Supply written sixty-days' notice of its voluntary termination of the Distributor Sales Agreement without cause, effective March 4, 2001. Dale Supply did not cease its distribution for York under the Agreement after receiving notice of termination. Instead, Dale Supply continued to market York products and even "received orders for York products to be delivered to its customers and dealers."

The alleged tortious conduct occurred while Dale Supply continued to sell York products and during the period that the parties were winding down their relationship. In fact, Dale Supply complains that York entered into an agreement with Team Air, as a successor distributorship, to distribute York products in Middle and East Tennessee only a week after Dale Supply was given its sixty-day notice of termination. Moreover, Dale Supply complains that York and Team Air "held discussions ... regarding a new Distributor Sales Agreement for Middle Tennessee" during the fourth quarter of 2000, prior to York's notice of termination. Dale Supply also complains of a meeting that allegedly occurred on February 15, 2001, within the period of continued performance under the Agreement, at which Team Air was "introduced as Defendant York's new distributor." In actuality, Dale Supply's Complaint is predicted on some conduct occurring prior to the termination of the Agreement. As noted, the Complaint plainly dates the alleged conduct both prior to the notice of termination and within the sixty-day notice period, before the effective date of the termination. The Complaint also is explicitly predicated on "confidential information" that Dale Supply alleges was obtained during the course of the parties' relationship.

***7** A determination of whether York engaged in any wrongful conduct can only be determined in the context of the Agreement which gave Dale Supply a non-exclusive right to distribute York products and which expressly reserved York's right to sell its products in Dale Supply's territory and to terminate Dale Supply without cause. A

court cannot determine whether York' actions were improper without first considering and interpreting provisions in the Agreement that gave York the right to sell its products to customers in Dale Supply's territory even during the term of the Agreement.

Nor can a court resolve Dale Supply's claim that its "confidential information" was misappropriated when York transitioned the territory to Team Air without interpreting the Agreement to determine, among other things, whether the information was confidential and whether it (and the customers) belonged to York or Dale Supply. *See e.g., McMahon v. RMS Electronics, Inc.,* 618 F.Supp.189, 191 (S.D.N.Y.1985) ("when a tort claim is based in substantial part on the contractual rights and responsibilities of the two parties, then it must be arbitrated as required by an arbitration clause").

Dale Supply and York agreed to submit to arbitration all claims, disputes and controversies arising out of or relating to the Agreement, the relationship of the parties, or the breach thereof. The broad scope of the Agreement to arbitrate encompasses all of Dale Supply's tort claims, and therefore Counts Four and Five of the Complaint must be arbitrated. The instruction by the courts of this state and the federal courts that any doubts must be resolved in favor of arbitration mandates such a result. For instance, in *Tennessee Imports, Inc. v. Filippi,* 745 F.Supp. 1314 (M.D.Tenn.1990), a distributor brought claims for breach of contract and tortious interference with contract against the Italian manufacturer (with whom it had a distribution agreement) and the manufacturer's representative. Finding that the court "should focus on the factual allegations in the complaint rather than the legal causes asserted," the court held the claim was arbitrable if the allegations underlying the claims "touch matters' covered by the parties' contract, whatever the "legal labels' attached to the claims. *Id.* at 1325-26. Applying this principle, the court found that the distributor's breach of contract and tortious Interference claims "touched upon" the parties' agreement in some way and held that the claims therefore were arbitrable. *Id.* at 1326. *See also, Howell v. NHC Healthcare-Fort Sanders, Inc.,* 109 S.W.3d 731, 733 (Tenn.App.2003): "[C]ourts are required to give an arbitration agreement 'as broad a construction as the words and intentions of the parties will allow....' "

Similarly, in *Pennzoil Co. v. Arnold Oil Co.,* 30 S.W.3d 494 (Tex.App.2000), tortious interference claims arising out of the termination of a distributorship were held to be arbitrable. In that case Pennzoil and Arnold Oil ("Arnold") had entered into a nonexclusive distributor agreement under which Arnold was given certain rights to distribute Pennzoil's products in south Texas. Pennzoil gave Arnold notice of termination of the contract within sixty days and then contracted with another distributor to serve as its authorized distributor in the area. Following the termination, Arnold sued both Pennzoil and the successor distributor, claiming tortious interference with contract, conspiracy and tortious interference with prospective business relationships. Pennzoil moved to compel arbitration.

***8** The allegations by Arnold were very similar to those asserted by Dale Supply. Arnold alleged that while its contract with Pennzoil was still in effect, Pennzoil and Arnold's successor worked together to induce Arnold's customers to start buying from the successor, instead of Arnold and to undercut Arnold's sales within its territory. *Id.* at 499. Arnold also alleged that the defendants engaged in this conduct to provide justification for Pennzoil to cancel the contract with Arnold and replace it with the successor. *Id.* The arbitration agreement between Pennzoil and Arnold provided that the parties must arbitrate "any controversy or claim arising out of or relating to this Agreement, its performance or the breach thereof." *Id.* at 498-99. The arbitration clause in the Agreement between York and Dale Supply appears at least as broad as the language in the *Pennzoil* agreement.

Looking at the allegations and the parties' arbitration agreement, the court held in *Pennzoil* that all claims were arbitrable. Among other things, the court specifically determined that Arnold's claim of the tortious interference with future business was based on its allegation that Pennzoil's termination of the contract caused Arnold to lose future business from its existing customers. 30 S.W.3d at 499. Accordingly, the court found that the claim was "factually interwoven with and relates to the contract and its performance," and the court ordered arbitration of the claims. *Id.*

The fact that Dale Supply has asserted related tort claims against York's co-defendant, Team Air, does not affect the agreement between York and Dale Supply to arbitrate those claims. United States Supreme Court precedent makes it clear that the arbitration clause between York and Dale Supply must be enforced, notwithstanding the fact that common counts are asserted against York and Team Air, and that ordering arbitration means that the tortious interference claims against York and Team Air would be resolved in separate proceedings. *See Moses H. Cone Mem'l Hosp.*, 460 U.S. at 103 S.Ct. At 927; *Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 105 S.Ct. 1238 (1985).

In *Moses H. Cone Mem'l Hosp,* a hospital hired a contractor and an architect to construct additions to the hospital. The hospital's agreement with the contractor had an arbitration clause, but its agreement with the architect did not. 460 U.S. at 5-6, 103 S.Ct. at 931. When the contractor claimed that it had been damaged by virtue of certain delays in the project, the hospital asserted, among other things, that any delay was the fault of the architect who would be liable to the hospital in indemnity. Since the dispute with the architect could not be sent to arbitration without the architect's consent, given the absence of an arbitration clause, the hospital argued that it should not be required to arbitrate with the contractor. Instead, the hospital asked to have all of the related claims adjudicated in court, arguing that it was improper for the hospital to "be forced to resolve these related disputes in different forums." 460 U.S. at 20, 103 S.Ct. at 939. The Supreme Court flatly rejected that argument, and held that multiple actions were to proceed in different forums:

***9** It is true ... that if [the contractor] obtains an arbitration order for its dispute, the Hospital will be forced to resolve these related disputes in different forums. That misfortune, however, is not the result of any choice between the federal and state courts; it occurs because the relevant federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement. Under the Arbitration Act, an arbitration agreement must be enforced notwithstanding the presence of other person who are parties to the underlying dispute but not to the arbitration agreement. If the dispute between [the contractor] and the Hospital is arbitrable under the Act, then the Hospital's two disputes will be resolved separately-one in arbitration, and the other (if at all) in state-court litigation.

Id., 460 U.S. 20, 103 S.Ct. 939. The United States Supreme Court reaffirmed this principle in *Dean Witter* where the Court held that "the Arbitration Act requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums." *Dean Witter,* 470 U.S. at 217, 105 S.Ct. At 1241; see also *Wojcik v. Aetna Life Insurance & Annuity Co.,* 901 F.Supp. 1283 (N.D.Ill.1995).

Dale Supply is not relieved of its duty to arbitrate with York simply because it has related claims against another entity with whom it has no arbitration agreement. The trial court unnecessarily divided resolution of the dispute between Dale Supply and York into two forums, when those parties agreed to only one.

The judgment of the trial court below of May 8, 2002, wherein is ordered that the tort claims "shall proceed" in the trial court, is reversed, the motion for arbitration of all claims is granted and the case is stayed pending arbitration in accordance with the parties' Agreement. This cause is remanded for proceedings consistent with this opinion. Costs taxed to appellant, Dale Supply Company, and its surety, for which execution may issue if necessary.

Tenn.Ct.App.,2003.
Dale Supply Co. v. York Intern. Corp.
Not Reported in S.W.3d, 2003 WL 22309461 (Tenn.Ct.App.)

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IN THE COURT OF CRIMINAL APPEALS
FOR THE MIDDLE DIVISION
AT NASHVILLE

STATE OF TENNESSEE	]	
	]	
Appellant	]	
	]	
vs.	]	Case No. M2007-02011-CCA-R9-CO
	]	Williamson County
CHARLES H. WARFIELD, III	]	
	]	
Appellee	]	

BRIEF OF APPELLEE, CHARLES H. WARFIELD, III

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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

ARGUMENT

I. THE TRIAL COURT PROPERLY FOUND THAT THE PROSECUTOR ABUSED HER DISCRETION IN DENYING MR. WARFIELD PRETRIAL DIVERSION.

A statutorily eligible defendant is not presumptively entitled to diversion. *Curry,* 988 S.W.2d at 157. Rather, the district attorney general has the sole discretion to determine whether to grant pretrial diversion to one who meets the strict statutory requirements. *Curry,* 988 S.W.2d at 157. In determining whether to grant pretrial diversion, the district attorney general "has a duty to exercise his or her discretion by *focusing on a defendant's amenability for correction* and by considering all of the *relevant* factors, including evidence that is favorable to a defendant." *State v. Bell,* 69 S.W.3d 171, 178 (Tenn.2002) (emphases added). Among the factors to be considered in addition to the circumstances of the offense are the defendant's criminal record, social history, the physical and mental condition of a defendant where appropriate, and the likelihood that pretrial diversion will serve the ends of justice and the best interest of both the public and the defendant. *State v. Hammersley*, 650 S.W.2d 352, 355 (Tenn.1983).

If the prosecutor denies the application, "the factors upon which the denial is based must be clearly articulable and stated in the record." *State v. Herron,* 767 S.W.2d 151, 156 (Tenn.1989). "This requirement entails more than an abstract statement in the record that the district attorney general has considered [all relevant] factors." *Herron*, 767 S.W.2d at 156. Rather, "[i]f the district attorney general denies pretrial diversion, that denial must be written and must include both an enumeration of the evidence that was considered and a discussion of the factors considered and weight accorded each." *State v. Pinkham,* 955 S.W.2d 956, 960 (Tenn.1997) (reiterating that the

district attorney general must not only consider all relevant factors, including evidence favorable to the defendant, he or she must also weigh each factor and must explain in writing how a decision to deny pretrial diversion was determined). A district attorney general's failure to consider and articulate all relevant factors constitutes an abuse of discretion. *Bell,* 69 S.W.3d at 178; *see also Curry,* 988 S.W.2d at 159.

It is well settled that a district attorney general is bound to consider and weigh all *relevant* factors in determining whether to grant pretrial diversion. "The obvious corollary to this requirement is that the district attorney general must *avoid* relying upon *irrelevant* factors in denying diversion." *State v. McKim*, 215 S.W.3d 781, 787 (Tenn.2007); *see also State v. Thompson,* 189 S.W.3d 260, 268 (Tenn.Crim.App.2005) (holding that the prosecutor abused his discretion in denying pretrial diversion where he "did not properly consider all of the relevant factors, and did consider some irrelevant ones"); *State v. Lane,* 56 S.W.3d 20, 27 (Tenn.Crim.App.2000) (district attorney general abused his discretion in denying pretrial diversion because "off-duty acts that are unrelated to this defendant's duties of public employment are not a proper basis for imposing a higher standard of conduct and thereby justifying a denial of pretrial diversion").

> Where the prosecutor denies a defendant's application for pretrial diversion, the defendant may petition the trial court for a writ of certiorari. Tenn.Code Ann. § 40-15-105(b)(3) (Supp.2004). The prosecutor's decision is "presumptively correct," *Curry,* 988 S.W.2d at 158, and, on review, the trial court is limited to examining only the evidence considered by the district attorney general and must determine thereupon whether the prosecutor has abused his or her discretion, *Bell,* 69 S.W.3d at 177. That is, "the trial court should examine each relevant factor in the pretrial diversion process to determine whether the district attorney general has considered that factor and whether the district attorney general's finding with respect to that factor is supported by substantial evidence." *Yancey,* 69 S.W.3d at 559. The trial court must focus on the prosecutor's methodology rather than the intrinsic correctness of his or her decision, and the trial court should therefore not engage in re-weighing the evidence considered by the district attorney general. *Id.* at 558-59.

McKim, 215 S.W.3d at 788.

a. The Trial Court Properly Found that the Prosecutor Abused Her Discretion By Relying on Primarily Irrelevant Factors in Denying Mr. Warfield Pretrial Diversion.

The Tennessee Supreme Court has held that one means by which a prosecutor may abuse her discretion is by relying on irrelevant factors in denying diversion. *McKim*, 215 S.W.3d at 787. In this case, it is apparent from the prosecutor's January 30, 2006, letter that the prosecutor relied upon primarily irrelevant factors in her decision to deny Mr. Warfield diversion. (Ex. 3). The trial court agreed holding that, "[T]he facts that [the prosecutor] has based her decision on in the letter both to the defense counsel and Court, are based primarily on irrelevant factors that the Court, while it may be her job to consider, the Court is unwilling to consider and make [Mr. Warfield] ineligible for diversion." (Tr. 42).

First, the prosecutor found that the circumstances of the offense weighed against diversion. (Ex. 3). In making this determination, the prosecutor asserted that Mr. Warfield had demonstrated a disregard for the safety of others by driving his vehicle while impaired. (Ex. 3). However, Mr. Warfield was never charged with driving under the influence. (R. 2). In addition, the trial court made the factual finding that the circumstances of the incident were not such that would create an inference that Mr. Warfield was driving his vehicle while impaired. (Tr. 37). The circumstances of the incident according to the Brentwood Police Department's Affidavit of Complaint were as follows:

> [T]he vehicle driven by Mr. Warfield was stopped for running the stop sign at Mallory Lane and Commerce Way in Brentwood, TN. Mr. Warfield went through the stop sign at approximately 15 M.P.H. The vehicle went onto a curb in the parking lot area of Best Buy.

(Ex. 2). Furthermore, there is no evidence in the record showing that Mr. Warfield's driving placed anyone in danger nor that he disregarded the safety of others. Therefore, the trial court properly found the prosecutor's assertion that Mr. Warfield had driven his vehicle while impaired was irrelevant. (Tr. 38). The prosecutor also asserted that Mr. Warfield lied to the arresting officer and that Mr. Warfield's alleged lack of candor did not favor pretrial diversion. (Ex. 3). This Court has held that a prosecutor may not require a defendant to admit guilt as a prerequisite to favorable consideration for pretrial diversion and therefore should not weigh this factor against a defendant. *Thompson*, 189 S.W.3d at 268. Furthermore, the trial court made the factual finding that Mr. Warfield had admitted his guilt to the arresting officer. (Tr. 37). Therefore, the trial court properly found that the prosecutor's assertion that Mr. Warfield had lied to the arresting officer was irrelevant. (Tr. 38).

Although the prosecutor admitted that Mr. Warfield had no criminal record, she determined that his prior criminal *behavior* was tantamount to a criminal record and therefore militated against pretrial diversion. (Ex. 3). In making this determination, the prosecutor found that Mr. Warfield's dismissed citation for underage drinking and a related dismissed charge for failure to appear "demonstrated a sustained intent to violate the law." (Ex. 3). However, because both these citations were dismissed and did not result in a conviction, they were irrelevant to the prosecutor's determination of whether Mr. Warfield's criminal record weighed in favor of diversion. Furthermore, the court made the factual finding that these citations did not demonstrate a sustained intent to violate the law. (Tr. 38). Likewise, the trial court made the factual finding that Mr. Warfield's admission to the prosecutor that he had smoked marijuana recreationally over the past year also did not demonstrate a sustained intent to violate the law. (Tr. 38). In addition, the

prosecutor obtained evidence of Mr. Warfield's allegedly criminal behavior during the pretrial diversion interview. This Court held in *State v. Johnson*, No. M2002-1054-CCA-R3-CD, 2002 WL 31757505, at * 2 (Tenn.Crim.App. Dec. 10, 2002), that a prosecutor's use of incriminating evidence obtained during a pre-sentence report to punish the offender is inconsistent with the purposes of the report, counter-productive, and discourages truthfulness. Said the Court:

> [W]e remain mindful of the fact that the pre-sentence report was never intended to serve the purpose of gathering incriminating evidence to punish the offender. The offender is encouraged to be truthful and participate in the preparation of the pre-sentence report in order that information provided may be utilized by the sentencing court in arriving at an individualized sentence. To use the offender's statements within the report against the offender is counter-productive in that it discourages truthfulness and is inconsistent with the purposes of the pre-sentence report.

Johnson, 2002 WL 31757505, at *2. Because neither Mr. Warfield's prior dismissed citations nor his admission that he had smoked marijuana recreationally in the past year resulted in a conviction, they were irrelevant to the prosecutor's evaluation of this factor.

The prosecutor next determined that Mr. Warfield's social history weighed against diversion. (Ex. 3). The prosecutor supported this assertion with the fact that Mr. Warfield had failed to complete his college education at MTSU due to academic challenges. (Ex. 3). However, this Court has held that a defendant's failure to complete high school or to further his education is not a relevant factor weighing against pretrial diversion. *Thompson*, 189 S.W.3d at 266. The Court held in *Thompson*:

> The prosecutor placed slight weight against diversion based on the Defendant's failure to complete high school and his failure to "further his education since." The district attorney general fails to explain why the Defendant's academic history reflects negatively upon his amenability to correction. At the time he submitted his application, the Defendant had been steadily employed for almost forty years as a truck driver/owner-operator. As pointed out by defense counsel in his

> appellate brief, "not everyone is suited for academic pursuits." The failure to complete high school, or any other academic pursuit, is not in and of itself an indicator of a defendant's potential for rehabilitation, especially when the defendant follows this failure with a steady, consistent and lengthy course of gainful employment. The district attorney general abused his discretion by weighing this factor against the Defendant.

Thompson, 189 S.W.3d at 266.

Likewise in this case, the prosecutor failed to present any correlation between how Mr. Warfield's prior academic failure would negatively impact his amenability to correction. Furthermore, at the time of Mr. Warfield's application for diversion he was employed full-time, was attending community college part-time, had a good work history, and came from a good family. (Ex. 3). Therefore, the trial court properly found that the prosecutor's consideration of Mr. Warfield's failure to complete his education at MTSU was irrelevant. (Tr. 40).

The prosecutor further determined that Mr. Warfield was not amenable to correction. (Ex. 3). In making this determination, the prosecutor cited her subjective belief that Mr. Warfield expressed "an air of entitlement to leniency" since he had received a prior citation for underage drinking which was dismissed and for which he was "clearly guilty." (Ex. 3). However, the underage drinking citation against Mr. Warfield was ultimately dismissed; therefore, there was no adjudication of guilt for which the prosecutor could determine that Mr. Warfield was "clearly guilty." Furthermore, pretrial diversion has become the public policy of the State of Tennessee awarded to worthy candidates in order to show leniency in the appropriate circumstances:

> [Pretrial diversion's] purpose is to rehabilitate certain offenders and restore those individuals to useful and productive citizenship. As the late Mr. Justice Henry said in *Pace:*

> The self-evident purpose of pretrial diversion is to spare appropriately selected ... offenders the stigma, embarrassment and expense of trial and the collateral consequences of a criminal conviction. The result contemplated is the restoration of successful divertees to useful and productive citizenship. This is a legitimate and praiseworthy objective and one that has now become the public policy of the State.

566 S.W.2d at 868. The Act also permits the conservation of judicial manpower and the reduction of court congestion.

State v. Cornelius, No. 02-C-01-9204-CC-00089, 1993 WL 177127, at *3 (Tenn.Crim.App. May 26, 1993).

Thus, Mr. Warfield should not be penalized for requesting leniency when he was qualified to do so and when the public policy of the State of Tennessee encouraged him to make such an application. In addition, the prosecutor admitted in the same paragraph that "[Mr. Warfield] seems to be on the right track," that he was working, and that he had passed several drug screens since his arrest, indicating that Mr. Warfield was in fact amenable to correction. (Ex. 3). Therefore, the trial court properly found that the prosecutor's subjective belief that Mr. Warfield expressed "an air of entitlement to leniency" was irrelevant. (Tr. 41).

Finally, the prosecutor found that general deterrence weighed against diversion. (Ex. 3). The prosecutor reasoned that Mr. Warfield had not served as an appropriate role-model to the boys he coached at Franklin High School and that if Mr. Warfield were granted diversion, the boys may somehow fail to appreciate the seriousness of Mr. Warfield's offense. (Ex. 3). It is clear that the prosecutor was holding Mr. Warfield to a higher standard of conduct than the average citizen because Mr. Warfield chose to volunteer his time to coach wrestling to younger boys. The Appellee was unable to locate any case holding a volunteer coach to a higher standard of conduct than the

average citizen; however, the court has held that *public officials* are called upon to act in accordance with a higher standard than that applied to the average citizen. *Woodson v. State*, 608 S.W.2d 591, 594 (Tenn.Crim.App.1980). However even in that instance, the court has cautioned that acts that are committed by a public official off-duty and do not relate to an offender's public employment should not impose a higher standard of conduct justifying a denial of diversion. *State v. Lane*, 56 S.W.3d 20, 27 (Tenn.Crim.App.2000). In addition, there is no evidence in the record that the boys who Mr. Warfield coached had any knowledge whatsoever of his offense such that would cause them to fail to appreciate the seriousness of the offense if the prosecutor were to grant Mr. Warfield diversion. Therefore, the prosecutor's belief that Mr. Warfield had not served as an appropriate role-model and that the boys he coached would not appreciate the seriousness of Mr. Warfield's offense if he were granted diversion was irrelevant.

Based on the foregoing, Mr. Warfield respectfully requests that the Court affirm the trial court's finding that the prosecutor abused her discretion by relying on primarily irrelevant factors in denying Mr. Warfield pretrial diversion.

b. The Prosecutor Abused Her Discretion By Failing to Properly Consider All the Relevant Factors and By Reaching a Decision Not Supported By Substantial Evidence.

A prosecutor may also abuse her discretion by failing to properly consider all the relevant factors and by reaching a decision which is not supported by substantial evidence. *Thompson*, 189 S.W.3d at 266. In this case, it is clear from the prosecutor's January 30, 2006, letter that the prosecutor heavily weighed the aforementioned irrelevant factors while failing to properly consider the numerous factors which weighed in favor of granting Mr. Warfield diversion.

First, the prosecutor failed to place any weight on the circumstances of the offense. In *Johnson*, 2002 WL 31757505, at *1, defendant who tested positive for marijuana drove into the parking area of a market in the direction of an occupied vehicle requiring that vehicle to take evasive action. Defendant proceeded to make several high speed "donuts" before finally striking an unoccupied car and knocking that car into another parked car. *Johnson*, 2002 WL 31757505, at *1. The prosecutor denied defendant diversion citing defendant's history of drug use and "the fact that [defendant] engaged in conduct which created a significant danger to civilians." *Johnson*, 2002 WL 31757505, at *2. This Court reversed finding that defendant's conduct "was occasioned by an act of recklessness as opposed to a sustained intent to violate the law or to inflict serious bodily injury." *Johnson*, 31757505, at *3. The circumstances in this case are even less serious than those involved in *Johnson*. Here, Mr. Warfield drove through a stop sign at fifteen (15) M.P.H. and pulled onto a curb in the parking area of Best Buy. (Ex. 2). There is no evidence in the record showing that Mr. Warfield's driving placed anyone in danger nor that he disregarded the safety of others. Furthermore, Mr. Warfield fully cooperated with the arresting officer. (Ex. 1). Therefore, the prosecutor abused her discretion by failing to afford the circumstances of Mr. Warfield's offense any weight.

Next, the prosecutor failed to afford any weight to Mr. Warfield's lack of a criminal record, which this Court has held is one of the factors most relevant to a defendant's amenability to rehabilitation. *Thompson*, 189 S.W.3d at 266. Said the Court:

> [A] defendant's criminal history-especially a lack thereof-is an important signifier of whether the defendant is likely to offend again. That is, a defendant's criminal history is a critical factor to consider in evaluating his or her amenability to correction: the primary focus required in evaluating a request for pretrial diversion. The prosecutor's refusal to give any favorable weight to this factor is a refusal to

> accord any significance to a factor repeatedly stressed by Tennessee's appellate courts as crucial to the comprehensive analysis required of district attorneys in assessing a request for pretrial diversion. Accordingly, we conclude that the prosecutor abused his discretion by refusing to accord this factor any weight. *See Bell,* 69 S.W.3d at 179 (recognizing that a district attorney general abuses his or her discretion when he or she denies pretrial diversion "without considering *and weighing* substantial evidence favorable to a defendant.") (emphasis added).

Thompson, 189 S.W.3d at 267.

In this case, the prosecutor stated that "[Mr. Warfield] has no criminal record and has been certified as eligible for diversion by the Tennessee Bureau of Investigation;" however, the prosecutor failed to place any weight to this important factor. (Ex. 3). This Court has held that a prosecutor's acknowledgment of a favorable factor will not suffice and a refusal to place any weight on the lack of a criminal record is tantamount to refusing to consider it at all. *Thompson,* 189 S.W.3d at 266-267. Furthermore, the prosecutor's reliance on Mr. Warfield's admission to engaging in allegedly criminal *behavior* prior to the offense including a dismissed citation for underage drinking, a related dismissed charge for failure to appear, and an admission to smoking marijuana recreationally over the past year, did not result in any criminal conviction and therefore were irrelevant considerations and should not have effected the weight afforded Mr. Warfield's lack of a criminal record.

The prosecutor also failed to place any weight on Mr. Warfield's positive social history. The prosecutor stated that "This office has considered the seemingly good work history, the fact that [Mr. Warfield] comes from a good family and the positive reference provided" without affording these positive factors any weight in favor of diversion. (Ex. 3). This Court has held that a prosecutor may not acknowledge a positive factor alone and a failure to place any weight on a factor is tantamount to refusing to consider it at all. *Thompson*, 189 S.W.3d at 266-267. According to Mr. Warfield's

employer, Mr. David A. LeFeve, Mr. Warfield had been employed with Ikon Construction in Brentwood, Tennessee, for two and half years. (Ex. 2). Mr. LeFeve described Mr. Warfield as "a good, dependable worker and an overall excellent employee." (Ex. 2). Mr. Jon Hill also verified that Mr. Warfield was volunteering at Franklin High School as a wrestling coach. (Ex. 2). In addition to working approximately thirty-two hours per week at Ikon Construction, Mr. Warfield was taking two classes per semester at Columbia State Community College. (Ex. 3). Mr. Warfield also submitted letters from five character references. (Ex. 1). Mr. William E. Turner, Jr., First Vice President at Merrill Lynch and Mr. Warfield's Sunday school teacher wrote:

> I thought [Mr. Warfield] had the strongest character of just about anyone I had seen in my forty six years of teaching young people in Sunday school. I can say, without a doubt, in my mind, that [Mr. Warfield] will be a good citizen, a good family man - husband, and father, and will bring integrity to any area he chooses to work in. He does know the Lord, I am convinced of that. I would be proud to have him as a son.

(Ex. 1). Mr. David A. LeFeve, President of Ikon Construction and Mr. Warfield's employer wrote:

> I have challenged [Mr. Warfield] to excel with his studies in school as well as learn as much as possible while working for my company. He has embraced these challenges and continues to work hard and perform as requested. I believe [Mr. Warfield] is an honest, trusting and respectful young man and I will continue to employ him and challenge him to be the very best he can be in all aspects of his life.

(Ex. 1). Mr. John Collett, Senior Minister at Belmont United Methodist Church wrote:

> [Mr. Warfield] has made a mistake and is now suffering some of the consequences. I have consulted with the family to know that they are surrounding [Mr. Warfield] with structure, supervision, and accountability to enable him to move past his mistakes. [Mr. Warfield] is now living at home and attending Columbia State Community College. He is being drug-tested, at the insistence of his parents, every 2-3 weeks.
>
> Having worked with young adults through troubling times and experiences, I think I know when a young person can turn things around and go in a good direction. One

> of the success factors is a family that will provide the kind of supervision [Mr. Warfield] is now receiving.
>
> ...I know from experience that young men can turn themselves around, and I believe [Mr. Warfield] has the will, spirit, and family support to do it.

(Ex. 1). Mr. John Adams, Mr. Warfield's former Boy Scout Troop Leader, wrote:

> It was my honor to watch [Mr. Warfield] move from being a shy young boy, to being the Senior Patrol Leader of our troop. [Mr. Warfield] was always caring for and assisting the younger boys as they developed through Scouts. It was one of my most memorable moments when I presented the Eagle Scout Badge to [Mr. Warfield] a few years ago. Even after leaving Scouts, [Mr. Warfield] still maintained interest in helping the younger scouts grow. He would often come by and assist with meetings.
>
> [Mr. Warfield] has a great future ahead of him. I know this because of the solid foundation of a good past. It is always an honor and privilege to stand up for outstanding young men like [Mr. Warfield].

(Ex.1). Mr. Jon M. Hill, Mr. Warfield's former wrestling coach wrote:

> [Mr. Warfield] was a great leader while in high school. He wasn't a vocal leader, but rather a leader by example. Well respected by his team mates, he was involved in decision making and discipline. For a young man, [Mr. Warfield] made wise decisions.
>
> After high school graduation, and enrolling in college, [Mr. Warfield] was afforded some freedoms. I'm sure, as a college student, some of his decision making was tested and even failed. But I can assure that he has maintained his strong positive character and respectability. Earlier in life [Mr. Warfield] defined himself as a positive leader, and trustworthy individual. I can't help but believe that he still holds on to those traits.

(Ex.1). The prosecutor's dismissal of Mr. Warfield's character letters because of their failure to directly address the circumstances of the offense or Mr. Warfield's dismissed citation were irrelevant considerations and should not have effected the weight afforded to Mr. Warfield's positive social history. Likewise, Mr. Warfield's failure to complete his college education at MTSU due to academic challenges was not a relevant factor weighing against pretrial diversion, *see Thompson*,

189 S.W.3d at 266, and therefore should not have effected the weight afforded to Mr. Warfield's positive social history.

Finally, the prosecutor failed to place any weight on Mr. Warfield's amenability to correction. The prosecutor stated that "[Mr. Warfield] seems to be on the right track. He is working and has passed several drug screens since his arrest;" however, the prosecutor failed to afford this factor any weight in favor of diversion. (Ex. 3). This Court has held that a prosecutor may not acknowledge a positive factor alone and a failure to place any weight on a factor is tantamount to refusing to consider it at all. *Thompson*, 189 S.W.3d at 266-267. Furthermore, the prosecutor's reliance on Mr. Warfield's underage drinking citation as an indication of his non-amenability to correction was irrelevant because the citation was dismissed and therefore did not result in an adjudication of guilt. Likewise, the prosecutor's subjective belief that Mr. Warfield expressed "an air of entitlement to leniency" was an irrelevant consideration in determining Mr. Warfield's amenability to correction since Mr. Warfield was qualified for diversion and the public policy of the State of Tennessee encouraged him to make such an application for leniency. *See Cornelius*, 1993 WL 177127, at *3.

Based on the foregoing, Mr. Warfield respectfully requests that the Court find that the prosecutor abused her discretion by failing to properly consider all the relevant factors and by reaching a decision not supported by substantial evidence.

II. The Trial Court Properly Ordered the Parties to Enter Into a Memorandum of Understanding Placing Mr. Warfield on Pretrial Diversion Upon Finding that the Prosecutor Abused Her Discretion.

The Tennessee Supreme Court held in *McKim* that upon finding that the prosecutor failed to consider all relevant factors, the trial court should "reverse the district attorney general's decision

and remand the matter for further consideration and weighing of all the factors relevant to the pretrial diversion determination." 215 S.W.3d at 788. Likewise, the Court in *McKim* held that upon finding that the prosecutor relied upon irrelevant factors, the trial court should "reverse[] the prosecutor's decision and remand the matter of the defendant's diversion application for further consideration." *McKim*, 215 S.W.3d at 789.

However, in *State v. Tipton*, No. M2006-00260-CCA-R9-CO, 2007 WL 2295610, at *7 (Tenn.Crim.App. Aug. 9, 2007), this Court reversed a prosecutor's denial of pretrial diversion based on the prosecutor's consideration of irrelevant factors and failure to properly weigh the relevant factors and remanded the case to the trial court for the entry of an order granting pretrial diversion instead of remanding the defendant's application to the prosecutor for further consideration. In *Tipton*, defendant was charged with reckless operation of a motor vessel and failure to observe motor vessel light laws which resulted in the death of a passenger on a ski boat. 2007 WL 2295610, at *1. Defendant applied for pretrial diversion, which the prosecutor denied. *Tipton*, 2007 WL 2295610, at *1. On appeal, the court reversed the prosecutor's denial and remanded the matter to the prosecutor for further consideration finding that the prosecutor had considered irrelevant factors and based the denial primarily on the need for deterrence and the seriousness of the offense, while failing to emphasize defendant's amenability to correction. *Tipton*, 2007 WL 2295610, at *2 (*see State v. Tipton*, No. M2003-03030-CCA-R9-CO, 2005 WL 1240174, at *3 (Tenn.Crim.App. May 24, 2005)). Upon remand, the prosecutor again denied diversion and defendant appealed. *Tipton*, 2007 WL 2295610, at *2.

On appeal, the prosecutor alleged that he had taken all the relevant factors into consideration; however, it was clear that the prosecutor had again relied on irrelevant factors including (1)

defendant's multiple marriages; (2) the failure of defendant to answer one of the questions on his application for pretrial diversion; (3) the fact that defendant, a retired police officer, had violated Tennessee's laws; and (4) the failure of defendant to admit his guilt. *Tipton*, 2007 WL 2295610, at *2-3. The prosecutor had also again failed to afford sufficient weight to defendant's amenability to correction, lack of a criminal history, and positive social history. *Tipton*, 2007 WL 2295610, at *7. This Court determined that in the interests of justice and finality and the conservation of judicial manpower and the reduction of court congestion, the case should be reversed and remanded to the trial court with an instruction that pretrial diversion be granted rather than remanded to the prosecutor for further consideration. *Tipton*, 2007 WL 2295610, at *7. Said the Court:

> We note that when the appellant filed a petition for a writ of certiorari, the trial court should have informed the prosecutor that he had abused his discretion because the denial of pretrial diversion was obviously based upon irrelevant factors. *Id.* at 788-89. Ordinarily, the proper remedy would be to remand to the prosecutor for further consideration. *Bell,* 69 S.W.3d at 180. However, following this court's remand, the prosecutor and the trial court again failed to correctly focus the inquiry upon the appellant's suitability for pretrial diversion. Upon remand, the prosecutor found that certain factors weighed in favor of diversion. However, the prosecutor again ruled, based upon irrelevant considerations and factors, that the evidence weighed against diversion. Additionally, the prosecutor staunchly refused to focus on the appellant's lack of a criminal history and his positive social history, which indicate the appellant's amenability for correction, as weighty factors favoring diversion. Because there is no substantial evidence to support the decision of the prosecutor, we are compelled to reverse the prosecutor's denial of pretrial diversion and remand to the trial court with an instruction that pretrial diversion is to be granted.

Tipton, 2007 WL 2295610, at *7.

Unlike *McKim* and its progeny, this case does not require the Court to remand Mr. Warfield's application for diversion to the prosecutor for further consideration but rather to affirm the order of the trial court placing Mr. Warfield on pretrial diversion under *Tipton*. Similar to *Tipton,* the

prosecutor in this case relied on highly irrelevant factors that this Court has clearly held should be disregarded including: (1) Mr. Warfield's failure to complete his college education; (2) the prosecutor's assertion that Mr. Warfield's had failed to timely admit his guilt; (3) Mr. Warfield's failure to serve as a proper role-model; (4) Mr. Warfield's alleged expression of entitlement to leniency for applying for pretrial diversion; (5) the prosecutor's finding that Mr. Warfield's admission to allegedly illegal behavior was tantamount to a criminal record; and (6) the prosecutor's finding that Mr. Warfield was driving impaired when no such charges were filed. Likewise, the prosecutor in this case failed to place any weight on the factors weighing in favor of diversion including Mr. Warfield's the lack of a criminal record, positive social history, amenability to correction, and the circumstances of the offense.

It is clear that like the prosecutor in *Tipton*, the prosecutor in this case engaged in a result-oriented analysis "staunchly" refusing to focus on any factor weighing in favor of diversion while resorting to ridiculously irrelevant facts in order to deny diversion. The Tennessee Supreme Court has held that "the responsibility placed upon prosecutors to pick and choose among the lot [of applicants for pretrial diversion] based upon a particular candidate's amenability to rehabilitation or recidivism requires the exercise of unusual powers of discrimination." *Hammersley*, 650 S.W.2d at 353. "However, that discretion is not unbridled: It must be exercised so as to serve the interests of justice." *Pace v. State*, 566 S.W.2d 861, 864 (Tenn.1978). Here, the prosecutor's January 30, 2006, letter exhibited a clear prejudice against young men and the award of pretrial diversion in general when the law requires that she engage in an impartial determination of Mr. Warfield's *particular* amenability to correction. In relevant part the prosecutor stated:

> [Mr. Warfield] expressed little remorse for his actions. Instead his attitude expresses an air of entitlement to leniency. The fact that the other charges were dismissed when [Mr. Warfield] was clearly guilty seems to have fed the perception that he should have no consequences for his actions because they personify the sayings "young and stupid", "these are the type of things college kids do" and "boys will be boys".

Furthermore, this is not a simple case of the prosecutor mistakenly including an irrelevant factor in her analysis or failing to give due weight to a defendant's amenability to correction but rather a county-wide disfavor for diversion even in the most appropriate of circumstances. Judge Hayes in a separate concurring opinion in *Tipton* discussed the growing disparity in the application of diversion in various counties:

> This case illustrates the growing disparity in the application of diversion, both pre-trial and judicial, in the State of Tennessee. The appellant in this case, who presents an unblemished combined history of thirty-five years of meritorious service to his country in the military and to the citizens of this state as a police officer, is denied diversion, in effect, for operating a boat without proper light. Meanwhile, on the date this opinion is being written, the Shelby County Criminal Court grants diversion of a conviction for manslaughter stemming from the shooting death of the defendant's husband.

Tipton, 2007 WL 2295610, at *8.

Likewise in this case, Mr. Warfield is a twenty-three year old first-time offender, Eagle Scout, volunteer wrestling coach, active member of his church, full-time employee, and part-time student who was denied diversion, in effect, for running a stop sign and having a small amount of marijuana and marijuana paraphernalia in his vehicle. The trial court expressed its frustration with the prosecutor's refusal to grant Mr. Warfield diversion based on these circumstances stating:

> [T]he State of the law as it is written now that these are the kind of the cases – again, I'm not being specific enough, these are the cases that the Courts want us to grant pretrial diversion under, misdemeanor offenses committed by young people that did not cause or did not cause harm to the community at large. I mean pretty much these are the types of cases that we should be granting pretrial diversion on.

(Tr. 42).

Much like the prosecutor's office in *Tipton,* the Williamson County prosecutor's office is notorious for denying pretrial diversion in even the most deserving of cases. In *McKim* the Supreme Court explained how the prosecutor erred in relying on his own personal opinion of which offenses should or should not be divertible stating, "[c]ontrary to established precedent, the [prosecutor] in this case focused not on the [appellant's] amenability to correction but rather on his own opinion of what should and should not be a divertible offense." 215 S.W.3d at 788; *see also Hammersley*, 650 S.W.2d at 356 (holding that the prosecutor "was obviously in error in undertaking to apply a local policy contrary or different from that provided by state law" and that the prosecutor's action was "contrary to the policies formulated in the Pretrial Diversion Act."). Similarly, the Williamson County prosecutor's office has refused to analyze diversion cases according to established precedent, relying instead on their own opinion of what should and should not be a divertible offense and disregarding the pretrial diversion statute created by the legislature. Much like the Court in *Tipton*, the trial court in this case removed "the unusual power of discrimination" from the hands of the prosecutor who had failed "to serve the interests of justice."

Based on the foregoing, Mr. Warfield respectfully requests that the Court affirm the trial court's order placing him on diversion in the interests of justice and finality, uniformity in the application of the law, and the conservation of judicial manpower and the reduction of court congestion.

CONCLUSION

In conclusion, Mr. Warfield respectfully submits that the trial court properly found that the prosecutor abused her discretion by relying on irrelevant factors in determining whether to grant Mr. Warfield pretrial diversion. Mr. Warfield also respectfully submits that the prosecutor abused her discretion by failing to properly consider all the relevant factors and by reaching a decision not supported by substantial evidence. Based on the Court's decision in *Tipton* and in the interests of justice and finality, uniformity in the application of the law, and the conservation of judicial manpower and the reduction of court congestion, Mr. Warfield asks this Court to affirm the trial court's decision placing Mr. Warfield on pretrial diversion.

Respectfully submitted,

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