Tennessee Judicial Nominating Commission

Application for Nomination to Judicial Office

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INTRODUCTION

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

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

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

I am a partner in the three member firm of Rogers, Duncan & North. I primarily have a trial practice which includes personal injury, medical malpractice, will contests and other estate litigation, motor carrier liability, products liability, business/commercial litigation, domestic relations, and Social Security disability. I also handle the administration of estates.

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

1989, BPR No. 013778

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

Tennessee, BPR No. 013778; October 19,1989; 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).

I worked as an associate at the law firm of Rogers & Richardson after I completed law school. I became a partner in 1991, and the firm name changed to Rogers, Richardson & Duncan. In 1997, Doyle E. Richardson left the firm, and the name changed to Rogers & Duncan. In June 2010, Edward H. North became a partner, and the name of the firm changed to Rogers, Duncan & North.

I am one of two General Partners in Duncan Farms Family Limited Partnership. I am the Secretary/Treasurer of Duncan Farms, Inc. We own and operate a 2,500 acre row crop farm. I assist primarily with the bookkeeping.

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.

My practice is principally a civil trial practice. I represent clients in personal injuries and wrongful death cases, including cases arising out of automobile accidents, commercial motor vehicle accidents, medical malpractice, and products liability. I represent clients in the administration of estates, will contests, and other estate litigation. My domestic relations practice includes representing clients in divorce cases, post-divorce cases, termination of parental rights, adoption, and paternity and custody cases arising in Juvenile Court. I represent claimants before the Social Security Administration. A small percentage of my time is devoted to an office practice which includes the preparation of estate planning documents and business matters. I handle cases involving eminent domain and business/commercial litigation. I have represented criminal clients, including court appointments. I represent clients in appeals of cases, and I have included the appellate time in the percentage of the particular area of law.

Personal Injury and Wrongful Death (including cases arising out of automobile accidents, commercial motor vehicle accidents, medical malpractice, and products liability)	35%
Estate Matters (including administration of estates, will contests, and other estate litigation)	25%
Domestic Relations	17%
Social Security Disability	14%
Office Practice	5%
Business/Commercial Litigation/Eminent Domain	3%
Criminal Law	<1%

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 am admitted to practice before the U.S. Supreme Court, U.S. Court of Appeals for the Sixth Circuit, U.S. District Courts in the Middle, Eastern, and Western Districts of Tennessee, and the Tennessee Supreme Court.

I estimate that I have been involved in 1,300 matters in which I appeared before Tennessee Courts of record and 500 in lower courts (General Sessions, municipal). I estimate that I have been involved in approximately 45 cases in which I appeared before Federal District Courts. The vast majority of these cases have been civil.

I have been involved in 31 cases in the Tennessee Courts of Appeals and two cases in the Federal Court of Appeals. I researched and wrote the briefs in all of these cases. I made oral arguments in approximately 24 cases in the Tennessee Courts of Appeal and one case in the Federal Court of Appeals.

I have represented approximately 120 claimants before the Social Security Administration. The majority of these cases were resolved by a hearing before an Administrative Law Judge.

I have summarized a few noteworthy cases in the answer to question 9.

The majority of my legal experience over the entire time in which I have been a licensed attorney has been in the civil trial practice. I have been involved in the cases from the beginning to end. I interview clients; file pleadings; do discovery of parties, witnesses, and experts; research and file or respond to any legal issues which arise; attend mediation; try the case either before a jury or nonjury; and file or respond to any post-trial issues. If cases are appealed, I research and write the briefs and participate in oral argument. I have been lead counsel on many cases and co-counsel on many cases. If I served as co-counsel, I would participate at all levels in the majority of cases. I drafted the pleadings and performed the research in all cases in which I was counsel or co-counsel.

I have a very good work ethic. I am self-motivated. I strive to promptly return telephone calls and respond to client and other written communications. My experiences have required me to calendar and meet deadlines.

My personal experiences are also a positive factor. My husband and I have been married for 25 years and have two sons, Forrest, age 19, who is an upcoming Sophomore at UT-Knoxville and Hence, age 13, who will be in the 8th grade at North Middle School. We operate the family farm on which we raise corn, soybeans, and we have cattle.

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

TRIAL COURTS

Ralph Raymond Jones, III and wife, Fay Jones v. Dorothy Qualls d/b/a J&D Qualls Wrecker Service and Repair and William Paul Delp and General Motors, LLC, No. 37,534, Circuit Court, Coffee County.

My firm filed this personal injury action on December 11, 2009. Ralph Jones was injured in an accident on August 12, 2009. Mr. Jones was travelling across a bridge in Coffee County, Tennessee, driving a 2005 Chevrolet Avalanche pickup truck. His vehicle was struck by a vehicle which was being improperly towed by defendants, Qualls. The impact was very violent and caused significant damage to the front driver's corner of the Jones' truck. The airbags in the Jones' truck did not deploy. Mr. Jones suffered severe and permanent injuries, specifically to his lower extremities.

Plaintiffs brought suit against the towing company and General Motors, LLC, the manufacturer of the Jones' truck. The liability of the wrecker service was admitted. In order to establish a claim against General Motors, we hired several experts including engineers, a human factors expert, and a vocational rehabilitation expert. It was our burden of proof to establish that the airbag system was designed to deploy in this corner-frontal impact and that the injuries which Mr. Jones sustained were more serious as a result of the failure of the airbags to deploy.

I was involved in the development of the theories of the case to wit: negligence of the driver; negligence of the wrecker service on the basis of agency; respondeat superior; negligent hiring and supervision, and negligent entrustment; negligence of General Motors on the basis of negligent design, manufacturing, and marketing; designing, manufacturing, and selling a truck in a defective and unreasonably dangerous condition and failure to warn.

I drafted all of the pleadings and participated in the research and development of the case against General Motors. I participated in trial preparation, witness and expert depositions preparation, and taking of the depositions. I participated in the mediation of the case in which we reached a successful settlement.

Robert O. Higby, as Personal Representative of the Estate of Goldie Higby, deceased; Tammy Daniels Downs, as Personal Representative of the Estate of Patsy Sue Daniels Capps, deceased; and Murray Capps, as Personal Representative of the Estate of Doyle Ray Capps, deceased v. Net Transportation, Inc., Contract Carriers, Inc., and Weslie John Wilkes, deceased, nominal defendant, No. 3920705, U.S. District Court, Middle District of Tennessee. This case was filed in August 1992 and settled in July 1994.

Rogers & Duncan represented the plaintiffs in this motor carrier liability case. I drafted all of the pleadings and actively participated in discovery and trial preparation.

On May 30, 1992, defendant, Wilkes, was operating a tractor trailer truck on a two lane highway in Glencoe, New Mexico, and attempted to pass the vehicle in front of him. This point in the roadway was a no passing zone on a curve. The tractor trailer truck struck head on the vehicle being driven by Patsy Sue Daniels Capps, deceased. Goldie Higby, deceased, and Doyle

Ray Capps, deceased, guest passengers, were killed instantly, and Ms. Capps, deceased, received injuries which resulted in her death. When Mr. Wilkes walked up to the scene and observed the deaths, he returned to his truck and committed suicide.

We alleged that the two motor carrier defendants were liable based upon respondeat superior and agency. We also alleged that the motor carrier defendants were liable based upon the independent causes of action of negligent entrustment and failure to properly train, supervise, and control their driver. The suit was filed in the United States District Court, Middle District of Tennessee, because the defendant motor carriers were Tennessee corporations. The case involved extensive discovery. The tractor-trailer truck was leased to one defendant but was being operated, controlled, and dispatched by the other defendant. Plaintiffs and Defendants had expert witnesses.

The discovery established that defendant, Wilkes, had falsified his logbooks and exceeded the hours of service regulations. We would have been able to present this proof to the jury based on the allegations of negligent entrustment and failure to properly train and supervise. The case also involved complicated conflict of law issues. I researched the laws of the State of New Mexico and presented a memorandum on the Choice of Law Considerations.

We settled the case a few days before it was scheduled to be tried.

Other Motor Carrier Litigation.

I have participated in at least 20 accident cases in which a tractor-trailer truck was involved. These cases involved 22 deaths and 19 injuries. Motor carrier cases require extensive discovery which produces many records to be exhibited. Generally, all parties will retain a motor carrier expert. The litigation is complex. This case and other motor carrier cases we have tried or settled were significant to hold the motor carrier responsible when it entrusts a commercial motor vehicle to a reckless or incompetent driver.

Judy Darlene Mounts, surviving spouse, individually and on behalf of Billy Ray Mounts, deceased v. Cardiovascular Anesthesiologists, P.C., and St. Thomas Hospital, No. 00C-1756, Third Circuit Court of Davidson County, Tennessee.

This medical malpractice case was filed on June 23, 2000, and was settled in November 2001. Larry B. Stanley, J. Stanley Rogers, and I represented the plaintiff, Judy Mounts, in this wrongful death cause of action arising from medical negligence.

On September 9, 1999, 52 year old Billy Ray Mounts, deceased, was admitted to defendant, St. Thomas Hospital, for a heart transplant. The heart transplant surgery was successful. Once the chest cavity was closed, the attending surgeon requested that the anesthesiologist "hold the breath" so that a tube could be inserted. The request to "hold the breath" was a temporary non-use of the ventilator. Approximately 20 minutes later it was discovered that the ventilator had been disconnected, and Billy Ray Mounts had been deprived of oxygen for a prolonged period of time. Mr. Mounts died several days later.

The proof developed that all three of the audible alarms on the mechanical ventilator had been turned off. This was a violation of the *Standards of the American Society of Anesthesiologists*. The standards provide that the operation of the audible alarm system cannot be waived under any circumstances. I drafted the pleadings and was actively involved in the discovery process, including depositions. I assisted in preparing our experts. The case was mediated on two occasions. The case was settled, and the settlement was structured.

Other Medical Malpractice Litigation.

This is one of approximately 15 medical malpractice cases in which I have participated.

Delbert Eugene Wardwell, Sr. and wife, Constance Wardwell v. Satterfield Trucking Corporation, Bobby Satterfield d/b/a Satterfield Trucking and Sealy Mattress Manufacturing Company, Inc., No. 62CV352, Circuit Court, Third Judicial District at Morristown, Hamblen County, Tennessee. The case was filed on December 31, 2002, and was settled the day before the trial was to begin on September 13, 2005.

Rogers & Duncan and James Davis represented plaintiffs, Delbert Eugene Wardwell, Sr. and wife, Constance Wardwell. I prepared the majority of the pleadings and researched all of the legal issues. I took the video depositions of two of the medical providers and participated in the remainder of the depositions including two other medical providers and the motor carrier experts. I participated in the discovery and trial preparation. There were over 25 pretrial motions filed in the case. I drafted all of the motions and responses filed on behalf of Plaintiffs.

Delbert Wardwell, Sr. was an employee of Foamex. Part of his duties were to unload large bales of mattress material from trailers. He opened the trailer door, and a bale weighing approximately 890 pounds fell on him. As a result, he sustained extensive permanent injuries.

Rogers & Duncan and James Davis represented the plaintiffs in the third party action against the company which loaded the trailer and the company which transported the trailer. Mr. Wardwell was the sole provider for his family. We were able to make a substantial recovery for them, and the settlement was structured.

Extensive discovery was taken in the case. We had a motor carrier expert and a vocational rehabilitation expert. Both Defendants had motor carrier experts.

After the case was settled, the issues surrounding subrogation with the worker's compensation insurance carrier had to be addressed, including the division of attorneys' fees. In addition, the worker's compensation carrier took the position that it should not be required to pay future medical benefits or that it should receive credit in future medical benefits for amounts which Mr. Wardwell received in the third-party action. I researched and briefed these issues. The issues were resolved by the entry of an Agreed Order. The worker's compensation carrier will pay future medical benefits without receiving any credit.

Vickie Ruth Strickland v. Paul Lee Strickland, No. 06-52, Chancery Court of Coffee County, Tennessee. The trial of this case was bifurcated. The first phase of the trial held January 4, 2007, addressed the validity of the Ante-Nuptial Agreement. The second phase of the trial held January 11, 2007, addressed the classification of property as separate and marital and the distribution of the marital property.

This was a divorce case involving the validity of an Ante-Nuptial Agreement. The parties did not have children together. Both parties had prior marriages and significant assets at the time of the marriage. I represented the husband who sought to enforce the Ante-Nuptial Agreement. The wife took the position that the Agreement was not valid, because she did not enter the Agreement "knowledgeably" as required by Tenn. Code Ann. § 36-3-501. The wife took the position that there was not a full and fair disclosure of the husband's assets, because there was not a specific listing of assets attached to the Agreement. I developed the proof under the principles set forth in Randolph v. Randolph, 937 S.W.2d 851 (Tenn. 1996) to establish that the wife had independent knowledge of the full nature, extent, and value of the husband's property and holdings. This was a significant case, because it applied principles set forth in a Supreme Court decision to establish the statutory requirement of "knowledgeably" without a listing of specific assets.

Cynthia Canavan Turman and husband, Frank K. Turman v. State of Tennessee and Mary Sue Waller v. State of Tennessee, Claim Nos. 20100608 and 20100619, Claims Commission of Tennessee, Middle Division. This case was tried before the Claims Commission of the State of Tennessee on November 29, 2004. The Judgment was entered on June 6, 2005.

Rogers & Duncan represented Mr. and Mrs. Turman in a personal injury action. Mrs. Turman was injured when the vehicle she was driving was rear-ended by a rock/gravel truck. Mrs. Turman was unable to work due to her injuries. I participated in the preparation and trial of the case which was tried before the Claims Commission. A Judgment was entered in favor of the Turmans. I represented her in the claim for Social Security disability benefits. Mrs. Turman was awarded Social Security disability benefits after a hearing before an Administrative Law Judge. This case was significant, because my firm was able to assist our client in obtaining the legal remedies/relief to which she was entitled. This is one example of several cases in which my firm was able to address the legal needs of clients in multiple venues.

APPELLATE COURTS

State of Tennessee v. Rudolph Munn, 56 S.W.3d 486 (Tenn. 2001).

Rogers & Duncan represented defendant, Rudolph Munn, in this first-degree murder case. I researched and wrote the Motion to Suppress that was filed in the trial court. I participated in the jury trial. I researched and wrote the pleadings and briefs which were filed in the Court of Criminal Appeals and in the Supreme Court. I participated in the oral argument at the Court of Criminal Appeals and the Supreme Court. See, Attachment 1 for briefs submitted to the Supreme Court.

Defendant, Rudolph Munn, was convicted of first-degree murder of his Middle Tennessee State University roommate. During the investigation, the police requested that defendant, Munn, come to the Murfreesboro Police Station. His parents and his two-year-old sister took him to the police station. At one point, Mrs. Munn and her son were alone in an interview room. The police officer turned off the tape recorder which was visible on the table. The police secretly videotaped their conversations. During his conversation with his mother, defendant, Munn, admitted to killing the victim. At the trial, I drafted and filed a Motion to Suppress the videotapes and the confession on multiple grounds. The trial court denied the motion. Defendant, Munn, was convicted of first-degree murder and sentenced to life without the possibility of parole. The Court of Criminal Appeals affirmed.

The Supreme Court granted the appeal to determine four issues. The Supreme Court held that defendant, Munn, had a subjective expectation of privacy and that the expectation was reasonable. The Supreme Court held that the secret videotaping was a violation of defendant, Munn's, federal and state constitutional rights and a violation of the federal and state wiretapping statutes. Therefore, the videotapes should have been suppressed. The Supreme Court held that the error was harmless as to the guilt phase of the trial but not harmless as to the sentencing phase of the trial.

The Supreme Court held that defendant, Munn, was not in custody and therefore not entitled to be advised of his Miranda rights. After defendant, Munn, had confessed to his mother, he confessed to the officers. The Court held that these later statements did not have to be suppressed under the "derivative evidence rule". At the sentencing phase of the trial, defendant, Munn, did not testify, and we requested that the trial court charge a no-adverse-inference instruction. The trial court denied the jury request. The Supreme Court held that defendant, Munn, had a constitutional right to this instruction at both the guilt and penalty phase of the trial.

The Supreme Court remanded this case for a new sentencing hearing.

Scott Goodermote v. State of Tennessee and Tennessee Claims Commission, 856 S.W.2d 715 (Tenn. Ct. App. 1993).

Rogers & Duncan represented plaintiff, Scott Goodermote, in the trial before the Claims Commission and the appeal to the Court of Appeals. I participated in the trial preparation and the trial. I performed the research and wrote the Brief and Reply Brief which were filed in the Court of Appeals and the Response to the Application for Permission to Appeal filed by the State of Tennessee. I participated in the oral argument in the Court of Appeals. See, Attachment 2 for brief submitted to the Court of Appeals.

This action arose out of a wreck which happened on Interstate 24 near Manchester, Tennessee. Plaintiff, Scott Goodermote, was a passenger in a vehicle which left the interstate and traveled between twin bridges, down a 28-foot embankment, and came to rest in a ditch. Plaintiff, Scott Goodermote, received significant injuries. Our expert witnesses testified that if a guardrail or berm had been in place between the two bridges, the impact would have been less, and plaintiff, Scott Goodermote, would not have incurred his injuries.

We alleged that defendant, State of Tennessee, was liable for negligence in the construction, inspection, and maintenance of this portion of the interstate pursuant to Tenn. Code Ann. § 9-8-307(a)(1). We also alleged that defendant, State of Tennessee, created or maintained a dangerous condition on the state-maintained interstate. The Claims Commission dismissed the petition, and we appealed.

The Court of Appeals discussed the proof required under our two theories of liability. The plans for the highway included the installation of a guardrail, earthen berm or other safety mechanism across the opening between the twin bridges. The industry standard also required placing a guardrail or berm between the twin bridges. There was no guardrail or berm at the accident site.

Our proof established that in the last three years, six accidents had occurred within six-tenths of a mile of the site. Two accidents had occurred in exactly the same manner and in exactly the same location.

The Court of Appeals discussed in detail the elements of proof of each theory. The Court of Appeals held that the State of Tennessee was liable under both theories and that its negligence was the proximate cause of plaintiff, Scott Goodermote's, injuries. The case was remanded for a hearing on damages.

The Supreme Court denied the Application for Permission to Appeal filed by the State. Goodermote v. State, 856 S.W.2d 715 (Tenn. Ct. App. 1993) (perm. app. denied, June 1, 1993).

William J. Reinhart and wife, Judith F. Reinhart v. Robert T. Knight and wife, Glenda Knight, Bob Parks and John E. Harney, III, a partnership, 2003 Tenn. App. LEXIS 852 (Tenn. Ct. App., December 4, 2003).

William J. Reinhart and wife, Judith F. Reinhart v. Robert T. Knight and wife, Glenda Knight, Bob Parks and John E. Harney, III, a partnership, 2005 Tenn. App. LEXIS 753 (Tenn. Ct. App., December 2, 2005).

Rogers & Duncan represented plaintiffs, William J. Reinhart and wife, Judith Reinhart, in these proceedings. I assisted in the preparation of pleadings and participated in discovery and trial preparation at the trial court level. I researched and wrote the pleadings and briefs filed in the Court of Appeals and in the Supreme Court. See, Attachment 3 for brief submitted to the Court of Appeals.

Plaintiffs brought this cause of action in Rutherford County Circuit Court against defendants, Robert T. Knight and wife, Glenda Knight, alleging a breach of a real estate contract. Plaintiffs also named Bob Parks and John E. Harney, III, a partnership, as defendants and alleged that they were liable for procurement of breach of contract pursuant to Tenn. Code Ann. § 47-50-109.

The cause of action arose out of a Contract for Sale of Real Estate which provided that defendants, Knight, would purchase a 115-acre farm with improvements from Plaintiffs. Defendant, Harney, had previously approached Plaintiffs concerning the possible sale of the property. Plaintiffs initially did not know that defendant, Glenda Knight, and defendant, Harney, both worked for the same company, Bob Parks Realty. There were several delays, and the purchase was never closed. Plaintiffs were forced to sell the property at auction due to financial problems. Defendants, Parks and Harney, purchased the property. Within two years, defendants, Parks and Harney, developed a subdivision on the property and sold it for a substantial profit.

The jury held that defendants, Knight, breached the contract and that Plaintiffs incurred damages in the amount of $185,476.48. The jury also held that defendants, Parks and Harney, induced the breach of the contract. Several post-trial motions were filed. The trial judge denied the Motion for New Trial filed by defendants, Parks and Harney, and entered a remittitur of the entire Judgment against defendants, Knight. All parties filed a Notice of Appeal.

The Court of Appeals held that the original jury verdict should be reinstated. The Court of Appeals affirmed the jury's finding that defendants, Parks and Harney, procured the breach of contract. The Court of Appeals remanded the case. Reinhart v. Knight, 2003 Tenn. App. LEXIS 852 (Tenn. Ct. App., December 4, 2003).

The Application for Permission to Appeal filed by defendants, Parks and Harney, was denied by the Supreme Court. Reinhart v. Knight, 2004 Tenn. LEXIS 395 (Tenn., May 10, 2004).

After the case was remanded, the issue arose regarding the correct manner to apply the statutory treble damages provision to the jury's verdict. We took the position that Plaintiffs were entitled to receive the jury's verdict of $185,476.48 from defendants, Knight, and treble that amount from defendants, Parks and Harney. Defendants, Parks and Harney, took the position that they were entitled to an offset for any amounts paid by defendants, Knight. The trial court held that defendants, Parks and Harney, were entitled to an offsetting credit for any amounts paid by defendants, Knight.

We filed an appeal. The Court of Appeals held that "the treble damage award is not entirely punitive, and because it includes an element of compensatory pecuniary damages incurred as a result of the breach of contract, there should be an offsetting credit in the amount paid in satisfaction of the judgment for breach of the contract." Reinhart v. Knight, 2005 Tenn. App. LEXIS 753 at *2.

We filed an Application for Permission to Appeal to the Supreme Court which was denied. See, Attachment 4 for Application for Permission to Appeal. Reinhart v. Knight, 2006 Tenn. LEXIS 358 (Tenn., April 24, 2006).

Vickie Bramblett, Conservator for Robert Wayne Bramblett, and Vickie Bramblett, individually; Alec Garland and wife, Glenda R. Garland, and Norman "Archie" Slater v. Nick

Carter's Aircraft Engines, Inc. and Avco Corporation, 1991 Tenn. App. LEXIS 66 (Tenn. Ct. App., February 7, 1991).

Vickie Bramblett, Conservator for Robert Wayne Bramblett, and Vickie Bramblett, individually; Alec Garland and wife, Glenda R. Garland, and Norman "Archie" Slater v. Nick Carter's Aircraft Engines, Inc. and Avco Corporation, 1992 Tenn. App. LEXIS 645 (Tenn. Ct. App., July 17, 1992).

Vickie Bramblett, Conservator for Robert Wayne Bramblett, and Vickie Bramblett, individually; Alec Garland and wife, Glenda R. Garland, and Norman "Archie" Slater v. Avco Corporation, 1994 Tenn. App. LEXIS 178 (Tenn. Ct. App., April 5, 1994).

When I began practicing with Rogers & Richardson, it was co-counsel for the plaintiffs in this products liability cause of action. I researched and wrote all of the pleadings and briefs filed in the Court of Appeals and in the Supreme Court. I participated in the oral arguments.

A private plane crashed in Kentucky, because a two-piece camshaft separated during the flight. When I became involved, the trial court had granted the defendant manufacturer's motion for summary judgment based upon Tennessee's ten-year statute of repose. The trial court held that the statute of repose was procedural rather than substantive. Therefore, the trial court held that the claim was barred by the statute of repose even though the doctrine of lex loci which was in effect at the time required that the substantive law of Kentucky applied. The Court of Appeals reversed, holding that the Tennessee ten-year statute of repose was substantive and therefore did not apply to the accident which happened in Kentucky.

Defendant, Avco, filed an Application for Permission to Appeal to the Supreme Court. While the Application was pending, the Supreme Court issued the decision in Hataway v. McKinley, 830 S.W.2d 53 (Tenn. 1992) renouncing the doctrine of lex loci and adopting the "most significant relationship" doctrine. The Supreme Court then issued an order remanding this case to the Court of Appeals in light of the change in the law. Bramblett v. Avco Corp., 1992 Tenn. App. LEXIS 376 (Tenn., May 26, 1992).

The Court of Appeals remanded the case to the trial court to allow the parties to present proof on the "most significant relationship" factors. Bramblett v. Nick Carter's Aircraft Engines, Inc., 1992 Tenn. App. LEXIS 645 (Tenn. Ct. App., July 17, 1992).

The trial court found that the substantive law of Tennessee applied to the case; and therefore, the statute of repose barred the claim. We took the position that either the substantive law of Kentucky or Pennsylvania (the place in which the camshaft was designed and manufactured) should apply. Neither of these states had a ten-year statute of repose. The Court of Appeals affirmed the decision of the trial court. Bramblett v. Avco Corp., 1994 Tenn. App. LEXIS 178 (Tenn. Ct. App., April 5, 1994).

We filed an Application for Permission to Appeal which was denied. Bramblett v. Avco Corp., 1994 Tenn. App. LEXIS 238 (Tenn. Ct. App., July 25, 1994).

In re: T.K.Y., 2003 Tenn. App. LEXIS 259 (Tenn. Ct. App., April 2, 2003).
In re: T.K.Y., 2005 Tenn. App. LEXIS 415 (Tenn. Ct. App., July 14, 2005).
In re: T.K.Y., 2005 Tenn. App. LEXIS 416 (Tenn. Ct. App., July 14, 2005).
In re: T.K.Y., 205 S.W.3d 343 (Tenn. 2006).

Rogers & Duncan represented Kinda Young and husband, David Young, throughout these proceedings. At the trial level, I assisted in the preparation of the pleadings, discovery, and the trial. I researched and wrote the pleadings and briefs filed in the Court of Appeals and in the Supreme Court. See, Attachment 5 for brief submitted to the Supreme Court. I participated in the oral argument of each appeal.

This case arose out of the Juvenile Court of Coffee County, Tennessee. Tom Pitts filed a Petition to Establish Paternity of a two year old child. The child was born during the marriage of Kinda Young and husband, David Young. However, the genetic testing proved that Tom Pitts was the biological father. We filed a Petition to Terminate his parental rights. The trial court did not rule on the issue of paternity. The trial court terminated parental rights based upon Mr. Pitts' failure to file a petition to establish paternity under Tenn. Code Ann. § 36-1-113(g)(9)(A)(vi) within 30 days after he had notice that he could have been the child's father.

Mr. Pitts filed an appeal. While the case was on appeal, the Supreme Court issued an opinion in Jones v. Garrett, 92 S.W.3d 835 (Tenn. 2002). In Jones, the Supreme Court held that the trial court should address the issue of paternity prior to addressing the issue of termination. The Jones case also held that the statutory ground of termination relied upon by the trial court in our case is only available to terminate the parental rights of persons who are not legal parents. The Court of Appeals remanded the case. In re: T.K.Y., 2003 Tenn. App. LEXIS 259 (Tenn. Ct. App., April 2, 2003).

On remand, we took the position that David Young should be named the legal father based upon the fact that he and Mrs. Young were married when the child was born and the fact that Mr. Young received the child in his home and openly holds the child out as his natural child pursuant to Tenn. Code Ann. §36-2-304(a)(1) and (4). The trial court found that Mr. Pitts was the legal father based upon the DNA test and the fact that he had taken action to prove his parentage. We appealed. The Court of Appeals reversed and held that Mr. Young was the legal father of the child. In re: T.K.Y., 2005 Tenn. App. LEXIS 415 (Tenn. Ct. App., July 14, 2005).

Mr. Pitts' Application for Permission to Appeal was granted. The Supreme Court held that the biological father is both the "father" under the parentage statutes and the "legal father" for purposes of the adoption and termination statutes. In re: T.K.Y., 205 S.W.3d 343 (Tenn. 2006). The Petition to Rehear we filed on behalf of the Youngs was denied.

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

each case; and (4) a statement of the significance of the case.

I have represented many clients in mediation which is statutorily required in divorce and post-divorce cases. I have also represented many clients in mediations in personal injury and medical malpractice cases. Some were successfully settled at the mediation, some were settled in follow up negotiations after the mediation, and some were not resolved through mediation.

Since mediation has been required by statute, I have served as a mediator in approximately 35 domestic relations cases in which the parties agreed that I could serve. My duties are to explain the mediation process and mediate the issues in an attempt to settle the case. These cases were pending in the Circuit or Chancery Courts of Coffee County and Franklin County, Tennessee.

On March 4, 2005, I was the mediator in the divorce of Judy Ann Spinetti v. Robert Louis Spinetti, No. 03-529, Chancery Court, Coffee County, Tennessee. All issues were contested including the parenting plan, division of marital assets, and alimony. The parties had significant assets. We began the mediation process in the afternoon and were making progress. The attorneys for the parties and I knew that the settlement would never be finalized if we did not have the parties sign the documents at the mediation. We continued mediation after hours. My legal assistant came back to the office to assist in the preparation of the documents. We completed a detailed Marital Dissolution Agreement and detailed Permanent Parenting Plan. We finished at approximately 1 a.m. The parties and the attorneys were very appreciative that we continued working and settled the case. I saw Ms. Spinetti several months after the mediation. She thanked me for my help and persistence and told me that she and her ex-husband were able to communicate some since the mediation.

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

I am frequently appointed Guardian ad Litem in the Juvenile Court of Coffee County, Tennessee, for children in dependent and neglected cases and in contested custody cases.

I am the Trustee of the Joy Henley McKee Irrevocable Trust. My sister, Joy Henley McKee, D.D.S., M.S., created this trust for her sons.

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

Fortunately, my practice has allowed me to have experience in cases involving many different fact situations. A trial lawyer must be very knowledgeable about the facts or standards that give rise to the cause of action. I have studied different disciplines. I have been involved in complex litigation that required multiple day trials, and I have handled simple General Sessions Court cases. I have met and worked with clients from all walks of life. This background gives me a good perspective from which to view the law and the litigants involved in appeals.

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

I submitted an Application for the Judgeship on the Middle Section Court of Appeals in July 2007. The Judicial Selection Commission met on July 31, 2007, and August 1, 2007. My name was not submitted to the Governor as a nominee.

I submitted an Application for the Judgeship on the Middle Section Court of Appeals in October 2007. My name was one of the three submitted to the Governor after the Judicial Selection Commission met on November 15, and 16, 2007.

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.

Vanderbilt University, B.A., cum laude, history major; 1982-1986
University of Tennessee College of Law, J.D. with honors; 1986-1989

I graduated 12 out of 98 in law school.

I graduated from law school with honors. I was on the Dean's List during the following semesters: Spring 1987, Fall 1987, Fall 1988, Spring 1989. I received the American Jurisprudence Award in Insurance in Spring 1989.

I took the following courses in law school which directly addressed the subject of appellate or trial advocacy:

Legal Writing and Advocacy, Spring 1987
Trial Practice, Fall 1988
Appellate Practice Seminar, Spring 1989

PERSONAL INFORMATION

15. State your age and date of birth.

I was born on March 29, 1964, and I am 49 years old.

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

49 years.

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

49 years. I attended college and law school but maintained my permanent residence in Franklin County, Tennessee.

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

Franklin 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.

None.

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

I have received and paid two speeding citations. I was issued a speeding citation in Murfreesboro, Tennessee, in the fall of 1982 on my first trip home from Vanderbilt University. I also received and paid a speeding citation in the summer of 1986 in the State of Georgia.

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.

Not applicable.

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.

Rogers & Duncan v. Diana Northcutt, No. 05-01203, General Sessions Court, Coffee County, Tennessee. I represented the wife in a very contested divorce that involved custody of two children. After the lengthy trial, the wife was named primary residential parent. She had paid a retainer fee which had been used. She owed additional fees and expenses which she agreed to pay out of the proceeds she was to receive from her equity in the marital home. The husband refinanced the house and paid the equity directly to the wife. She did not pay my fees and expenses as agreed. Therefore, I filed a suit to collect on August 30, 2005. I was granted a Judgment.

Rogers & Duncan v. Brian Brown, No. 07-00380, General Sessions Court, Coffee County, Tennessee. I represented the husband in a contested divorce action that involved the division of assets as well as custody of the children. The litigation was very protracted. I appeared in Court on many occasions, including on an Order of Protection and criminal charges which arose during the divorce proceedings. The divorce trial lasted two days, and there were post-trial motions. My client did not pay or set up a payment plan to pay the fees and expenses. I made repeated requests by telephone and in writing for him to contact me to discuss the matter. He did not contact me, and I filed the suit to collect on March 20, 2007. I was granted a Judgment.

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

Court Appointed Special Advocate (CASA), Board of Directors January 2012-Present
Franklin County Industrial Board, Member April 2012-Present
Church of Christ

Manchester Chamber of Commerce
University of Tennessee Parents Association, Member 2012-Present

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.

American Bar Association, 1989-2006
Tennessee Bar Association, 1989-Present
Tennessee Bar Association Professional Liability Insurance Committee, 2003-2007
Tennessee Trial Lawyers Association, 1989-2007
Tennessee Trial Lawyers Association, Board of Governors; 2000-2007
Tennessee Association for Justice, 2007-Present, Board of Governors; 2007-2010
Tennessee Lawyers Association for Women
Coffee County Bar Association, 1989-Present; President 1993-1994
Board of Professional Responsibility, Hearing Committee Member; March 2009-Present

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

None.

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

Duncan, Christina Henley "Negligent Entrustment: Alive and Well, But When Should It Be Pled?" The Tennessee Trial Lawyer, (2003).

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

None.

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

See answer to question 13 above.

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

No.

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

I researched and wrote each of the attachments.

Attachment 1. State v. Munn, 56 S.W.3d 486 (Tenn. 2001).

Brief of Appellant, Rudolph Munn submitted to the Supreme Court of Tennessee with Appellant Munn's Application for Permission to Appeal.

Supplemental Brief of Appellant, Rudolph Munn submitted to the Supreme Court of Tennessee after the Application for Permission to Appeal was granted.

Attachment 2. Goodermote v. State, 856 S.W.2d 715 (Tenn. Ct. App. 1993).

Brief of Petitioner.

Attachment 3. Reinhart v. Knight, 2003 Tenn. App. LEXIS 852 (Tenn. Ct. App., December 4, 2003).

Brief of Appellees, William J. Reinhart and wife, Judith F. Reinhart.

Attachment 4. Reinhart v. Knight, 2006 Tenn. LEXIS 358 (Tenn., April 24, 2006).

Application of William J. Reinhart and wife, Judith F. Reinhart, for Permission to Appeal to the Supreme Court.

Attachment 5. In re: T.K.Y., 205 S.W.3d 343 (Tenn. 2006).

Brief of Plaintiffs/Appellees, David Young and Kinda Young.

Attachment 6. Harold Thomas Jackson v. Jones Trucking, Inc. and Gary A. Coffey, No. 4:05-CV-52, United States District Court, Eastern District of Tennessee at Winchester.

Plaintiff's Trial Brief.

ESSAYS/PERSONAL STATEMENTS

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

I decided to reapply for this position, because I believe my temperament, education, and experience qualify me. I believe I would enjoy serving as an Appellate Judge. I have been involved in many appellate cases involving diverse legal issues and fact scenarios. I enjoy research and writing. My 24 years of private trial practice and numerous appeals are a solid foundation for this position.

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)***

I have been a member of the Tennessee Bar Association and the Tennessee Association of Justice (formerly Tennessee Trial Lawyers Association) since I have been practicing law. Both of these organizations support and promote equal justice under the law.

I have always taken pro bono cases. In my personal practice, I have chosen to assist individuals with legal needs who could not afford to pay a private attorney. I will take matters on pro bono or reduced fee basis where there is a need for legal services. I have pledged to take two referrals per year from Leal Aid Society of Middle Tennessee and The Cumberlands.

I have assisted community organizations in obtaining 501(c)3 status including Almost Home, a local organization which provides temporary housing for the homeless. I have also assisted my children's local elementary school in legal mattes on a pro bono basis.

I accept appointments to represent indigent clients in the Coffee County Juvenile, General Sessions, and Circuit Courts. I have taken many appointments in dependency and neglect cases in the Coffee County Juvenile Court. I believe it is very important for the judicial system to be available to all citizens.

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)***

I am seeking a position on the Middle Section Court of Appeals. There are four members of this Section of the Court. I think I would be an asset to the Court of Appeals. I have a strong academic record. My legal experiences include involvement with many different areas of the law and many different fact situations. I have handled many appeals for clients and understand the very real and personal impact that appellate decisions have on parties. I am excited about the prospect of serving on the Court of Appeals and would take my duties very seriously.

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)***

If I am appointed, I intend to continue to be involved in my community in several ways. I would continue to be actively involved in my children's school and extracurricular activities. In addition, I would visit elementary, junior high, and high schools. I think it is very important to educate young people about the judicial system. I would also be involved in civic organizations. I believe judicial interaction with the public increases the public's understanding of and respect for the system.

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 raised on a farm in a rural community outside Decherd, Tennessee. My parents ran the farm and worked in the family lumber and hardware business. I learned a strong work ethic from my parents. I worked at the lumber and hardware business during summer vacations and school breaks from the 9th grade through college. I learned to work hard and to appreciate the value of a dollar.

Although I was raised in a rural community, I have observed and been exposed to many types of environments. My parents believed that traveling was important and educational. My husband and I share that belief and have traveled with our children.

My education sets a solid foundation for this position. I attended public schools through high school. I enjoyed my four years at Vanderbilt University. I made life-long friends and studied under excellent professors. One summer, I studied at the London School of Economics. I have always been a good student, and I love to research and write.

My husband, two sons, and I live on a farm which has been in my husband's family for four generations. We have expanded the farm and now raise crops on 2,500 acres. My husband and I have a wonderful relationship. Many people wondered how a farmer and lawyer would make it together. It works perfect, because we understand that work is required when your "ox is in the ditch" regardless of the time or the day. We are trying to teach our children a strong work ethic.

I am active in my children's school, public speaking, and competition grilling activities.

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. I would uphold the law even if I disagree with the substance of the law. This is part of a Judge's responsibility. If constitutional challenges were made to a statute or rule, that issue would have to be addressed by the Court. If the statute or rule is held constitutional, then I would uphold it even if I disagree with the substance of it.

As a licensed attorney, I am required to represent my clients zealously. This zealous representation includes finding and using statues or rules which assist my client regardless of whether I agree or disagree with the law.

I cannot recall any specific incident in which I disagreed with a statute or rule on which I relied on behalf of my client.

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. Jim Allison
Chairman of Tennessee Regulatory Authority
President and Chief Executive Officer
Duck River Electric Membership Co-op
305 Learning Way
Shelbyville, Tennessee, 37160
(931) 684-4621

B. Larry B. Stanley, Sr., Esq.
Stanley & Bratcher
100 West Main Street
Post Office Box 568
McMinnville, Tennessee, 37110
(931) 473-4922

C. Clinton H. Swafford, Esq. Swafford, Peters, Priest & Hall 120 North Jefferson Street Winchester, Tennessee, 37398 (931) 967-3888
D. John R. Tarpley, Esq. Lewis, King, Krieg & Waldrop, P.C. 424 Church Street, Suite 2500 Post Office Box 198615 Nashville, Tennessee, 37219 (615) 259-1366
E. Bob G. Willis President of Willis Farms, Inc. Former Director of Tennessee Farm Bureau Federation [redacted]

AFFIRMATION CONCERNING APPLICATION

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

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the [Court] Middle Section Court of Appeals 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: June 7, 2013.

Signature

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

TENNESSEE JUDICIAL NOMINATING COMMISSION

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

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

WAIVER OF CONFIDENTIALITY

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

Christina Henley Duncan
Type or Printed Name

Christina Henley Duncan
Signature

6/7/2013
Date

013778
BPR #

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

ATTACHMENT 1

IN THE SUPREME COURT OF THE STATE OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE, Appellee, vs. RUDOLPH MUNN, Appellant.	)	No. _____ (From the Court of Criminal Appeals at Nashville, Tennessee No. 01C01-9801-CC-00007)

BRIEF OF APPELLANT, RUDOLPH MUNN

ROGERS & DUNCAN

J. Stanley Rogers
BPR #2883
Christina Henley Duncan
BPR #13778
Attorneys for Appellant
100 North Spring Street
Manchester, TN 37355

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REFERENCES TO THE RECORD AND NAMES OF THE PARTIES

Defendant, Rudolph Munn, is referred to as either defendant or defendant, Munn, throughout this brief.

The record includes multiple volumes that have been designated by the trial court with Roman Numerals. All references to the Record will be designated by R. Volume Number. Page Number.

At the suppression hearing, the Court viewed an unedited videotape of a series of interrogations of defendant, Munn. A transcript of this tape was prepared by the defense and introduced as Exhibit 4-ID. The transcript was divided into parts depending on who was present in the room. Munn 1 includes the initial questioning that lasted approximately 54 minutes. Lieutenant Eddie Peel, Detective Chris Guthrie, defendant, Munn, and his father, Ron Munn, were present. Munn 2 is the transcript of the conversations when the officers and defendant, Munn, returned to the Felony Booking Room. Munn 2A-20 is the transcript of the series of conversations. The transcript was divided into parts designated by letters, and the letters change as various persons enter or leave the room. Any reference to this unedited version of the videotape transcript is designated as Munn #, letter. Page number. (uned.)

At the trial, the jury viewed edited videotapes of the interrogations. These tapes were introduced as Exhibits 37 and 38. Certain portions of the tape were edited out upon motion of Defendant and by agreement with the State. A transcript of these

videos was prepared which omitted the edited out portions. In addition, lines were drawn for any parts of the conversation the contents of which counsel could not agree. This edited transcript was not given to the jury but will be helpful to the Court in determining the issues raised in this appeal. The edited transcript of the initial interrogation (Munn 1) was introduced for identification only as Exhibit 35-ID. The edited transcript of the second set of interrogations (Munn 2A-2L) was introduced for identification only as Exhibit 36-ID. All references to this transcript will be designated as Munn #, letter. page number.

The defendant filed a Motion to Supplement Record to add the transcript of the proceedings had on July 23, 1996, which had been omitted from the Record. The Court granted this Motion. All references to this transcript are designated as R. 7/23/96. page number.

All references to the Opinion rendered by the Court of Criminal Appeals are designated as Opinion. page number. All references to the Concurring and Dissenting Opinion written by Judge Joseph M. Tipton are designated as Dissent. page number.

STATEMENT OF THE CASE

Defendant, Rudolph Munn, was found guilty of premeditated first degree murder and sentenced to life without parole in the Rutherford County Circuit Court. Rutherford County Circuit Judge overruled the Defendant's Motion for New Trial and Motion of Acquittal.

Defendant appealed to the Court of Criminal Appeals at Nashville, Tennessee. Judge James T. Woodall wrote the decision of the Court which affirmed the trial court's ruling. Judge Joe G. Riley joined the decision. Judge Joseph M. Tipton wrote a Concurring and Dissenting Opinion in which he concurred in affirming the conviction but stated he would reverse the sentence of life without parole and remand the case for a new sentencing hearing. The basis for Judge Tipton's consent was that he disagreed with the conclusion of the Opinion that the surreptitious taping of the conversations between the defendant and his parents did not violate the Fourth Amendment to the United States Constitution and the federal and state wiretapping statutes.

The Court held a hearing on the Defendant's Motion to Suppress Statements on July 19, 1996. R. V. On September 9, 1996, Defendant filed a Supplemental Memorandum of Law in Support of Defendant's Motion to Suppress Statements. R. II. 175. The Court overruled the Defendant's Motion to Suppress Statements in a ruling from the Bench on November 15, 1996. R. IV.

On November 1, 1996, the State filed Notice of the State's Intention to Seek the Sentence of Life Imprisonment without the Possibility of Parole, relying on the aggravated factors found in Tenn. Code Ann., Section 39-13-204(i)(6) and (7). R. II. 177.

The jury trial was held on December 2-4, 1996. R. III. VI.-IX. The jury returned a verdict finding defendant, Munn, guilty of premeditated first degree murder. The sentencing hearing was held on December 5, 1996. R. X. The jury sentenced Munn to a sentence of life without the possibility of parole. R. II. 180.

On December 31, 1996, Defendant filed a Motion for New Trial listing 17 grounds. R. II. 191. On the same date, Defendant filed a Motion for Judgment of Acquittal. R. II. 194.

On September 22, 1997, Judge Clayton denied Defendant's post trial motions in a ruling from the Bench, and on October 6, 1997, an Order was entered. R. II. 197.

Defendant filed a Notice of Appeal on October 21, 1996. R. II. 198. On April 1, 1999, the Court of Criminal Appeals filed its Opinion affirming the lower Court's ruling.

Defendant, Munn, filed an Application for Permission to Appeal to the Supreme Court of Tennessee.

STATEMENT OF FACTS

Defendant, Rudolph Munn, was found guilty of premeditated first degree murder of his Middle Tennessee State University roommate, Andrew C. Poklemba, and sentenced to life without the possibility of parole.

At the trial, the State presented proof that at approximately 6:13 p.m. on November 28, 1995, the body of an unidentified white male was found lying in the parking lot at the Days Inn in Murfreesboro, Tennessee. R. VIII. 363. The body was lying close to the back of a car being towed by a motor home. The body had been shot in the back of the head with a single bullet. A pocket knife with the blade open was lying next to the body. R. VIII. 403; R. III. 516-517. No witnesses were found on the scene. The pockets of the pants were turned inside out, and no wallet, set of keys or other identification was found on the body. R. VII. 380, 382, 386, 405. The identification of the body was unknown.

The police circulated a composite drawing and received information that the victim was Andrew C. Poklemba, a student at Middle Tennessee State University. R. VIII. 415, 430.

As part of their investigation, the officers went to the MTSU dorm room where Poklemba and defendant, Munn, resided and spoke with defendant, Munn. R. III. 539-540, 542. Defendant, Munn, basically told them when he had last seen Poklemba and his activities of November 28, 1995. R. VIII. 481. The next day,

Mr. and Mrs. Munn took defendant, Munn, to their home in Manchester, Tennessee.

The continuing investigation revealed some discrepancies in the details and information that had been given by defendant, Munn. R. VIII. 433. On December 1, 1995, Lieutenant Peel contacted the Munn home and requested that defendant, Munn, answer some additional questions. R. VIII. 421, 545. Mr. and Mrs. Munn and their two year old daughter went with defendant, Munn, to the Rutherford County Police Department on the evening of December 1, 1995. R. VIII. 432. The officers' interrogations of Munn were videotaped by a hidden camera. R. III. 546-547. At one point during the interrogation, the officers left defendant, Munn, and his mother alone in the room and defendant, Munn, confessed to killing Poklemba. Munn 2-C. Mrs. Munn conveyed this to the officers. Munn 2-D. Defendant, Munn, was arrested for first degree murder. R. VIII. 422.

Defendant, Munn, made a Motion to Suppress all statements made by him on December 1, 1995. Defendant, Munn, contented that all statements made, and the fruits thereof, were inadmissible, illegal, and taken in violation of federal and state law and in violation of his rights under the Fourth, Fifth, Fourteenth, and Sixteenth Amendments to the Constitution of the United States and Article I, Sections Seven, Eight, and Nine of the Constitution of Tennessee. R. I. 8.

The trial court held an evidentiary hearing on the Motion to Suppress on July 19, 1996, and July 23, 1996. R. V. and R. 7/23/96.

Detective Chris Guthrie testified that his investigation revealed that Poklemba was killed on Tuesday, November 28, 1995, at approximately 6:13 p.m. at Days Inn in Murfreesboro, Tennessee. R. V. 15. Detective Guthrie described the progress of the investigation. The police initially interviewed Munn at the MTSU dorm where Munn and Poklemba lived. R. V. 20-21; R. 7/23/96. 7. The police obtained information that was inconsistent with the statements made by defendant, Munn, in that initial interview. R. V. 22. Eddie Peel contacted defendant, Munn, at his home in Manchester, Tennessee, and advised that he needed to come to the police department. R. 7/23/96. 8.

Mr. and Mrs. Munn brought defendant, Munn, to the police station at approximately 5:15 p.m. on Friday evening, December 1, 1995. R. V. 22-23; R. 7/23/96. 9. Defendant, Munn, and his father went with Officers Peel and Guthrie to the Felony Booking Room on the third floor of the police department for questioning. R. V. 24-25; R. 7/23/96. 12. The Felony Booking Room is marked with a sign and is approximately a 12 x 12 room. R. V. 30, 80; R. 7/23/96. 11. On the table, there was an audio tape recorder. R. V. 24; R. 7/23/96. 13, 77. There is a hidden video camera in the clock and microphones in the ceiling above the table and chairs. R. V. 24; R. 7/23/96. 13, 72, 73. The officers did not advise defendant, Munn, that the conversations were being

recorded and videotaped. R. V. 79. In another room within the police department, there are several video cassette recorders and a monitor. R. V. 26. The conversations in the Felony Booking Room could be monitored by officers in the separate room while they were being recorded. R. V. 26; R. 7/23/96. 75. Eddie Peel advised defendant, Munn, that he was not under arrest and that he was free to leave at anytime. R. V. 28; R. 7/23/96. 12.

This first interview lasted 54 minutes. R. V. 33, Exhibit 1. Both officers, Peel and Guthrie, inquired about the discrepancies in Defendant's story, but Defendant generally stayed with his original story. R. 7/23/96. 15. At the conclusion of this interview, Lieutenant Peel escorted defendant, Munn, and his father to the lobby where Mrs. Munn and defendant, Munn's, two year old sister were waiting. R. V. 36; R. 7/23/96. 15. Lieutenant Peel had asked Mr. Munn to explain to Mrs. Munn that defendant, Munn, might be asked to return to the station if more information was needed. R. 7/23/96. 14. Mrs. Munn was very upset, and she asked Lieutenant Peel if he thought that defendant, Munn, had killed Poklemba. Lieutenant Peel responded, "Ask you son." Mrs. Munn did so, and defendant, Munn, did not respond. R. 7/23/96. 16. Mrs. Munn then asked Lieutenant Peel what he wanted to do and he told her he wanted to talk to defendant, Munn, outside of the presence of his parents. R. 23/96. 16. Mrs. Munn testified that Lieutenant Peel kept staring at her as if he wanted her to get involved in the process and

that she felt they could not leave at that time. R. 7/23/96. 155-157.

Defendant, Munn, agreed to talk with the police further, and everyone proceeded to the third floor. Defendant, Munn, returned to the Felony Booking Room with Peel and Guthrie, and the officers turned on the audio tape that was visible on the table in the room. R. V. 73.

When the officers and defendant, Munn, returned to the Felony Booking Room, they confronted him about discrepancies in his story. This interrogation is designated as Munn 2-A. They confronted him that they thought he knew more than he was telling them. R. 7/23/96. 18. They told him they wanted to take his fingerprints, and he responded that he did not want to give his fingerprints that night. R. 7/23/96. 20. Lieutenant Peel told defendant, Munn, that he did not believe that defendant, Munn, was telling the truth. R. 7/23/96; Munn 2-A. 12. Defendant, Munn's, contact lens popped out, and he said he needed a mirror. R. 7/23/96. 58; Munn 2-A. 10. Although a bathroom was located next door to the Felony Booking Room, Detective Guthrie suggested that Defendant pull the blinds up on the window and use the reflection of the window as a mirror. R. 7/23/96. 58. Defendant, Munn, asked whether he could come back another time on several occasions.

After approximately 28 minutes, Mrs. Munn entered the room and said, "This sounds like the kind of thing that you need a lawyer for." Munn 2-B. 1; R. 7/23/96. 23. Munn 2-B is a

transcription of the conversations had with Mrs. Munn present. Mrs. Munn made a very emotional and effective plea to her son to tell the officers what they wanted to know. The following is an excerpt of Ms. Munn's plea:

> You know that if we don't get it out in the open, the next stop is we'll go to a lawyer's office and we'll have to go through all this or he'll have to make you get it out in the open because sooner or later we'll have to all get it out in the open. Even if you went to confession. The first thing Father Kurt would say is tell me what happened. If you were to walk out of this b[uilding] and die tonight, that would be enough for certain if you lied to these men or avoid telling them something, then that would be enough to keep you out of heaven. Is this worth eternal damnation? Do you understand? Is this worth that? I don't think so. You cant' go to communion and take the body of Christ and believe all that and not believe that he doesn't love you too, and won't forgive you. That's the first step. We can't take the first step until we know what you've done. We will not abandon you Rudy. We love you too much for that. Yeah. But please, this is like bleeding an open wound. Can we just get to the end of it? Please? Okay? Please?
>
> . . .
>
> They [the officers] think there's more, they think there's more. Andy you ___ okay, let's just get to the end. I'll pray for you, okay? Okay? I'll help you. What happened?

The officers suggested that defendant, Munn, and his mother speak alone or privately. R. V. 79; Munn 2-B. 6, 7. The officers left the room and shut the door. R. 7/23/96. 29. The officers then went to the separate video monitoring room where the conversations of defendant, Munn, and his mother could be monitored. R. V. 47.

The conversation between Mrs. Munn and defendant, Munn, is transcribed as Munn 2-C. Mrs. Munn sat in the chair close to her

son, touched him on his knee, and in hushed tones pleaded with him to tell the officers what they wanted to know. Munn 2-C. 1-2. Defendant, Munn, told his mother that he shot Poklemba. Munn 2-C. 2. Mrs. Munn testified that she thought she and the defendant were alone and that no one was listening or recording their conversations. R. 7/23/96. 135.

When the officers returned, Mrs. Munn told them that defendant, Munn, told her that he shot Poklemba. Munn 2-D. 1. Mrs. Munn or the defendant mentions or questions whether a lawyer is needed on several occasions. Munn 2-B. 1; 2-D. 1; 2-I. 1; 2-K. 12; 2-L. 1.

After the issue of whether there was a need for a lawyer arose, the officers remained in the room with the defendant, and there was continued conversation. Officer Peel handed defendant, Munn, a piece of paper that Lieutenant Peel said contained the Miranda warnings and asked him if he had read it. Defendant, Munn, responded no, and defense counsel and the Attorney General disagreed on the content of the sentence made by defendant, Munn, that followed. R. 7/23/96. 48; Munn 2-K. 2. During this time, Lieutenant Peel testified that he thought they were waiting on the Munns to make a decision as to whether to hire an attorney. Lieutenant Peel continued to talk to defendant, Munn, and ask him questions. R. 7/23/96. 50-54. Defendant, Munn, also thought they were "waiting on a lawyer". R. 7/23/96. 57; Munn 2-L. 1.

The officers contacted District Attorney General, William Whitesell. R. V. 52, 2E-1. After he arrived, he spoke with the

Munns. He told the Munns that they could speak alone with the defendant and led them to the Felony Booking Room. These conversations were also recorded and transcribed as Munn 2-M; 2-N; and 2-O (uned.); Exhibit 4-ID.

Defendant, Munn, was arrested, booked, and he signed a written Miranda waiver at 9 p.m., according to the time on the waiver. R. 7/23/96. 66.

In a ruling from the Bench, the Court overruled the Motion to Suppress. R. IV. The trial was held on December 2-4, 1995.

At the trial, the State called Poklemba's fiancé, Valerie Roscoe. R. VI. 200. Poklemba was a 25 year old Junior ROTC student at MTSU who had served in Panama Just Cause and in Saudi Arabia. R. VI. 207. Poklemba owned several military type weapons, including a .9 mm., CAR-15, AK-47, M-16, and a couple of rifles. R. VI. 216, 249. He kept these guns at his dorm room. Poklemba had given her the CAR-15. She testified that Poklemba had loaned the defendant the AK-47, and Poklemba was trying to get it back. R. VI. 221, 226, 246. She and Poklemba were members of the Society of Creative Anachronism. R. VI. 203.

Paul Reavis, who was a student at MTSU and a friend of defendant, Munn's, also testified on behalf of the State. R. VI. 257, 259, 261. On November 28, 1995, defendant, Munn, requested to borrow a handgun from Reavis, and Reavis let him borrow a Ruger .22 caliber revolver and a box of .22 long rifle bullets. R. VI. 263, 267. Defendant, Munn, gave Reavis the pistol back that same evening at approximately 7:30 p.m. R. VI. 274. Some

of the bullets were missing, and there were indications that the gun had been fired. R. VI. 275-276. Defendant, Munn, offered to sell Reavis an AR-15, and Reavis gave him Two Hundred Dollars ($200.00) or Two Hundred Fifty Dollars ($250.00) toward the purchase. Reavis returned the AR-15 to Munn, because threads in the gun were stripped. R. VI. 282. Defendant, Munn, loaned him an AK-47. VI. 284.

The State called various other witnesses who had seen Poklemba shortly before his death and the man who discovered the body. R. VIII.

Several police officers who participated in the investigation testified. R. VIII. The Tennessee Department of Investigation forensic agent testified that the bullet found in the victim was a .22 caliber long rifle bullet, but he could not determine if that bullet was fired from the gun which defendant, Munn, had borrowed from Reavis. R. III. 490, 500-501.

The State introduced the edited videotapes of the statements made by defendant, Munn, on December 1, 1995. R. IX. 607, 616. The jury found defendant, Munn, guilty of premeditated first degree murder.

The sentencing hearing was held on December 5, 1996. The State argued that the two aggravating circumstances listed in Tenn. Code Ann., Section 39-13-204(i)(6) and (7) were present and that these aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. The State argued that Munn committed the murder for the purpose of avoiding,

interfering with or preventing his lawful arrest or prosecution for the theft of the AR-15. The State also argued that the seventh aggravating factor that the murder was committed while Defendant was committing or was attempting to commit a robbery or theft applied.

The State called Poklemba's fiancé, Valerie Roscoe, as a witness. R. X. 30, 31. She testified that she last saw him on Monday, November 27, 1995, when they went to Embassy Suites to make plans for their wedding reception. R. X. 38-40.

Poklemba lived with her six days a week at a duplex in Nashville, Tennessee. R. X. 34. He was 25 years old and a Junior at Middle Tennessee State University (MTSU) majoring in history. R. X. 32. Andrew Poklemba had entered the United States Army Reserve when he was 17 years old and had served in active combat. R. X. 54. Ms. Roscoe testified that Poklemba owned several weapons, including an AR-15 or a CAR-15; an AK-47, and a .9 mm. R. X. 34, 36-37.

At one time, Poklemba thought the AR-15 was stolen, but it was returned. R. X. 46. On November 27, 1995, the AR-15 was at Roscoe's house. R. X. 43, 46. After the AR-15 was returned, Poklemba loaned the AK-47 to defendant, Munn, according to the testimony of Valerie Roscoe. R. X. 46. She testified that Poklemba loaned the AK-47 to Munn for the weekend of November 3, 1997. R. X. 47.

After Roscoe and Poklemba met at the Embassy Suites, Poklemba was going to MTSU to meet with Munn and get the AK-47.

R. X. 43. She spoke with Poklemba on the telephone at 8:30 p.m. and testified that he was upset, because Munn had not returned the gun. R. X. 43.

Ms. Roscoe and the father of the victim testified that it was the practice of Poklemba to always carry his wallet and identification. R. X. 33, 54-55. Ms. Roscoe testified that she had no personal knowledge as to whether Poklemba had his wallet in his possession at his death. R. X. 48.

Mr. Poklemba testified that he had made the statement on television that he did not want anyone to forget that two fathers had each lost a son because of this incident. R. X. 57.

Detective Chris Guthrie testified that Munn stated that he had never borrowed a gun from Poklemba. R. X. 58, 59. Detective Guthrie testified that Munn told him he asked Poklemba to remove the license plate so he could get him to kneel down, and that is when he shot him. R. X. 60. Detective Guthrie testified that Munn told him he rolled Poklemba over and took his license and wallet. R. X. 60. Munn said he shot Poklemba for the gun and money, according to Detective Guthrie. R. X. 61, 62. These statements were made during the interrogation at the police department.

On cross-examination, Detective Guthrie testified that they had recorded Munn's conversation with his mother by a video camera hidden in a clock on the wall. R. X. 63-64, 67. The audio recorder on the table was turned off. R. X. 62. Detective Guthrie's investigation revealed that Munn had just turned 18

years old, was in his first three months at MTSU, and that he had no previous criminal record. R. X. 67. At one time, Munn told the officers that he was intimidated by Poklemba. R. X. 69. Detective Guthrie acknowledged that the officers told Munn in essence that if he told the truth it would be better for him. R. X. 74-75.

Rudy Munn's father, older sister, and older brother testified on his behalf at the sentencing hearing. In addition, Billy Ray Bouldin, a family friend and Defendant's former teacher; Abby Stokes, a family friend and former neighbor to the Munns; Dr. Jerry Campbell, the Munn family pediatrician; and Tony Graf, a friend and fellow church member, testified on behalf of the young defendant.

The testimony of these witnesses was that Munn was born on April 24, 1977, the third of ten children of Ron and Rita Munn. R. X. 78, 80, 90. Ron Munn is a senior engineer with Corporate Technology as an Operating Contractor at Arnold Engineering Development Center. R. X. 78. Munn was raised in Manchester, Tennessee, and was a member of the Catholic Church which he attended regularly with his family. R. X. 81, 85-86, 92, 104. Munn did volunteer work at Crestwood Nursing Home. R. X. 85. Munn participated in Boy Scouts and played soccer. R. X. 83. He made good grades in the public high school he attended and in deportment. R. X. 84. The Munns are a well-known, well-liked, and very close-knit family. R. X. 114, 122, 125.

In November 1995, defendant, Munn, was a Freshman at MTSU in his third month of college. R. VI. 279, 285, 298. Initially, he had been placed in the athletic dorm, and he was then transferred to the room of Poklemba, a 25 year old combat veteran. R. X. 97, 147. Poklemba kept military weapons, ammunition, and other military gear in the dorm room.

The witnesses described Munn as a funny, caring young man who helped around the home and who always tried to take care of his family and shield them from problems. R. X. 84, 120-121, 140-142, 145-146. None of these witnesses ever knew of Munn to get into any trouble prior to this incident. R. X. 84, 90, 141. None of the Munns had ever had any difficulty with the law prior to this incident. R. X. 81. Munn would sometimes puff himself up to be a tough guy in order to hide his true emotions, according to his brother and sister. R. X. 152-153.

After he was released on bond, defendant, Munn, lived with his parents in Manchester, Tennessee, and had helped his mother in her bread baking and catering business. R. X. 88-89.

At MTSU, defendant, Munn, had cut some classes and had begun drinking alcohol. R. X. 95, 151, 161. On November 6, 1995, Munn had completed a written application requesting to change rooms, because he was not comfortable with Poklemba as his roommate. R. X. 97, 148; R. X. 101-102, Exhibit S-1.

On rebuttal, the State called Lieutenant Eddie Peel, and he was asked about statements made by defendant, Munn, in the interview that the Court had ruled inadmissible in the trial.

R. X. 163-166. In the interrogation with the officers, Munn mentioned that he had been drinking, gambling, and doing other activities about which his parents were not aware. R. X. 171.

The jury retired to deliberate at approximately 4:50 p.m. R. X. 235. After some period of deliberations, the jury asked the Court Officer a question. R. X. 235. The Court requested that the jury write out the question, and they submitted the following questions:

> 1. Can the 51 years ever be changed by statute?
>
> 2. What happens if the jury cannot come to a unanimous decision?
>
> R. X. 238.

The Court responded to both questions that he could not answer them. R. X. 241.

The jury requested to watch the videotape of the Munn interview. The Court allowed the jury to have the videotape and television to view it in the Jury Room.

The jury continued with deliberations and later returned with the following:

> We can agree on aggravating circumstances. However, we cannot reach a decision on the sentence to impose. What do we do?
>
> R. X. 241.

The Court responded that they were to continue deliberations per earlier instructions. R. X. 241.

After further deliberations, the jury returned with the sentence of life without the possibility of parole. R. X. 242.

The jury found the aggravating factor that the murder was knowingly committed while the defendant was committing or attempting to commit a robbery or theft. R. X. 242-243. The Court then polled the jury. R. X. 243-244.

LAW AND ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPRESS THE VIDEO TAPED STATEMENTS BECAUSE THEY WERE VIDEOTAPED IN VIOLATION OF HIS FOURTH AMENDMENT RIGHTS AGAINST SEARCH AND SEIZURE AND FEDERAL AND STATE LAW.

The trial court erred in denying defendant's Motion to Suppress the conversations between defendant, Munn, and his mother and father which were transcribed as Munn 2-C, 2-G, 2-H, and 2-J. These private conversations were videotaped without the knowledge or consent of the Munns and in violation of the Fourth Amendment and Tenn. Code Ann., Section 40-6-301 et seq. and 18 U.S.C., Section 2510 et seq.

Eavesdropping and electronic surveillance like the tape used during the interrogation constitute searches and seizures and are subject to the warrant requirements of the Fourth Amendment. The Wiretapping and Electronic Surveillance Act of 1994 and its federal counterpart specifically define the mandatory procedure to be followed in order to lawfully intercept oral communications for use as evidence and both require a Warrant or Order from the Court. None of the mandatory statutory procedures or Fourth Amendment protections were followed when the Munns' communications were videotaped.

The Court of Appeals correctly held that the defendant had a subjective expectation of privacy but erroneously held that this expectation was not legitimate or reasonable. The activities of the law enforcement officers in this case constituted an unreasonable government intrusion and surveillance. The Supreme Court should hold that these actions were a violation of Munn's constitutional and statutory rights.

The Fourth Amendment protects individuals from unreasonable searches and seizures and protects individual privacy against certain kinds of governmental intrusion. The Fourth Amendment protects people, not places, and what a person seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. Katz v. United States, 389 U.S. 347, 351-352, 88 S.Ct. 507, 19 L.Ed.2d 576, 581-582 (1967). The Fourth Amendment reflects that the Framers of the Constitution made a choice that our society should be one in which citizens "dwell in reasonable security and freedom from surveillance". Johnson v. United States, 333 U.S. 10, 14, 68 S.Ct. 367, 92 L.Ed. 436 (1948). Cases have held that Courts should use a two part inquiry in determining if a person has a constitutionally protected reasonable expectation of privacy. First, has the individual manifested a subjective expectation of privacy in the challenged search? Second, is society willing to recognize that expectation as reasonable? Katz, 389 U.S. at 360, California v. Ciraolo, 476 U.S. 207, 211 106 S.Ct. 1809, 90 L.Ed.2d 210, 215 (1986). State v. Roode, 643 S.W.2d 651, 652-53 (Tenn. 1982).

The federal and state wiretapping statutes specifically define the mandatory procedure to be followed in order to lawfully intercept oral communications for use as evidence. The statutes define oral communication as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation". Tenn. Code Ann., Section 40-6-303(13). See also, U.S.C. Section 2510(2). The two prong inquiry used in Fourth Amendment cases is also applied in determining whether something is oral communication under the wiretapping statutes.

The case involves an unusual set of facts as it relates to the videotaping of the conversations between Defendant and his mother and later between Defendant and his father. The police officers suggested on several occasions that defendant, Munn, and his mother speak "alone" or "by themselves". The officers deliberately fostered an expectation of privacy knowing that they could monitor and videotape the conversations. The officers knew that Mrs. Munn had a considerable influence over the defendant and had observed her using an emotional and persuasive plea to defendant, Munn, to try to get him to come forward with the truth. The officers knew that this conversation was likely to lead to Defendant making incriminating statements to his mother in confidence. It was reasonably predictable and foreseeable that defendant, Munn, would confess any involvement he had in the murder to his mother. By the surreptitious taping, the officers

accomplished indirectly what they had been unable to accomplish directly.

The activities of the police officers in this case should not go unregulated. The Court of Criminal Appeals states "Although we do not necessarily condone the surreptitious manner in which the police video taped Defendant in this case, we cannot, as a matter of law, say that those actions violated Defendant's Fourth Amendment rights." Opinion. P. 27. However, by allowing this videotape into evidence, the Court did condone the activity. Judge Tipton held in his Concurring and Dissenting Opinion that the actions of the officers should not only not be condoned but should be held to violate the defendant's Fourth Amendment rights.

This is a case of first impression in Tennessee. This fact scenario is vastly different from the cases which have been decided in Tennessee holding that a person does not have a justifiable expectation of privacy in a jail cell, State v. Dulsworth, 781 S.W.2d 277 (Tenn. Crim. App. 1989), on jailhouse telephones, and the back of the police cars, State v. Tilson, 929 S.W.2d 380 (Tenn. Crim. App. 1996). This case involves the videotaping of subjectively private conversations between an 18 year old defendant and his mother. The officers had "set up" the private meeting. The defendant had not been arrested, and according to the Opinion, was not "in custody" for the purposes of Miranda. Defendant had requested that the visible audio tape recorder be turned off. The officers were merely using this

audio tape as a prop and a subterfuge. They turned it off at Defendant's request, and this supports a finding that the Defendant's privacy expectations should be recognized by society. The officers videotaped the conversations for the purpose of monitoring what was being said. They fully and reasonably expected the defendant to confess his involvement and/or knowledge about the murder to his mother.

The officers did not videotape the conversation for safety reasons, and it was not an accidental monitoring or overhearing. The Court of Criminal Appeals recognizes that the officers did not offer any safety reasons for the monitoring and taping. The Court states as follows:

> . . . Officer Peel testified that the hidden video camera is used in "[m]ajor felony interviews, major investigations. And now mostly just about all the time with any investigation since we've got it operative." Although we can find no testimony that the hidden camera is used for safety purposes as was established in the cases cited above, we can say that this has obviously become ordinary, police station procedure at this particular police station.
>
> Opinion. P. 27.

Defendant would state that just because a practice becomes "ordinary, police station procedure" does not mean that the procedure does not violate a defendant's constitutional rights. The focus should not be on whether or not the conduct of the officers was an established practice, but rather whether or not the conduct was unreasonable and a violation of the Fourth Amendment rights. Further, the "ordinary, police station procedure" would be to videotape the officers interviewing and

interrogating witnesses and/or suspects so the officers "would not miss anything". That is a vastly different purpose and procedure than the manner in which the video was used in this case in which the officers secretly videotaped a private conversation after insuring the defendant and his mother that they were speaking "alone". This case presents a need for review by the Supreme Court to settle these important questions and issues raised,

In the Concurring and Dissenting Opinion, Judge Tipton states the following:

> . . . I believe that the defendant's expectation of privacy is one that should be recognized as reasonable and justified in light of the fact that (1) there was no showing that the conversations were recorded for safety or security, and (2) the officers, with full knowledge that the conversations were being videotaped, led the defendant to believe that the conversations were private.
>
> . . ;
>
> While conceding that the defendant manifested a subjective expectation of privacy, the majority opinion refers to several cases to support its position that the defendant's expectation of privacy is not objectively reasonable. I believe that most of the cases are distinguishable in that the prosecution showed in them that it was necessary to record the conversations for police safety relative to prisoners. For example, in State v. Wilkins, 868 P.2d 1231 (Idaho 1994), the conversation of an arrestee-defendant was recorded by the emergency dispatcher who testified that conversations were recorded for police safety. Id. At 1237. Likewise, in State v. Hauss, 688 P.2d 1051, 1055 (Ariz. Ct. App. 1984), the state proved that the arrestee-defendant's conversation was recorded because the officers were concerned about the defendant receiving a weapon or discussing possible escape plans. Also, in United States v. Hearst, 563 F.2d 1331 (9th Cir. 1977), justification for recording stemmed from

the government's interests in prison security and order.

A substantive distinction between those cases and the instant case is that there has been no showing by the state in the present case that the recordings were made in the furtherance of police safety. To the contrary, Officer Guthrie testified at trial that the reason for videotaping conversations is to insure that the officers do not miss anything. In the context of interviewing an individual who has not been arrested, the explanation makes sense, but it has nothing to do with safety or security.

The facts reflect that the conversations between the defendant and his parents were recorded in the hopes of securing evidence. With respect to the defendant's first conversation with his mother, the officers deliberately fostered an expectation of privacy, knowing that the conversation would be far from private. The officers' comments to the defendant during their interrogation of him indicated that they believed the defendant's mother held considerable influence over the defendant. The mother's own questions of the officers indicated that she believed the defendant was not being forthcoming. When the officers could not get the defendant to admit to the crime through their questioning, they encouraged the defendant to speak with his mother alone, anticipating that the defendant would admit the crime to her. Detective Guthrie even testified that after he left the defendant and his mother alone, he went to the videotape room and watched the conversation.

Police safety and security are important and legitimate concerns, and in the appropriate case, the need for police safety and security can outweigh a defendant's right to privacy. This, however, is not that case. The defendant was not in custody. The police deliberately fostered an expectation of privacy for the purpose of getting the defendant to confess to his mother what he would not confess to them. The majority opinion concedes that it does not condone this type of surreptitious behavior. Not only do I not condone it, but I also believe that it violated the defendant's Fourth Amendment rights and the wire tapping statutes.

For the same reasons, I believe that the three other recorded conversations that the defendant challenges are also inadmissible. The second

> conversation involved the defendant and his father alone in the room, and the defendant said that he killed the victim for money. The defendant's mother then entered, and in that conversation, the defendant further elaborated on the shooting and told his parents that it was intentional. In the final conversation that the defendant challenges, his mother and father were present in the room, and he again said that he shot the victim.
>
> The defendant's discussions with his parents were quite blunt regarding his feelings and motivations about the killing and were much more detailed about the events surrounding the murder than he provided to the police. The state relied on these statements in the sentencing phase. In the context of the jury determining whether the defendant should or should not have the possibility of parole, I believe that the statements could seriously affect the jurors' view of the defendant, particularly as to determining the relative weight of aggravating and mitigating circumstances. I would remand the case for a new sentencing hearing.
>
> Dissenting, P. 1, 4-5.

In this case, the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment and federal and state wiretapping statutes. This decision and the methods used by the law enforcement officials should not be allowed to stand.

This case is distinguishable from the cases from other jurisdictions which are relied upon by the majority opinion in the Court of Criminal Appeals. In State v. Wilkins, 868 P.2d 1231 (Idaho 1994), the Idaho Supreme Court held that conversations between the defendant and his parents which were overheard and recorded over an intercom system by the emergency dispatcher were admissible in the sentencing hearing. Wilkins was arrested for violation of an Order of Protection and

transported to the police station. The officers read him his Miranda rights and interrogated him. His parents arrived in the booking room, and the officers offered to leave Defendant alone with his parents. Defendant, Wilkins, agreed but asked that the audio tape recorder be turned off. The room was wired with an electronic monitoring system wired to the dispatcher's office. The dispatcher heard the officer say that he was leaving, and she monitored and recorded the conversations. Defendant made several incriminating statements. He was charged with assault with intent to commit a serious felony. The dispatcher testified that she listens to conversations in the police booking room for purposes of police safety. The Court held that the governmental interests of security and order outweighed any expectation of privacy. In the Wilkins case, Defendant was arrested and had been read his Miranda rights. The purpose of the monitoring was for legitimate safety purposes. These facts distinguish the case from the case at bar.

In State v. Calhoun, 479 So.2d 241 (Fla. App. 4 Dist. 1985), the District Court of Florida held inadmissible statements made by the defendant to his brother. Defendant was in jail on an unrelated charge when he became a suspect in another case. The officers took Defendant from his jail cell to an interview room. The officers read Defendant his Miranda rights, and he requested to speak with his brother who was also in jail on unrelated charges. The officers placed the two brothers in the interview room. The officers monitored the conversations without the

brothers' consent or knowledge. After approximately five minutes, an officer reentered the room and removed the brother to a nearby holding cell. The officer then entered the interview room with the defendant and repeated his Miranda rights. Defendant invoked his right to remain silent and requested to speak to the public defender, thereby terminating the attempted interview. After some discussion, the officers returned the defendant's brother to the interview room. The brothers' conversations were monitored and videotaped "for investigative purposes, not just for security", according to the officer. The Court held that both conversations between brothers were inadmissible on four separate and severable grounds to-wit: Florida Constitution, unlawful interception of oral communication in violation of Florida's wiretapping statute, obtained in violation of Defendant's right to remain silent, and obtained in violation of Defendant's right to counsel. The Court recognized that the officers deliberately fostered the expectation of privacy. The Court of Criminal Appeals in the case at bar indicates that the statements in Calhoun were held inadmissible simply because Defendant raised his right to remain silent. This was the holding of the concurring opinion. The majority based its decision on four separate and severable grounds. State v. Calhoun, 479 at 245. (emphasis added). This case supports defendant, Munn's, argument that the statements should have been suppressed.

The Court of Criminal Appeals also relies on the case of State v. Hauss, 688 P. 2d 1051 (Ariz. App. 1984), which is distinguishable from the case at bar. Defendant was arrested, transported to the police station and placed in an interview room. One of the officers related some evidence against Defendant and read him his Miranda rights. Defendant told the officers that he would discuss the crimes with the police if they would first let him talk to his live-in girlfriend. The girlfriend came to the police station at the request of Defendant, and she was escorted to an interview room. The officers told her that they did not want her to pass any weapons or anything else to Defendant and told her that the room was being monitored. The officers recorded the conversation by a concealed device. The officers testified that they were concerned with the passing of a weapon, the discussion of possible escape plans, or plans to destroy evidence. They never expected that he would confess his involvement to his girlfriend. The Court held as follows:

> The trial court, after the hearing on the motion to suppress, found: (1) The girlfriend was aware the conversation would be monitored and impliedly consented to the recording; (2) she was not an agent of the state; (3) there was no government interrogation nor were the statements elicited by a functional equivalent of governmental interrogation nor government conduct; (4) the monitoring was a reasonable means of maintaining security at the police station; (5) any expectation of privacy was outweighed by the need to maintain security; (6) the statements were not obtained in violation of any constitution or statute. We agree with the trial court's conclusions.
>
> Hauss, 688 P.2d at 1054.

This case is distinguishable on several grounds. The girlfriend was advised that the conversations were being monitored. In addition, the officers established that they had specific and legitimate safety concerns. The police never expected that Defendant would confess his involvement in the crimes to his girlfriend. In the case at bar, defendant, Munn, had not been advised of his Miranda rights, and the officers deliberately fostered an expectation of privacy in hopes that Defendant would confess his involvement in the crime. In addition, the officers did not advise Defendant or his parents that the room was being monitored. Defendant had specifically requested that the audio tape recorder that was sitting on the table in plain view be turned off. The officers complied with this request thereby deliberately fostering an expectation of privacy.

The case of United States v. Hearst, 563 F.2d 1331 (9th Cir. 1977), is also distinguishable. In Hearst, the jail monitored and taped a conversation between the inmate defendant and a visitor. The visitor and the inmate communicated by using a telephone like intercommunication system while looking at each other through bulletproof glass. The jail had an established policy to monitor conversations for security purposes. Relying on Lanza v. New York, 370 U.S. 139, 82 S.Ct. 1218, 8 L.Ed.2d 384 (1962), the Court recognized this as a legitimate safety concern and stated the government has a weighty, countervailing interest in prison security and order.

In the case at bar, the officers offered no safety reason to monitor the conversations between defendant, Munn, and his parents. In fact, the officers offered no legitimate purpose to videotape the conversations. The officers testified that the video was used regularly in major felony investigations. However, the normal use would be to videotape an interview and/or interrogations by the police, not to tape "private" conversations. No safety concerns were present in the Munn case, and the Court should have suppressed Munn 2-C, 2-G, 2-H, and 2-J from the guilt and sentencing phases of the trial.

This evidence affected the jury's determination of the guilt or innocence of Defendant and affected its determination of the sentence to be imposed. In his dissent, Judge Tipton recognized the impact that Defendant's statements had to have had on the jury in weighing aggravating and mitigating circumstances. The State relied on these statements to prove premeditated first degree murder and the existence of aggravating circumstances (i)(7). The introduction of Munn 2-C, 2-G, 2-H, and 2-J for any purpose was reversible error.

II. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS BECAUSE THE STATEMENTS WERE NOT VOLUNTARY.

The Fifth Amendment to the United States Constitution, which is applicable to the States through the Fourteenth Amendment, Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1498, 12 L.Ed.2d 653 (1964), provides that "[n]o person . . . shall be compelled in

any criminal case to be a witness against himself." The corresponding provision of the Tennessee Constitution provides "[t]hat in all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself." Tenn. Const. Art. I, Section 9.

The requirement that a statement be freely and voluntarily given even applies to statements and confessions not made as a result of custodial interrogations. See, Arizona v. Fulimante, 499 U.S. 279, 111 S. Ct. 1246, 1252-53, 113 L.Ed.2d 302, (1991). Statements and confessions may not be extracted by "any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence". Bram v. United States, 168 U.S. 532, 542-43, 18 S. Ct. 183, 187, 42 L.Ed. 568 (1897) (citation omitted).

The test of voluntariness for confessions under the State Constitution is broader and more protective of individual rights than the test of voluntariness under the Fifth Amendment. See, State v. Crump, 834 S.W.2d 265, 268 (Tenn. 1992), cert. denied, ____ U.S. ____, 113 S.Ct. 298, 121 L.Ed.2d 221 (1992); State v. Smith, 834 S.W.2d 915 (Tenn. 1992).

In order to be admissible, the statements made by defendant, Munn, must have been voluntary so as to satisfy the due process requirements of the Fourteenth Amendment. In determining whether the statements are voluntary, the Court must look at the "totality of the circumstances". In examining the "totality of the circumstances", the Court generally should consider two

categories of factors, one being the characteristics of the defendant and the second being the method of interrogation. In this case, the "totality of the circumstances" shows that the statements made by Munn were not voluntarily made. In the ruling from the Bench denying the defendant's Motion to Suppress, the trial court did not address this issue or make any findings as to whether the statements were voluntary.

Since the trial court did not make specific findings of fact as to whether each interview was voluntary, the Court should conduct a de novo review. State v. Dougherty, 930 S.W.2d 85 (Tenn. Crim. App. 1996).

A de novo review reveals that the statements made by defendant, Munn, were not voluntary. The characteristics of defendant, Munn, include his young age of 18 years with no criminal record and no experience with police interrogation. The method of interrogation involved two very experienced investigators interrogating this young man for several hours over various settings. The officers used strong psychological ploys by bringing his parents into the questioning and by making such statements as the following: "Your mamma's gonna want to talk to me when I get through here." and "Now's the time to do it, with Mamma and Daddy here to support you and be with you.". Munn 2-A, P. 14. At one point, Lieutenant Peel indicated that the defendant's brother, Matthew, might be involved. Munn 2-D, P. 2. In addition, the investigators suggested he would "come out better" if he gave a statement and that "it looks more favorable

in the end on your part if you tell us the truth and tell us what happened.". Munn 2-A, P. 13, 16. They pressured him to make statements to clear his conscience. All of these ploys were very powerful, taking into consideration Munn's religious and family background.

The trial court should have suppressed all incriminating statements made by defendant, Munn, because they were not voluntarily made. In the alternative, the trial court should have suppressed the statements made in Munn 2-B through 2-L. Mrs. Munn entered the room, and the investigators used the compelling influences of this distraught mother to bring about incriminating statements that were not freely self-determined.

The very experienced investigators misled defendant, Munn, and his mother into believing that they were speaking alone or privately. The officers could see that Mrs. Munn had a dramatic impact on her son, and they knew that they could monitor the Munns' conversations when they left them alone in the room. The officers used strong psychological ploys, brought on by deception, to elicit the incriminating statements. In addition, the officers made direct or implied promises that it would "come out better" or look more favorable to defendant, Munn, if he told them what happened. Munn 2-A, P. 13, 16.

The officers did not use threats or violence to elicit the incriminating statements. Instead, they used mental and psychological ploys which were much more effective in this case based on the characteristics of defendant, Munn. In addition,

they used implied promises to extract the statements. Due process requires that these improperly extracted statements and confessions be suppressed.

The evidence establishes that the officers used all of the impermissible manners of extracting a statement except physical threats, i.e. implied promises; psychological ploys, improper influence by his mother and psychological coercion.

The officers used his mother as a means of extracting the statements and confessions. She made a very emotional and psychological plea to Defendant. The officers realized the impact she would have on Defendant and used this pressure to extract the statements that were not voluntarily made. An example of her plea is as follows:

> You know that if we don't get it out in the open, the next stop is we'll go to a lawyer's office and we'll have to go through all this or he'll have to make you get it out in the open because sooner or later we'll have to all get it out in the open. Even if you went to confession. The first thing Father Kurt would say is tell me what happened. If you were to walk out of this b[uilding] and die tonight, that would be enough for certain if you lied to these men or avoid telling them something, then that would be enough to keep you out of heaven. Is this worth eternal damnation? Do you understand? Is this worth that? I don't think so. You cant' go to communion and take the body of Christ and believe all that and not believe that he doesn't love you too, and won't forgive you. That's the first step. We can't take the first step until we know what you've done. We will not abandon you Rudy. We love you too much for that. Yeah. But please, this is like bleeding an open wound. Can we just get to the end of it? Please? Okay? Please?
>
> . . .
>
> They [the officers] think there's more, they think there's more. Andy you ___ okay, let's just get to the

end. I'll pray for you, okay? Okay? I'll help you. What happened?

Defendant, Munn, asserts that the trial court's conclusory statement that "it was certainly voluntary" requires a de novo review.

If the Court should determine that a de novo review is not required, defendant, Munn, alternatively asserts that the evidence preponderates against the finding of the trial court, and the Court of Criminal Appeals erred in affirming the decision. This was reversible error, because the statements had an effect on both the finding of guilt and the sentence imposed.

III. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS BECAUSE DEFENDANT WAS NOT PROPERLY WARNED OF HIS MIRANDA RIGHTS AND DID NOT KNOWINGLY WAIVE HIS MIRANDA RIGHTS PRIOR TO MAKING THE STATEMENTS.

The videotaped statements of defendant, Munn, should not have been played to the jury in either the guilt phase or the sentencing phase of the trial, because Defendant was not properly advised of his Miranda rights and did not knowingly waive his rights prior to making the statements. Defendant, Munn, was not read and did not sign a waiver of his rights until after he was taken from the police station. A sheet of paper was handed to Munn by Lieutenant Peel, after he had been at the police station for over two hours. This was not a proper warning, and even if it was, Munn did not knowingly make a valid waiver of those rights.

In Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 706 (1966), the Supreme Court held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination". At a minimum, the Court held that the procedural safeguards must include warnings prior to any custodial questioning, that the accused has the right to remain silent, that any statement made may be used as evidence against him, and that he has the right to have an attorney present, whether retained or appointed. Miranda, 16 L.Ed.2d at 706-707. Custodial interrogation is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way". Miranda, 16 L.Ed.2d at 706. A person is in custody for purposes of Miranda if there has been "a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest". California v. Beheler, 463 U.S. 1121, 103 S.Ct. 3517, 77 L.Ed.2d 1275, 1279 (1983). Defendant, Munn, was subjected to custodial interrogation prior to being advised of his Miranda rights; and therefore, the trial court erred in allowing the State to introduce the statements made by Munn on December 1, 1995. The totality of the circumstances show that Munn was "in custody" and that he was not given and did not waive his Miranda rights.

The Court of Criminal Appeals held "[a]lthough there are certainly some factors which point towards(sic) custodial interrogation, the evidence as a whole in the record simply does not preponderate against the trial court's determination that Defendant was not in custody during the interview." Opinion. P. 34. Defendant asserts that the evidence and the law correctly applied to the evidence does preponderate against the trial court's ruling and this is reversible error.

A. DEFENDANT, MUNN, WAS "IN CUSTODY" AT THE TIME OF THE INTERROGATION.

In State v. Anderson, 937 S.W.2d 851 (Tenn. 1996), the Tennessee Supreme Court clarified the standard for Courts to apply when determining whether a person is "in custody" and therefore, entitled to his Miranda warnings. The Court stated that "the test is whether, under the totality of the circumstances, a reasonable person in the suspect's position would consider himself or herself deprived of freedom of movement to a degree associated with a formal arrest." Anderson, 937 S.W.2d at 854. The Court held that it was an objective test and listed the following nonexclusive list of factors to be considered in this very fact specific inquiry: (1) the time and location of the interrogation; (2) the duration and character of the questioning; (3) the officer's tone of voice and general demeanor; (4) the method of transportation to the place of questioning; (5) the number of police officers present; (6) limitations on movement or other forms of restraint imposed

during the interrogation; (7) interactions between the officer and the person being questioned, including the words spoken by the officer and the verbal or nonverbal responses of the person being questioned; (8) the extent to which the person being questioned is confronted with the officer's suspicions of guilt or evidence of guilt; and finally (9) the extent to which the person being questioned is aware that he or she is free to refrain from answering questions or to end the interview at will. Anderson, 937 S.W.2d at 855.

These factors as applied to the facts of this case are as follows:

1. In this case, there were a series of interrogations. The first one began at approximately 5 p.m. on December 1, 1995. All took place in a 12 x 12 room marked "Felony Booking Room" of the Murfreesboro Police Department. The two officers used effective psychological ploys and deceptive techniques in their questioning. The officers essentially used the 18 year old defendant's mother, Rita Munn, to perform the interrogation, since they suggested that the two talk by themselves knowing that these conversations were being videotaped and that they could monitor them.

2. The series of interrogations began at approximately 5 p.m. and ended at approximately 9 p.m. when defendant, Munn, was formally arrested. He was first questioned by the officers in the presence of his father for approximately 54 minutes. When he returned to the "Felony Booking Room", the two officers

questioned him alone for approximately 28 minutes before Ms. Munn entered the room. The very experienced and skilled officers were seated on either side of Munn, and both officers asked him questions.

There is no way to describe the character of this questioning without watching the videotape. The first of the series of interrogations began as a relatively normal interrogation of a suspect. Then Lieutenant Peel got Mrs. Munn involved in the process, and the interrogation took on a life of its own. In the beginning of the second interrogation, Munn 2-B, the officers increased the pressure on defendant, Munn, and more intensely questioned him, particularly on inconsistencies in time. Defendant, Munn, requested the officers to turn off the audio tape recorder and stated that he wanted to come back Monday. Lieutenant Peel told Munn that now was the time to tell the truth, when his parents were with him to support him. At that point, Mrs. Munn entered the room and was very upset. The officers "sat back and watched" as a very emotional mother pleaded with her son to tell the officers what they wanted to know so the Munns could go home. Exhibit 27-ID; Report of Interrogation.

Mrs. Munn continuously made references to God, the Church, and praying a rosary. Mrs. Munn told defendant, Munn, that he would be damned and not get into Heaven, if he left the police station that night without telling the truth and died before he came back to tell the truth. "Is this worth eternal damnation?"

Munn 2-B, P. 4. Defendant, Munn, responded to his mother's questions by saying he had already told the officers everything. Munn 2-B, P. 3. She kept badgering him and insisting that there was more to the story. The officers recognized the effectiveness of Mrs. Munn's questioning, so they offered to leave the room to allow Mrs. Munn to talk to the defendant "by himself". Munn 2-B, P. 7. The officers reasonably expected that defendant, Munn, would confess his involvement to his mother. The officers set up this confrontation knowing they could monitor the conversation from the video which could be viewed on a screen in another room.

After this conversation, the officers came and went from the interrogation room, conversed with defendant, Munn, and tried to get him to make a formal statement to the police.

Throughout this whole process, Munn's two year old sister was talking and crying. During one point, defendant, Munn, baby sat his little sister while his parents talked to the District Attorney. The overall nature of the interrogation was very coercive and emotional. The character of the questioning in the case went far beyond "investigative fact inquiries". The officers confronted defendant, Munn, and accused him of committing the crime.

3. The officers' tone of voice and general demeanor were cajoling, trying to get the defendant to talk to them, telling him it "looks more favorable" if he gave a statement. Mrs. Munn was acting as a very concerned and distraught mother pleading with her son to tell the officers what they wanted to know.

4. Defendant, Munn, was transported to the Murfreesboro Police Department by his parents, and they came there at the request of Lieutenant Peel.

5. There were two experienced detectives present. Defendant, Munn, asserts that the detectives used Mrs. Munn as part of the interrogation process.

6. The police officers and Mr. and Mrs. Munn came and went from the room, but defendant, Munn, was never allowed to leave the room, even though he had said he wanted to go home and come back another day on at least five occasions during Munn 2-B. In addition, he was not allowed to leave the room to go next door to a mirror in the restroom to fix his contact which had fallen out. He was told to use the reflection in the window. His freedom of movement was significantly restricted, as it was confined to the 12 x 12 room for a total of approximately 54 minutes during Munn 2-A and two and one-half (2 ½) hours during Munn 2-A through 2-O. The officers ignored his repeated requests to leave and come back or to go home.

7. In this case, the interactions between Mrs. Munn and the defendant should be considered as well as the interactions between the officers and the defendant. This factor is discussed under 2 above.

8. The officers confronted Munn with their strong suspicion that defendant, Munn, either shot or actively participated in the shooting of Poklemba. When the officers and defendant, Munn, returned to the "Felony Booking Room", transcribed as Munn 2-B,

they strongly and insistently confronted defendant, Munn, with their suspicions of guilt and the evidence of guilt. The officers repeatedly asserted that defendant, Munn, was being untruthful and confronted him with discrepancies in the statement previously given and the telephone logs. At one point, Lieutenant Peel blatantly accused defendant, Munn, of the crime when he said he was going to tell Mrs. Munn that he thought defendant, Munn, did it. Munn 2 A, P. 16. During the videotaped interrogation, the officers told Munn they suspected it was him "the other night" and "way before" they brought him in for questioning. Munn 2-K, P. 5, 6.

This is one fact that distinguishes this case from the holding in State v. Bush, 942 S.W.2d 489 (Tenn. 1997). In that case, the officers did not accuse the defendant of the crime or question his story. In this case, the officers disclosed their suspicions, and these suspicions affected how a reasonable person would perceive his freedom to leave.

9. Even though the officers initially made the statement that he could leave at any time, the circumstances show that the officers suspected defendant, Munn, and never intended to let him leave the police department that night. They ignored his repeated requests to leave or go home.

The nine factors above are a nonexclusive list of relevant factors, and in this case, the Court should consider the additional factor of the nature of the suspect. This factor was listed as relevant in the previous test. State v. Morris, 456

S.W.2d 840, 842 (Tenn. 1969). In Anderson, the Supreme Court clarified that the fifth factor in the Morris test which was the focus or progress of the investigation factor is not relevant, but it did not hold that the other Morris factors should not be considered. Anderson, 937 S.W.2d at 854. The nature of the defendant is relevant to the determination of whether a reasonable person in the suspect's position would consider himself deprived of freedom of movement to a degree associated with a formal arrest. The nature of the suspect is a young 18 year old boy who had never been arrested or had any problems with police authorities. Defendant, Munn, is from rural Manchester, Tennessee, and was a Freshman at Middle Tennessee State University. He comes from a large, close-knit family, so the ploy to get the mother involved had a great psychological impact on him. The Munns are a devout Catholic family, and the references made by the officers to his family and clearing his conscience placed considerable pressure on him. Considering defendant, Munn's, age and background, he was very susceptible to the overzealous police practices that were employed here and against which the Miranda warnings were designed to protect.

The evidence of the totality of the circumstances preponderates against the trial court's ruling that this was not custodial interrogation and the case should be remanded for a new trial or a new sentencing hearing.

B. RUDY MUNN WAS BEING "INTERROGATED BY THE STATE".

The questioning by the officers throughout the transcript is clearly interrogation by the State so as to raise the right to have Miranda warnings given. However, the questioning by Mr. and Mrs. Munn, both in and out of the presence of the officers, constitutes interrogation by the State as well. In Rhode Island v. Innis, 100 S.Ct. 1682, 446 U.S. 291, 64 L.Ed.2d 297 (1980), the Supreme Court recognized that the term "interrogation" under Miranda includes any words or actions on the part of the police that the police should know is reasonably likely to elicit an incriminating response from a suspect.

In this case, the officers "sat back and watched" as this distraught mother begged and pleaded with her son. The officers then set up the allegedly "private" confrontation between defendant, Munn, and his mother which they secretly videotaped. The officers expected Defendant to confess to his mother and they knew that this set-up was reasonably likely to elicit incriminating statements. Later in the transcript, the officers continue to video conversations between defendant, Munn, and his parents. Unknown to the Munns the officers are watching their conversations on a monitor in another room. Defendant, Munn, submits that he was being "interrogated" during the time that all of his statements were made.

C. RUDY MUNN WAS NOT PROPERLY ADVISED OF HIS MIRANDA RIGHTS AND DID NOT WAIVE HIS RIGHTS.

When the initial interrogation began with defendant, Munn, and his father, defendant, Munn, was not advised of his Miranda rights. When the interrogation resumed with defendant, Munn, alone, defendant, Munn, was not advised of his Miranda rights. Defendant, Munn, was handed a piece of paper by Lieutenant Peel that contained the warnings after he had been at the police station for over two hours. There is no indication that defendant, Munn, actually read this piece of paper, and he declined to sign it. The officers never verbally read defendant, Munn, his rights prior to his formal arrest. The Supreme Court has emphasized that the giving of Miranda warnings is so simple that no amount of proof that the defendant was aware of his rights will suffice to stand in place of the giving of the Miranda warnings. The giving of these warnings is an absolute prerequisite to interrogation. The warnings were not given or waived; and therefore, the trial court committed reversible error in denying defendant's Motion to Suppress and in allowing the jury to view the video.

IV. THE DEFENDANT'S STATEMENTS SHOULD HAVE BEEN SUPPRESSED BECAUSE THEY WERE TAKEN IN VIOLATION OF HIS RIGHTS TO COUNSEL.

At the time of this interrogation, defendant, Munn, had a right to legal representation. Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964). Defendant asserts that this Court should follow its previous holding that once a defendant makes an unequivocal request for counsel, the officers should limit questioning to a clarification of whether Defendant desires counsel. State v. Stephenson, 878 S.W.2d 530 (Tenn. 1994). This specific issue has not been addressed by this Court since the United States Supreme Court issued its ruling in Davis v. United States, 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). In Davis, the Supreme Court addressed the issue on Fifth Amendment grounds and held that the officers may continue interrogation until the defendant specifically requests an attorney.

In State v. Huddleston, 924 S.W.2d 666 (Tenn. 1996), this Court held that no reasonable police officer could have understood the defendant's statements to be a request for an attorney. In Huddleston, Defendant had refused to sign the waiver of right form and had stated "I ain't signing nothing." Huddleston, 924 S.W.2d at 669-670. That decision was based on Fifth Amendment grounds.

Defendant asserts that this Court should hold that Article I, Section 9 of the Tennessee Constitution provides broader

protection for the accused than the Fifth Amendment. See, State v. Farmer, 927 S.W.2d 582 (Tenn. Crim. App. 1996). This Court has held that Article I, Section 9 of the Tennessee Constitution provides broader protection than the Fifth Amendment for the purposes of determining voluntariness of a statement State v. Crump, 834 S.W.2d 265, 268 (Tenn. 1992), cert. denied, ____ U.S. ____, 113 S.Ct. 298, 121 L.Ed.2d 221 (1992); State v. Smith, 834 S.W.2d 915 (Tenn. 1992). This analysis should also be applicable to this case.

Defendant, Munn, submits that he invoked his right to counsel on the following occasions:

> RITA: "This sounds like the kind of thing where we need a lawyer." Munn 2-B, P. 1.
>
> RITA: "Don't we have to have a lawyer?" Munn 2-D, P. 1.
>
> RITA: "He should have a lawyer." Munn 2-I, P. 1.
>
> RUDY: "'. . . get a lawyer, that would probably be the best thing, . . . get a lawyer." Munn 2-K, P. 12.
>
> RUDY: ". . . waiting on lawyer . . ." Munn 2-L, P. 1.

These statements articulated defendant, Munn's, desire to have counsel present sufficiently clearly that a reasonable officer would understand the statement to be a request for an attorney. Defendant, Munn, submits that all statements after Munn 2-B, Page 1 should be suppressed as taken in violation of his right to counsel.

The State argued that the statements of his parents did not constitute a valid invocation of the defendant, Munn's, right to

counsel. Defendant, Munn, disagrees with this and submits that Mrs. Munn's initial statement invoked the right to counsel. Even the State's own witness, Lieutenant Peel, testified at the suppression hearing that at one point the right had been invoked, because he testified that they were waiting on the decision of whether to consult an attorney to be made. According to Lieutenant Peel, after Mrs. Munn made the statement "He should have a lawyer." Munn 2-I, P. 1, they were waiting for the decision of whether to consult with counsel to be made. R. X. 41-42, 44.

After that point, Lieutenant Peel initiated conversations with defendant, Munn, and continued talking to him for some period of time in violation of defendant, Munn's, constitutional rights. Munn 2-K, P. 1. Lieutenant Peel handed defendant, Munn, the paper containing the Miranda warnings, and defendant, Munn, declined to sign it. Munn 2-K, P. 2. Lieutenant Peel continued to ask defendant, Munn, questions about himself and his family. Some of the responses to those questions were incriminating. The officers told defendant, Munn, they had suspected him for some time. Lieutenant Peel clearly violated defendant, Munn's, right to counsel when he asked "Reckon we can find the billfold?". Munn 2-K, P. 6.

Defendant, Munn, asserts that it was reversible error for the trial court to deny the Motion to Suppress all statements made after the first mention of a lawyer was made by Mrs. Munn in Munn 2-B, P. 1. Even if the Court should find that this did not

raise an equivocal invocation of the right to counsel which should have limited questioning, all statements made after Mrs. Munn's statement "He should have a lawyer." made in Munn 2-I, P. 1, should have been suppressed. Even the officer testified that he thought this raised the issue of whether defendant, Munn, was going to consult with counsel. However, the officers did not cease or limit their questioning of defendant, Munn. Defendant, Munn's, constitutional rights were violated, and he is entitled to a new trial.

Even if the Court follows the rule in Davis that the officers do not have to cease questioning when a defendant makes an equivocal request for an attorney, reversible error was committed in this case. The Court of Criminal Appeals held that Defendant did make an unequivocal request for counsel when he said ". . . get a lawyer, that would probably be the best thing, . . . get a lawyer." Munn 2-K, P. 12. The following incriminating statements were made after this request was made:

> Mrs. Munn: Rudy are you sorry?
>
> Defendant: Not really.
>
> Mrs. Munn: Why?
>
> Defendant: He was a dirty little son of a bitch, looked at porno magazines, . . which is why . .
>
> Mrs. Munn: Why would you want to kill him, did he do something to you?
>
> Defendant: . . . other than he was a jerk.

The Court of Criminal Appeals erroneously held that this was not interrogation by the State because the "type of interrogation

prohibited by Miranda must be initiated by a law enforcement official". Opinion. P. 38. Defendant respectfully disagrees that this exchange was not interrogation by the State. The term interrogation for Miranda purposes refers "not only express questioning, but also to any words or actions of the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect". Rhode Island v. Innis, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). In this case, the officers knew that Defendant was likely to continue making confessions to his mother. Despite this knowledge, they stayed in the room with Defendant and his mother and allowed her to continue questioning him after he had made a request for counsel. These statements should not have been admitted.

The Court of Criminal Appeals also held that the introduction was harmless error beyond a reasonable doubt because proof of guilt was overwhelming and the statements were cumulative. The Court erred in failing to consider the impact these statements had on the jury in determining the sentence. Such blunt and derogatory remarks impacted the jury in weighing the aggravating and mitigating circumstances.

Defendant, Munn, maintains that he is entitled to a new trial or in the alternative a new sentencing hearing.

V. THE TRIAL COURT ERRED IN NOT SUPPRESSING THE LATER STATEMENTS MADE BY DEFENDANT, MUNN, UNDER THE DERIVATIVE EVIDENCE RULE.

As discussed above, the investigators improperly questioned defendant, Munn, without advising him of his Miranda rights and illegally intercepted the oral communication between defendant, Munn, and his mother as transcribed in Munn 2-C. As a result of these illegalities, other incriminating statements were made as transcribed in Munn 2-D through 2-O. These later statements are "fruit of the poisonous tree" and should have been suppressed. The first incriminating statements were made in violation of defendant, Munn's, constitutional rights, and the same influences were present when the later statements were made. The later statements were made in close proximity to the misconduct of the officers, and the later incriminating statements are tainted and inadmissible.

In Smith v. Smith, 834 S.W.2d 915, 919-920 (Tenn. 1992), the Tennessee Supreme Court outlined certain factors to be considered in the determination of whether the defendant made a free and informed choice to waive the State Constitutional rights to provide evidence against one's self and voluntarily confess his involvement in the crime. The Court listed the factors as follows:

. . .

> 1. The use of coercive tactics to obtain the initial, illegal confession and the causal connection between the illegal conduct and the challenged, subsequent confession;

2. The temporal proximity of the prior and subsequent confessions;

3. The reading and explanation of Miranda rights to the defendant before the subsequent confession;

4. The circumstances occurring after the arrest and continuing up until the making of the subsequent confession including, but not limited to, the length of the detention and the deprivation of food, rest, and bathroom facilities;

5. The coerciveness of the atmosphere in which any questioning took place including, but not limited to, the place where the questioning occurred, the identity of the interrogators, the form of the questions, and the repeated or prolonged nature of the questioning;

6. The presence of intervening factors including, but not limited to, consultations with counsel or family members or the opportunity to consult with counsel, if desired;

7. The psychological effect of having already confessed, and whether the defendant was advised that the prior confession may not be admissible at trial;,

8. Whether the defendant initiated the conversation that led to the subsequent confession; and

9. The defendant's sobriety, education, intelligence level, and experience with the law, as such factors relate to the defendant's ability to understand the administered Miranda rights.

. . .

State v. Smith
834 S.W.2d at 919-920.

As discussed above, the police used illegal and coercive tactics to obtain the initial confession made to Mrs. Munn.

Tennessee has rejected the holding in Oregon v. Elstad, 470 U.S. 298, 105 S. Ct. 1285, 84 L.Ed.2d 222 (1985) and retained the

"cat out of the bag" theory espoused in United States v. Bayer, 331 U.S. 532, 67 S. Ct. 1394, 91 L.Ed. 1654 (1947); State v. Smith, 834 S.W.2d 915, 919 (Tenn. 1992).

In Bayer, the Supreme Court recognized:

> Of course, after an accused has once let the cat out of the bag by confession, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first.
>
> Id., 331 U.S. at 540, 67 S. Ct. 15, 1398.

The Smith case holds that the extraction of an illegal unwarned confession from a defendant raises a rebuttable presumption that a subsequent confession is tainted by the initial illegality. The State can overcome the presumption by establishing "that the taint is so attenuated to justify admission of the subsequent confession". State v. Smith, 834 S.W.2d at 919, quoting Elstad, 105 S. Ct. 15 1306-07 (Brennan, J., dissenting). In this case, the State did not overcome that presumption.

The factors outlined in State v. Smith, are discussed below.

1. The police used illegal coercive tactics to obtain the first confession of defendant, Munn, which he made to his mother in transcript Munn 2-C. Subsequently, he made additional incriminating statements and all of the statements are causally connected. One part of the events naturally led to the others.

2. All of the statements made by defendant, Munn, were close in time and made over an approximate three and one-half (3 ½) hour period.

3. The officers never read defendant, Munn, his Miranda rights until after he was formally arrested. He was handed a piece of paper by Lieutenant Peel, but this does not constitute a proper warning as discussed above.

4. This factor is not relevant since the formal arrest was made after the statements.

5. The atmosphere of the 12 x 12 "Felony Booking Room" was very coercive. These two experienced police investigators both asked defendant, Munn, questions and then set up the confrontation between defendant, Munn, and his very distraught mother, who was literally begging him to talk so they could go home. The officers used Mrs. Munn and other strong psychological ploys to play on the defendant's conscience, including references to God and the Church.

6. The officers set up the confrontation between defendant, Munn, and his mother recognizing the strong psychological effect this would have on him given his background.

7. The videotape shows that making the earlier statements had a strong psychological effect on him, and he was not advised that any earlier statements he had made might not be admissible.

8. Although defendant, Munn, initiated some conversation with the officers, the majority of the conversation was initiated by the officers.

9. Defendant, Munn, was not formally advised of his Miranda rights prior to the time any statements were made, so this factor is not relevant.

The trial court's denial of the defendant's Motion to Suppress the later statements based on the Derivative Evidence Rule is reversible error.

VI. THE FINDING OF GUILT OF FIRST DEGREE MURDER SHOULD BE SET ASIDE BECAUSE THE VERDICT IS CONTRARY TO THE EVIDENCE AND IS BASED ON PASSION, PREJUDICE, AND CAPRICE.

The State had the burden of proving defendant, Munn's, guilt beyond a reasonable doubt. The evidence does not support the jury's finding of guilt of premeditated first degree murder. Each element of the crime has not been proven beyond a reasonable doubt.

VII. THE TRIAL COURT ERRED IN FAILING TO DECLARE A MISTRIAL DURING THE GUILT HEARING.

During direct examination of Detective Chris Guthrie, the following exchange occurred:

(By General Newman)

Q. Now, I believe that there has been prepared and you have helped in preparing a transcript of this particular interview; is that correct?

(By Detective Guthrie)

A. Yes, sir.

Q. And what is the significance of the blank portions of that interview or the blank spaces? What does that indicate?

A. Certain things were left out that would be damaging to the defense.

III. 549.

Defendant, Munn's, counsel objected and moved for a mistrial. Certain portions of the videotape were omitted pursuant to a Motion in Limine of defendant, Munn. In the edited transcript, these conversations were "whited out" so that blank spaces were left in the transcript. There were places in the edited transcript where the parties could not agree as to what was being said in the videotape. Lines were drawn in the edited transcript for these places. In watching the videotape, it is obvious that it had been edited and some portions were omitted.

Counsel for defendant, Munn, made a Motion for Mistrial and stated to the Court that the jury would interpret the testimony to mean that certain portions of the video were edited out, because they were damaging to the defense. The Judge ruled that the transcript would not be submitted to the jury and gave the jury a curative instruction, stating in substance that the tapes had been edited to delete portions of which were deemed by the Court either irrelevant or immaterial, and they should not be concerned with any jumps or blank spots in the tape. R. III. 589; IX. 605-606.

The Court committed reversible error in denying defendant, Munn's, Motion for Mistrial. The Court of Appeals incorrectly held that the trial court did not abuse its discretion in denying Defendant's Motion for a Mistrial and that any error was

harmless. The statements made by Detective Guthrie created a manifest necessity for a mistrial. The Court of Appeals incorrectly held that the trial court's curative instruction was effective.

Defendant, Munn, submits that the trial court's instruction was not sufficient to cure prejudice against him. This instruction does not erase from the jury's mind the statement made by Guthrie that there were statements damaging to Defendant and that they would not be allowed to hear these statements. The only way the jury could interpret his testimony was that the edited out portions of the video contained evidence damaging to defendant, Munn. This could only result in the jury speculating in the contents of the omitted portions. This testimony prejudicially affected the jury in both their finding of guilt and in the sentence imposed.

The videotape was key evidence against the defendant in both the guilt and sentencing phases of the trial. The Court of Criminal Appeals erred in holding that they could not say that the statement made by Detective Guthrie "more probably than not affected the judgment" in this case. Opinion. P. 44.

VIII. THE JURY'S FINDING THAT AGGRAVATING CIRCUMSTANCE FOUND IN TENN. CODE ANN., SECTION 39-13-204(i)(7) EXISTED IS NOT SUPPORTED BY THE EVIDENCE.

The jury found that the "murder was knowingly committed, solicited, directed or aided by the defendant while the defendant had a substantial role in committing or attempting to commit, or was fleeing after having a substantial role in committing or attempting to commit, any . . . robbery . . . [or] theft". Tenn. Code Ann., Section 39-13-204(i)(7). The evidence is insufficient to support this finding. The State took the position that defendant, Munn, took Poklemba's keys and/or wallet after he was shot, and this was sufficient to prove this aggravating circumstance. The State did not meet its burden of proving the existence of this aggravating circumstance beyond a reasonable doubt.

The Court of Appeals affirmed the decision. It did not examine the plain meaning of the statute or the purpose of the statute. The Court held that a temporal relationship existed but did not require or find a motivational relationship which is required.

In State v. Odom, 928 S.W.2d 18, 25 (Tenn. 1996), the Supreme Court recognized the following:

> The State has a constitutional responsibility to tailor and apply its death penalty law in a manner that avoids the arbitrary and capricious infliction of this ultimate penalty. Godfrey v. Georgia, 446 U.S. 420, 427, 100 S.Ct. 1759, 1764, 64 L.Ed.2d 398 (1980). "[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty," Zant v. Stephens, 462 U.S. 862, 877, 103 S.Ct. 2733,

2742, 77 L.Ed.2d 235 (1983), and "provide a meaningful basis for distinguishing the few cases which the death penalty is imposed from the many cases in which it is not," Furman v. Georgia, 408 U.S. 238, 313, 92 S.Ct. 2726, 2764, 33 L.Ed.2d 346 (1972) (White, J., concurring).

State v. Odom,
928 S.W.2d 18, 25 (Tenn. 1996)

The same aggravating circumstances are used to establish that a defendant is eligible for life without the possibility of parole and the death penalty; and therefore, the Odom analysis also applies to the interpretation of an aggravating circumstance when it is used to determine whether a defendant receives the sentence of life without the possibility of parole. The language of the statute should be strictly followed, and the aggravating circumstances should be interpreted to "narrow" the class of persons to whom they apply. The trial court's interpretation and application of this circumstance to the facts in this case do not properly narrow the cases to which it applies.

The statute uses the term "while". The proof does not support the finding that the murder was committed "while" defendant, Munn, was committing or attempting to commit a robbery or theft. Webster's New Collegiate Dictionary defines "while" when used as a conjunction as "during the time that". Black's Law Dictionary defines "while" as "pending or during the time that". The record is void of any proof that the murder was committed "while" defendant, Munn, was committing or attempting to commit a robbery or theft. In fact, the State admitted otherwise and argued to the trial court and jury that the fact

that the items were taken after the murder was immaterial. Defendant submits that charging the jury that they could find this aggravating circumstance under this factual scenario was improper under the plain language of the statute. Such an interpretation of the meaning of this statute will result in a widening, rather than the required narrowing, of the class of persons to whom this aggravating circumstance applies.

The requisites of (i)(7) also have not been met, since the nexus between Defendant's alleged robbery or theft of victim's wallet and/or keys was not the type of connection within the scope of the statute. The Supreme Court discussed this issue in State v. Terry, 813 S.W.2d 420 (Tenn. 1991). In Terry, the victim was not a witness to or victim of the larceny, and he was not killed because he was in close proximity to larceny nor was he killed because he tried to thwart larceny, expose it or interfere in any way with the commission of the crime.

In State v. Terry, 813 S.W.2d 420, 424 (Tenn. 1991), the Supreme Court held that there must be some "nexus" between the murder and the robbery or theft. In doing so, the Supreme Court stated as follows:

> Cases from other jurisdictions discussing the issue of sufficiency of the evidence of similar statutory aggravating circumstances are annotated at 67 A.L.R. 45h 887 (1989). The annotator states:
>
> > Whether the evidence supports a finding that the murder was committed in the course of, during, or while engaged in the commission of another felony for purposes of a death penalty aggravating circumstance, generally depends on an analysis of the temporal,

> spatial and motivational relationships between the capital homicide and the collateral felony, as well as on the nature of the felony and the identity of its victim.
>
> 67 A.L.R. 4th at 392.

In his memorandum opinion granting the new sentencing hearing, the trial judge quoted the following comment by the author of the present Tennessee death penalty statute:

> Aggravating circumstances six, seven, and eight deal with defendants who commit murder during the course of other crimes or while the defendants are in custody or escaping from custody. These aggravating circumstances are based on the Georgia and Florida statutes as well as the Model Penal Code. While the seventh aggravating circumstance bears the similarity to the felony murder rule under the definition of first degree murder, there is no prohibition against using this as a further aggravation of the crime. It should be noted that the defendant in Gregg [v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 359 (1976)] was convicted under the felony murder rule which is much broader in Georgia than as drafted in this act. The jury in that case found as the aggravating circumstance that the murder was committed during the course of the armed robbery and the death sentence was imposed. The seventh aggravating circumstance however serves a different purpose than the felony murder rule. The latter serves to supply the requisite intent to commit the crime or kill which murder requires . . . <u>However, the seventh aggravating circumstance deals with an individual who commits an armed robbery and other similar felonies and kills the person victimized by the other crime. In short, this aggravating circumstance seeks to deter "witness killings."</u> Raybin. <u>New Death Penalty Statute Enacted for Tennessee</u>, Judicial News Letter, University of Tennessee College of Law (May, 1977) (Emphasis added).
>
> <u>State v. Terry</u>, 813 S.W.2d at 423.

The death statute was amended and rewritten by the Tennessee Criminal Sentencing Reform Act of 1989. However, (i)(7) is still included as an aggravating circumstance, and the analysis and purpose stated in Terry is still applicable to the present statute.

In this case, there is no motivational relationship between the capital homicide and the collateral crime of theft or robbery. The purpose of this aggravating circumstance is to deter "witness killings". There is no evidence at all that there was any motivational relationship between the murder and the robbery or theft.

In this case, the District Attorney General erroneously argued that the reason the person commits a theft or robbery is immaterial. R. X. 195. The District Attorney argued that if the wallet and/or keys were taken to hide the identity or disguise the crime is irrelevant to whether this circumstance applies. R. X. 195. The District Attorney General admitted that there was no proof that Munn killed Poklemba so he could take his keys and/or wallet. R. X. 195. In his arguments to the Court, the District Attorney kept referring to the Judge's application of the felony murder rule in other cases. Aggravating circumstance (i)(7) serves a different purpose than and has a different standard than the felony murder rule. Defendant insists that (i)(7) requires the murder to be committed while Munn was committing or attempting to commit a robbery or theft and that there must be a motivational relationship between the two. Neither are present

in this case. It was error for the trial court to charge the jury that they could consider this aggravating circumstance, and the record does not contain any justification for the jury's finding of its existence.

The evidence is not sufficient to uphold the finding that Munn committed the murder while he was committing or attempting to commit a theft or robbery beyond a reasonable doubt. The State argued that they proved a theft or robbery of the car keys and/or wallet. The proof did not establish this beyond a reasonable doubt.

The State proved that when officers arrived at the scene there was no set of keys, wallet or identification on the victim, that the victim's pocket was turned inside out and that he normally carried his wallet. The only proof that the State introduced to link defendant, Munn, to the keys and wallet were defendant, Munn's, statements which are inadmissible. One statement was made to Mrs. Munn that after Poklemba fell, defendant, Munn, rolled him over and took his license and wallet. The other statements were made in response to Lieutenant Peel's questions. Crucial to this issue is the fact that after they were waiting to determine if defendant, Munn, was going to consult a lawyer, Lieutenant Peel asked the question "Reckon we can find the billfold?". Defendant, Munn, responded "I can help you find it, the keys too.". Munn 2-K, P. 6, Exhibit 36 I.D. This is the only evidence introduced by the State that links

defendant, Munn, directly to the keys and wallet. This evidence should have been suppressed.

The jury found the existence of an invalid aggravating circumstance that should not have been included in the jury charge under this fact pattern. In addition, the evidence does not support the jury's finding. Therefore, the sentence of life without the possibility of parole should be set aside. Since there are no valid aggravating circumstances applicable to this case, the Court should enter a sentence of life with the possibility of parole if the Court does not set aside the finding of guilty. Alternatively, the Court should remand the case for a new sentencing hearing.

The State basically argues that the evidence is sufficient to support the jury's finding of the existence of aggravating circumstance, Tenn. Code Ann., Section 39-13-204(i)(7), based on a temporal relationship, because the theft of Poklemba's wallet and keys was closely connected or done simultaneously with the murder. Defendant, Munn, submits that this is an insufficient nexus. Such an application of the aggravating circumstance does not act to "narrow" the class of cases to whom the aggravating circumstances apply as is constitutionally required.

The temporal relationship between the murder and the felony is only one of the factors for the Court to consider in determining whether this aggravating circumstance should be charged. State v. Terry, 813 S.W.2d 420 (Tenn. 1991). The language of the statute, the application of the statute in

previous cases, the history, and the purpose of the statute to prevent "witness killings" all are evidence that the State must prove more than a temporal relationship between the felony and the murder. The State must prove that the murder was motivated by the intent to commit a theft. At trial, the State did not prove or even argue that a motivational relationship existed.

The jury found the existence of an invalid aggravating circumstance; and therefore, the Court should set aside the sentence of life without the possibility of parole.

IX. THE COURT ERRED IN THE CHARGE TO THE JURY IN THE SENTENCING PHASE.

At the end of the sentencing phase, the Court gave the charge to the jury. R. X. 221. The Court erred in this charge, and defendant, Munn, submits that each of the four errors is reversible error which entitles him to a new sentencing hearing. The jury instructions are critical in enabling a jury to make a sentencing determination that is demonstrably reliable. State v. Odom, 928 S.W.2d 18, 31 (Tenn. 1996). The Court of Appeals held that three of these were error but that any error would be harmless. Defendant, Munn, submits that each error was reversible error. In the alternative, defendant, Munn, submits that the cumulative effect of three allegedly "harmless errors" in a jury charge in the sentencing phase should be reversible error.

A. THE COURT ERRED BY CHARGING THE JURY THAT THEY COULD CONSIDER AGGRAVATING CIRCUMSTANCES CONTAINED IN TENN. CODE ANN., SECTION 39-13-204(i)(6) AND (7).

The Court charged the jury on two aggravating circumstances, (i)(6) and (7). Defendant objected to these two circumstances being included in the charge. Although the jury only found that one aggravating circumstance existed, Defendant submits that having the jury consider two invalid circumstances was confusing to the jury and prejudiced them to find that one of the two existed. Defendant maintains that these facts did not fit into either of these circumstances, and it was error for the Court to charge them. The error in charging Tenn. Code Ann., Section 39-13-204(i)(7) is discussed more fully in Section VIII of this Brief.

Tenn. Code Ann., Section 39-13-204(i)(6) provides as follows:

> (6) the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another.

The District Attorney General argued that the murder was committed to prevent the lawful arrest of Munn for the theft of Poklemba's AR-15. R. X. 191. The State argues that Munn took the gun, sold it to Paul Reavis, obtained money from Paul Reavis; and therefore, Munn killed Poklemba to avoid prosecution of a theft. The Court of Appeals ruled "we may agree that aggravating circumstance (i)(6) was inapplicable to the facts of this case" but held it was harmless error. Opinion. P. 46.

Defendant, Munn, asserts that charging two aggravating circumstances prejudiced the defendant. The jury was confused by this charge and felt compelled to find that one of the two circumstances existed.

B. THE TRIAL COURT ERRED IN THE JURY CHARGE IN FAILING TO INSTRUCT THE STATUORY DEFINITIONS OF THEFT AND ROBBERTY.

When the trial court charges Tenn. Code Ann., Section 39-13-204(i)(7), the trial court must charge the statutory definition of the underlying crimes that defendant, Munn, was allegedly committing or attempting to commit at the time of the murder which in this case is robbery or theft. State v. Nichols, 877 S.W.2d 722, 735 (Tenn. 1994). Defendant, Munn, objected to the charge of this aggravating circumstance but requested that the Court charge the statutory definition of robbery found in Tenn. Code Ann. Section 39-13-401 and theft found in Tenn. Code Ann., Section 39-14-103, if he was going to charge this aggravating circumstance. The Judge charged T.P.I. Criminal 9.01 and 11.01. This charge of the full T.P.I. instruction was confusing to the jury and improper. The Court of Appeals erroneously held that any error in the charge was harmless.

Pattern jury instructions are not officially approved by the Supreme Court or the General Assembly and should be used only after careful analysis. They are merely patterns or suggestions. They must be revised or supplemented, if necessary, in order to fully and accurately conform to applicable law. State v. Hodges,

944 S.W.2d 346, 354 (Tenn. 1997). In this case, there are significant differences in the two. The pattern instructions are lengthier and more specific. Under these circumstances, the long pattern jury instruction was confusing to the jury. The trial court's failure to instruct the statutory definitions of theft and robbery at the sentencing hearing is reversible error.

C. THE TRIAL COURT ERRED BY NOT INCLUDING THE NONSTATUTORY MITIGATING FACTOR REQUESTED BY DEFENDANT.

Defendant requested that the Court instruct the jury on the nonstatutory mitigating circumstance that the defendant had not criminal record or conviction. R. X. 178, 181-182. The District Attorney General argued that it was improper for the Court to charge any mitigating factors that are not included in the statute. R. X. 182. The Supreme Court has held that once a trial court determines that evidence is mitigating in nature and that it has been raised by the evidence, it must include it in the instructions. State v. Odom, 928 S.W.2d 18, 31 (Tenn. 1996).

D. THE TRIAL COURT ERRED IN REFUSING TO CHARGE T.P.I. CRIMINAL 43.03 AT THE SENTENCING HEARING.

At the sentencing hearing, defendant, Munn, requested the Court to charge a modified version of Tennessee Pattern Jury Instruction Criminal 43.03 Defendant: Not Testifying. R. X. 186. The Court refused to add this charge, and this is reversible error. AT the sentencing hearing, the State has the burden of proving the existence of statutory aggravating circumstance

beyond a reasonable doubt. Tenn. Code Ann., Section 39-13-207. Since the State still has the burden of proof at this phase of the trial, the Court should have charge T.P.I. Criminal 43.03 or some similar charge that said in substance the State has the burden of proof on the existence of aggravating circumstances and that defendant, Munn's, election not to take the stand cannot be considered for any purpose against him nor could any inferences be drawn from such fact. The failure to do so constituted reversible error.

X. THE TRIAL COURT ERRONEOUSLY ALLOWED THE STATE TO INTRODUCE CERTAIN IRRELEVANT AND INADMISSIBLE EVIDENCE AT THE SENENCING HEARING.

At the sentencing hearing, the Court erred in allowing the victim's fiancée', Valerie Roscoe, to testify about irrelevant and inadmissible items. Ms. Roscoe testified about their wedding plans and her plans to convert to Catholicism. Defendant, Munn, objected to this testimony. R. X. 41. Defendant, Munn, submits that this evidence was inadmissible under Tenn. R. Evid. 403. The Court abused its discretion in allowing the State to call Lieutenant Eddie Peel as rebuttal and allowing him to testify about statements made by defendant, Munn, during the interrogation about his past activities. Defendant, Munn's, counsel objected to this, and the Court allowed him to testify on rebuttal. R. X. 163-169. During this testimony, Lieutenant Peel testified that defendant, Munn, made statements that he had been involved in certain activities. Part of the statements about

which Lieutenant Peel testified were not discussed during defendant, Munn's, proof. This testimony went beyond the proper scope of rebuttal, the function of which is to contradict, impeach or defuse the impact of evidence offered by the adverse party. State v. Smith, 735 S.W.2d 831 (Tenn. Cr. App. 1987). The Court of Criminal Appeals ruled that they found "the relevancy of parts of Ms. Roscoe's testimony to be questionable" but they ruled that any error in admitting the testimony would be harmless. Opinion. P. 51. Defendant submits that it was erroneous to admit the testimony and that the error was reversible error.

Defendant submits that the admission of this personal testimony regarding wedding plans and her plans to convert to Catholicism "more probably than not affected the judgment". Tenn. R. App. P. 36(b). The jury was allowed to hear and consider this irrelevant evidence and it had an impact on the sentencing. Therefore, the Court should remand the case for a new sentencing hearing.

XI. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY TO CONTINUE DELIBERATIONS WHEN THEY REPORTED THAT THEY COULD NOT REACH A VERDICT ON THE SENTENCE TO BE IMPOSED.

After several hours of deliberations, the jury reported to the Court that they could agree on the aggravating circumstances, but they could not reach a verdict on the sentence to be imposed and inquired what to do. The Judge erroneously sent a written response, "Continue deliberations per earlier instructions."

R. X. 241. The Court of Criminal Appeals correctly acknowledges that the trial court did not comply with the dictates of State v. Kersey, 525 S.W.2d 139 (Tenn. 1975) and Section 5.4 of the ABA Standards Relating to Trial by Jury. However, the Court of Criminal Appeals erroneously held that this was not reversible error.

In Kersey v. State, 525 S.W.2d 139 (Tenn. 1975), the Supreme Court set forth the procedure to be followed in this circumstance. The Court erred to follow the ABA Standards Relating to Trial by Jury, Section 5.4, which were adopted by the Tennessee Supreme Court in the case of Kersey v. State, 525 S.W.2d 139 (Tenn. 1975). The Kersey Court formulated the following instruction to be given as part of the main charge and then repeated to the jury in open Court if a deadlock develops:

> The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.
>
> It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment.
>
> Kersey, 525 S.W.2d at 145.

This instruction has been incorporated into the Pattern Jury Instruction. T.P.I. - Criminal 43.02. The Kersey Court stated that judicial economy and uniformity demanded this and "[s]trict adherence is expected and variations will not be permissible". Kersey, 525 S.W.2d at 145.

During the sentencing hearing, the jury had indicated on two occasions that they were having a problem reaching a verdict. In the first set of questions that the jury sent to the Judge, they inquired what would happen if they could not reach a unanimous decision. The Judge responded that he could not answer this question. The second written communication confirmed that the jury was deadlocked. The Court sent a written response and instructed them to continue deliberations. The Opinion of the Court of Appeals contains a factual error as it relates to the timing between the two inquiries made by the jury. The Opinion states that the second inquiry was made "a few minutes later". Opinion. P. 52. Actually, there was a significant lapse of time between the two. The jury requested to watch the videotape and deliberated a considerable amount of time before it reported that it was deadlocked. This factual error is significant, because it shows that the jury had deliberated a substantial amount of time and tried to reach an agreement before notifying the Judge of the deadlock.

The Court should have followed the Kersey procedure and brought the jury into open Court to repeat T.P.I. - Criminal 43.02. This instruction was included in the initial jury charge at the guilt hearing of the trial and should have been repeated once the deadlock developed.

The Court failed to properly instruct the jury and in effect coerced a verdict. The jury began deliberating at approximately

4:51 p.m. and did not return a verdict until 10:30 p.m. The case should be remanded for a new sentencing hearing.

The Court of Criminal Appeals indicates that if the trial court responds to a deadlocked jury in some variation of Kersey about continuing deliberations that it is not reversible error. The Court held "[W]e find that the comment was not directed to jurors in the minority, nor did it urge such jurors to reevaluate or to cede their views to those of the majority." Opinion. P. 53. In Kersey, the Supreme Court clearly and unequivocally set forth the exact procedure to be followed and required strict adherence. The Supreme Court held "variations will not be permissible". The Court of Criminal Appeals held that a variation was permissible in this case. That was error.

The Court of Criminal Appeals then stated "[A]n error in the charge to the jury is not grounds for reversal unless it affirmatively appears that the error has affected the results of the trial." Opinion. P. 53. In this case, it affirmatively appears that this instruction affected the sentence imposed. The jury had a choice of sentencing Defendant to life with the possibility of parole or life without parole. If the jury deadlocks on the decision, Defendant receives the sentence of life with the possibility of parole. It was error for the Court to instruct the jury to continue deliberations.

This case is distinguishable from the two Court of Criminal Appeal cases relied upon by the Appellate Court. In State v. Baxter, 938 S.W.2d 697 (Tenn. Crim App. 1996), perm. to appeal

denied (Tenn. 1997) and in State v. Dick, 872 S.W.2d 938 (Tenn. Crim. App. 1993) the trial courts addressed the jury in open Court and each noted that the jury had not been deliberating very long and encouraged the juror to reach a verdict. The Court then sent the jurors back to deliberate.

In the case at bar, the Court did not address the deadlocked jurors in open Court. He merely sent a note to "[C]ontinue deliberations per earlier instructions." This sent a strong message to the juror that he was not going to address the deadlock and that they were required to reach a verdict. This was an impermissible variation from Kersey. If the Court brings the jury into open Court, it lets them know the Court is taking their deadlock position seriously and how to address it. The Court did not do that in this instance.

In Baxter and Dick, the jury was determining guilt or innocence and the guilt of a particular crime. In the case at bar, the jury was determining the sentence of life with or without the possibility of parole. If the trial court had not coerced the jury into reaching a verdict, the Court would have imposed the sentence of life with the possibility of parole. This is another distinguishing factor.

In both of the civil cases relied upon by the Court of Appeals, the Court held that the jury charge did affect the outcome of the trial. Bass v. Barksdale, 671 S.W.2d 476 (Tenn. App. 1984), perm. appeal denied 1984, Vanderbilt v. Steely, 566 S.W.2d 853 (Tenn. 1978). Like these cases, the trial court's

failure to comply with Kersey in the case at bar was a material factor and affected the results of the trial.

The jury's charge was a material factor in persuading the jury to return a verdict, and the variation between the procedure followed by the Court and the Kersey procedure was a material factor in its having that effect. Vanderbilt, 566 S.W.2d at 854. The departures of the Court in not bringing the jury into the open Court to address them and not giving the Kersey charge or even a variation of it to the jury prejudiced the defendant. Therefore, the case should be remanded for a new sentencing hearing.

XII. THE COURT ERRED IN ALLOWING THE JURY TO WATCH IN THE JURY ROOM THE VIDEO TAPE INTERVIEW OF DEFENANT, RUDY MUNN, DURING THE SENTENCING HEARING OF THE TRIAL.

After the jury had deliberated for approximately four hours, the jury requested to watch the videotape interview of defendant, Munn. The Court erroneously allowed the jury to take the videotape and television to view it in the jury room during deliberations. Tenn. R. Crim. P. 30.1 provides as follows:

> Rule 30.1. Taking of Exhibits to Jury Room. -- Upon retiring to consider its verdict the jury shall take to the jury room all exhibits and writings which have been received in evidence, except depositions, for their examination during deliberations, unless the court, for good cause, determines that an exhibit should not be taken to the jury room.

This rule became effective July 1, 1995. In this case, the Judge should have used his discretion to not allow the jury to take the tape and recorder to the jury room.

The Court should have exercised his discretion under Tenn. R. Crim. P. 30.1 and excluded this tape from going into the jury room during deliberations. The jury placed undue emphasis on this tape or parts of it, and the viewing of it in the jury room constitutes reversible error.

The Court of Appeals held that this was not reversible error, because the tape was not a violation of any of Defendant's constitutional rights, and they find no "good cause" reason as to why the videotape should not have been taken to the jury room.

As discussed above, Defendant vehemently disagrees that the tape was not a violation of his rights under the United States Constitution, Tennessee Constitution, and state and federal law. Therefore, Defendant asserts that the videotape should not be used for any purpose. However, even the Court of Appeals acknowledge that a portion of the tape was made after Defendant invoked his right to counsel. The Court of Appeals erroneously justifies the introduction of that portion of the tape on two grounds, one being that these incriminating statements were made in response to questions by his mother rather than law enforcement officials, and that it was cumulative as to the guilt phase of the trial. The Court of Criminal Appeals did not address the impact these statements had on the jury with respect to the sentencing phase.

The Court of Appeals acknowledges that the following exchange took place after Defendant made an unequivocal request for counsel:

> Mrs. Munn: Rudy are you sorry?
>
> Defendant: Not really.
>
> Mrs. Munn: Why?
>
> Defendant: He was a dirty little son of a bitch, looked at porno magazines, . . which is why . .
>
> Mrs. Munn: Why would you want to kill him, did he do something to you?
>
> Defendant: . . . other than he was a jerk.
>
> Opinion. P. 38.

This improper evidence had to have an effect on the jury in determining the sentence to be imposed. It should have been excluded from both the guilt and sentencing phase. The jury placed undue emphasis on the statements contained on the videotape. This undue emphasis constitutes "good cause" for the Court to exclude the tape or at least this portion of it. The case should be remanded for a new sentencing hearing.

CONCLUSION

Based on the foregoing reasons, Appellant submits that his Application for Permission to Appeal should be granted. Appellant has submitted his Brief for the Court's full consideration of his Application.

Respectfully submitted this 28 day of May, 1999.

ROGERS & DUNCAN

BY: _____
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BY: _____
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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded to Paul G. Summers, Esq., Attorney General for the State of Tennessee, 425 5th Avenue North, Nashville, TN 37243-0485, by placing a copy of the same in the U.S. Mail with sufficient postage thereon to carry the same to its destination.

This 28 day of May, 1999.

ROGERS & DUNCAN

BY: _____
J. Stanley Rogers
Attorney for Appellant

IN THE SUPREME COURT OF THE STATE OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE, Appellee,	)	
vs.	)	No. M1998-00126-SC-R11-CD
RUDOLPH MUNN, Appellant.	)	(From the Court of Criminal Appeals at Nashville, Tennessee No. 01001-9801-CC-00007)

SUPPLEMENTAL BRIEF OF APPELLANT, RUDOLPH MUNN

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(SECTION IXD FROM THE ORIGINAL BRIEF)

I. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS THE VIDEOTAPED STATEMENTS BECAUSE THEY WERE VIDEOTAPED IN VIOLATION OF HIS FOURTH AMENDMENT RIGHTS AGAINST SEARCH AND SEIZURE AND FEDERAL AND STATE LAW.

The jury was allowed to view a videotape of conversations between defendant, Munn, and his parents secretly videotaped when he was left alone in the felony booking room with his parents. Defendant submits that these conversations should have been suppressed because they were secretly videotaped in violation of his Constitutional rights and the wiretapping statutes codified in Tenn. Code Ann., Section 40-6-301 et. seq. and 18 U.S.C., Section 2510 et. seq. The trial court erred in failing to suppress this evidence and this was not harmless error. These statements had an impact on the jurors' finding of guilt, as well as, the jurors' sentencing of life without the possibility of parole.

There is a two-part inquiry to be used in analyzing both the Constitutional violation of the Fourth Amendment and the Tennessee State statutory violations. First, has the individual manifested a subjective expectation of privacy in the challenged search? Second, is society willing to recognize that expectation as reasonable? Katz v. United States, 389 U.S. 347, 360, 88 S Ct 507, 19 L.Ed.2d 576 (1967); State v. Roode, 643 S.W.2d 651, 652-53 (Tenn. 1982); Tenn. Code Ann., Section 40-6-303(13) and 18 U.S.C., Section 2510(2).

After a de novo review, the Court of Criminal Appeals correctly held that the defendant had a subjective expectation of privacy. Opinion. P. 22. This finding is supported by the evidence and should be affirmed.

However, the Court of Criminal Appeals erroneously held that the expectation was not objectively reasonable and justified. Opinion. P. 23. The Court of Criminal Appeals correctly stated that the critical inquiry is "whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society". Opinion. P. 23. (citations omitted).

Defendant, Munn, submits that the misleading and deceitful practices of the officers, in leading defendant to believe that his conversations with his parents were private, cannot be allowed to go unregulated. The police intentionally created the expectation of privacy in defendant, Munn, during his conversation with his mother. The State used hidden recording devices to intercept this communication and asserts that the expectation of privacy it created in defendant, Munn, was not reasonable. Defendant, Munn, submits that allowing police to conduct investigations and interrogations using hidden recording devices to intercept conversations in this manner will lead to a significant diminution in the public's right to privacy and to be

free from surreptitiously intercepted information by law enforcement agents without judicial approval based on a probable cause determination. In addition, the secret videotaping of these conversations for no safety or other legitimate reason diminishes the amount of privacy and freedom remaining to citizens to a compass inconsistent with the aims of a free and open society. The officers offered no real reason to videotape the conversations and the only possible purpose was to obtain incriminating statements. Such actions violated Defendant's Constitutional and statutory rights. Unlike the cases relied upon by the majority opinion, there are no competing state interests like safety and security to weigh against the defendant's Fourth Amendment protection from unreasonable searches and seizures and protection of individual privacy rights against governmental intrusion. Society should recognize defendant, Munn's, expectations of privacy as reasonable.

The Court of Criminal Appeals stated that defendant, Munn, was not under arrest at the time he made the statements and recognized that this fact distinguished this case from the cases on which it relied. Opinion. P. 27. Citing United States v. McKinnon, 985 F.2d. 525, 528 (11th Cir. 1993), the Court of Criminal Appeals held that case law does not distinguish between pre-arrest and post-arrest statements in the analysis of whether a defendant's privacy expectations are reasonable. In United States v. McKinnon, 985 F.2d. 525 (11th Cir. 1993), the Eleventh

Circuit held admissible a tape recording of the defendant's pre-arrest conversation with a co-defendant made while the two were sitting in the back seat of a police car. The Court held that defendant, McKinnon, did not have either a subjective expectation of privacy or a reasonable and objective expectation of privacy. The Eleventh Circuit stated:

> Moreover, McKinnon concedes that his post-arrest conversations are not entitled to Title III or Fourth Amendment protection. He argues, however, that a person has broader rights pre-arrest than post-arrest. We find no persuasive distinction between pre-arrest and post-arrest situations in this case.
>
> McKinnon, 985 F.2d. at 528 (emphasis added).

Defendant, Munn, submits that the McKinnon case does not stand for the proposition that whether or not a defendant has been formally arrested never plays a role in the determination of whether a defendant's expectation of privacy is reasonable and justifiable. Defendant, Munn, further submits that in the facts of his case, this is a relevant and important distinguishing factor that the Court should consider.

Defendant, Munn, submits that he met both prongs of the test in that he had both a subjective expectation of privacy and it was objectively reasonable and justifiable. Therefore, the secret videotaped statements made when he was left alone with his parents should have been suppressed as a violation of his constitutional and federal and state statutory rights. These were transcribed as Munn 2-C, 2-G, 2-H, and 2-J.

II. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS BECAUSE DEFENDANT WAS NOT PROPERLY WARNED OF HIS MIRANDA RIGHTS AND DID NOT KNOWINGLY WAIVE HIS MIRANDA RIGHTS PRIOR TO MAKING THE STATEMENTS.

(SECTION III OF ORIGINAL BRIEF)

The evidence preponderates against the trial court's finding that Defendant was not subjected to custodial interrogation at the time he made the incriminating statements that were contained on the videotape. The statements should have been suppressed and the jury should not have been permitted to view the tape during the trial or during its deliberations or sentencing. Defendant is entitled to a new trial and a new sentencing hearing.

The giving of the Miranda warnings is a very basic and long-standing Constitutional right that should be protected by our judicial system. In this case, the officers had many obvious opportunities to advise defendant, Munn, of his Miranda rights yet they declined to do so. The officers declined to perform this simple process that would have advised this young 18-year-old defendant with no criminal background whatsoever of his Constitutional rights against compulsory self-incrimination. The Court should not allow the introduction of statements made when the officers chose to ignore and failed to use these procedural safeguards which were designed to ensure that the right against compulsory self-incrimination is protected and intelligently exercised. This failure requires the suppression of all

subsequent statements and any evidence gained as a fruit thereof, and entitles the defendant to a new trial.

A. DEFENDANT, MUNN, WAS "IN CUSTODY" AT THE TIME OF THE INTERROGATION.

The Court must examine the "totality of the circumstances" to ascertain whether the particular defendant was subjected to custodial interrogation which requires that the officers advise a suspect of his rights. The greater weight of the evidence does not support the conclusion made by the trial court that the statements were admissible because Defendant was not in custody. The Court of Appeals recognized that certainly some of the relevant factors listed in State v. Anderson, 937 S.W.2d 851 (Tenn. 1996) pointed toward the conclusion that Defendant was subjected to custodial interrogation. Opinion. P. 34. However, the Court of Appeals erroneously held that the record as a whole did not preponderate against the trial court's finding. Defendant, Munn, requests this Court to reverse that decision.

In State v. Anderson, 937 S.W.2d 851 (Tenn. 1996), the Tennessee Supreme Court set forth a non-exclusive list of factors to be considered in determining whether a suspect is "in custody". Each of these factors is discussed in detail in Defendant's original Brief. Defendant submits that the majority of these factors and the preponderance of the evidence establish that he was in custody.

This was not a brief and limited questioning session in which the officers were conducting an investigation as the type discussed in United States v. Harris, 528 F.2d 914 (4th Cir. 1975), cert. denied 423 U.S. 1075, 96 S Ct 860, 47 L.Ed.2d 86 (1976) and in United States v. Harris, 611 F.2d 170 (6th Cir. 1979). The series of interrogations of defendant, Munn, lasted approximately four hours and involved confrontational and accusatory questions from the officers, as well as, a very emotional and religious plea from Mrs. Munn initiated by the police. The officers were not simply questioning defendant, Munn, to obtain general information. They were interrogating him for the purpose of obtaining incriminating statements and they should be required to give the Miranda warnings. Defendant, Munn, was an 18-year-old first semester freshman at Middle Tennessee State University. The proof established that he had not had prior experience or problems with the police and had no criminal past. The officers' testimony and subjective view that defendant, Munn, was not under arrest and was free to leave at any time lacks any plausible foundation. The officers continuously ignored Defendant's five requests to leave and come back.

The purpose of the request for Defendant to come to the police station, the number of officers involved, the limitation on Defendant's movement, the duration and character of the detention and the extent to which the defendant was confronted

with suspicions of guilt are circumstances which establish a custodial expedition. This young, inexperienced defendant was entitled to be given his Constitutional rights prior to such custodial interrogation. All of the relevant factors and the totality of the circumstances preponderate against the trial court's ruling that Defendant was not in custody.

B. DEFENDANT, MUNN, WAS BEING "INTERROGATED BY STATE".

The undersigned could not find a Tennessee case which has addressed in depth the issue of what constitutes "interrogation by the state" in a similar context to the facts of this case. The United States Supreme Court has held that for Miranda purposes, "interrogation" includes not only express questioning, but also any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from a suspect. Rhode Island v. Innis, 100 S Ct 1682, 446 U.S. 291, 64 L.Ed.2d 297 (1980). The actions of the officers in putting Defendant and his mother in the same room and secretly monitoring the situation were "interrogation" for Miranda purposes. Justice Tipton recognized this in his Concurring and Dissenting Opinion discussing the reasonableness of defendant, Munn's, expectation of privacy. Justice Tipton stated "When the officers could not get the defendant to admit to the crime through their questioning, they encouraged the defendant to speak with his mother alone, anticipating that the

defendant would admit the crime to her." Concurring and Dissenting Opinion, P. 5. The actions of the officers in setting up the confrontation between the defendant and his mother were the functional equivalent of formal questioning and required that the Miranda warnings be given.

C. DEFENDANT, MUNN, WAS NOT PROPERLY ADVISED OF HIS MIRANDA RIGHTS AND DID NOT WAIVE HIS RIGHTS.

Defendant, Munn, was not properly given his Miranda warnings until he was formally arrested and booked. According to the written waiver which Munn signed, this was approximately 9 p.m. This proper warning and waiver was given after all of the interrogations and videotaping had been concluded. The State argues "Munn, after being fully informed of his Miranda rights chose to speak with the police." State's Answer in Opposition to the Application for Permission to Appeal. P. 26. However, the State did not set forth any facts supporting this assertion.

It is undisputed that the officers did not advise defendant, Munn, of his Miranda rights prior to beginning or during the police initial interrogation transcribed as Munn-1 or the subsequent police interrogation transcribed as Munn-2A. The only possible time that defendant, Munn, was given his Miranda warnings prior to the written waiver at 9 p.m. was when Officer Peel handed defendant, Munn, a piece of paper that Peel said contained the written Miranda warnings. Officer Peel asked defendant, Munn, if he had read it and he responded "No", in the

negative. The defense counsel and the Attorney General disagreed on the content of the statement made by defendant, Munn, that followed. R. 7/23/96, 48; Munn 2-K.2. At this time, defendant, Munn, never acknowledged that he understood his rights or that he waived them as argued by the State. Defendant, Munn, submits that this was not a proper warning and even if it was, it was done during Munn 2-K after defendant, Munn, had made the initial confession and incriminating statements. Therefore, his statements should have been suppressed.

III. THE TRIAL COURT ERRED IN NOT SUPPRESSING THE LATER STATEMENTS MADE BY DEFENDANT, MUNN, UNDER THE DERIVATIVE EVIDENCE RULE.

(SECTION V FROM THE ORIGINAL BRIEF)

Defendant, Munn's, first confession was made to his mother while they were "alone" in the felony booking room. Defendant, Munn, submits that the confession and other incriminating statements were taken in violation of his Constitutional rights and in violation of his federal and state statutory rights. Defendant, Munn, submits that these unwarned confessions and incriminating statements are inadmissible. The Supreme Court has recognized that Article I, Section 9 of the Tennessee Constitution necessitates that Courts recognize that an illegal, unwarned confession from a defendant raises a rebuttable presumption that a subsequent confession is tainted by the initial illegality even if the subsequent confession was preceded

by proper Miranda warnings. State v. Smith, 834 S.W.2d 915, 919 (Tenn. 1992). As discussed above, defendant, Munn, was not properly Mirandized until after all statements had been made. The State did not rebut the presumption that the later statements made by defendant, Munn, were tainted by the violations of Defendant's state and federal Constitutional rights and state and federal statutory rights. The State did not meet its burden of showing that the taint was so attenuated as to justify admission of the subsequent confessions. State v. Smith, 834 S.W.2d at 919.

Defendant's original Brief contains a detailed discussion of each of the relevant factors to be considered as outlined in State v. Smith, 834 at 919, 920. In this case, the temporal proximity of the police misconduct to the subsequent confessions and incriminating statements made by defendant, Munn, was too short to purge the confessions of the taint of the prior constitutional and statutory violations. All of the statements were made in a stream of events that were related and there was never any significant break in those events to remove the taint. In his initial confession to his mother, Defendant "let the cat out of the bag" and he could never get the cat back in the bag.

The later confessions and incriminating statements should have been suppressed as "fruit of the poisonous tree".

IV. THE TRIAL COURT ERRED IN REFUSING TO CHARGE THE JURY THAT THE DEFENDANT HAD A RIGHT NOT TO TESTIFY AT THE SENTENCING HEARING.

(SECTION IXD FROM THE ORIGINAL BRIEF)

At the sentencing hearing, defendant, Munn, requested the Court to charge a modified version of Tennessee Pattern Jury Instruction Criminal 43.03. Defendant: Not Testifying. R. X. 186, 188-189. The Court's refusal to instruct the jury that the defendant has a constitutional privilege to remain silent and that no adverse inferences are to be drawn from the exercise of that privilege is reversible error. The Court of Criminal Appeals erred in its holding that Defendant's request was unwarranted, because the Court had instructed the jury in T.P.I. 7.04(a)(sic) that the State had the burden of proof as to the aggravating circumstances. Opinion, P. 50. This instruction is not a substitute for the requested instruction. The Court of Criminal Appeals incorrectly held that any error in not giving the requested charge was harmless and did not constitute reversible error.

In Carter v. Kentucky, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981), the Supreme Court held that a trial court must give the jury an instruction that they should not draw inferences from the defendant's failure to testify if a defendant requests such an instruction. The Carter Court held that the

instruction was required by the privilege against self-incrimination protected by the Fifth and Fourteenth Amendments.

The Fifth Amendment to the Constitution provides no person "shall be compelled in any criminal case to be a witness against himself". This Amendment is applicable to the States through the Fourteenth Amendment. In Carter, 67 L.Ed.2d at 254 the Court stated:

> And the Constitution further guarantees that no adverse inferences are to be drawn from the exercise of that privilege. Griffin v. California, 380 US 609, 14 L Ed 2d 106, 85 S Ct 1229. Just as adverse comment on a defendant's silence "cuts down on the privilege by making its assertion costly," Griffin, id., at 614, 14 L Ed 2d 106, 85 S Ct 1229, 5 Ohio Misc 127, 32 Ohio Ops 2d 437, the failure to limit the jurors' speculation on the meaning of that silence, when the defendant makes a timely request that a prophylactic instruction be given, exacts an impermissible toll on the full and free exercise of the privilege. Accordingly, we hold that a state trial judge has the constitutional obligation, upon proper request, to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify.

In Carter, the defendant was indicted for third degree burglary and he chose not to testify at both the guilt phase of the trial and the recidivist phase of the trial. The defendant had prior felony convictions that could have been used to impeach his credibility if he had chosen to testify. The defendant chose not to testify and requested that the Court instruct the jury as follows:

> "The [defendant] is not compelled to testify and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way."
>
> Carter, 67 L.Ed.2d at 246.

The trial court refused the request. The jury returned a verdict of guilty and recommended a sentence of two years. At the conclusion of the recidivist phase of the trial, the jury found the petitioner guilty as a persistent offender and sentenced him to the maximum term of 20 years in prison. The Kentucky Supreme Court affirmed and held that giving the requested instruction would be commenting upon the defendant's failure to testify in violation of a state statute which provided that a defendant's failure to testify shall not be commented upon or create any presumption against him.

The U.S. Supreme Court reversed the decision and reviewed the cases which had enforced the constitutional privilege against self-incrimination.

The Supreme Court held:

> A trial judge has a powerful tool at his disposal to protect the constitutional privilege--the jury instruction--and he has an affirmative constitutional obligation to use that tool when a defendant seeks its employment. No judge can prevent jurors from speculating about why a defendant stands mute in the face of a criminal accusation, but a judge can, and must, if requested to do so, use the unique power of the jury instruction to reduce that speculation to a minimum.
>
> . . .
>
> The other trial instructions and arguments of counsel that the petitioner's jurors heard at the trial

> of this case were no substitute for the explicit instruction that the petitioner's lawyer requested. Although the jury was instructed that "[t]he law presumes a defendant to be innocent," it may be doubted that this instruction contributed in a significant way to the jurors' proper understanding of the petitioner's failure to testify. Without question, the Fifth Amendment privilege and the presumption of innocence are closely aligned. But these principles serve different functions, and we cannot say that the jury would not have derived "significant additional guidance," Taylor v. Kentucky, 436 US. 478, 484, 56 L Ed 2d 468, 98 S Ct 1930, from the instruction requested. See, United States v. Bain, 596 F2d 120 (CA5); United States v. English, 409 F2d 200, 201 (CA3). And most certainly, defense counsel's own argument that the petitioner "doesn't have to take the stand . . . [and] doesn't have to do anything" cannot have had the purging effect that an instruction from the judge would have had. "[A]rguments of counsel cannot substitute for instructions by the court." Taylor v. Kentucky, supra, at 489, 56 L Ed 2d 468, 98 S Ct 1930.
>
> Carter, 67 L.Ed.2d at 252-253. (emphasis added).

In the case at bar, the Court of Criminal Appeals incorrectly held that the requested instruction was unwarranted since the Court instructed the jury that the State had the burden of proof as to any statutory aggravating circumstances beyond a reasonable doubt. Opinion, P. 50. As the Carter Court recognized, these are two different instructions with different purposes. The Constitution mandates that the instruction must be given if timely requested. The defendant in the case at bar made such a request at the sentencing hearing and he had a Constitutional right to have the requested instruction given.

In Estelle v. Smith, 451 U.S. 454, 101 S. Ct. 1866, 68 L.Ed.2d. 359 (1981), the Supreme Court held that a defendant is entitled to the Fifth Amendment protection against self-incrimination in the punishment phase of a bifurcated trial of a capital case. It therefore follows that defendant, Munn, had a right to have the requested instruction given to the jury at the punishment phase of his trial. In Finney v. Rothgerber, 751 F.2d. 858 (6th Cir 1985), the Sixth Circuit Court of Appeals held that the defendant is entitled, if requested, to have the jury charged during the enhancement portion of a bifurcated trial of one charged as a persistent felony offender that no adverse inference may be drawn from the defendant's failure to testify. Defendant, Munn, requested that such an instruction be given during the sentencing phase of his first degree murder trial and it was reversible error to refuse to so instruct the jury.

The issue of whether such an instruction is required to be given during the sentencing phase of a first degree murder trial was raised in the case of State v. Porterfield, 746 S.W.2d 441 (Tenn. 1988) cert. denied 486 U.S. 1017, 108 S Ct 1756, 100 L.Ed.2d 218 (1988). In Porterfield, the defendants, Porterfield and Owens, received the death sentence for the killing of Mrs. Owens' husband. On appeal, defendant, Porterfield, raised the issue that the trial court committed reversible error in failing to instruct the jury that they were not to consider his silence as evidence against him in the sentencing phase of the trial.

Porterfield, 746 S.W.2d at 451. The Tennessee Supreme Court held: "The record shows that the defendant did not request this instruction. Absent such a request, the failure of the trial judge to charge on the constitutional right of the defendant not to give testimony is not error. See Carter v. Kentucky, 450 U.S. 288, 101 S Ct 112(sic), 67 L.Ed.2d 241 (1981); Rowan v. State, 212 Tenn. 224, 369 S.W.2d 543 (1963)." Porterfield, 746 S.W.2d at 451. This holding implies that if such a request is timely made during the sentencing phase of a bifurcated trial, the Court is required to give the instruction. The fact that T.P.I. 43.03 was given during the guilt phase does not protect the defendant's constitutional rights against self-incrimination at the sentencing phase.

As the Court is Estelle v. Smith recognized,

> We can discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned. Given the gravity of the decision to be made at the penalty phase, the State is not relieved of the obligation to observe fundamental constitutional guarantees.
>
> Estelle, 68 L.Ed.2d at 369. (citations omitted).

In many respects the sentencing phase of a first-degree murder trial is a new and separate trial. Though the same jury sits in both phases, the attorneys have the right to make opening and closing statements, each side has a right to present evidence, including the testimony of the defendant if he chooses to testify, and the Court instructs the jury separately on the

law applicable to the sentencing phase. This phase of the trial is very important since so much is at stake. The jury had a very serious decision to make in sentencing Munn, the 18 year old defendant with no criminal background whatsoever, and he was entitled to a no adverse inference instruction.

This failure was not harmless error. This case is distinguishable from the case of Finney v. Rothgerber, 751 F.2d. 858 (6th Cir 1985) in which the Court held that the failure to instruct the jury was harmless error. In Finney, the defendant was convicted of theft by unlawful taking and received a sentence of one year. The Court then began the persistent offender/enhancement phase of the trial and the Court held that the defendant voluntarily waived his right to be present when he did not come back to the proceedings after the lunch break. The State relied upon documentary evidence to establish that the defendant was a persistent felony offender. The jury found that the defendant was a persistent felony offender in the second degree and enhanced his punishment for the theft charge to ten years imprisonment. The Sixth Circuit Court of Appeals held that defendant had a due process right, if requested, to have the jury charged that he had a right not to testify in the persistent offender phase of the trial. The Court held that the failure to do so in that case was harmless error. The Court stated that it was convinced beyond a reasonable doubt under the facts of the case that it was the revelation of defendant's past criminal

record coupled with his absence, rather than his failure to testify, which caused the jury to impose the maximum enhancement sentence. Finney, 751 S.W.2d at 865.

The test of whether a constitutional error is harmless is stated as follows:

> [B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.
>
> Chapman v. California, 368 U.S. 18, 24, 87 S Ct 825, 17 L.Ed.2d. 705 (1967).

In the case at bar, the State had the burden of proving any statutory aggravating circumstances beyond a reasonable doubt. The defendant did not have the burden of proving a mitigating circumstance. If there was some evidence that a mitigating circumstance existed, the State had the burden of proving that the mitigating circumstance did not exist beyond a reasonable doubt. T.P.I. 7.04(d).

The defendant had a right to have the jury instructed that no adverse inference could be drawn from his failure to testify. It cannot be said that the failure to instruct the jury was harmless beyond a reasonable doubt in this case. Unlike the Finney case, the State's case against defendant, Munn, did not involve purely documentary evidence. The jury obviously noticed that defendant, Munn, elected not to testify at the sentencing phase. A cautionary instruction is very significant and has been recognized as appropriate even over a defendant's objection.

See, Griffin v. California, 380 U.S. 609, 85 S Ct 1229, 14 L.Ed.2d 106 (1965). If a jury is not properly instructed, it is "left to roam at large with only its untutored instincts to guide it, to draw from the defendant's silence broad inferences of guilt". Carter, 67 L.Ed.2d at 251. The failure to properly instruct the jury was not harmless error in this case.

Defendant submits that the trial court committed reversible error and that the case should be reversed and remanded for a new trial and/or a new sentencing hearing.

CONCLUSION

Based on the foregoing, defendant, Munn, submits that the decision of the Court of Criminal Appeals should be reversed and the case should be remanded for a new trial.

Respectfully submitted this 8th day of December, 1999.

ROGERS & DUNCAN

BY: _____
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BY: _____
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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded to Paul Summers, Esq., Attorney General for the State of Tennessee, 425 5th Avenue North, Nashville, TN 37243-0485, by placing a copy of the same in the U.S. Mail with sufficient postage thereon to carry the same to its destination.

This 8th day of Dec., 1999.

ROGERS & DUNCAN

BY: J. Stanley Rogers

J. Stanley Rogers
Attorney for Appellant

ATTACHMENT 2

IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE DIVISION AT NASHVILLE

SCOTT GOODERMOTE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Appeal No. 01-A-01-9206-BC-00232
	)	Tennessee Claims Commission 04335
STATE OF TENNESSEE and	)	
TENNESSEE CLAIMS COMMISSION,	)	
	)	
Respondents.	)	
	)	

BRIEF OF PETITIONER

ORAL ARGUMENT REQUESTED

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REFERENCE TO THE RECORD

All references to the record on appeal will be abbreviated as R. followed by the appropriate page number. All references to the transcript of the proceedings will be abbreviated as T. followed by the appropriate page number. All references to the depositions which were filed with the Court will be abbreviated as Name of Witness Depo. followed by the appropriate page number.

TABLE OF AUTHORITIES

CASES:

STATUTES:

OTHER AUTHORITIES:

STATEMENT OF THE CASE

Plaintiff, Scott Goodermote, filed a Petition in The Board of Claims of the State of Tennessee on May 17, 1983, seeking to recover damages from the State of Tennessee for injuries he received in a single automobile accident which occurred on May 18, 1982, near mile marker 110 on Interstate 24 in Coffee County, Tennessee. Plaintiff alleged that the State of Tennessee was negligent in the design and construction of the highway and that it was negligent in maintaining the highway so as to create a dangerous condition. R. 3-7. The case was transferred from the Board of Claims to the Claims Commission on July 23, 1985. R. 1.

Defendant, State of Tennessee, moved for an extension of time within which to answer on September 25, 1985. R.8. Defendant, State of Tennessee, filed a Response to Claim on November 6, 1985, denying that it was negligent and asserting that the accident resulted from the negligence of the driver of the automobile in which the plaintiff was a guest passenger. R. 9-11.

Defendant, State of Tennessee, submitted interrogatories to plaintiff, Scott Goodermote, which were answered on December 3, 1986. R. 13-116.

The parties stipulated that certain medical records were authentic copies of the original documents. R. 117.

Plaintiff, Scott Goodermote, submitted a second set of interrogatories to defendant, State of Tennessee, and the answers

to these questions were filed on November 2, 1990. R. 118-121. Plaintiff, Scott Goodermote, filed a Motion to Compel Defendant, State of Tennessee to fully respond to the second set of interrogatories. R. 122-127. A hearing was held on this motion on March 6, 1991, and an order was entered on March 8, 1991. R. 128-132.

On October 21, 1991, defendant, State of Tennessee, filed a Motion to Continue the trial from the hearing date of November 18, 1991. R. 133-136.

The trial of this cause was held before C.E. Murray, Commissioner, on December 17, 1991. An Order dismissing the claim was entered on May 11, 1992. R. 137-148.

Plaintiff filed a Petition to Review and an Appeal Bond on June 3, 1992. R. 142, 151. Plaintiff filed a Replacement Appeal Bond on July 17, 1992.

STATEMENT OF FACTS

On May 18, 1982, plaintiff, Scott Goodermote, was a guest passenger in a 1973 Ford Maverick which was being driven by Timothy Arnold. T. 40, 41. Scott Goodermote and Timothy Arnold were both members of the United States Air Force and were traveling from an air force base in Ohio to Eglin Air Force Base in Florida to which they had been transferred. T. 169, 170. The motor vehicle in which Scott Goodermote was a guest passenger was traveling East on Interstate 24 immediately prior to the accident in question.

Scott Goodermote was seventeen years old at the time of the accident and he was riding in the passenger seat with his seat belt fastened. T. 172. At the time of the accident, Scott Goodermote was asleep against the window. T. 173. Goodermote testified that he did not remember anything about the accident and the first thing that he remembers was being transported to the hospital. T. 174.

Sergeant Lonnie Ashburn, who has been a Tennessee State Trooper for twenty years, testified on behalf of the plaintiff. T. 34. Sergeant Ashburn testified that he investigated the Goodermote accident which occurred a few minutes prior to 7 a.m. on May 18, 1982. T. 38, 40. Trooper Ashburn testified that the 1973 Ford Maverick was off the interstate and on Monoguard Road when he arrived at the scene. T. 41. Apparently, driver Arnold

fell asleep, and the motor vehicle traveled off the left side of the roadway and entered the grass median near mile marker 110. T. 45. Trooper Ashburn, the investigating officer, testified that he estimated the path of the motor vehicle by observing the tracks in the grass. T. 41. Trooper Ashburn testified that the motor vehicle traveled approximately seven hundred feet in the middle of the median and then traveled down the embankment before stopping at the bottom of the embankment on Monoguard Road. T. 41, 162-164. There was no evidence that the driver had applied the brakes on the motor vehicle prior to the impact. T. 44. The entire front portion of the motor vehicle was damaged. T. 42, 43, 164.

At the accident scene, twin bridges, one on each side of the interstate, extended over Monoguard Road which passed under the interstate and the bridges were 61.25 feet apart. T. 92. An embankment led from the median of the interstate down to Monoguard Road and there is a distance of twenty-eight feet from the top of the embankment to the bottom of it. The measurement from the bridge to the road below is nineteen feet. T. 108. A farm-type fence was across the side of the embankment approximately three to four feet from the top, but there was not an earthen berm or guardrail extending between the twin bridges. T. 47, 48, 163. A guardrail ran along the left side of the eastbound lane of traffic one hundred fifty feet from the bridge and curved toward the median and to the ground. T. 146. The sixty-four

foot wide median sloped downward and created a "ditch". There were no trees at this particular location. T. 48. As the eastbound lane of traffic approaches the twin bridges, the roadway curves to the right. T. 48.

Trooper Bobby South, who has been a Tennessee State Trooper since January 17, 1967, also testified on behalf of the plaintiff. T. 28. Trooper South testified that he investigated an accident which occurred at the same twin bridges on October 8, 1975. T. 29-30. This previous accident also involved one vehicle, and it was being driven by Billy Floyd. T. 28-30. Billy Floyd, a former Tennessee Highway Patrolman, who resigned on August 6, 1973, also testified about the October 1975 accident. T. 22-24. Mr. Floyd testified that he was traveling East on Interstate 24 when a tractor-trailer truck ran him off the left side of the roadway. T. 24. Mr. Floyd testified that his motor vehicle left the roadway, traveled between the twin bridges and down the embankment. T. 24-25. At the time of that accident, there was no guardrail or earthen berm covering the opening between the twin bridges. T. 24. Mr. Floyd testified that a farm-type fence was between the bridges and that the fence jerked the gas tank off of his motor vehicle. T. 24.

Trooper South also testified that he assisted in the investigation of another one vehicle accident which occurred at this location and involved a one and one-half ton U-Haul truck. T. 31, 33. The U-Haul truck was also traveling East on Interstate

24. T. 31. Trooper South testified that two persons burned to death in that accident. T. 31. Billy Floyd observed the scene of this accident and testified that his vehicle landed ten to fifteen feet from where this truck burned. T. 27.

The plaintiff introduced an accident report of a May 21, 1981, accident for the purpose of establishing notice by the State of Tennessee. T. 49. The motor vehicle in that accident was traveling East on Interstate 24, left the roadway, ran through a farm-type fence, down an embankment between twin bridges and into a creek. T. 49. This accident occurred near the Goodermote accident site. T. 49.

The plaintiff called Jarvis D. Michie to testify as an expert witness in the case. T. 53. Michie is a professional engineer licensed in the states of Texas and Louisiana. T. 53. Michie received a Bachelor of Science in Civil Engineering from the University of Texas in 1955 and a Master of Science from Louisiana State University in 1961. T. 53. Michie has worked in the engineering filed in various capacities prior to beginning work at the Southwest Research Institute in San Antonio, Texas. T. 53-54. Michie worked at the Southwest Research Institute from 1962 until his retirement in 1985. T. 54. After retiring, Michie began his own company in which he works principally in the area of highway safety consultant engineering. T. 55. While at the Southwest Research Institute, Michie was involved with highway safety research. T. 55-56. Michie was involved in

developing the forgiving roadside, performing crash-worthiness studies, and analyzing data to evaluate safety features of automobiles. T. 56-57.

Michie was the project manager of the NCHRP project which produced the National Recommended Procedures for the Safety Performance Evaluation of Highway Appurtenances, No. 230. T. 66-67. Michie has published ten significant reports and at least five other presentations and publications. T. 72.

Michie made an inspection of the Goodermote accident scene on November 4, 1987. T. 76. Michie made a report based upon the information relevant to the accident in question, including a site inspection, photographs, and the proposed plans adopted by the State of Tennessee. Selected sheets from the Plan and Profile of Proposed State Highway Project, Federal Aid Project, number I-24-2(43) 103 which showed the accident site were introduced by the plaintiff as Exhibit 7. The earliest date on the plans is 1965. T. 89. All of the plans introduced into evidence show that guardrails or earthen berms were to be placed across the opening between the twin bridges. T. 89-93. The proposed plans called for a 150 foot guardrail to run parallel with the roadway in addition to the safety barrier. T. 145. The earthen berm feature was a later development that was to replace the heavy guardrail. T. 92.

The plaintiff's expert Jarvis Michie testified that the twin bridges at the accident site fell within the classifications of

the various guardrail and earthen berm treatments shown on the plans. T. 92. Michie further testified that the standard of care in the industry at the time the roadway was planned and constructed was to place guardrails across the openings between the twin bridges. T. 133. The guardrail and earthen berm treatments as shown on the plans were consistent with the industry standards and recognized in the engineering community. T. 134. The expert testified that the guardrails or berms were necessary as a safety feature, because national statistics showed that motor vehicles would leave the roadway and enter into the area between the twin bridges. T. 97.

Based on certain measurements and the fact that the vehicle hit and stopped in the ditch, Michie calculated the maximum speed of the motor vehicle at the top of the embankment as being 17.6 m.p.h. T. 110-112. Michie also calculated the speed of the motor vehicle upon impact with the ditch as being 29.6 m.p.h. T. 113.

Based upon his experience, physical inspection of the site, and calculations, expert Michie testified that the injuries sustained by the plaintiff would have been much less severe if an earthen berm had been installed at the top of the embankment. T. 127. Michie explained that the berm would have stopped the vehicle at the top of the embankment and the impact of stopping the vehicle at the top would have been much less severe than the impact at the bottom of the ditch. T. 127. Michie testified

that the severity would have been a factor of two-thirds and that neither occupant should have sustained any kind of long-term injury if they were wearing seat belts. T. 127. The expert Michie further testified that if a guardrail had been installed between the twin bridges, the injuries would be even less severe than the berm treatment because the guardrail would be deflected and the impact would have been softened. T. 129. Michie explained that the fact that the impact occurred on an angle at the bottom of the ditch rather than at the top on the flat surface is another factor in the severity of the injury due to the "submarine" effect. T. 127-128.

If the plaintiff was not wearing his safety belt at the time of the accident, there would be some AIS four level injuries which are injuries with some permanent disability. T. 128. Goodermote testified that he was wearing his seat belt. T. 172.

Michie testified that if the State of Tennessee had complied with the design standards that were in effect in 1965, the plaintiff's injuries, if any, would have been much, much less severe. T. 130-131.

Richard Douglas Whirlpool, who is the manager for the mapping and statistics office under the planning division of the Tennessee Department of Transportation, testified on behalf of the defendant. T. 216-217. This department deals primarily with statistics, including data on accidents. T. 220. Law enforcement agencies are required to send copies of the accident reports

to the Tennessee Department of Safety on a daily basis. T. 220. The Department of Safety enters the information in the computer and forwards the data to the Department of Transportation. T. 221. Approximately 170,000 reports per year are processed. T. 222. The State of Tennessee is responsible for the maintenance of 14,000 road miles of highway. T. 222.

Whirlpool testified that the Department of Transportation keeps three years of the latest accident data in the computer file and each year a program is run that computes accident rates for different types of highway systems and to form a high hazard list. T. 223, 224. Mr. Whirlpool testified that his records indicated that six accidents had occurred within six-tenths of a mile of this location during the three years prior to the Goodermote accident. T. 224-225. Whirlpool testified that his office calculated the actual rate for this stretch of the highway to be 0.621 accidents per million vehicle miles of travel and the critical rate to be 0.753 per million vehicle miles of travel. T. 229, 233. In calculating the critical rate, Whirlpool's office attempts to omit accidents which would occur by chance. T. 228-230. According to Whirlpool's testimony, the locations that are on the high hazard list had a rating of approximately 5. T. 237. Whirlpool testified that approximately forty locations in each district were placed on the high hazard list at the time of the accident. T. 234. The accidents used in the calculations performed by the Department of Transportation did not include

accidents with property damage of less than $400. T. 241. The severity of the accidents was only considered for sites which were on the high hazard lists. T. 242. Most of the sites on the high hazard list are city streets, according to Whirlpool's testimony. T. 243. Mr. Whirlpool's office has the capability of analyzing particular locations, or all locations with twin bridges to determine if guardrails are needed, but his office has never run that type of listing. T. 246-248.

Scott Goodermote testified about the injury he received. He was transported from the accident scene to the hospital by an ambulance. T. 174. Goodermote testified that he remained in a Coffee County hospital for approximately two weeks. T. 174. His injuries included cuts above his eye, across the bridge of his nose, on his eyelid, and under his chin, some of which required stitches. T. 175. Goodermote also sustained a dislocated shoulder and injuries to his left knee and lower leg. T. 176. On May 29, 1982, Goodermote was transferred from the Coffee County hospital to a hospital at Eglin Air Force Base where he remained until July 19, 1982. T. 178-179. Treatment of these injuries included traction, surgery, and physical therapy. T. 180-182. At various times during recovery, plaintiff was required to wear a cast, a brace, and walk with crutches or a cane. T. 180-182. In January 1983, Goodermote refractured his left leg when he turned around while walking on a wooden floor in a bowling alley. T. 183-184, 201. In November of 1984, Scott

Goodermote broke his left femur for a third time in a motor cycle accident. T. 185, 186. Goodermote was discharged from duty in the Air Force in November of 1985, because the medical board found him unfit for worldwide duty. T. 187. Currently, the plaintiff is required to wear an elevated shoe on his left foot because the left leg is shorter due to the initial injury. T. 195.

Plaintiff submitted the deposition of Michael J. Fajgenbaum, M.D. which was taken on May 11, 1988, as evidence. T. 215. Dr. Fajgenbaum is an orthopedic surgeon who maintained offices at the University of Florida and the Veteran's Administration Hospital in Gainesville, Florida. Fajgenbaum Depo. 3, 4. The only records which Dr. Fajgenbaum had available were the two occasions on which Goodermote was treated at the Veteran's Administration Hospital on November 9, 1987, and March 14, 1988. Fajgenbaum Depo. 4-6. Dr. Fajgenbaum testified about the injuries contained in these records, including an angular deformity of the left femur, anterior cruciate insufficiency, and locking and swelling of the knee. Fajgenbaum Depo. 6, 7. In addition, the physician testified that Goodermote's right leg was approximately four centimeters longer than the left leg. Fajgenbaum Depo. 6.

The plaintiff also submitted the deposition of Dr. Robert M. Canon as evidence. T. 215. Dr. Canon is an orthopedic surgeon who maintains a practice in Coffee County, Tennessee. Canon

Depo. 4-5. Dr. Canon did not treat the plaintiff for his injuries, but examined the plaintiff on September 1, 1989, and examined all of the medical records for the purpose of evaluation. Canon Depo. 5. According to Dr. Canon's testimony, Goodermote's injuries sustained in the motor vehicle accident included a comminuted fracture of the proximal third and middle one-third of his left femur, and an anterior dislocation of his left shoulder with a fracture of the left humeral greater tuberosity. Canon Depo. 6. Dr. Canon testified that surgical procedures were performed in the treatment of these initial injuries, including the insertion of a tibial traction pin. After the second and third injuries, additional surgical procedures were performed. At the time of his examination, Dr. Canon testified that Goodermote would retain a thirty-one percent (31%) permanent partial impairment to the body as a whole. Canon Depo. 15. Dr. Canon testified that this impairment rating was a result of the original accident. Canon Depo. 17. Dr. Canon testified about the causation of the injuries and the relationship between the initial injury and the later re-injuries in January 1983 and November 1984. Canon Depo. 17-21.

ARGUMENT

I. THE COMMISSION ERRED IN ITS HOLDING THAT DEFENDANT, STATE OF TENNESSEE, WAS NOT NEGLIGENT UNDER TENN. CODE ANN., SECTION 9-8-307(a)(1)(I).

Plaintiff is entitled to recover under Tenn. Code Ann., Section 9-8-307(a)(1)(I), because the State of Tennessee was negligent in the planning, design, construction, and maintenance of the state highway and twin bridges at the site of this accident, located on Interstate 24 near mile marker 110 in Manchester, Coffee County, Tennessee. The Commission erroneously held that the State was not negligent and even if the State was negligent, its negligence was not the proximate cause of the plaintiff's injuries. The plaintiff established that the State of Tennessee was guilty of actionable negligence in failing to install a guardrail, earthen berm, or other safety mechanism across the opening of the twin bridges. Further, the plaintiff established that this negligence was the direct and proximate cause of the extensive injuries which plaintiff sustained in the accident.

Tenn. Code Ann., Section 9-8-307(a)(1) provides in pertinent part as follows:

> 9-8-307(a)(1)(I). Jurisdiction -- Claims -- Waiver of actions -- Standard for tort liability -- Damages -- Immunities -- Definitions -- Transfer of claims. --(a)(1) The commission or each commissioner sitting individually shall have exclusive jurisdiction to determine all monetary claims against the state

> falling within one (1) or more of the following categories:
> . . .
> (I) Negligence in planning and programming for, inspection of, design of, preparation of plans for , approval of plans for, and construction of, public roads, streets, highways, or bridges and similar structures, and negligence in maintenance of highways, and bridges and similar structures, designated by the department of transportation as being on the state system of highways or the state system of interstate highways. . . .

The Commission erroneously held that the State of Tennessee was not negligent in failing to install a guardrail, earthen berm, or other safety feature across the opening between the twin bridges. In examining this issue, the Court should follow traditional tort concepts of duty and the reasonably prudent person's standard of care. Tenn. Code Ann., Section 9-8-307(c).

Under the general principles of the Tennessee law of negligence, the plaintiff must establish that the defendant owed a duty of care to the plaintiff, injury or loss, conduct falling below the applicable standard of care amounting to a breach of the duty, causation in fact, and proximate, or legal cause. McClenahan v. Cooley, 806 S.W.2d 767 (Tenn. 1991). Plaintiff, Scott Goodermote, established each element of a negligence cause of action and is entitled to recover.

Clearly, the State of Tennessee, has a duty to exercise reasonable care under all of the attendant circumstances in planning, designing, constructing, and maintaining the state

system of interstate highways. See, Tenn. Code Ann., Section 9-8-307(a)(1)(I). This duty is owed to persons lawfully travelling upon the highways, including plaintiff.

Defendant, State of Tennessee, breached this duty of care in the construction of the roadway at the accident site by failing to install a guardrail, earthen berm, or other safety mechanism across the opening between the twin bridges. If the State of Tennessee had exercised reasonable care in the construction and maintenance of the accident site, the appropriate safety feature would have been installed. The evidence established that the plans adopted by the State of Tennessee at this location specified the installation of a safety barrier. The early plans called for the installation of a heavy guardrail and later plans called for the installation of an earthen berm in place of the guardrail. The plans specified the use of these features in addition to the 150 foot guardrail which extended from the bridge and ran parallel with the roadway. The plaintiff's expert, Jarvis Michie, testified that the various safety features which were specified on the plans beginning as early as 1965 were appropriate under the industry standards. Michie testified that the guardrail or earthen berm as proposed in the plans represented the technology of the day and were in compliance with the industry standards as of the date of the plans, that were introduced into evidence. These safety features were specified to be installed across the opening at the top of the embankment,

because national statistics had demonstrated that motor vehicles would leave the roadway and enter the area between twin bridges. According to the uncontradicted testimony of Michie, the standard of the industry and engineering community was to place guard-rails, earthen berm, or other safety barriers across the opening between the twin bridges. Despite the fact that all of the plans introduced and industry standards specified the need for a safety mechanism between twin bridges, the State of Tennessee failed to install <u>any</u> safety mechanism. This conduct by the State of Tennessee falls below the standard of care of the industry and of reasonable conduct in light of the apparent risk. The Commission discusses the fact that changes were often made at the site and that a representative of the federal government had to approve the "as built" plans. The "as built" plans were not introduced into evidence, so the defendant did not establish that the "as built" plans omitted the safety barrier. Even if a federal government representative had approved any such plans, the State of Tennessee would not be relieved of liability. The State of Tennessee's conduct of failing to follow their own plans and industry safety standards constitutes a breach of duty. The engineers who prepared the plans and the industry in general recognized the need for some type of safety barrier at this location. Despite this fact and the knowledge that there was a known risk of motor vehicles leaving the highway and traveling down the embankment, the State of Tennessee failed to install a

safety feature at the time of construction or later when maintaining the highway. This conduct constitutes a breach of duty.

The plaintiff also established the cause in fact element of a negligence claim. As Michie testified, the plaintiff's injuries, if any, would have been much, much less severe if either an earthen berm or guardrail had been installed across the opening. The expert Michie had been involved in crash tests of various roadside hardware to determine whether occupants would survive an impact under various conditions. Michie testified that in his expert opinion, an earthen berm or guardrail would have stopped the motor vehicle at the top of the embankment and that the impact of stopping the vehicle at the top would have been much less severe than the impact which actually occurred at the bottom of the embankment. He further testified that the occupants would have sustained minor injuries, at most, if an earthen berm or guardrail had been in place. Because the motor vehicle was not stopped at the top, the speed of the motor vehicle increased from a maximum of 18 m.p.h. at the top of the embankment to a maximum speed of 29.6 m.p.h. upon impact. This increased speed, along with the submarining effect due to the downward movement made the plaintiff's injuries worse than they otherwise would have been if a guardrail or berm had been installed. The testimony of this distinguished expert was uncontradicted. The absence of any safety feature was clearly a cause in fact of the plaintiff's injuries.

Likewise, the failure of the State to install a safety mechanism was the proximate or legal cause of the plaintiff's injuries. As the Court in McClenahan v. Cooley, 806 S.W.2d 767, 775 (Tenn. 1991) recognized, Tennessee cases have suggested the following three-pronged test to determine proximate causation:

> (1) the tortfeasor's conduct must have been a "substantial factor" in bringing about the harm being complained of; and (2) there is no rule or policy that should relieve the wrongdoer from liability because of the manner in which the negligence has resulted in the harm; and (3) the harm giving rise to the action could have reasonably been foreseen or anticipated by a person of ordinary intelligence and prudence. (citations omitted.)

In this case, the negligent conduct of the State of Tennessee was a substantial factor in bringing about the plaintiff's extensive injuries, and there is no rule or policy that would relieve the State from liability in these circumstances. The main issue is whether the foreseeability requirement has been met.

In this case, the State of Tennessee could and should have foreseen that harm would occur if a safety barrier was not installed. National statistics demonstrated that motor vehicles would leave the roadway and enter the space between the twin bridges. As the uncontradicted testimony of the expert showed, the industry standard and nationwide standard in constructing interstates called for the installation of a safety barrier at locations with twin bridges similar to the accident site. The State of Tennessee should have reasonably foreseen that injuries would occur when it omitted this safety feature which was speci-

fied in its own plans.

The Commission erroneously held that the State was not negligent under these circumstances. The Commission stated:

> . . . the state had no duty to anticipate and provide against a driver falling asleep and leaving the roadway in a curve, traveling in a curve of the median some 700 feet, evading a 150 foot long guardrail that extended toward the center of the median, and proceeding over an embankment between the two bridges.
>
> R. 144

Contrary to the holding of the Commission, the plaintiff, Scott Goodermote, is not required to show that the State of Tennessee could foresee the specific facts of this accident before he can recover. The Supreme Court discussed the foreseeability requirement as follows:

> The foreseeability requirement is not so strict as to require the tortfeasor to foresee the exact manner in which the injury takes place, provided it is determined that the tortfeasor could foresee, or through the exercise of reasonable diligence should have foreseen, the general manner in which the injury or loss occurred. Roberts [v. Robertson County Board of Education, 692 S.W.2d 363 (Tenn. App. 1985)] at 871; Wyatt [v. Winnabago Industries, Inc., 566 S.W.2d 276 (Tenn. App. 1976)] at 280-81. "The fact that an accident may be freakish does not per se make it unpredictable or unforeseen." City of Elizabethon v. Sluder, 534 S.W.2d 115, 117 (Tenn. 1976). It is sufficient that harm in the abstract could reasonably be foreseen. Shell Oil Co. v. Blanks, 46 Tenn. App. 539, 330 S.W.2d 569, 572 (1959).
>
> McClenahan v. Cooley
> 806 S.W.2d 767, 775
> (Tenn. 1991).

Under this standard, the plaintiff only has to establish

that the State of Tennessee should have foreseen the general manner in which the injury or loss occurred. McClenahan, Id.

Although it is unusual for a motor vehicle to travel this distance in the median, this fact does not take the injury out of the realm of foreseeability in light of the attendant circumstances. The roadway curved to the right before the twin bridges and the median sloped downward to form a "ditch" which led to the opening at the top of the embankment. In light of these circumstances, injury could be reasonably foreseeable if a motor vehicle left the roadway. The concept of a forgiving highway was developed precisely to allow for driver error, including leaving the roadway and traveling in the median, according to the expert's testimony. As the expert Michie testified, testing and experience demonstrate that motor vehicles will leave the roadway and enter the area between the twin bridges. This risk was a reasonably foreseeable one which the State of Tennessee should have guarded against in the construction and maintenance of the interstate at this location.

The Commission erroneously held that the conduct of the State of Tennessee were not the proximate cause of the accident, because the actions of driver Timothy Arnold were the proximate cause of the accident. The actions of both the State and Arnold could be the proximate cause of the accident. The Supreme Court has recognized that, "[t]here is no requirement that a cause, to be regarded as the proximate cause of an injury, be the sole

cause, the last act, or the one nearest to the injury, provided it is a substantial factor in producing the end result". (citations omitted). McClenahan, 806 S.W.2d at 775. In the case at bar, the negligence of the State of Tennessee in failing to install a safety barrier was a substantial factor in producing the extensive injuries which the plaintiff sustained. Therefore, the conduct of the State of Tennessee was a proximate cause of the plaintiff's injuries.

In the Order, the Commissioner discussed the doctrine of independent intervening cause, although he did not appear to base his decision on the application of that doctrine. This doctrine does not prevent the plaintiff from recovering, because the negligent intervening act of driver Arnold in allowing the motor vehicle to leave the roadway could reasonably have been anticipated. The Supreme Court stated the rule as follows:

> With respect to superseding intervening causes that might break the chain of proximate causation, the rule is established that it is not necessary that tortfeasors or concurrent forces act in concert, or that there be a joint operation or a union of act or intent, in order for the negligence of each to be regarded as the proximate cause of the injuries, thereby rendering all tortfeasors liable. . . . An intervening act, which is a normal response created by negligence, is not a superseding, intervening cause so as to relieve the original wrongdoer of liability, provided the intervening act could have reasonably been foreseen and the conduct was a substantial factor in bringing about the harm. Solomon v. Hall, 767 S.W.2d 158, 161 (Tenn. App. 1988). "An intervening act will not exculpate the original wrongdoer unless it appears that the negligent intervening act could not have been reasonably anticipated." Evridge v. American Honda Motor Co., 685 S.W.2d 632, 635 (Tenn. 1985); Ford Motor

> Co. v. Wagoner, 183 Tenn. 392, 192 S.W.2d 840, 843 (1964). See also Restatement (Second) of Torts, Section 447 (1965). "It is only where misconduct was to be anticipated, and taking the risk of it was unreasonable, that liability will be imposed for consequences to which intervening acts contributed." . . .
>
> McClenahan, 806 S.W.2d at 775 (Tenn. 1991).

In this case, the interstate highways were constructed as forgiving highways, because misconduct on the part of drivers was anticipated, according to the expert testimony. The State of Tennessee has actual knowledge that some motor vehicles will leave the roadway because of negligence of others or by chance. This was demonstrated by the testimony of Richard Whirlpool who testified that the State calculates actual and critical rates of accidents and tries to eliminate the accidents caused by chance in these calculations. The conduct of the driver of apparently falling asleep and leaving the roadway does not relieve the State of Tennessee from liability, since this conduct could reasonably have been foreseen.

The plaintiff clearly established the element of an injury. The plaintiff testified about his injuries and the treatment he received, including surgeries, physical therapy, and the wearing of a cast and brace. In addition, the plaintiff introduced the deposition testimony of two physicians who testified about the plaintiff's injuries.

This case is distinguishable from the case of McDaniel v.

Southern Railway Company, 203 S.E.2d 260 (Ga. App. 1978) on which the plaintiff heavily relies. In the first place, this case is a Georgia decision and is not controlling on this Court. The McDaniel Court is applying Georgia law rather than the Tennessee statues and legal principles which are outlined above. The plaintiff submits that it is inappropriate to rely on a 1973 Georgia Court of Appeals case when three recent Tennessee Supreme Court cases extensively discuss the issues before the Court. Hames v. State, 808 S.W.2d 41 (Tenn. 1991); McClenahan v. Cooley, 806 S.W.2d 767 (Tenn. 1991); and Sweeney v. State, 768 S.W.2d 253 (Tenn. 1989). The McDaniel plaintiff was seeking to recover under a statute which made the county liable for injuries caused by defective bridges. This statute is different than Tennessee's statutes, because the liability of the county in the Georgia case was limited to the defective bridge. The McDaniel Court, quoting several Georgia cases, stated as follows:

> The mere fact that a bridge, at its entrance on a highway, is narrower than the road, and that by reason of this discrepancy in width a vehicular traveler approaching the bridge and adhering to the outer edge of the road will fail to take the bridge and will fall from the road into a declivity on the side of the road at the entrance to the bridge, constitutes no defect in the bridge itself or in the abutments to the bridge, or in the manner in which the bridge is connected with the highway.
>
> McDaniel, 203 S.E.2d at 262

Plaintiff respectfully submits that this is not the standard

of care under Tenn. Code Ann., Section 9-8-307(a)(1), as outlined in the three recent Supreme Court cases which are discussed throughout this Memorandum of Law. This Court should rely on this recent Tennessee law. Also, factual differences distinguish the two cases. The plaintiff in McDaniel alleged that the bridge was defective because it did not have the guardrail which became a standard after the bridge in question was designed but before the bridge was constructed. The guardrail which was installed complied with the standards that were in effect at that time the bridge was designed. It is important to note that the basis of Goodermote's claim is not that the State did not install the latest safety designs, but that the State did not even install the safety designs which were the industry standard fifteen to twenty years prior to the time of this accident.

The McDaniel case is not controlling and should not be relied upon by the Commission or this Honorable Court. Under the established principles of Tennessee law, the plaintiff established each element of a negligence cause of action and is entitled to recover from the defendant, State of Tennessee. The commission erred in dismissing the plaintiff's cause of action.

II. THE COMMISSION ERRED IN ITS HOLDING THAT DEFENDANT, STATE OF TENNESSEE, WAS NOT LIABLE TO THE PLAINTIFF UNDER THE THEORY THAT THE STATE NEGLIGENTLY CREATED OR MAINTAINED A DANGEROUS CONDITION ON A STATE MAINTAINED HIGHWAY.

Plaintiff, Scott Goodermote, is entitled to recover from the defendant, State of Tennessee, because the State of Tennessee was negligent in allowing a dangerous condition to exist at the twin bridges at the accident site. The absence of a guardrail, earthen berm, or other safety barrier across the opening between the twin bridges created a dangerous condition. The plaintiff established that the State of Tennessee had the requisite notice of the dangerous condition and the foreseeability of the risk as outlined in the statute. Therefore, plaintiff is entitled to recover from the State of Tennessee.

Tenn. Code Ann., Section 9-8-307(a)(1) provides in pertinent part as follows:

> 9-8-307(a)(1)(J). Jurisdiction -- Claims -- Waiver of actions -- Standard for tort liability -- Damages -- Immunities -- Definitions -- Transfer of claims. -- (a)(1) The commission or each commissioner sitting individually shall have exclusive jurisdiction to determine all monetary claims against the state falling within one (1) or more of the following categories:
>
> . . .
>
> (J) Dangerous conditions on state maintained highways. The claimant under this subsection must establish the foreseeability of the risk and notice given to the proper state officials at a time sufficiently prior to the injury for the state to have taken appropriate measures; . . .

In Hames v. State, 808 S.W.2d 41 (Tenn. 1991), the Supreme Court discussed the plaintiff's burden of proof in establishing that the State of Tennessee negligently created or maintained a dangerous condition on state controlled property under Tenn. Code Ann., Section 9-8-307(a)(1)(C). These same principles should apply to Tenn. Code Ann., Section 9-8-307(a)(1)(J). Traditional principles of tort law apply in the determination of the issue currently before the Court.

Clearly, the State of Tennessee owed a duty to Mr. Goodermote to exercise reasonable care under all of the attendant circumstances to make the roadways safe. As discussed above in Section I, the plaintiff established the elements of injury and causation in fact.

Also, the plaintiff established that the State of Tennessee breached its duty by failing to install the safety barriers. Unlike the situation in the Hames case, there are established industry standards controlling the installation of safety barriers. The expert testimony of Jarvis Michie, who has been involved in this field since 1962, established that the standard in the industry as early as 1965 was to install safety barriers across the openings between twin bridges.

The plaintiff established that a dangerous condition existed at this location. In Sweeney v. State, 768 S.W.2d 253, 255 (Tenn. 1989), the Supreme Court adopted the following factors to

be considered in determining whether a dangerous condition exists:

> The decision of whether a condition of a highway actually is a dangerous and hazardous one to an ordinary and prudent driver is a factual one, and the Court should consider the physical aspects of the roadway, the frequency of accidents at that place in the highway and the testimony of expert witnesses in arriving at this factual determination. (Citations omitted).

The evidence at trial established that there was no guard-rail or earthen berm across the opening between the twin bridges. The opening led to a twenty-eight foot embankment which sloped downward to Monoguard Road that passed under the interstate. The evidence further established that the median sloped inward to create a type of "ditch" which led directly to the embankment. The roadway for the eastbound lane of traffic in which Goodermote's vehicle was traveling curved to the right prior to the twin bridges.

The State of Tennessee admitted that at least six previous accidents had occurred within six-tenths of a mile of this location within the three years prior to the Goodermote accident. The plaintiff introduced evidence of two previous one motor vehicle accidents in which the drivers were traveling East, left the roadway, traveled into the median and down the embankment at the same location. The plaintiff also introduced an accident report of an accident which occurred at twin bridges near the Goodermote accident site under very similar circumstances. There

was no evidence that the State had taken any measures to correct this dangerous condition since these previous accidents.

In addition, the expert Jarvis Michie testified that the roadway was not built and maintained in compliance with industry standards, because of the absence of a safety barrier. The expert further testified that the accidents which occurred at the unguarded opening would be much more severe than they would have been if the guardrail or earthen berm was in place. This expert testimony was uncontradicted.

Plaintiff, Scott Goodermote, established the statutory requirement of the foreseeability of the risk as discussed extensively in Section I. The risk of a motor vehicle leaving the roadway and entering the area between the twin bridges was not only reasonably foreseeable to the State, but was actually a known risk based on statistics and experience.

The evidence establishes that the proper state officials had notice at a time sufficiently prior to the injury for the state to have taken appropriate measures. The State of Tennessee admitted knowledge of the condition of the accident site and the fact that no safety barrier was installed across the opening between the twin bridges. The State of Tennessee also had notice of at least six previous accidents which had occurred at this location in the three years prior to the Goodermote accident. The State of Tennessee received copies of all accident reports and placed this data in a computer for analysis. Therefore, the

proper State officials had knowledge that two persons were burned to death at this same accident site. The State of Tennessee continuously collected and analyzed the accident data and the fact that six previous accidents had occurred at this same location within three years should have put the State officials on notice that the dangerous condition existed. Furthermore, the knowledge of the previous accidents was received by the proper State officials at a time sufficient prior to the Goodermote injury for the State of Tennessee to have installed the appropriate safety barrier across this opening.

The case at bar is distinguishable from the case of Hames v. State, 808 S.W.2d 41 (Tenn. 1991) in which the Supreme Court held that the State was not negligent and that any negligence on the part of the State was not the proximate cause of the death of plaintiff's decedent. The plaintiff in the Hames case alleged that the State was negligent in failing to erect lightning proof shelters or maintaining a warning system to vacate the golf course during the electrical storms. The Supreme Court held that the State's conduct did not fall below the applicable standard of care. The Supreme Court held that lightning was such a highly unpredictable occurrence of nature that the risk to be guarded against was too remote to impose legal liability. Also, the Court stated that dangers associated with playing golf in a lightning storm are obvious to most adults and that the plaintiff's decedent could have reached the safety of the clubhouse in

two minutes. The Supreme Court found it significant that there was no industry standards to implement warning devices and that most golf courses did not have warning devices or lightning proof shelters. Hames, 808 S.W.2d at 45. In this case, there are industry standards which call for the installation of safety barriers and these have been the standards for fifteen to twenty years. In addition, the standards adopted by the State in the plans called for the installation of safety barriers. Also, the risk that a motor vehicle would leave the roadway and enter the opening in the median was not too remote to be guarded against.

In Hames, the Supreme Court held that the absence of warning devices and lightning proof shelters was not the proximate cause of death, because there were two distinct causes unrelated in operation. The Court held that the lightning bolt was an act of God which was the "direct cause" of death and that the absence of shelters and warning devices merely furnished the condition by which lightning could strike the decedent. Hames, 808 S.W.2d at 45. In the case at bar, there were not two distinct causes unrelated in operation, since the absence of a safety barrier played a substantial factor in the plaintiff's injuries. The expert testimony showed that if the State had installed a safety barrier, the plaintiff would have received only minor injuries, if he received any injuries at all.

The plaintiff met his burden of establishing that the State was negligent in this case. In addition, the plaintiff estab-

lished that a dangerous condition existed at this location, under the factors delineated in Sweeney v. State, 768 S.W.2d 253 (Tenn. 1989). The plaintiff further proved the statutory notice to the proper state officials. Therefore, the plaintiff is entitled to recover under Tenn. Code Ann., Section 9-8-307(a)(1)(J).

CONCLUSION

Based on the foregoing, the petitioner respectfully requests the Court to reverse the holding of the Tennessee Claims Commission.

Respectfully submitted this 12th day of August, 1992.

ROGERS, RICHARDSON & DUNCAN

BY: _____
J. Stanley Rogers

BY: _____
Christina Henley Duncan
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CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing pleading has been forwarded to Brenda Little, Esq., and Bill Carpenter, Esq., attorneys for respondent, State of Tennessee, 450 James Robertson Parkway, Nashville, TN 37219; and C.E. Murray, Commissioner, Tennessee Claims Commission, Suite 2, 55 Sunrise Park, Winchester, TN 37398, by U.S. Mail, postage prepaid, this 12th day of August, 1992.

ROGERS, RICHARDSON & DUNCAN

BY: _____
J. Stanley Rogers

ATTACHMENT 3

IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE DIVISION AT NASHVILLE

WILLIAM J. REINHART and wife, JUDITH F. REINHART, Plaintiffs/Appellees, vs. ROBERT T. KNIGHT and wife, GLENDA KNIGHT, BOB PARKS, and JOHN E. HARNEY, III, a partnership, Defendants/Appellants.	)	No. M2001-02195-COA-R3-CV (From the Circuit Court of Rutherford County, Murfreesboro, Tennessee, No. 41,560)

BRIEF OF APPELLEES, WILLIAM J. REINHART AND WIFE, JUDITH F. REINHART

ORAL ARGUMENT REQUESTED

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   A. DEFENDANTS, KNIGHT, BREACHED THE CONTRACT AND DEFENDANTS CANNOT RELY ON THE DEFENSE OF CONDITION PRECEDENT TO EXCUSE THE BREACH.

   B. PLAINTIFFS ESTABLISHED DAMAGES FOR THE BREACH OF CONTRACT AND THE PROCUREMENT OF THE BREACH.

II. THE TRIAL COURT'S JURY INSTRUCTIONS ARE NOT REVERSIBLE ERROR.

III. DEFENDANTS', KNIGHT, REQUEST FOR AN INTERPRETATION OF THE TRIAL COURT'S ORDER SHOULD BE DENIED.

IV. THE TRIAL COURT ERRED IN GRANTING A REMITTITUR OF THE JUDGMENT AGAINST DEFENDANTS, KNIGHT.

STATEMENT OF THE CASE

Plaintiffs, William J. Reinhart and wife, Judith F. Reinhart, filed a Complaint on April 26, 1999, against defendants, Robert T. Knight and wife, Glenda Knight; Bob Parks, John E. Harney, III, and Gary Bowman d/b/a Bob Parks Realty. R. 2. The Complaint was filed in the Circuit Court for Rutherford County, Tennessee, and sought damages for breach of a real estate sales contract against defendants, Knights, and damages for procurement of the breach against the remaining defendants. R. 2-6.

On June 28, 1999, defendants, Parks, Harney, and Bowman, filed an Answer denying that they were liable for any damages. R. 10-12. On September 28, 1999, defendants, Robert T. Knight and wife, Glenda Knight, filed an Answer. R. 14. Defendants, Knight, denied that they breached the Contract and raised affirmative defenses. R. 14-16.

On September 22, 2000, an Order was entered appointing the Honorable James L. Weatherford to hear the case. R. 13.

Defendants, Parks, Harney, and Bowman, filed a Motion for Summary Judgment. R. 17-19. Defendants, Knight, filed a Motion for Summary Judgment on January 7, 2000. R. 22. Plaintiffs filed Responses and a Memorandum of Law opposing the Motions for Summary Judgment. R. 37-52.

Plaintiffs filed an Amended Complaint on February 13, 2001. R. 53-58. The Court entered an Order dismissing Gary Bowman as a defendant on February 13, 2001. R. 59.

A jury trial was conducted on February 13, 14, and 15, 2001, in Rutherford County, Tennessee. R. 60. The jury held that defendants, Knight, breached the Contract and that Plaintiffs suffered damages in the amount of $185,476.48. The jury also held that defendants, Parks and Harney, induced the breach of the Contract. R. 60. The Order was entered March 5, 2001. R. 61.

An Agreed Order allowing substitution of counsel for defendants, Knight, was entered March 21, 2001. R. 63.

Plaintiffs filed a Motion for Prejudgment Interest against defendants, Knight, on March 19, 2001. R. 62.

Defendants, Knights, filed post-trial motions on April 2, 2001. R. 65-70. Defendants, Parks and Harney, filed a Motion for New Trial and a Stay Motion on April 5, 2001. R. 71, 72-73. Plaintiffs responded to the post-trial motions, and a hearing was held at which time the Judge took the matter under advisement. R. 81-93.

The Judge issued a letter Opinion on July 22, 2001, and an Order was entered August 20, 2001. R. 96-99. The Judge denied the post-trial motions of defendants, Parks and Harney, and entered a Remittitur on the entire Judgment against defendants, Knight. R. 96-97.

Plaintiffs accepted the Remittitur under protest. R. 100. All parties timely filed a Notice of Appeal. R. 103-104, 108-109. Defendants, Parks and Harney, filed an Appeal Bond in the amount of the Judgment, and the Stay Motion was granted. R. 101, 106. The parties filed Designations of the Record. R. 115-118.

Since multiple parties filed Notices of Appeal, the Appellate Court Clerk's Office designated the parties who first filed a Notice of Appeal as the Appellants. For purposes of the appeal in this case, Robert T. Knight and wife, Glenda Knight, Bob Parks, and John E. Harney, III were designated as Appellants and William J. Reinhart and wife, Judith F. Reinhart were designated as Appellees.

In this Brief, plaintiffs, Reinhart, respond to the arguments raised by defendants, Knight, Parks, and Harney, and also request relief from the Judgment of the trial court. Therefore, plaintiffs, Reinhart, plan to file a Brief in reply to the response of the Appellants to the issues presented by Appellees' request for relief pursuant to Tenn. R. App. P. 27(c).

REFERENCES TO RECORD AND PARTIES

All references to the Transcript of the proceeding are designated as Tr. page number. All references to the Record on Appeal are designated as R. page number. The parties are referred to as plaintiffs or defendants and their names.

STATEMENT OF THE FACTS

The trial of this cause was held in the Circuit Court of Rutherford County, Tennessee, on February 13, 2001. Plaintiff, William J. Reinhart, testified that he and his wife, Judith F. Reinhart, currently reside at 1502 Harrison Road in Murfreesboro, Tennessee. Tr. 6.

Plaintiffs, Reinhart, purchased the 115 acre farm in question in May 1982, and they made some improvements and raised horses on the farm. Tr. 5-8. Plaintiff, William J. Reinhart, testified that defendant, John E. Harney, III, came to see him in March 1996 and inquired about selling the farm which was not listed for sale at that time. Tr. 8. Defendant, Harney, advised him that he had a doctor and his wife who were interested in constructing a substantial house on the property and then developing the remainder of it in tracts of land. Tr. 8, 9. Plaintiff, William J. Reinhart, testified that he intended to retain several acres along Seagrove Road. Tr. 9, 10. Plaintiff, William J. Reinhart, testified that he was interested in the development of the property, because he was retaining some of the property and wanted it to be a low density development meaning a few houses. Tr. 11, 12. Plaintiff, William J. Reinhart, requested that the maximum of 30 lots be inserted in the Contract. Tr. 18. He would not sign the first draft of the

Contract that did not contain this maximum number of lots. Tr. 18.

On April 8, 1996, Plaintiffs and defendants, Knight, signed a Contract For Sale of Real Estate. Ex 2. A copy of the Contract is attached hereto in the Appendix.

A Facilitation agreement was signed which provided that defendant, John E. Harney, III, was not an agent of either party. Tr. 79; Exhibit 11. Plaintiff, William J. Reinhart, testified that he did not know that defendant, Glenda Knight, worked for or was an agent of defendant, Parks, until several weeks after he signed the Contract. Tr. 47-48.

The Contract provided for a 120 day feasibility period in which studies, including topographical and engineering studies, could be completed. Exhibit 2. Testing was only performed on 26 acres near the middle of the farm. Tr. 21-23. Randy Dickerson, a soils consultant, and William H. Huddleton, IV testified on behalf of the defendants regarding the soil testing. Tr. 207, 375. All of the testing performed was contained within the 26 acre tract in the heart of the property which had been grid staked. Tr. 386, 212-213, 247. Randy Dickerson performed some percolation tests, and all of those were within the 26 acres. Tr. 212-213, 247. Approximately 18 lots were identified in this study. Tr. 381. Plaintiffs allowed Defendants additional time to perform the soil testing. The buyers actually did not tell plaintiffs, Reinhart, that they were not going to purchase the

property until on or about November 1, 1996, an additional two months after the original deadline. Ex. 13.

This delay caused plaintiffs, Reinhart, financial problems. Throughout these extensions, plaintiff, William J. Reinhart, made defendant, Harney, aware of their financial problems. Tr. 32, 33. Defendant, Harney, continued to assure plaintiffs, Reinhart, that the sale was going to close. Tr. 31-32. Defendant, Harney, told plaintiffs, Reinhart, that another doctor, Dr. Rudd and his wife, were joining the project. Tr. 31-32. Dr. Rudd's deposition was read to the jury at the trial. Tr. 166.

Plaintiff, William J. Reinhart, testified that he would have had sufficient property to meet the 92.8 acres called for in the Contract. Tr. 86-87. Plaintiff, William J. Reinhart, testified that the line of the property he intended to keep was not definitely set, and it could be moved to provide the necessary acreage and/or solve the drainage problems. Tr. 16. Defendant, John E. Harney, III, also testified that the parties discussed an easement on the property which was marked to be excluded. Tr. 324-325.

Plaintiff, William J. Reinhart, discussed the basic plan for the subdivision with defendant, John E. Harney, III. Tr. 18, 19. Defendant, John E. Harney, III, testified that he discussed the basic subdivision plans with the defendants, Knight. Tr. 308-309. Defendant, Robert T. Knight, wanted to build a single residence on the property and develop other tracts of land with

similar size houses. Tr. 19, 20. Exhibit 3 was introduced as the plat showing the grid staking as well as a potential road and lots. This was in existence prior to the breach. Exhibit 23 was the recorded plat of Churchill Farms which was developed by defendants, Parks and Harney. The two exhibits showed very similar layouts for a subdivision.

After the initial sale was not closed, defendant, Harney, told plaintiffs, Reinhart, that Gary Bowman was interested in purchasing the property for $375,000.00 without a real estate commission. Tr. 34-35. Defendant, Harney, told plaintiffs, Reinhart, it would take approximately 60 days to get an appraisal. Tr. 35. Plaintiff, William J. Reinhart, could not obtain additional extensions from their banker and was forced to sale the property at absolute auction on December 14, 1996, for $303,000.00. Tr. 37; Ex. 5. Defendant, Parks, defendant, Harney, and Gary Bowman purchased the property at the auction. Ex. 5.

Defendants immediately began soil testing after they purchased the property at the auction. They tested property that had not been previously tested. Tr. 40. Within two years of the auction, Defendants had developed Churchill Farms. Tr. 41. Plaintiff, William J. Reinhart, testified that the road configuration and houses were similar to that discussed previously as being the defendants', Knight, subdivision plan. Tr. 48-50.

After defendant, Parks, defendant, Harney, and Bowman purchased the farm, they formed a limited liability company which sold and developed 16 tracts of property to individuals. That development is known as Churchill Farms, LLC. Tr. 51-52, Collective Exhibit 7. The plat of Churchill Farms is almost identical to the plat sketching possible tracts that was made before the breach of Contract. Exhibit 8 contained a list of the tracts, parcel number, acreage, and purchase price of the 16 tracts. The total sales price of the 87.3 acres in tracts was $1,018,700.00. Ex. 8. Plaintiffs introduced photographs of the 14 residences constructed in Churchill Farms. Tr. 60-61, Collective Exhibit 9.

Plaintiff, William J. Reinhart, introduced a schedule of damages as Exhibit 10. Tr. 62. He asserted damages totaling $270,099.20. Exhibit 10.

Defendant, Robert T. Knight, testified at the trial. Tr. 270. Defendant, Robert T. Knight, testified that his wife, defendant, Glenda Knight, had a real estate license and that she was an agent for defendants, Bob Parks and John E. Harney, III, in 1996. Tr. 282. Defendants, Knight, and Dr. Rudd were looking for some property to develop, and they created a limited liability company to do so. Tr. 276, 277; Exhibit 25. Defendant, Robert T. Knight, testified that defendant, John E. Harney, III, showed them all of the information with respect to the soil tests and that he felt that defendant, Harney, dealt

fairly with them. Tr. 280. Defendant, Harney, hired the people to do the grid staking and soil studies, and defendants, Knight, paid for the work to be done. Tr. 284. After the sale did not close, plaintiff, William J. Reinhart, sent a letter to defendants, Knight, requesting that the 30-32 holes which were dug for testing be filled. Tr. 287. Defendant, Robert T. Knight, testified that he called defendant, Harney, and defendant, Harney, told him he would take care of the holes. Tr. 287. The holes were never filled in as required by the Contract.

Fali Kapadia also testified on behalf of defendants. Tr. 249. He is an environmentalist with the State Department of Environment and Conservation and supervises the ground water protection programs for Rutherford and Wilson Counties. Tr. 250. He discussed the type of soils on the property and the lots which were ultimately approved. Tr. 250-272.

Defendant, John E. Harney, III, testified at the trial. Tr. 297. He was a real estate agent who primarily did commercial real estate, including the development of subdivisions. Tr. 298. In early 1996, defendant, Glenda Knight, came to him and advised that she and her husband were interested in developing a subdivision with sizeable lots and large houses. Tr. 304. He approached plaintiffs, Reinhart, about selling their farm. Tr. 305. He had all parties sign a Facilitator Agreement. He had acted as Sellers' agent for plaintiffs, Reinhart, in several previous transactions. Tr. 304-306. He discussed the type of

development with the defendants, Knight, and they wanted a subdivision similar to another one which Bob Parks had developed. Tr. 308, 315. He testified that defendants, Knight, told him they wanted to build on the property and subdivide it. Tr. 344. Defendant, Harney, testified that the development of the subdivision was profitable.

Defendants also called Paul B. Vantrease, Jr., who is a Certified Public Accountant in Murfreesboro, Tennessee. He prepared the tax returns for Churchill Farms, LLC for 1997 and 1998 which were introduced as Exhibits 27 and 28. Tr. 364, 365. On cross-examination, the witness testified about the profits, fees, and commissions which Defendants made in the development and sale of Churchill Farms. Tr. 368-373.

The jury returned a verdict of $185,476.48 against defendants, Knight, for breach of contract and found that defendants, Parks and Harney, were liable for procurement and breach of contract.

LAW AND ARGUMENT

I. THE TRIAL COURT PROPERLY HELD THAT DEFENDANTS, PARKS AND HARNEY, WERE LIABLE FOR PROCUREMENT OF BREACH OF CONTRACT.

In this case, Plaintiffs alleged that defendants, Knight, breached the Contract for Sale of Real Estate. In addition, Plaintiffs alleged that defendants, Parks and Harney, were liable for procurement of a breach of the Contract pursuant to Tenn. Code Ann., Section 47-50-109. The jury correctly held that defendants, Knight, breached the Contract and awarded damages in the amount of $185,476.48. The jury also correctly held that defendants, Parks and Harney, induced defendants, Knight, to breach the Contract for Sale of Real Estate. The trial court entered a Judgment in favor of Plaintiffs in the amount of $185,476.48 against defendants, Knight, and treble damages in the amount of $556,429.44 against defendants, Parks and Harney. R. 60-61.[1] In their Brief, defendants, Parks and Harney, request the Court to dismiss the procurement of breach claim against them as a matter of law. Parks and Harney Brief, P. 19, 22. The jury's findings of fact should be set aside only if there is no

[1] Plaintiffs recognize that they could have sought punitive damages under Hodges v. Toof & Co., 833 S.W.2d 896 (Tenn. 1992) and treble damages under the statute and that they would not have had to make an election between the two remedies until the jury had returned a verdict and calculated the damages under both theories. Buddy Lee Attractions, Inc. v. William Morris Agency, Inc. 13 S.W.3d 343, 359 (Tenn. App. 1999) (perm. app. denied, March 6, 2000). However, Plaintiffs chose to seek relief from defendants, Parks and Harney, solely under the statute in the form of treble damages. Tenn. Code Ann., Section 47-50-109. See, Complaint and Amended Complaint. R. 2, 53.

material evidence to support the verdict. Tenn. R. App. P. 13(d). In this case, there is ample evidence to support the jury's verdict.

Tenn. Code Ann., Section 47-50-109 provides as follows:

> **47-50-109. Procurement of breach of contracts unlawful -- Damages. --** It is unlawful for any person, by inducement, persuasion, misrepresentation, or other means, to induce or procure the breach or violation, refusal or failure to perform any lawful contract by any party thereto; and, in every case where a breach or violation of such contract is so procured, the person so procuring or inducing the same shall be liable in treble the amount of damages resulting from or incident to the breach of the contract. The party injured by such breach may bring suit for the breach and for such damages.

The statute is a statutory declaration of the common law except it substitutes treble damages for punitive damages. Polk & Sullivan v. United Cities Gas, 783 S.W.2d 538, 542 (Tenn. 1989); Emmco Insurance Co. v. Beacon Mutual Indemnity Co., 322 S.W.2d 226, 231 (Tenn. 1959). The elements of the tort of inducement of breach of contract are as follows:

(1) There must be a legal contract.

(2) The wrongdoer must have knowledge of the existence of the contract.

(3) There must be an intention to induce its breach.

(4) The wrongdoer must have acted maliciously.

(5) There must be a breach of the contract.

(6) The act complained of must be the proximate cause of the breach of the contract.

(7) There must have been damages resulting from the breach of the contract.

Buddy Lee Attractions, Inc. v. William Morris Agency, Inc., 13 S.W.3d 343, 354-355 (Tenn. App. 1999) (perm. app. denied, March 6, 2000). Plaintiffs established each element of this claim by a clear showing, and the jury's verdict should be affirmed.

A. DEFENDANTS, KNIGHT, BREACHED THE CONTRACT AND DEFENDANTS CANNOT RELY ON THE DEFENSE OF CONDITION PRECEDENT TO EXCUSE THE BREACH.

Defendants, Parks and Harney, argue that no breach of the Contract occurred, because defendants, Knight, the buyers, had the right to nullify the Contract. Defendants argue that the Contract provisions regarding acreage was a condition precedent which was not met; and therefore, there was no breach of the Contract. Plaintiffs submit this argument is without merit.

The defendants do not have a right to raise the acreage provision as a condition precedent. The nonperformance of a condition precedent is an affirmative defense that must be pled specifically and with particularity. Tenn. R. Civ. P. 9.03. In their Answer, defendants, Parks and Harney, do not raise any conditions precedent as affirmative defenses. R. 10-11. In their Answer, defendants, Knight, raise some conditions precedent as affirmative defenses but do not include the acreage provision as one. R. 14-16. Therefore, Defendants should not be allowed

to raise this issue on appeal. Harlan v. Hardaway, 796 S.W.2d 953, 957 (Tenn. App. 1990) (perm. app. denied, Sept. 24, 1990).

Even if the Court allows this issue to be raised, the acreage provision should not be considered a condition precedent.

In their Brief, defendants, Parks and Harney, quote only a portion of the contractual language relating to the survey and the acreage provisions. The entire contractual provision is as follows:

> **CONSIDERATION:** Buyer agrees to purchase said real estate and pay the sum of $436,160.00 (Four Hundred Thirty six thousand one hundred and sixty and 00/100 Dollars) upon the following terms: cash at closing. Actual purchase price to be based on $4700.00 (Forty Seven Hundred and 00/100 Dollars) per acre from accurate survey to be provided by Seller upon Buyers giving notice of contingencies, except for approval of survey, being removed. Seller shall have 25 days to provide survey after aforementioned removal of contingency notice. Should Buyer opt to acquire boundary survey before the end of the feasibility period, Seller shall reimburse Buyer for the survey cost at closing, otherwise survey shall be at Buyer's expense solely. If sales price after survey of acreage is completed is below $425,000.00 (Four Hundred Twenty five Thousand and 00/100 Dollars), Buyer or Seller shall have the right to nullify the Contract and all earnest money shall be returned to the Buyer.
>
> Contract, P. 1.

This provision is not a condition precedent as argued by defendants, Parks and Harney. In the determination of whether a contractual provision is a condition precedent, the Court looks at the "parties' intention which should be gathered from the language they employ and in light of all the circumstances surrounding the contract's execution . . . Courts do not favor

conditions precedent and will, as a general matter, construe doubtful language as imposing a duty rather than creating a condition precedent." Harlan v. Hardaway, 796 S.W.2d 953, 957-958 (Tenn. App. 1990) (perm. app. denied, Sept. 24, 1990) (citations omitted).

The language used, and all the circumstances demonstrate, that the acreage provision was not a true condition precedent. The parties did not make it a part of the contingency provisions nor require that the survey be performed during the 120 day feasibility period. The factual sequence of events is important to the determination of this issue. The Contract only required plaintiffs, Reinhart, to provide a survey "upon Buyers giving notice of contingencies, except for approval of survey, being removed". Contract, P. 1. The contingencies referred to are contained in Paragraph 1 of the Contract to wit: "buyer's obtaining health department approvals for a maximum of 30 (3 bedroom septic system) sites distributed across the property in a manner satisfactory to the buyer's subdivision plan". Contract, P. 1.

Defendants never gave Plaintiffs notice that these contingencies were removed; and therefore, Plaintiffs did not have an obligation to and did not provide a survey. The survey on which Defendants rely is the one completed for the auction of the real property. This survey was done several weeks after defendants, Knight, breached the Contract.

In this case, defendants, Knight, did not have a right to abandon or refuse to perform the Contract. When they refused to perform, they did not know the amount of acreage shown on a survey because it had not even been performed. They cannot use this as a defense. Their breach was not dependent upon or linked to the number of acres shown on the survey. Plaintiffs' cause of action for breach of contract arose when the act and conduct of defendants, Knight, showed their intention to no longer be bound by the Contract. Greene v. THGC, Inc., 915 S.W.2d 809, 810 (Tenn. App. 1995). Defendants, Knight, unequivocally renounced the Contract in November 1996, and Plaintiffs were not obligated to furnish a survey. Plaintiffs' cause of action for breach of contract arose prior to the survey and auction sale.

Defendants, Park and Harney, state "The Reinharts claim that the Knights repudiated the Contract." Appellee Brief of Parks and Harney, P. 13. Plaintiffs have always pled and maintained that the defendants, Knight, breached the Contract. Repudiation was not a remedy available to defendants, Knight. Plaintiffs had met all of their obligations at the time of the breach.

Even if the survey had been required and it had only shown acreage in the amount of 87.34 acres for a purchase price of $410,498.00, defendants, Knight, would only have had a "right" to nullify the Contract. There is nothing in the Record to establish that they would have chosen to nullify the Contract on that basis. Defendant, Robert T. Knight, testified at the trial,

and he did not state that they would have nullified the Contract if a survey showed 87.34 acres. Tr. 273-288. Defendant, Robert T. Knight, testified that they did not complete the Contract, because they wanted 30 lots. Tr. 285. In fact, he did not even mention the acreage provision in his testimony. Tr. 273-288.

A contractual duty subject to a condition precedent is not required to be performed until the condition occurs or its nonoccurrence is excused. Covington v. Robinson, 723 S.W.2d 643, 645 (Tenn. App. 1986). The defendant asserting the affirmative defense of a condition precedent bears the burden of proof on that issue. Defendants did not meet their burden of establishing that a condition precedent existed or that any such condition was not met or would not have been excused.

In this case, there is no testimony that defendants, Knight, would not have excused the minimum purchase price if the survey had revealed 87.34 acres. The minimum purchase price on which the acreage provision was based was more beneficial to the sellers (Reinharts) than the buyers (Knights).

In any event, the proof established that Plaintiffs owned a sufficient amount of land to satisfy the minimum purchase price. Plaintiff, William J. Reinhart, testified that he would have included some of the land that he and his wife retained at the auction sale, if that was necessary to close the Real Estate Contract with the defendants, Knight. Tr. 85-87. The Reinharts owned a total of 115 acres.

Defendants rely upon Exhibit A to the Contract to argue that the "property description" would contradict the testimony that 90.43 acres would have been available. Exhibit A to the Contract is merely a line drawn on an aerial view indicating what portion of the property would be sold and what portion would be retained. This shows an overview of the entire tract. There was not a specific written description of the property included in the Contract. The deed reference in the Contract, in addition to the map attached as Exhibit A, was sufficient to identify the property. The deed reference in the Contract was to the deed for the entire 115 acres. In his testimony, defendant, John E. Harney, III, agreed that the parties had discussed using land that was marked on Exhibit A to be retained by plaintiffs, Reinhart, to complete the Knight Contract for easements. Tr. 324-325. The amount surveyed and sold at auction was only 3.09 acres less than the amount required to fulfill the Contract purchase price. That acreage was available to satisfy the minimum purchase requirements.

The actions of defendants, Knight, rise to the level of a Breach of Contract, because Plaintiffs could perform their own conditions precedent. The point is: Even if defendants, Knight, would have had a right to nullify the Contract after the survey was performed, they did not nullify the Contract on that basis. The jury correctly found that a breach of the Contract occurred.

The trial court agreed that the jury could have found a breach. R. 96. These findings should be affirmed.

B. PLAINTIFFS ESTABLISHED DAMAGES FOR THE BREACH OF CONTRACT AND THE PROCUREMENT OF THE BREACH.

Defendants, Parks and Harney, also argue that Plaintiffs cannot recover for procurement of breach of contract, because the trial court remitted the Judgment against defendants, Knight. Plaintiffs maintain that the trial court erred when he remitted the award against defendants, Knight, as argued below. However, even if this Court does not reinstate the Judgment against defendants, Knight, Plaintiffs can recover against defendants, Parks and Harney. Plaintiffs had the burden of establishing the amount of damages they suffered as a result of the breach of contract. Plaintiffs put on proof, and the jury set the damages for breach in the amount of $185,476.48. Under the statute, Plaintiffs recover treble the amount of damages resulting from an incident to the breach against defendants, Parks and Harney, which calculates to the amount of $556,429.44. Tenn. Code Ann., Section 47-50-109.

The trial court erroneously remitted the Judgment for breach of contract. However, in his letter Opinion and Order, the trial court did not find that the amount awarded by the jury was excessive or that Plaintiffs suffered no damages as a result of the breach. R. 96, 97. Counsel for defendants, Parks and

Harney, quote a portion of the letter Opinion but place the quote in an improper context. The trial court did not state that the jury should have found under the circumstances that the defendants, Knight, would not be liable to Plaintiffs in damages. Defendants, Knight, argued in their post-trial motions that a breach could have occurred and that Plaintiffs suffered damages but that defendants, Knight, were not liable for the damages. Plaintiffs disagree with that argument, but the trial court ruled as follows based on that argument:

> Considering all the facts and circumstances of this case, I feel that if the jury had been properly instructed, it was within the realm of possibility that the jury could have found that the defendants (the Knights) could have breached the contract and could have found that the plaintiffs were damaged because of the breach, and could have found under the circumstance of this case, that the defendants (the Knights) would not be liable to the plaintiffs in damages. R. 96.

There is material evidence to support the jury's damage award, and it should not be set aside. Tenn. R. App. P. 13(d). Plaintiffs asked for damages for the breach in the amount of $270,099.20. Ex. 8.

Breach of a contract and procurement of breach of a contract are two separate and distinct causes of action. Plaintiffs could have brought an action against defendants, Parks and Harney, and not brought one against defendants, Knight. A person's liability in tort for inducing the breach of a contract is separate and distinct from the injured party's right of recovery in contract against the breaching party. The Court of Appeals has held the

mere fact that a compromise and settlement has been reached with regard to the contract action does not bar an action for inducement of that contract against a third person. TSC Industries, Inc. v. Tomlin, 743 S.W.2d 169, 172 (Tenn. App. 1987). Therefore, even if the Judgment against defendants, Knight, is remitted, the Judgment against defendants, Parks and Harney, should stand.

II. THE TRIAL COURT'S JURY INSTRUCTIONS ARE NOT REVERSIBLE ERROR.

Defendants, Parks and Harney, argue that the trial court committed reversible error in instructing the jury T.P.I. 3 -- Civil 13.07 Forms of Contract which provides that contracts can be partly oral and partly in writing. The "Use Note" following the pattern instruction reminds users that the Statute of Frauds requires that many types of agreements must be in writing to be enforceable. Plaintiffs submit that this instruction does not constitute reversible error.

The Statute of Frauds codified in Tenn. Code Ann., Section 29-2-101(a)(4) is not an issue in this case. In the Answers, all defendants admitted that a written Contract was drafted and executed. R. 10, Para. 12; R. 14, Para. 12. The Statute of Frauds is an affirmative defense that must be raised in the pleadings. Tenn. R. Civ. P. 8.03 provides "[i]n pleading to a preceding pleading, a party shall set forth affirmatively facts in short and plain terms relied upon to constitute . . . statute

of frauds . . . and any other matter constituting an avoidance or affirmative defense." No party ever raised the affirmative defense of Statute of Frauds in an Answer or at trial. The issue was first raised in post-trial motions.

Plaintiffs submit that the jury instructions were not erroneous; but even if they were, this does not constitute reversible error. Tenn. R. App. P. 36(b) provides as follows:

> (b) Effect of Error. - A final judgment from which relief is available and otherwise appropriate should not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process.

In this case, it cannot be said that the instruction that was given more probably than not affected the Judgment. The Statute of Frauds was not an issue in this case. The issue of whether a Contract existed or was enforceable was not submitted to the jury. Defendants' theories and arguments to the jury were that defendants, Knight, were excused from closing the sale based upon the contingencies contained in Paragraph 1 of the Contract. R. 14-16. The jury found that defendants, Knight, were not excused. The jury was not called upon to determine whether a Contract existed. This was not an issue submitted on the Special Verdict Form on which the parties agreed.

This jury instruction was not reversible error. If it was error, it more probably than not did not affect the verdict from which defendants, Parks and Harney, appealed and did not result

in prejudice to the judicial process. This instruction could not have played a material role in the jury's decision-making process; and therefore, no error occurred. Grandstaff v. Hawks, 36 S.W.3d 482, 497 (Tenn. App. 2000).

III. DEFENDANTS', KNIGHT, REQUEST FOR AN INTERPRETATION OF THE TRIAL COURT'S ORDER SHOULD BE DENIED.

Defendants, Knight, filed a Notice of Appeal in this cause from the Order on Post-Trial Motions entered August 20, 2001. R. 98. The trial court took the matter under advisement after the hearing on Defendants' post-trial motions. The trial court issued a letter Opinion on July 22, 2001. R. 96. A proposed Order was submitted by counsel for defendants, Knight, which is attached to the Appellant Brief of defendants, Knight. Counsel for Plaintiffs disagreed with the terms of the Order and therefore, also submitted a Proposed Order. The trial court chose to sign and enter the Order submitted by Plaintiffs. R. 98.

Defendants, Knight, argue that it is implicit in the trial court's letter Opinion that the proof does not support an award of damages in any amount against them. Appellant Brief of Knights, P. 1. Plaintiffs disagree. As discussed above, Plaintiffs put on proof and established that they suffered damages as a result of the breach. The damages were set by the jury. This amount was used to calculate the amount of treble

damages awarded against defendants, Parks and Harney. In the letter Opinion, the trial court did not include a finding that no damages were incurred by Plaintiffs.

The trial Judge knew his intention when he executed the Order.

IV. THE TRIAL COURT ERRED IN GRANTING A REMITTITUR OF THE JUDGMENT AGAINST DEFENDANTS, KNIGHT.

The Court submitted a Special Verdict Form to the jury, and the jury answered each of the questions submitted. The Special Verdict Form provided as follows:

> 1. Did Robert T. Knight, and wife, Glenda Knight, breach the contract they signed on April 8, 1996, in which they agreed to purchase 92.8 acres of land from William J. Reinhart and wife, Judith F. Reinhart?
>
> **ANSWER: Yes.**
>
> 2. What do you find to be the total amount of damages arising from this breach of contract?
>
> **AMOUNT IN DOLLARS: $185,476.48.**
>
> 3. Do you find that Bob Parks and John E. Harney, III, a partnership, induced Robert T. Knight and wife, Glenda Knight, to breach their contract with William Reinhart and wife, Judith F. Reinhart?
>
> **ANSWER: Yes.**
>
> R. 60.

After the trial and the entry of the Judgment, counsel for defendants, Knight, filed a post-trial Motion. R. 65-70. One of the issues raised in the post-trial motion was that the charge

and Jury Verdict Form misled the jury. R. 68. Defendants, Knight, argued that the charge and the Jury Verdict Form erroneously instructed the jury that they must find a breach of the Contract by defendants, Knight, in order to determine whether defendants, Parks and Harney, were liable for a procurement of the breach. Defendants, Knight, argued "The jurors could have found, and probably wanted to find from the proof, that the Knights did nothing wrong, but that Harney (individually, and as agent for Parks) was the culprit." R. 68.

In a letter Opinion, the Court then granted a remittitur of the entire Judgment in the amount of $158,476.48 against defendants, Knight. The Court ruled:

> Considering all the facts and circumstances of this case, I feel that if the jury had been properly instructed, it was within the realm of possibility that the jury could have found that the defendants (the Knights) could have breached the contract and could have found that the plaintiffs were damaged because of the breach, and could have found under the circumstance of this case, that the defendants (the Knights) would not be liable to the plaintiffs in damages. R. 96-97.

Plaintiffs, Reinhart, submit to the Court that defendants, Knight, should not be allowed to challenge the issues raised in the Special Verdict Form. Tenn. R. Civ. P. 49.01 provides as follows:

> **49.01. Special Verdicts.** -- The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answers or may submit written forms of the several special findings which might properly be made under the

> pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instructions concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand, the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

The Special Verdict Form which was submitted to the jury was developed by and approved by all counsel. Tr. 42, 43, 295, 396, 452, 453. The Court reviewed the questions with counsel prior to reading it to the jury and again after reading it to the jury before the jury retired. All counsel, including counsel for defendants, Knight, agreed to the Special Verdict Form. No party made any objection, request for withdrawal or request for restatement of any issue. Therefore, this issue cannot be raised on appeal. As the Court in Williams v. Van Hersh, 578 S.W.2d 373, 376 (Tenn. App. 1978) stated:

> Absent an obvious miscarriage of justice, or situations of extreme hardship or of extraordinary and compelling circumstances, we hold that a party may not acquiesce in the special issues submitted by the court and then, after a verdict unfavorable to him, object to a particular question as submitted.

In Williams, the Court recognized that Tenn. R. Civ. P. 49.01 specifically deals with the situation where the trial court fails to submit all issues of fact raised by the pleadings or the

evidence. Williams, 578 S.W.2d at 375. The Court held that the rule also applied to circumstances in which a party maintains that an improper issue was submitted to the jury. Id. The Court then stated:

> . . . as a general rule a party who complains of a special issue submitted to the jury under Rule 49.01 must at the trial raise the question in some way, as by objection, exception, motion or request before he can contend on motion for a new trial that the court erred in submitting the particular question to the jury.
>
> Williams, 578 S.W.2d at 375. (Citations omitted.)

This case does not involve an obvious miscarriage of justice, a situation of extreme hardship or of extraordinary and compelling circumstances. This issue should not be raised on appeal.

If Defendants are allowed to raise this issue, Plaintiffs submit that the jury instructions and Special Verdict Form were proper and that the trial court erred in remitting the verdict.

Tenn. Code Ann., Section 20-10-102 provides as follows:

> **20-10-102. Remittitur.** -- (a) In all jury trials had in civil actions, after the verdict has been rendered, and on motion for a new trial, when the trial judge is of the opinion that the verdict in favor of a party should be reduced, and a remittitur is suggested by the trial judge on that account, with the proviso that in case the party in whose favor the verdict has been rendered refuses to make the remittitur a new trial will be awarded, the party in whose favor such verdict has been rendered may make such remittitur under protest, and appeal from the action of the trial judge to the court of appeals.

> (b) The court of appeals shall review the action of the trial court suggesting a remittitur using the standard of review provided for in Rule 13(d) of the Tennessee Rules of Appellate Procedure applicable to decisions of the trial court sitting without a jury. If, in the opinion of the court of appeals, the verdict of the jury should not have been reduced, but the judgment of the trial court is correct in other respects, the case shall be reversed to that extent, and judgment shall be rendered in the court of appeals for the full amount originally awarded by the jury in the trial court.

In this case, the Court did not simply reduce the amount of the verdict but rather remitted the entire amount. This was an improper use of the remittitur statutes. The preponderance of the evidence supports the jury's finding that the defendants, Knight, breached the Contract and that Plaintiffs suffered damages in the amount awarded by the jury. The Judgment should be reinstated.

The findings of a jury should not be set aside based upon an improper jury instruction, if the error did not or could not have played a material role in the jury's decision making process. The Court discussed this principle in Grandstaff v. Hawks, 36 S.W.3d 482, 497 (Tenn. App. 2000) as follows:

> We have a duty to uphold a jury's verdict whenever possible. . . . In doing so, we must give effect to the jury's intention, . . . as long as that intention is permissible under the law and ascertainable from the phraseology of the verdict. . . . accordingly, we should not set aside a jury's verdict because of an erroneous instruction unless it affirmatively appears that the erroneous instruction actually misled the jury.
>
> (Citations omitted.)

In the case at bar, the Court properly and clearly instructed the jury that these were two separate cases or lawsuits. Tr. 439. There is nothing to indicate that the jury did not understand the jury instructions or Special Verdict Form. Defendants, Knight, attempt to cloud the issues in the post-trial motions by raising irrelevant and unsupported arguments regarding illegal contracts, a fraud perpetrated on them by defendant, Harney, contracts against public policy, and the Statute of Frauds. R. 65. The facts of this case do not involve any of those scenarios. There is nothing in the Record to support the defendants', Knight, theory that "The jurors could have found, and probably wanted to find from the proof, that the Knights did nothing wrong, but that Harney (individually, and as agent for Parks) was the culprit." R. 68. Likewise, there is nothing in the Record to support the trial court's ruling based on that argument. Defendant, Robert T. Knight, testified that he thought defendant, Harney, dealt with him and his wife fairly. Tr. 280. The case against defendants, Knight, involved the issue of whether they breached the Contract for Sale of Real Estate. The jury did not accept defendants' arguments that they were justified in not closing on the sale. The remittitur should be set aside and the verdict reinstated.

The trial court did not give effect to the jury's intention and did not try to uphold the jury verdict. The findings by the jury should be set aside only if there is no material evidence to

support it. Tenn. R. App. P. 13(d). The Court's ruling of what the jury "could have" found should not be substituted for their verdict.

CONCLUSION

Based on the foregoing, plaintiffs, Reinhart, respectfully request this Court to reverse the remittitur and enter Judgment against defendants, Knight, in the amount of $185,476.48 pursuant to Tenn. Code Ann., Section 20-10-102(b). Plaintiffs also request the Court to affirm the Judgment against defendants, Parks and Harney.

Respectfully submitted this 17 day of January, 2002.

ROGERS & DUNCAN

BY: 

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Attorneys for Appellees

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded to John G. Mitchell, Jr., Esq., Mitchell & Mitchell, P.O. Box 1336, Murfreesboro, TN 37133-1336, and Bradley A. MacLean, Esq., and Steven H. Price, Esq., Stites & Harbison, SunTrust Center, Suite 1800, 424 Church Street, Nashville, TN 37219, attorneys for appellants, John E. Harney, III and Bob Parks, a partnership; and Walter W. Bussart, Esq., Bussart & Medley, 520 North Ellington Parkway, Lewisburg, TN 37091, attorneys for appellants, Robert Knight and wife, Glenda Knight, by placing a copy of the same in the United States Mail with sufficient postage thereon to carry the same to its destination this 17 day of January, 2002.

ROGERS & DUNCAN

By: J. Stanley Rogers
Attorney for Appellees

ATTACHMENT 4

IN THE SUPREME COURT OF THE STATE OF TENNESSEE
AT NASHVILLE

WILLIAM F. REINHART and wife, JUDITH F. REINHART, Plaintiffs/Appellants, vs. ROBERT T. KNIGHT and wife, GLENDA KNIGHT, BOB PARKS and JOHN E. HARNEY, III, Defendants/Appellees.	)	(From the Court of Appeals at Nashville, Tennessee No. M2004-02828-COA-R3-CV)

APPLICATION OF WILLIAM J. REINHART AND WIFE, JUDITH F. REINHART, FOR PERMISSION TO APPEAL TO THE SUPREME COURT

Come WILLIAM J. REINHART and wife, JUDITH F. REINHART, pursuant to Tenn. R. App. P. 11 and file this Application For Permission to Appeal from the Court of Appeals to the Supreme Court.

I. DATE ON WHICH JUDGMENT WAS ENTERED

The Judgment in this case was entered on December 2, 2005, in the Court of Appeals of Tennessee, Middle Section. A copy of the Opinion is included in the Appendix. App. 1. There was no petition for rehearing filed in the Court of Appeals.

II. QUESTIONS PRESENTED FOR REVIEW

Whether the Court of Appeals in applying Tenn. Code Ann. § 47-50-109 correctly held that Parks and Harney, the inducing parties, were entitled to receive credit on the treble damage

award entered against them for amounts paid by Knights, the breaching parties on the underlying judgment entered against Knights.

III. STATEMENT OF THE FACTS

The jury trial of this cause was held on February 13, 14 and 15, 2001. At the trial, plaintiffs, William J. Reinhart and wife, Judith F. Reinhart (hereinafter referred to as Reinharts), alleged that defendants, Robert T. Knight and wife, Glenda Knight (hereinafter referred to as Knights), breached a real estate contract, and that defendants, Bob Parks and John E. Harney, III (hereinafter referred to as Parks and Harney), had induced the breach. The jury held that Knights had breached the contract and awarded "damages arising from this breach of contract" in the amount of $185,476.48. R. 2. The jury further held that Parks and Harney induced Knights to breach the contract. The jury was charged that Reinharts had to prove that Parks and Harney induced Knights to breach the contract by clear and convincing evidence. The jury was further charged the elements of an inducement to breach contract cause of action, including that Parks and Harney intended to bring about or cause the breach and that Parks and Harney acted maliciously. The jury held that Parks and Harney were liable for inducement of breach of contract. Reinharts sought treble damages against Parks and Harney pursuant to Tenn. Code Ann. § 47-50-109 in lieu of the common law punitive damages. On March 7, 2001, the Trial Court entered a judgment in the specific amount of $556,429.44 against Parks and Harney, trebling the amount of compensatory damages. R. 2.

The Trial Court granted Knights' Post-Trial Motion and remitted the judgment against them. Reinharts and Parks and Harney filed Notices of Appeal. The Court of Appeals reinstated the judgment against Knights in the amount of $185,476.48 and affirmed the judgment against Parks and Harney in the amount of $556,429.44. The Supreme Court denied Application for

Permission to Appeal. Reinhart v. Knight, 2003 WL 22964302, 2003 Tenn. App. LEXIS 852 (Tenn. Ct. App. December 4, 2003) perm. app. denied May 10, 2004. (Reinhart I). App. 9.

After remand, Reinharts sought to collect $185,476.48, plus post-judgment interest, from Knights in damages for breach of the contract, and $556,429.44, plus post-judgment interest, from Parks and Harney for inducement of breach. Parks and Harney took the position that they were entitled to a credit against the treble damages award for any amounts paid by Knights on the compensatory damages award. Collectively, Knights, Parks and Harney paid a total of $556,429.44, plus post-judgment interest. They maintain that this satisfies the judgments against them. Reinharts maintain that an additional $185,476.48, plus post-judgment interest, must be paid to satisfy the judgments.

The parties submitted the issue to the Trial Court on a Joint Motion for Clarification of Judgment. The Trial Court heard oral argument on the Joint Motion on October 29, 2004. The Trial Court held that Parks and Harney were entitled to a credit for all amounts paid by Knights. An Order of Satisfaction of Judgment was entered on November 5, 2004. R. 63.

The Reinharts appealed that decision. The Tennessee Court of Appeals, Middle Section, entered a Judgment on December 2, 2005, affirming the decision of the Trial Court. App. 9.

IV. REASONS SUPPORTING

A. The need to secure uniformity of decision.

B. The need to secure settlement of important questions of law.

C. The need to secure settlement of questions of public interest.

D. The need for the exercise of the Supreme Court's supervisory authority.

A. The Need to Secure Uniformity

This is a case of first impression in Tennessee. However, the holding in this case is contrary to the decision made in Reinhart I. App. 9. In addition, the holding in this case is contrary to principles of law which have been established and applied in previous cases. The Supreme Court should accept the application to secure uniformity of decision on these principles of law.

The Court of Appeals decision in this case is contrary to the ruling in the previous appeal. Reinhart I. App. 9. Specific judgment amounts were awarded and upheld in the previous appeal. The jury completed a Special Verdict Form which was incorporated in the Judgment entered March 7, 2001. The Judgment further provided as follows:

> IT IS THEREFORE, ORDERED, ADJUDGED and DECREED by the Court that Plaintiffs, WILLIAM J. REINHART and wife, JUDITH F. REINHART, are awarded a Judgment against Defendants, ROBERT T. KNIGHT and wife, GLENDA KNIGHT, in the sum of $185,476.48.
>
> IT IS FURTHER ORDERED, ADJUDGED and DECREED by the Court that Plaintiffs, WILLIAM J. REINHART and wife, JUDITH F. REINHART, are awarded a judgment against Defendants, BOB PARKS and JOHN HARNEY, III, a partnership, the sum of $556,429.44.

R. 2-3.

In Reinhart I, the Court of Appeals reinstated the jury's verdict against Knights and affirmed the Judgment against Parks and Harney. App. 15. The Supreme Court denied the Application For Permission to Appeal and the Judgment is the law of the case which must be followed. Memphis Pub. Co. v. Tennessee Petroleum, 875 S.W.3d 303, 306 (Tenn. 1998).

The holding in this case is contrary to the holdings in other cases which have recognized that the breach of contract cause of action and the inducement for breach of contract cause of

action are two separate and distinct causes of action. The breach cause of action is a contract cause of action, and the inducement cause of action is a tort cause of action. A person's liability in tort for inducing the breach of a contract is separate and distinct from the injured party's right of recovery in contract against the breaching party. T.S.C. Industries v. Tomlin, 743 S.W.2d 169, 172 (Tenn. Ct. App. 1987). The Supreme Court should accept review to secure uniformity of decision in these cases.

The holding in this case is also contrary to Tennessee's election of remedy doctrine. Tennessee cases have held that the statutory cause of action and the common law cause of action co-exist. Tenn. Code Ann. § 47-50-109 "is but a statutory declaration of the common law tort action expressly substituting treble damages for punitive damages. Emmco Insurance Company v. Beacon Mutual Insurance Company, 204 Tenn. 540 322 S.W.2d 226, 231 (1959)". Buddy Lee Attractions, Inc. v. William Morris Agency, Inc., 13 S.W.3d 343, 353-354 (Tenn. Ct. App. 1999) perm. app. denied March 6, 2000. Reinharts recognize that they cannot recover both punitive and treble damages. However, they maintain that they should recover both compensatory damages and the enhanced (treble or punitive) damages. The Buddy Lee Attractions decision settled the law that the common law remedy for breach of contract, the statutory remedy seeking multiple damages and the common law remedy of punitive damages co-exist. Buddy Lee Attractions, 13 S.W.3d at 357-358. Tennessee's election of remedy doctrine provides that it would be unfair to require the election between common law punitive damages and statutory multiple damages before a determination of liability and entitlement has been made. This rule allows "a plaintiff to realize the maximum recovery available under the fact finders' findings." Buddy Lee Attractions, 13 S.W.3d at 357. There is no question that Parks and Harney would not be entitled to a credit against a common law punitive damages award for amounts paid by

Knights on the compensatory damages award. The statutory multiple (treble) damages merely take the place of the common law punitive damages. Therefore, no credit should be allowed in this case. The decision in this case is contrary to that principle of law.

The holding that the treble damage award has a compensatory component is contrary to other cases. This holding is contrary to the holding that Tenn. Code Ann. § 47-50-109

> is but a statutory declaration of the common law tort action, expressly substituting treble damages for punitive damages. Emmco Insurance Company v. Beacon Mutual Indemnity Company, 204 Tenn. 540, 322 S.W.2d, 226, 231 (1959). The statute provides for mandatory treble damages in the event there is a "clear showing" that the defendant induced the breach. Continental Motel Brokers, Inc. v. Blankenship, 739 F.2d. 226, 229 (6th Cir. 1984).

Polk and Sullivan v. United Cities Gas,
783 S.W.2d 538, 542 (Tenn. 1989). (emphasis added.)

The Supreme Court should accept this Application to secure uniformity of decision and application of the principles of law established in previous cases.

B. The Need To Secure Settlement of Important Questions of Law.

This is a case of first impression in Tennessee. As discussed above, previous cases have addressed the law in this area but no court has been called upon to decide if a credit is allowed to the inducing party against the statutory treble damage award for payments made by the breaching party on the compensatory award. This is an important question which should be settled by the Supreme Court.

The Court of Appeals decision is contrary to the plain language in the statute. The plain statutory language of Tenn. Code Ann. § 47-50-109 resolves the issue in favor of Reinharts. The statute provides as follows:

> **47-50-109. Procurement of breach of contracts unlawful – Damages.** -- It is unlawful for any person, by inducement, persuasion, misrepresentation, or other means, to

> induce or procure the breach or violation, refusal or failure to perform any lawful contract by any party thereto; and, in every case where a breach or violation of such contract is so procured, the person so procuring or inducing the same shall be liable in treble the amount of damages resulting from or incident to the breach of the contract. The party injured by such breach may bring suit for the breach and for such treble damages. (emphasis added.)

The statute does not provide for or contemplate a credit of the treble damage award. To the contrary, it allows a suit for the breach and for such treble damages. If the legislature had intended to allow a credit, it would have provided for one in the statute. If the legislature had intended for the inducing party to only be liable for double damages, it would have so stated.

There is a need for the Supreme Court to review this case to secure settlement of the important question of whether the decision of the Court of Appeals is contrary to the statute and the correct application of the statute.

C. The Need To Secure Settlement of Questions of Public Interest

The statute was enacted in 1907. The legislature thought it was very important to deter the inducement of a breach of a contract and to punish those who induced a breach of contract. The legislature codified the common law cause of action and specifically provided for treble damages. App. 17. The statute substitutes treble damages for punitive damages. The public has an interest in preventing the inducement of breaches of contract, as well as, an interest in correctly interpreting and applying the statute. The interpretation and application made by the Court of Appeals in this case contradicts the manifest purpose of the statute.

The Court of Appeals erroneously held that the treble damage award is not entirely punitive in nature. This decision is contrary to the purpose of multiple damages. The purpose of punitive damages and multiple (treble) damages is punishment and deterrence. Multiple damages are punitive in nature and not intended to compensate for the plaintiff's injury. Buddy

Lee Attractions, 13 S.W.3d at 356. Concrete Spaces, Inc. v. Henry Sanders, 2 S.W.3d 901, 906 (Tenn. 1999) (emphasis added). The public has an interest in enforcing the treble damage statutory award which is punitive in nature and should be paid in addition to the compensatory damages.

The statute provides for mandatory treble damages in the event there is a "clear showing" that defendant induced the breach. Continental Motel Brokers, Inc. v. Blankenship, 739 F.2d 226, 299 (6th Cir. 1994), Buddy Lee Attractions, 13 S.W.3d at 354. The heightened burden of proof of clear and convincing evidence required for the recovery of treble damages is further evidence that it is a punitive award.

This ruling will cause confusion in the application of other statutes which allow the recovery of multiple (treble) damages. See, e.g. Tenn. Code Ann. § 47-18-109, Tennessee Consumer Protection Act and Tenn. Code Ann. § 56-53-103, Insurance Fraud.

The public has an interest in the enforcement of multiple damages as punitive.

D. The Need For The Supreme Court's Supervisory Authority

This case involves very serious and important issues of law that require the Supreme Court's supervisory authority.

The Court of Appeals held that "[o]ur review of pertinent precedential authority persuades us that compensatory damages for breach of contract are included in a treble damage award for procurement of breach." App. 4. The Court relied upon the general principle of law that any payments made by the one who breaches the contract must be credited in favor of the one who induced the breach.

Reinharts suggest that the language in the cases cited by the Supreme Court only addressed compensatory damages, not common law punitive or statutory treble damages. In

addition, this language is often included simply as dicta. None of the cases cited by the Court of Appeals directly addressed the issue in the case at bar. The Court of Appeals also stated that the research indicates other jurisdictions are in accord with this holding and cited several out of state cases in a footnote. App. 7. None of the out of state cases were interpreting a statute similar to Tenn. Code Ann. § 47-50-109. The undersigned could not locate any other state which has a statute providing for treble damages for inducement of a breach of contract. There is a need for the Supreme Court to exercise its supervisory authority in reviewing this decision.

V. CONCLUSION

Based on the foregoing, Reinharts respectfully request the Court to grant their Application For Permission to Appeal.

Respectfully submitted this 26th day of January, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded to Stephen H. Price, Esq., attorney for defendants/appellees, John E. Harney, III and Bob Parks, a partnership, Stites & Harbison, 424 Church Street, Suite 1800, Nashville, Tennessee, 37219, and Walter W. Bussart, Esq., attorney for defendants/appellees, Robert T. Knight and wife, Glenda Knight, Bussart & Medley, P. O. Box 2456, Lewisburg, Tennessee, 37091-2456, by placing a copy of the same in the United States Mail with sufficient postage thereon to carry the same to its destination this 26th day of January 2006.

ROGERS & DUNCAN

By: 

J. Stanley Rogers
Attorney for Plaintiffs/Appellants

ATTACHMENT 5

IN THE SUPREME COURT OF THE STATE OF TENNESSEE
AT NASHVILLE

DAVID YOUNG and KINDA YOUNG, Plaintiffs/Appellees, vs. THOMAS C. PITTS, III, Defendant/Appellant. IN RE: THOMAS K. YOUNG, A minor child (DOB: 10-03-97)	)	Supreme Court of Tennessee No. M2004-01634-SC-R11-JV (From the Court of Appeals at Nashville, Tennessee No. M2004-01634-COA-R3-JV)

BRIEF OF PLAINTIFFS/APPELLEES, DAVID YOUNG AND KINDA YOUNG

ORAL ARGUMENT REQUESTED

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REFERENCES TO RECORD AND PARTIES

The original record in this case filed on November 2, 2004, consists of one volume of Technical Record and the Transcript of Proceedings held on April 26, 2004, and four Exhibits. References to this Technical Record are designated as R. page number. References to this transcript are designated as April 2004 Tr. page number.

The Supplemental Record in this case was filed on November 22, 2004. The Supplemental Record included one Technical Record of pleadings filed after the original record was submitted and references to this are designated as S.R.I. page number. The Supplemental Record also includes one Technical Record from the previous appeal in case number M2002-00815-COA-R3-JV and references to this are designated as S.R.II. page number. References to the two volumes of the Transcript of the Proceedings held on March 4 and 5, 2002, are designated as March 2002 Tr. page number.

The parties are identified by name.

STATEMENT OF FACTS

There have been two evidentiary hearings in this case. The first was held on March 4 and 5, 2002. March 2002 Tr. The decision was appealed to the Court of Appeals which reversed and remanded the case to the Juvenile Court. After the case was remanded, the second evidentiary hearing was held on April 26, 2004. April 2004 Tr. Portions of the evidence presented at both are relevant to this appeal and will be set forth herein.

This appeal arises from the Order entered by the Coffee County Juvenile Court after the evidentiary hearing on the Petition to Establish Paternity held on April 26, 2004. In March 2002, the parties stipulated that the DNA test marked as Exhibit 1 established the probability of paternity 99.95% that Thomas C. Pitts, III is the biological father of Thomas "Kohl" Young (hereinafter referred to as Kohl Young). March 2002 Tr. 5-6. The parties did not stipulate that he was the legal father. March 2002 Tr. 5-6; April 2004 Tr. 9. At the April 2004 hearing, Thomas C. Pitts, III testified that he was the biological father based upon the genetic testing and requested the Court to find him to be the legal father. April 2004 Tr. 13. David Young requested that the Court find him to be the legal father based upon the fact that the child was born during the marriage, and he had received the child in his home and openly held him out as his natural child. April 2004 Tr. 4, 19.

David Young testified that he and Kinda Young met while they were students at Tennessee Tech University. March 2002 Tr. 14, 15, 19. They married on August 27, 1988. March 2002 Tr. 14; April 2004 Tr. 16. Mr. Young received a bachelor of science in electrical engineering from Tennessee Tech University in 1988 and began employment with Duck River Electric Membership Cooperative. March 2002 Tr. 15; April 2004 Tr. 16, 17. David Young worked as an electrical engineer in the Shelbyville, Tennessee, office until 1994 when he was

promoted to district manager for the Manchester, Tennessee, area. March 2002 Tr. 16; April 2004 Tr. 17. In April 2004, he and Kinda Young had a combined income of $125,000-$130,000 per year. April 2004 Tr. 18-19. David Young, who was 39 years old in 2004, is very active in his community, including being the Chairman of the Coffee County Partnership for Tomorrow; Vice-Chairman of the Joint Economic Community Development Board of Coffee County; Member of the Rotary Club; and Junior Warden at St. Bede's Episcopal Church. March 2002 Tr. 23, April 2004 Tr. 16. In May 1992, Kinda Young received a degree in elementary education from Middle Tennessee State University. March 2002 Tr. 20. She teaches first grade at North Coffee Elementary School in Manchester, Tennessee. March 2002 Tr. 21, 57; April 2004 Tr. 18.

The Youngs moved to Manchester in the Spring of 1996. They rented for a few years and then built a home on five acres in Urban Farms near Manchester, Tennessee. March 2002 Tr. 16-19. Their brick home consists of about 3,400 square feet and is valued at approximately $230,000. April 2004 Tr. 17, 18.

Kinda Young gave birth to Kohl Young on October 3, 1997. March 2002 Tr. 22. At the time of the birth, David Young assumed that he was the father of the child and had no reason to believe otherwise. March 2002 Tr. 22. David Young received the child into his home and has openly held the child out as his natural child even after the DNA test was performed. April 2004 Tr. 19. David and Kinda Young had a female child, Karson Young, on March 20, 1999. March 2002 Tr. 23, 24. Thomas C. Pitts, III filed a Petition for Legitimation as to Karson Young on August 10, 2000. DNA test results revealed that David Young was her biological father, and the Petition for Legitimation was dismissed. March 2002 Tr. 24, 51.

On July 7, 1999, Kinda Young told her husband, David Young, that she had been having an extramarital affair with Thomas C. Pitts, III and that she believed that Mr. Pitts was the

biological father of Kohl Young. March 2002 Tr. 21, 22. David Young and Kinda Young testified that he was devastated when he found out that Kohl Young was not his biological son. March 2002 Tr. 43, 75. He considered divorce and then made the determination that he wanted to save his marriage and family. March 2002 Tr. 142. Kinda Young was remorseful of her actions relative to her extramarital affairs. March 2002 Tr. 76. The Youngs testified that they sought individual counseling and joint marriage counseling. March 2002 Tr. 25, 76. They testified that they had overcome their problems and now have a strong, happy, healthy marriage. March 2002 Tr. 36, 75, 77.

David Young testified that he loved Kohl Young and has not felt any difference in his affection for him based upon the fact that he is not his biological son. March 2002 Tr. 27. He testified that the more time he spends with the child, the more he loves him, which is just the nature of being a parent. March 2002 Tr. 27. He testified that he deeply loved Kinda Young, Kohl Young and Karson Young. March 2002 Tr. 37. He wants to continue to father Kohl Young and provide a safe, stable and nurturing environment for him. March 2002 Tr. 29, 44.

Kohl Young and his sister, Karson Young, who is 18 months younger, have a very good, close relationship. March 2002 Tr. 29. A series of photographs showing family activities and trips was introduced at the March 2002 proceedings as Exhibit 3A-3EE. March 2002 Tr. 30-35. The photographs included ones taken before and after David Young found out about this relationship. March 2002 Tr. 35.

Mr. Pitts testified that he fathered a child about 30 years ago, and he does not know the name of the child or the mother. March 2002 Tr. 49, 182. In addition, his first wife had an abortion during their marriage. March 2002 Tr. 49, 182. Mr. Pitts' father fathered a child before his marriage to Mr. Pitts' mother, and his father did not help raise that child. Mr. Pitts testified

that he had met his half-brother, Fred, one time, but he did not know his last name. March 2002 Tr. 55, 182.

Kinda Young testified that she met Mr. Pitts in February 1996 and began an affair with him in November 1996. March 2002 Tr. 57. She advised Thomas C. Pitts, III that she was pregnant and that she thought he was the biological father in the first part of February 1997. March 2002 Tr. 59. Throughout her pregnancy and when Kohl Young was born on October 3, 1997, she led David Young to believe he was the biological father. March 2002 Tr. 60.

Mr. Pitts saw Kohl Young a total of 18 times between his birth on October 31, 1997, and August 29, 1999. These contacts were not scheduled visits, but were merely incidental to a meeting between Kinda Young and Thomas C. Pitts, III. March 2002 Tr. 66, 67, 70-74, 106. Mr. Pitts did not see Kohl Young for a period of four years and four months between August 29, 1999, and December 26, 2003. March 2002 Tr. 185. The Mandate from the first appeal issued on September 15, 2003. App. 35. Between the Mandate and the hearing in April 2004, Mr. Pitts only requested and received two one hour visits on December 26, 2003, and February 22, 2004. April 2004 Tr. 22, 23. These were the only visits requested. March 2002 Tr. 80, 81, 101; April 2004 Tr. 23.

At the March 2002 hearing, several witnesses testified on behalf of the Youngs including a neighbor, the daycare provider, Mr. Young's mother and the Youngs' friend and minister. March 2002 Tr. 110, 120, 123, 134. These witnesses confirmed the very close relationship between Kohl Young and David Young, and that David Young was an active father. March 2002 Tr. 113, 114, 121, 123, 124, 144, 145. The witnesses also testified that Kinda Young was remorseful and that the Youngs had a strong marriage despite these difficulties. March 2002 Tr. 115, 122, 126, 127, 143, 144. The daycare provider described David Young as one of the best

fathers she has ever seen while she has been in the daycare business since 1984. March 2002 Tr. 110, 113. She also testified that Kohl Young calls David Young "Daddy". March 2002 Tr. 115.

Mr. Pitts testified that he is a self-employed hairdresser in Shelbyville, Tennessee, and that his annual income averaged between $27,000 and $30,000 between 1997 and April 2004. March 2002 Tr. 157, 179; April 2004 Tr. 45, 46, 50, 51. In addition to that income, he received income from mowing. April 2004 Tr. 52, 53. In lieu of paying rent in 2001, 2002 and a portion of 2003, Mr. Pitts housesat a two bedroom house valued at approximately $150,000. Mr. Pitts testified that the fair market value of the rent would have been $500 to $800 per month. April 2004 Tr. 53-54. In April 2004, he was living with his father and his fiancee' in an apartment in Shelbyville, Tennessee. April 2004 Tr. 55-57.

Thomas C. Pitts, III never paid any prenatal care, birthing expenses, postnatal costs or medical expenses for Kohl Young. March 2002 Tr. 52, 62, 63; April 2004 Tr. 19, 20. He did not pay any babysitting services or purchase formula or diapers for Kohl Young. March 2002 Tr. 53. In the March 2002 proceedings, Mr. Pitts submitted a list of 11 items which he claimed he gave Kohl Young. None of these were of significant value and included a toy tractor, a coat, sippie cups and a ball. March 2002 Tr. 66, Ex. 5. Mr. Pitts did not pay child support for Kohl Young at any time, even after the Mandate issued from the Court of Appeals on September 15, 2003. April 2004 Tr. 20. Mr. Pitts did not set up any fund or account for Kohl Young. March 2002 Tr. 168.

Kinda Young and David Young provided all of the support for Kohl Young. April 2004 Tr. 20. Mr. Young testified that he has medical insurance on Kohl Young. He pays a premium for family coverage. He calculated the pro rata share of the premium for one family member to be $6,263.54 from Kohl Young's date of birth to the April 2004 hearing. April 2004 Tr. 64, 65,

76. Ex. 4. Mr. Young also introduced evidence of amounts he paid for prenatal costs and birthing expenses. The total amount was $6,394.72. Insurance paid $5,206.92, and the Youngs paid $1,188.63. April 2004 Tr. 62-64, Ex. 2 and 3. Mr. Young also introduced documentation of payments made by the Youngs for medical expenses for Kohl Young which were not covered by insurance in the amount of $1,027.62. March 2002 Tr. 100; April 2004 Tr. 19, Ex. 1.

On May 18, 2004, the Juvenile Court entered an Order of Parentage finding that Thomas C. Pitts, III was the legal father of Kohl Young. On July 14, 2005, the Court of Appeals reversed and remanded the case with instructions to enter a judgment that David Young is the legal father of Kohl Young, *nunc pro tunc* to the birth of Kohl Young. App. 11, 21.

On March 4, 2004, the Youngs filed a second Petition to Terminate the Parental Rights of Thomas C. Pitts, III based on abandonment. The Coffee County Juvenile Court denied the Petition, and the Youngs filed a Notice of Appeal. That case was on appeal contemporaneous to the appeal in this case. In re: T.K.Y., No. M2004-02005-COA-R3-PT, 2005 Tenn. App. LEXIS 416 (Tenn. Ct. App. July 14, 2005). App. 22. The opinion was filed contemporaneously with the opinion rendered in this case. The Court of Appeals held that the termination of parental rights proceedings were wholly unnecessary when it had been adjudicated that the person whose rights are to be terminated has no parental rights to terminate. The judgment of the Juvenile Court in the second termination proceedings was vacated and rendered moot since Thomas C. Pitts, III has no parental rights. App. 26.

LAW AND ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT DAVID YOUNG IS THE LEGAL FATHER OF KOHL YOUNG.

The original trial in this case was held on March 4 and 5, 2002. The Juvenile Court terminated the parental rights of Thomas C. Pitts, III based upon the fact that he did not file a petition for paternity within thirty (30) days of having notice that he may be the father. Tenn. Code Ann. § 36-1-113(g)(9)(A)(vi). Mr. Pitts appealed this decision. In relying on Jones v. Garrett, 92 S.W.3d 835 (Tenn. 2002), the Court of Appeals reversed the holding of termination. At the time of the first appeal, this ground was only available to terminate the parental rights of persons who are not legal parents.[1] The Court of Appeals held that the Juvenile Court should have determined the paternity issue prior to considering the petition to terminate. In re: T.K.Y., No. M2002-00815-COA-R3-JV, 2003 Tenn. App. LEXIS 259 (Tenn. Ct. App. April 2, 2003) perm. app. denied September 2, 2003. App. 28. The Court of Appeals held that Mr. Pitts' rights might have been terminated on a ground not applicable if he was adjudicated to be a legal parent. App. 28. The Court of Appeals remanded the case to Juvenile Court for an early hearing on Mr. Pitts' Petition to Establish Paternity. App. 34. The Juvenile Court had a hearing on April 26, 2004, and erroneously held that Thomas C. Pitts, III is the legal father of Kohl Young.

On remand, the Youngs took the position that David Young should be named the legal father based upon the fact that he and Mrs. Young were married when the child was born and the fact that Mr. Young received the child in his home and openly holds the child out as his natural child pursuant to Tenn. Code Ann. § 36-2-304(a)(1) and (4). Thomas C. Pitts, III took the

[1] The statute was later amended to make this ground available in cases in which the putative father had not been adjudicated to be the legal father when the Petition to Terminate was filed. The ground would then apply to this case. However, the Supreme Court held that the amendment could not be retroactively applied. In re: D.A.H., 142 S.W.3d 267 (Tenn. 2004).

position that he was the legal father based on the results of genetic tests pursuant to Tenn. Code Ann. § 36-2-304(a)(5). In the March 2002 proceedings, the parties stipulated that the DNA tests showed a statistical probability of 99.95% that Thomas C. Pitts, III was the biological father of Kohl Young. The parties did not stipulate that Thomas C. Pitts, III was the legal father. March 2002 Tr. 5-6, Ex. 1; April 2004 Tr. 3-5, 9.

Thomas C. Pitts, III bases his appeal on the argument that he has interests which are entitled to constitutional protections. The Youngs concede that a biological father of a non-marital child who has developed a substantial relationship with the child has rights that are constitutionally protected. State ex rel. Cihlar v. Crawford, 39 S.W.3d 172, 182 (Tenn. Ct. App. 2000), perm app. denied. February 20, 2001. The Youngs would show unto the Court that Thomas C. Pitts, III has not developed a substantial relationship with Kohl Young and that he has not made any reasonable effort to establish a relationship. The Youngs would show unto the Court that the rights and interests of Mr. Pitts are not entitled to constitutional protections due to his failure to take any affirmative action to establish a relationship with the child for over six years. A biological parent who has knowledge that he is the biological parent and takes no action should not have constitutionally protected rights. Mr. Pitts argues that he took no action to keep the affair a secret from David Young. However, there were many things which Mr. Pitts could have done for Kohl Young without Mr. Young's knowledge. He could have registered with the Putative Father Registry pursuant to Tenn. Code Ann. § 36-2-318 to insure he would be given notice of any actions involving Kohl Young. He could have set up a fund or account for the support of Kohl Young. In addition, Mr. Pitts did nothing to establish a relationship after David Young was advised that he was not the biological father in July 1999. He did not insist upon an early hearing. He did not pay support and did not arrange for regular visits even though

he could have done so through his attorney. He took no actions to establish a relationship or provide support and therefore, his rights are not entitled to constitutional protection.

In his argument, Mr. Pitts fails to acknowledge or recognize that a person like David Young (a husband of a woman whose child's parentage is disputed) has rights and interests that are constitutionally protected. Cihlar, 39 S.W.3d at 184. If the Court finds that Mr. Pitts' rights and interests rise to the level of constitutional protection, his rights and those of David Young conflict. The General Assembly enacted the Paternity Act of 1997 to set forth the procedures to establish paternity. Tenn. Code Ann. § 36-2-301, et seq. Tenn Code Ann. § 36-2-304(a) contains five rebuttable presumptions which replace all prior statutory and case law presumptions of parentage.

The statute provides in pertinent part as follows:

> **36-2-304. Presumption of parentage.** – (a) A man is rebuttably presumed to be the father of a child if:
>
> (1) The man and the child's mother are married or have been married to each other and the child is born during the marriage or within three hundred (300) days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce;
>
> . . .
>
> (4) While the child is under the age of majority, the man receives the child into the man's home and openly holds the child out as the man's natural child; or
>
> (5) Genetic tests have been administered as provided in § 24-7-112, an exclusion has not occurred, and the test results show a statistical probability of parentage of ninety-five percent (95%) or greater.

In certain cases, including this case, there are conflicting rebuttable presumptions, and the Court must resolve the conflicting presumptions. The statute does not give more weight to one presumption over another. The results of genetic testing do not end the inquiry.[2] The Court

[2] Recently, this Court addressed similar issues involving the issue of establishing maternity. The Court declined to adopt the genetic test or the intent test as a general rule for resolving maternity issues. In re: C.K.G., C.A.G. and C.L.G., 173 S.W.3d 714, 726 (Tenn. 2005).

must consider the level of commitment to parenthood that the presumptive fathers have demonstrated. Cihlar, 39 S.W.3d at 185.

The conflicting interests and conflicting presumptions were discussed by the Court of Appeals when the constitutionality of the statute was challenged. The Court of Appeals held that the statute is constitutional because it allows the courts to consider the competing interests and the constitutional rights of the various interested persons in resolving conflicting parentage disputes. Cihlar, 39 S.W.3d at 185. The Court of Appeals recognized that a biological father of a non-marital child who has developed a substantial relationship with the child has rights that are constitutionally protected. Cihlar, 39 S.W.3d at 182. The Court of Appeals also recognized that the husband of a child's mother at conception or birth has interests in his relationship with the child that are entitled to constitutional protection. Cihlar, 39 S.W.3d at 184.

In Cihlar, the Court stated:

> Tennessee's General Assembly and judiciary have long recognized the family as a vital; societal institution. For example, the General Assembly has stated that it is "the long-standing public policy of this state to recognize the family as essential to social and economic order and the common good and as the fundamental building block of our society." Tenn. Code Ann. § 36-3-113(a) (1996). Similarly, the Tennessee Supreme Court has noted that "parental autonomy is basic to the structure of our society because the family is 'the institution by which we inculcate and pass down many of our most cherished values, moral and cultural.'" Davis v. Davis, 842 S.W.2d 588, 601 (Tenn. 1992) (quoting Bellotti v. Baird, 443 U.S. 622, 634, 99 S.Ct. 3035, 3043, 61 L.Ed.2d 797 (1979)).

Cihlar, 39 S.W.3d at 181.

The Courts of Appeals have noted the changes made in the parentage statutes, but also have recognized that in no sense did the General Assembly retreat from its expressed policy favoring the importance of the traditional family unit. Cihlar, 39 S.W.3d at 184, Ardoin v. Laverty, No. M2001-03150-COA-R3-JV, 2003 Tenn. App. LEXIS 488 (Tenn. Ct. App. July 11, 2003). App. 1. The General Assembly was concerned with the potential harm to the marriage, trauma to the child, and disturbance of the relationship between the child and the mother's spouse. Ardoin, 2003 Tenn. App. LEXIS 488, at *15. App. 4.

The Cihlar Court went on to state as follows:

> We must still decide, however, what elements must be included in a statutory procedure for resolving parentage disputes in order to assure that the interests of persons like Mr. Crawford are protected. There are two essential ingredients. First, the procedure must comply with minimum procedural due process requirements which include adequate notice, an opportunity to present evidence, and a decision based on the evidence by an impartial trier-of-fact. Second, the procedure should enable the trier-of-fact to consider the level of commitment to parenthood that the presumptive father or fathers have demonstrated. Accordingly, courts called upon to resolve parentage disputes should be able to take into consideration: (1) the stability of the child's current family environment, (2) the existence of an ongoing family unit, (3) the source or sources of the child's support, (4) the child's relationship with the presumptive father, and (4) (sic) the child's physical, mental, and emotional needs.
>
> Tennessee's 1997 parentage statutes, as amended, contain these necessary elements. We have concluded that they do not impermissibly interfere with familial privacy interests, . . . or with the rights and interests of a husband of a woman whose child's parentage is disputed. Accordingly, we find that the 1997 parentage statutes are constitutional on their face.

Cihlar, 39 S.W.3d at 185
(emphasis added).

The procedure set forth in Cihlar was followed in the cases of In re: L.C.B., No. M2003-02560-COA-R3-CV, 2005 Tenn. App. LEXIS 74 (Tenn. Ct. App. February 4, 2005) and Russell

vs. Russell, Nos. M2000-01101-COA-R3-CV, M2000-01127-COA-R3-CV, 2001 Tenn. App. LEXIS 559 (Tenn. Ct. App. July 31, 2001). App. 6 and App. 36. This case is consistent with Tennessee law and should be affirmed.

The case of In re: L.C.B. is a case on point. In that case, M.B. and P.B. were married and four children were born during the marriage. The fourth child, L.C.B., was born after M.B. had a vasectomy. P.B. was having an extra-marital affair with R.D. M.B. and P. B. divorced two years later and M.B. agreed to provide support and share parental custody of all four children, including L.C.B. According to the Marital Dissolution Agreement, the parties expected to agree to a custody and visitation schedule. No such schedule occurred. In re: L.C.B., 2005 Tenn. App. LEXIS 74, at *4. App. 7. The Court of Appeals stated as follows:

> R.D., despite his own knowledge of M.B.'s prior vasectomy, made no move to establish his paternity of L.C.B. during this period. In fact, two years passed, and R.D. married P.B. Another year passed, and R.D. and P.D. submitted themselves and L.C.B. to DNA testing. This test established a 99.999 percent probability that R.D. is L.C.B.'s biological father. Also during this one-year period of time M.B. filed a petition seeking sole custody of the three older children, leaving L.C.B. subject to the joint custody arrangement, and seeking a concomitant reduction in child support. The record does not disclose how much time lapsed between M.B.'s petition to change custody and R.D.'s petition to establish paternity filed in juvenile court; nonetheless, armed with the paternity test results, the petitioners R.D. and P.D. filed first in juvenile court, and then in Chancery Court for Humphreys County, a petition to establish paternity . . .

In re: L.C.B., 2005 Tenn. App. LEXIS 74, at *4. App. 7.

The trial court held that P.D. was barred by estoppel and R.D. was barred by laches. The trial court did not address M.B.'s counter-complaint, but since the relief sought in the counter complaint was contingent upon the success of R.D. under the allegations of the complaint, the Court of Appeals treated the judgment as final. The Court of Appeals reversed the holding of the trial court that R.D. was barred by laches. The Court of Appeals affirmed the ruling that

dismissed the Petition to Establish Paternity of R.D. In re: L.C.B., 2005 Tenn. App. LEXIS 74, at *15, 16. App. 10. The Court stated:

> This statutory strengthening of the hand of the biological parent does not supplant or destroy the rights of the husband who was in lawful wedlock with the biological mother at the time of the birth of the child. This is particularly true in situations like the case at bar where a biological father who has shirked his responsibilities since the birth of the child seeks to interpose his bare "planting" [*12] of the seed" as a trump card to dwarf all other considerations. The problem that was posed but not resolved in Cihlar must be addressed in the case at bar.

In re: L.C.B., 2005 Tenn. App. LEXIS 74, at *11, 12.
App. 9.

The Court of Appeals then listed the Cihlar factors to be applied to the facts of the case and dismissed the Establish Paternity filed by R.D., the biological parent.

The Court of Appeals correctly decided the case at bar. The Court of Appeals found that "the trial court restricted itself to an erroneously narrow legal criteria and placed too great an emphasis on the genetic tests when it determined that Mr. P. was the 'legal' father of T.K.Y." App. 17.

The Juvenile Court ruled as follows:

> I'm going—I think Russell—if there had been no effort to establish support, no prior petitions filed, no effort on Mr. Pitts, I would find—probably find, he is not the father, the legal father of the child. He started this.

April 2004 Tr. 42-43.

The Juvenile Court did not give proper weight to the conflicting statutory presumptions and did not give proper weight to the factors listed in Cihlar, In re: L.C.B. and Russell.

The Court of Appeals used the correct legal standard to decide this case. It began with the paternity statute codified as Tenn. Code Ann. § 36-2-304. The Court correctly recognized that conflicting rebuttable presumptions were present and that the conflict would need to be resolved by applying the Cihlar factors.

The Court of Appeals correctly analyzed the Cihlar factors and correctly held that David Young is the legal father of T.K.Y. under that analysis. Each factor is addressed below. A review of the facts demonstrates David Young's extremely high level of commitment to parenthood. On the other hand, Thomas C. Pitts, III has done very little to parent Kohl Young and has shown no commitment to parenthood. Mr. Pitts did not file a Petition for Legitimation until Kohl Young was approximately two years of age and Mrs. Young had ended the extra-marital affair. He has never paid any support. He did not push for a hearing on his Petition to Establish Paternity and did not request any visitation during the pendency of the Petition. Mr. Pitts only requested two one hour visits after the Mandate issued from the first appeal reversing the termination of his parental rights.

(1) The stability of the child's current family environment. Since birth, Kohl Young has had a very safe, stable and loving environment in the Young home. The Youngs constructed the brick home on five acres in 1997, and this is the only home in which Kohl Young has resided. He has a very close relationship with his sister, Karson Young, and his presumptive father, David Young. Mr. and Mrs. Young have been married since August 27, 1988. Although they have had marital differences, their marriage has survived, and it is an intact and strong, stable relationship. David Young is the only father which Kohl Young has ever known. He calls Mr. Young "Daddy". David Young wants to continue to father Kohl Young and desires to provide a safe, stable and nurturing environment for him. As discussed above, the General Assembly did not retreat from its expressed policy favoring the importance of the traditional family unit like the Young family.

(2) The existence of an ongoing family unit. The Youngs continue to have an ongoing traditional family unit. They have overcome their marital and personal difficulties through

counseling and commitment. The Youngs had a daughter in March of 1999. The siblings are "best friends and playmates". March 2002 Tr. 29. The Youngs are devoted to their marriage, their children and maintaining the family. A finding that Mr. Young is not the legal father would disrupt the family unit and would have a detrimental effect on all family members, including the siblings, Kohl Young and Karson Young.

(3) The source or sources of the child's support. David Young and Kinda Young have been the sole support of Kohl Young since his birth. The Juvenile Court recognized that Thomas C. Pitts, III had filed a Petition to Set Support in August 1999. The Juvenile Court incorrectly viewed that as Mr. Pitts' willingness to support the child. What the Juvenile Court overlooked was the fact that Mr. Pitts had not paid a single dime to support the child or set up any fund for the child. The single act of filing the Petition 22 months after the child's birth did not feed, maintain and insure the minor child. All of that was done by David Young. Mr. Pitts paid no support and gave no explanation why he failed to do so. He testified about his average income. He could have applied the Guidelines to this amount and begun paying support, but he failed to do so. At the time of this hearing in April 2004, Kohl Young was 6 ½ years old. It is undisputed that Mr. Pitts had paid nothing for support, prenatal, birthing, postnatal or medical expenses. The Juvenile Court relied on Russell in analyzing the support factor. The Russell case is factually distinguishable from this case. In Russell, the Court of Appeals held that Mr. Russell (the presumptive father who was married to the mother during the conception and birth of the two children whose parentage was disputed) had waived any legal right he might have to the minor children by executing a Marital Dissolution Agreement that did not provide for support or visitation with the children. Russell, 2001 Tenn. App. LEXIS 559, at *11. App. 38. Mr. Russell did not provide any support for the children after the separation and divorce from their mother.

The Russell case was based on a waiver of rights. In this case, Mr. Young has not waived any legal right and has continuously provided support for Kohl Young, even after he became aware that he was not the biological father. The Court of Appeals correctly recognized that Mr. Pitts has provided no support whatsoever.

(4) The child's relationship with the presumptive father. Kohl Young has a very close, loving relationship with David Young. It is undisputed that David Young is a very active father. The daycare provider even described him as one of the best fathers she had seen while she had been in the daycare business for 18 years. David Young is committed to the father-son relationship. On the other hand, Kohl Young has no relationship with Thomas C. Pitts, III. The testimony was that Kohl Young had only seen Mr. Pitts 18 times between his birth and August 1999, and these visits were only incidental to his meeting Kinda Young. He did not see him at all in the four years and four months between 1999 and December 26, 2003. He had only requested two one hour visits in the eight months between the Mandate from the first appeal and the April 2004 hearing. Kohl Young has no relationship with Thomas C. Pitts, III, and Thomas C. Pitts, III has not tried to develop any relationship. The Court of Appeals discussed this factor as follows:

> By all accounts, Mr. Y is a doting, loving father who proudly holds T.K.Y. out as his child. Mr. Y testified, "I love that child, and I love my wife, and I love my daughter, and we have got a great family, and we want to keep it intact and healthy." It is undisputed that Mr. Y has demonstrated a high level of commitment to parenting T.K.Y..
>
> In contract to the fatherly actions of Mr. Y, Mr. P has done nothing other than plant the seed, file a civil action, albeit belatedly, and "offered to provide" support for T.K.Y.. Mr. P, at best, was most tardy in his legal efforts to establish parentage, waiting almost two years after T.K.Y.'s birth to initiate any legal proceedings to establish his paternity of T.K.Y.. Moreover, no valid reasons were given to justify the delay in pursuing his legal remedies, which we find significant since Mr. P has admitted that he had known "all along" that T.K.Y. was his biological child. Of further significance, and to aggravate Mr. P's deficiencies as

> a putative father, he has provided no support for T.K.Y.. Moreover, the evidence shows that Mr. P has the financial means to provide support, at least to some degree, but he has failed to do so. His financial support has been limited to an "offer" to provide support.
>
> To compound his deficiencies, Mr. P not only has no relationship with T.K.Y., he has not attempted to establish a relationship with T.K.Y. As of the April 2004 hearing, Mr. P had seen T.K.Y. twice since August 1999 – during two one-hour visits at McDonald's restaurant.
>
> Significantly, the record indicates that the trial court did not consider the existence of a family unit, the stability of the family environment, the child's relationship with the presumptive father(s), or T.K.Y.'s physical, mental, and emotional needs. As *Chilar* reasoned, these factors "enable the trier-of-fact to consider the level of commitment to parenthood that the presumptive father or fathers have demonstrated. 39 S.W.3d at 185.

In re: T.K.Y., 2005 Tenn. App. LEXIS 415, at 9.
App. 20. [footnotes omitted.]

(5) The child's physical, mental and emotional needs. All of these needs have been met by David and Kinda Young. A finding that David Young is not his legal father will be very emotional and traumatic for Kohl Young. He refers to Mr. Young as "Daddy" because this is the only Daddy he has ever known.

The Court of Appeals correctly applied the factors to the case at bar and correctly held that David Young is the legal father of Kohl Young.

Appellant, Thomas C. Pitts, III, also argues that the Court of Appeals "ignored" the law of the case doctrine in its decision. Appellant Brief, p. 8. The Court of Appeals specifically addressed Mr. Pitts' law of the case argument. The Court of Appeals correctly held: "We find Mr. P's 'law of the case' contention to be without merit, because the sentence upon which he bases this argument is *dicta.*" In re: T.K.Y., 2005 Tenn. App. LEXIS 415, at 4. App. 15.

The law of the case doctrine provides as follows:

> The phrase "law of the case" refers to a legal doctrine which generally prohibits reconsideration of issues that have already been decided in a prior

> appeal of the same case. . . . In other words, under the law of the case doctrine, an appellate court's decision on an issue of law is binding in later trials and appeals of the same case if the facts on the second trial or appeal are substantially the same as the facts in the first trial or appeal. . . . The doctrine applies to issues that were actually before the appellate court in the first appeal and to issues that were necessarily decided by implication. . . . The doctrine does not apply to dicta. . . .

Memphis Pub. Co. v. Tennessee Petroleum,
875 S.W.2d 303, 306 (Tenn. 1998).
(citations omitted).

The issue in the case before this Court is whether Thomas C. Pitts, III is the legal father of Kohl Young. The issues in the first appeal as stated by the Court of Appeals were as follows:

> There are several issues presented in this appeal. First, did the trial court err in deciding the termination of parental rights before determining the paternity issue? Second, did the trial court err in failing to terminate Mr. P.'s parental rights on other grounds? Third, should the court consider the constitutional attack on T.C.A. § 36-1-113(g)(9)(A)(vi)?

In re: T.K.Y., No. M2002-00815-COA-R3-JV,
2003 Tenn. App. LEXIS 259, at 1-2 (Tenn. Ct. App.
April 2, 2003), perm. app. denied September 2, 2003. App. 29, 30.

The issue of paternity was not raised and not decided in the first appeal. In the first appeal, the Court of Appeals further stated:

> For the foregoing reasons, this case is remanded to the Juvenile Court of Coffee County for an early hearing on Mr. P.'s Petition to Establish Paternity. Based on the parties' prior stipulation that Mr. P. is the biological father of T.K.Y., then the Juvenile Court shall determine issues regarding the proper, primary residential parent, shared parenting, support and other issues for T.K.Y. The costs of the appeal shall be taxed to the Y.'s, the appellees.

In re: T.K.Y., 2003 Tenn. App. LEXIS 259, at 6. App. 34

The remand was for the purpose of conducting a hearing on the Petition to Establish Paternity. As the Court of Appeals in this appeal recognized:

> The case at issue here is Mr. P's parentage action. Thus, the issue is whether Mr. P is or is not the legal father of T.K.Y.. The issues in the first appeal were limited to the petition to terminate the parental rights of Mr. P, if any. Though it was admitted, for the purposes of that action, that Mr. P was the

"biological" father of T.K.Y., there was no admission that he was the legal father or that he had parental rights. To the contrary, the purpose of that action was to forestall his pursuit of a claim of parental rights.

The subject of the sentence upon which Mr. P relies to make his "law of the case" argument did not pertain to the matters at issue in the first appeal. Therefore it is *dicta*, and it is not controlling. As a consequence, neither the trial court nor this court is precluded from making the determination, in this action, whether Mr. P or Mr. Y is the legal father of T.K.Y..

In re: T.K.Y., 2003 Tenn. App. LEXIS 259, at 5. App. 16.

The Court of Appeals correctly held that the law of the case doctrine did not apply to this case.

II. IF THE COURT FINDS THAT THOMAS C. PITTS, III IS THE LEGAL FATHER, THE COURT SHOULD ENTER A JUDGMENT FOR THE COST OF THE INSURANCE PREMIUM OR OR ALTERNATIVELY, A JUDGMENT FOR THE FULL AMOUNT OF THE PRENATAL, BIRTHING, POSTNATAL AND MEDICAL EXPENSES.

The Court of Appeals held that the issues of support and visitation were rendered moot by its holding that Mr. P is not the legal father of Kohl Young. If the Court should find that Thomas C. Pitts, III is the legal father, the Court should enter an additional judgment in the amount of $6,263.54 as reimbursement for the cost of the insurance premium, or alternatively, order Thomas C. Pitts, III to pay all of the past prenatal, birthing, postnatal and medical expenses not covered by insurance. In addition, the Court should order Mr. Pitts to furnish medical insurance or pay all of the costs not covered by insurance.

David Young testified that he paid for medical insurance for Kohl Young since his birth on October 3, 1997. April 2004 Tr. 64-66. His employer provides insurance coverage, but he is required to pay a premium for family coverage. Mr. Young testified that the amount of $6,263.54 represents the pro rata share of the family insurance premium for one family member from the date of Kohl Young's birth through the date of the hearing. April 2004 Tr. 76, Ex. 4.

The Juvenile Court erroneously held that Mr. Pitts was not required to pay any of this insurance premium. If Mr. Pitts is found to be the legal father, he should be required to furnish medical insurance on the child. Tenn. Code Ann. § 36-2-311(c) provides that all provisions related to child support orders shall also apply to orders of parentage.

Tenn. Code Ann. § 36-5-101(f)(1) provides as follows:

> The court may direct the acquisition or maintenance of health insurance covering each child of the marriage and may order either party to pay all, or each party to pay a pro rata share of, the health care costs not paid by insurance proceeds.

The Juvenile Court did not order Mr. Pitts to pay any reimbursement for the cost of insurance. This was error. The Youngs respectfully request the Court to enter a judgment for $6,263.54 as reimbursement for the insurance premium.

In the alternative, a judgment should be entered for the full amount of the cost of out-of-pocket prenatal, birthing, postnatal and medical expenses. The Juvenile Court erroneously held as follows:

> 9. Thomas C. Pitts, III shall reimburse Kinda Young the amount of $513.81 which represents one-half (1/2) of the cost of out-of-pocket prenatal and birthing expenses.
>
> 10. Thomas C. Pitts, III shall reimburse Kinda Young the amount of $594.32 which represents one-half (1/2) of the out-of-pocket medical expenses.
>
> . . .
>
> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED AS FOLLOWS:
>
> . . .
>
> 3. Thomas C. Pitts, III shall pay one-half (1/2) of the prenatal and birthing costs in the amount of $513.81 and one-half (1/2) of the medical expenses in the amount of $594.32 for a total of $1,108.13 for which a JUDGMENT is entered. Said amount shall be paid within 30 days of the entry of this Order.

Order of Parentage R. 7, 8.

If Mr. Pitts gets the benefit of the insurance coverage provided by Mr. Young's employer and the premium paid by the Youngs, it is equitable for him to pay all expenses not covered by said insurance. The Youngs respectfully request the Court to alternatively modify the Judgment to be in the amount of $2,216.25 for all of the prenatal, birthing and medical expenses not covered by insurance.

III. THE JUVENILE COURT ERRED IN CALCULATING THE CHILD SUPPORT.

Both parties raised issues regarding the calculation of child support in the appeal below. As stated above, the Court of Appeals held all issues regarding support were rendered moot. Support would only be an issue if the Court finds that Thomas C. Pitts, III is the legal father of Kohl Young.

The Juvenile Court held that the back child support was $405 per month for 78 months based on Mr. Pitts' average income of $28,500. The Juvenile Court entered a Judgment in the amount of $31,590 for back child support. R. 7,8. The Juvenile Court erred in failing to consider the in-kind income which Mr. Pitts received in 2001, 2002 and a portion of 2003 for house sitting. Mr. Pitts testified that he paid no rent for a two bedroom house valued at approximately $150,000 in which he lived in 2001, 2002 and a portion of 2003. He maintained the property in lieu of paying rent. He testified that the fair market value of the rent would be $500 to $800 per month. In addition, he received compensation for lawn mowing services. This additional income should have been included in the calculation of child support.

The Child Support Guidelines promulgated by the Department of Human Services in effect at the time of the hearing define income in pertinent part as follows:

(3) Gross income.

(a) Gross income shall include all income from any source (before taxes and other deductions), whether earned or unearned, and includes but is not limited to, the following: wages, salaries, . . . gifts, . . . and income from self-employment. . . . In kind remuneration must also be imputed as income, i.e. fringe benefits such as a company car, the value of on-base lodging and meals in lieu of BAQ and BAS for a military member, etc.

Tenn. Comp. R. & Regs. 1240-2-4-.03.

All of Mr. Pitts' income should be included in the calculation of back child support. The Juvenile Court only included the income from his self-employment as a hairdresser. The Juvenile Court should have included additional in-kind income of $6,000 to $9,600 per year ($500 to $800 per month) for the house-sitting income for the years 2001, 2002 and a portion of 2003.

In addition, the Guidelines in effect at the time of the hearing provide that the Court can make an upward deviation if a parent is not visiting the minor child as much as is contemplated by the Guidelines. The Guidelines provide as follows:

(1) Since these percentage amounts are minimums, the court shall increase the award calculated in Rule 1240-2-4-.03 for the following reasons:

(a) If the obligor is not providing health insurance for the child(ren), an amount equal to the amount necessary for the obligee to obtain such insurance shall be added to the percentage calculated in the above rule.

(b) If the child(ren) is/are not staying overnight with the obligor for the average visitation period of every other weekend from Friday evening to Sunday evening, two weeks during the summer and two weeks during holiday periods throughout the year, then an amount shall be added to the percentage calculated in the above rule to compensate the obligee for the cost of providing care for the child(ren) for the amount of time during the average visitation period that the child(ren) is/are not with the obligor [reference 1240-2-4-.02(6)].

Tenn. Comp. R. & Regs. 1240-2-4-.04.

As discussed above, Mr. Pitts was not providing insurance on the minor child. In this case, the testimony was undisputed that Mr. Pitts only saw Kohl Young 18 times between October 3, 1997, and August 29, 1999. These visits were not overnight or weekend visits. Mr. Pitts did not visit at all for the four years and four months between August 1999 and December 26, 2003. The Youngs provided 100% of the support for Kohl Young from his date of birth. In addition, the visitation allowed by the Juvenile Court does not provide for the average visitation period set forth above. The Juvenile Court erred in not finding that an upward deviation was appropriate under these facts.

Thomas C. Pitts, III does raise the issue that the Juvenile Court erred in ordering him to pay child support for 78 months. The Youngs would show unto the Court that the Juvenile Court did not err in ordering Mr. Pitts to pay support retroactively to the date of the child's birth. The Child Support Guidelines include a presumption that a father shall pay child and medical support for the child from its date of birth. Tenn. Comp. R. & Regs. 1240-2-4.04(1)(e). At the trial, Mr. Pitts did not request a deviation from the Child Support Guidelines and did not prove facts justifying such a deviation. The Youngs would show unto the Court that any request for deviation from the Guidelines should be deemed waived, since it was not pled or raised at the Juvenile Court. Even if the request for deviation is not waived, it is not justified.

The Juvenile Court has broad authority to order retroactive support and has discretion when setting the amount of retroactive support. The discretion must be exercised within the strictures of the Child Support Guidelines. Berryvill v. Rhodes, 21 S.W.3d 188, 193 (Tenn. 2000).

Tenn. Code Ann. § 36-2-311 provides in pertinent part as follows:

> (11)(A) Determination of child support pursuant to chapter 5 of this title. When making retroactive support awards pursuant to the child support guidelines

established pursuant to this subsection (a), the court shall consider the following factors as a basis for deviation from the presumption in the child support guidelines that child and medical support for the benefit of the child shall be awarded retroactively to the date of the child's birth:

(i) The extent to which the father did not know, and could not have known, of the existence of the child, the birth of the child, his possible parentage of the child or the location of the child;

(ii) The extent to which the mother intentionally, and without good cause, failed or refused to notify the father of the existence of the child, the birth of the child, the father's possible parentage of the child or the location of the child; and

(iii) The attempts, if any, by the child's mother or caretaker to notify the father of the mother's pregnancy, or the existence of the child, the father's possible parentage or the location of the child.

The Juvenile Court did not find that this case was an appropriate case for a deviation from the Guidelines. This ruling is appropriate based upon the statutory factors. The undisputed testimony is that Mr. Pitts knew of the pregnancy and the possible parentage before the birth of the child. Mr. Pitts at all times has known the location of the child. Ms. Young personally notified Mr. Pitts of her pregnancy and the possible parentage before and after the birth of the child. There is no reason to deviate from the Guidelines requiring retroactive support from the date of birth based on the relevant statutory factors.

The case relied upon by Thomas C. Pitts, III is irrelevant and inapplicable to this case. It was decided prior to the promulgation of the Child Support Guidelines and prior to the amendment to the paternity statute that was in effect at the time of the hearing in this case. Hoyle v. Wilson, 746 S.W.2d 665 (Tenn. 1988). This case is governed by the Child Support Guidelines and statutes governing paternity cases, Tenn. Code Ann. § 36-2-311. In addition, the Hoyle case is distinguishable. The Hoyle case involved a Petition filed pursuant to URESA and dealt with contempt issues for failing to pay support that was previously ordered.

One issue in this case is establishing an initial order of support and determining whether payment should be retroactive. It does not involve contempt issues or enforcement of a previous support order as in Hoyle.

The Youngs respectfully show unto the Court that the Juvenile Court did not err in awarding retroactive support to the date of the child's birth. However, the support amount should be modified to include income from all sources and an upward deviation based upon the small amount of visitation which Mr. Pitts has exercised.

CONCLUSION

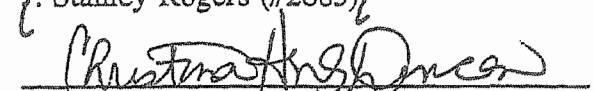
Based on the foregoing, the Youngs respectfully request the Court to affirm the decision of the Court of Appeals which held that David Young is the legal father of Kohl Young *nunc pro tunc* to his birth.

In the alternative, the Youngs respectfully request the Court to modify the Judgments entered to include either reimbursement for the insurance premiums or reimbursement of all of the out-of-pocket expenses. The Youngs also request the Court to modify the back child support to include all of Mr. Pitts' income and modify the back and current child support to provide an appropriate upward deviation.

Respectfully submitted this 6th day of January, 2006.

ROGERS & DUNCAN

By: 
J. Stanley Rogers (#2883)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Attorneys for Plaintiffs/Appellees

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded to Eric J. Burch, Esq., 200 South Woodland Street, Manchester, Tennessee 37355, Attorney for Defendant/Appellant, by placing a copy of the same in the United States Mail with sufficient postage thereon to carry the same to its destination this 6th day of January, 2006.

ROGERS & DUNCAN

By: 
J. Stanley Rogers
Attorney for Plaintiffs/Appellees

ATTACHMENT 6

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT WINCHESTER

HAROLD THOMAS JACKSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 4:05-cv-52
	)	
JONES TRUCKING, INC. and GARY A. COFFEY,	)	MATTICE/LEE
	)	
	)	
Defendants.	)	
	)	

PLAINTIFF'S TRIAL BRIEF

Statement of the Facts

This case arises out of an accident that occurred on August 12, 2004. On August 12, 2004, at approximately 10:20 p.m., plaintiff, HAROLD THOMAS JACKSON, was operating a 2001 International tractor, without trailer, in an easterly direction on Interstate 24 approximately .9 mile east of mile post 124 in Coffee County, Tennessee. At said time and place, defendant, GARY A. COFFEY, was operating a 1999 Peterbilt tractor with trailer owned by defendant, JONES TRUCKING, INC., in the course and scope of his employment with defendant, JONES TRUCKING, INC. Defendant, GARY A. COFFEY, was operating the tractor-trailer in an easterly direction on Interstate 24 approximately .9 mile east of mile post 124 in Coffee County, Tennessee, and was traveling at an excessive rate of speed for the conditions then and there present. Defendant, GARY A. COFFEY, struck Plaintiff's tractor in the rear with great force, causing it to slide out of control and overturn in the shoulder and ditch to the right of the roadway. Plaintiff alleges that defendant, GARY A. COFFEY, was guilty of common law negligence which was a direct and proximate cause of the accident in that he failed to keep his vehicle under proper control; failed to take appropriate action to avoid striking Plaintiff's tractor;

followed too closely; traveled at an excessive rate of speed for the conditions then and there existing; and failed to properly maintain his vehicle under control. Plaintiff alleges that defendant, GARY A. COFFEY, was acting under the direction and control of defendant, JONES TRUCKING, INC., and therefore it is liable for his negligence under the theories of *respondeat superior*, the Federal Motor Carrier Safety Regulations and the statutes of the State of Tennessee. Plaintiff alleges that defendant, GARY A. COFFEY, was a statutory employee and/or an employee of defendant, JONES TRUCKING, INC., and was operating the tractor-trailer with the express permission of defendant, JONES TRUCKING, INC., and under its supervision and control in the course and scope of his employment. Plaintiff alleges that defendant, GARY A. COFFEY, was guilty of negligence *per se* in that he violated Tenn. Code Ann. § 55-8-124 and § 55-10-205 and the Code of Federal Regulations, Title 49, Transportation, U. S. Department of Transportation, Chapter 3, Federal Highway Administration (B), "Federal Motor Carrier Safety Regulations" §§ 392.1, 392.2, 392.3 and 395.3.

Plaintiff alleges that defendant, JONES TRUCKING, INC., is a motor carrier directly involved in the business of providing and using commercial motor vehicles for hire in interstate commerce. Plaintiff alleges that defendant, JONES TRUCKING, INC., is negligent in that it violated the Code of Federal Regulations, Title 49, Transportation, U. S. Department of Transportation, Chapter 3, Federal Highway Administration (B) , "Federal Motor Carrier Safety Regulations" §§ 392.1, 392.2, 392.3 and 395.3.

Plaintiff further alleges that defendant, JONES TRUCKING, INC., is negligent because it negligently entrusted the tractor-trailer truck to defendant, GARY A. COFFEY, whom it knew or should have known was an incompetent driver. Plaintiff alleges that defendant, JONES

TRUCKING, INC., is negligent in failing to properly hire, train, supervise, monitor and control its driver, GARY A. COFFEY, which is a violation of industry standards.

Defendant, GARY A. COFFEY, had been an employee of defendant, JONES TRUCKING, INC., since November 6, 2000. Defendant, JONES TRUCKING, INC., produced the driver qualification file, employee file and other documents in response to Plaintiff's First Set of Interrogatories and Request for Production of Documents. Defendant, JONES TRUCKING, INC., had many documents in its file establishing that defendant, GARY A. COFFEY, was an incompetent driver. The documents established that defendant, JONES TRUCKING, INC., knew or should have known that defendant, GARY A. COFFEY, was an incompetent driver. Prior to his date of hire on November 6, 2002, the previous employer of defendant, GARY A. COFFEY, had advised that his license had been suspended or revoked in 1993 for speeding violations and that he had additional traffic charges in July 1999. In 1995, defendant, GARY A. COFFEY, was convicted in the State of Illinois for aggravated sexual assault. He was sentenced to serve six years in the penitentiary. He served three years and was on probation for two years.

During his employment, Defendant Coffey had multiple logbook violations and hours of service violations. According to the records of Defendant Jones, Defendant Coffey had seven months of violations in 2003 and seven months of violations in 2004 leading up to the date of the accident of August 12, 2004. He had two preventable accidents prior to this accident. In addition, he tested positive for cannabinoid in a drug test performed February 25, 2002. Exhibit 3 of Defendant Jones' Production of Documents, Bates stamped 351. On March 5, 2002, he tested positive for marijuana. Exhibit 3 of Defendant Jones' Production of Documents, Bates stamped 562-566. He then had an evaluation performed which contained the following: "CONCLUSIONS: 2. A person who has abused marijuana in the past. His occasional use places

him at risk in his career, and this is a life effect that could be considered abuse due to the serious nature of the possible consequences." An evaluation performed on April 6, 2002, determined that Defendant Coffey was in need of assistance in resolving problems with alcohol use or controlled substance abuse. Exhibit 3 of Defendant Jones Production of Documents, Bates stamped 545.

The record establishes a pattern of hours of service violations and inattentiveness. The negligence and negligence *per se* of Defendants were the direct and proximate cause of the accident and resulting injuries to Plaintiff. Plaintiff also alleges that Defendants are guilty of reckless conduct by consciously disregarding a substantial and unjustifiable risk to the safety and wellbeing of Plaintiff and others making Defendants liable for punitive damages.

Plaintiff suffered severe, painful and permanent injuries which required him to obtain medical attention, thus incurring necessary and reasonable medical bills and other expenses, both past and future; and such injuries caused pain, suffering and emotional anguish, as well as depriving him of the ability to enjoy the pursuit and pleasures of life. Plaintiff has incurred medical bills in the amount of $132,300.11. An additional surgical procedure is scheduled. Plaintiff's future medical costs are $37,969.45. Plaintiff alleges that he has suffered loss of wages, both past and future. Plaintiff seeks to recover damages for personal injuries.

Law and Argument

Defendants have filed several Motions in Limine and Plaintiff plans to file several Motions in Limine. Plaintiff does not anticipate that there will be many contested issues of law once these Motions are decided.

Plaintiff alleges that Defendant Coffey is negligent and that Defendant Jones is vicariously liable for Defendant Coffey's negligence under the theories of agency, *respondeat*

superior, the Federal Motor Carrier Safety Regulations and the statutes of the State of Tennessee. In addition, Plaintiff alleges that Defendant Jones is independently negligent for negligent entrustment and that it was negligent in hiring, training and supervising its driver, Defendant Coffey. Plaintiff seeks to recover compensatory and punitive damages.

Tennessee has long recognized the tort of negligent entrustment of an automobile to an incompetent driver. V. L. Nicholson Construction Co. v. Lane, 150 S.W.2d 1069 (Tenn. 1941). Rimer v. City of Collegedale, Tennessee, 835 S.W.2d 22 (Tenn. Ct. App. 1922). The cause of action for negligent entrustment is a separate cause of action and is independent of the cause of action against the employer based on the doctrine of *respondeat superior*. Ali v. Fisher, 145 S.W.3d 557 (Tenn. 2004). The owner's liability does not rest on imputed negligence, but is based on his own negligence in entrusting a motor vehicle to an incompetent driver. Ali, 145 S.W.3d at 562. The theory of negligent entrustment "requires proof that a chattel was entrusted to one incompetent to use it with knowledge of the incompetence, and that its use was the proximate cause of injury or damages to another." Ali, 145 S.W.3rd at 562, quoting Restatement (Second) of Torts § 390 (1964).

The commercial motor vehicle industry is a highly regulated industry. Motor carriers are governed by the Federal Motor Carrier Safety Regulations (FMCSR) and also state regulations. 49 U.S.C. § 113 and 322; 49 C.F.R. Parts 383, 390-396; Tenn. Code Ann. § 65-15-101, *et. seq.*; State of Tennessee Motor Carrier Safety Regulations. The FMCSR requires Defendant Jones, the motor carrier, to insure that safe drivers operate its equipment. This includes conducting an investigation of the driver before hiring and monitoring and supervising the driver while employed. 49 C.F.R. § 391.11. The FMCSR set forth the hours of service of drivers and the use

of graph grid (logs). A motor carrier is charged with ensuring that its drivers comply with the hours of service and properly complete the logs.

Defendant Jones knew or should have known that Defendant Coffey was an incompetent driver. Defendant Jones' action of entrusting the commercial motor vehicle to an incompetent driver was the proximate cause of this accident. Defendant Coffey had a long pattern of incompetency, including hours of service violations and inattentive driving. On July 24, 2004, Defendant Coffey had an accident in which he ran through the median in order to avoid striking a vehicle in front of him.

On the date of this accident, he was charged with four hours of service violations. He was placed out of service for 10 hours. According to Defendant Coffey's testimony, he was behind on his logbook at the time of this accident for 10 days. Defendant Jones had discretion to terminate Defendant Coffey prior to this accident under the terms of the Company Policy Manual in effect.

Defendant Jones did not dismiss Defendant Coffey for his multiple hours of service violations; drug test results or multiple accidents. Defendant Jones did not even seriously reprimand its driver, Defendant Coffey. Defendant Coffey testified as follows:

> A. Well, yes, I got a letter in my little mailbox where our checks was that said you had violated hours of service, you know, blah, blah, blah, whatever I had done, and no, they said have a nice day and have a good truck – keep trucking.

Coffey depo. p. 34, l. 22 - p. 35, l. 2

Defendant Jones was charged with the duty of hiring a safe driver; was charged with the duty of supervising and monitoring its driver and under its own company policy had discretion to terminate its driver based on the multiple violations of which it had knowledge.

Plaintiff seeks to recover punitive damages. In Tennessee, a court may award punitive damages if it finds that a defendant acted either (1) intentionally, (2) fraudulently, (3) maliciously, or (4) recklessly. Hodges v. S. C. Toof & Co., 833 S.W.2d 896 (Tenn. 1992). "A person acts recklessly when the person is aware of, but consciously disregards, a substantial and unjustifiable risk of such a nature that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances." Hodges, 833 S.W.2d at 901. In this case, Defendants' actions are reckless.

Defendant Jones knew that Defendant Coffey had driving violations when it hired him. Defendant Jones monitored Defendant Coffey's logs and recorded multiple violations of hours of service. Defendant Coffey's record of logs and accidents established him to be an incompetent and inattentive driver. Defendant Jones knew his record. It chose to ignore the violations and chose to not terminate him which it had the authority to do under the Company Policy Manual. In Defendant Coffey's words, Defendant Jones told him to "Keep Trucking."

Respectfully submitted this 17th day of October, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded to Stuart F. James, Esq., attorney for defendants, Jones Trucking, Inc. and Gary A. Coffey, 736 Cherry Street, Third Floor, Chattanooga, Tennessee, 37402, via electronic filing this the 17th day of October, 2006.

ROGERS & DUNCAN

By: *s/ J. Stanley Rogers*
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