The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: Michael Eugene Richardson

Office Address: (including county) 633 Chestnut Street, suite 1580
Chattanooga, TN 37450

Office Phone: 4236029623 Facsimile:

Email Address: [redacted]

Home Address: (including county) [redacted]
Ooltewah, TN 37363

Home Phone: Cellular Phone: [redacted]

INTRODUCTION

The State of Tennessee Executive Order No. 87 (September 17, 2021) hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

The Council requests that applicants use the Microsoft Word form and respond directly on the form using the boxes provided below each question. (The boxes will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit your original hard copy (unbound) completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts as detailed in the application instructions. Additionally you must submit a digital copy with your electronic or scanned signature. The digital copy may be submitted on a storage device such as a flash drive that is included with your original application, or the digital copy may be submitted via email to john.jefferson@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 trial attorney at the Richardson Law Firm, located in Chattanooga.

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

1980. My BPR no. is 7191.

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.

Just Tennessee. I have been admitted pro hac vice in several other States for the purpose of trying a lawsuit there, including the States of Georgia, Alabama, North Carolina, Virginia, and Pennsylvania.

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 have been a trial attorney in Tennessee since I obtained my license in 1980. (I will give more detail in my response to question no. 8). I started with the Chattanooga law firm of Gearhiser, Peters and Horton (1980-1985). I then started and formed a firm known as Patrick, Beard and Richardson in Chattanooga and was a partner there from 1985-1998. After that, I have practiced in an association of lawyers known as Poole, Thornbury, Morgan and Richardson for several years and also with a firm known as Lawrence, Lawrence and Richardson for several years. I have had the Richardson Law Firm (I am currently in sole practice), for the last six years.

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

I have practiced law continuously for the last 42 years.

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

Currently, I handle primarily cases involving professional negligence. (Medical, legal, and accounting malpractice cases). This is probably 75% of my current practice. I also handle personal injury cases, business tort cases and breach of fiduciary duty cases.

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

I have had an extensive and diverse trial practice during my career. I have tried in excess of 150 jury trials and have tried hundreds of bench trials. I have tried just about every kind of civil case there is, including many tort cases, breach of contract cases, medical malpractice cases, legal malpractice cases, accounting and audit malpractice cases, lender liability suits against banks, complex commercial and business disputes, construction litigation disputes and many others. I discontinued taking domestic relations cases a few years ago, but I have tried many divorces in the past and the related domestic disputes that go with divorces. (I've tried well in excess of 100 divorces over the years, along with cases involving child custody and permanent parenting plans). I have also had a very active criminal practice, which includes many jury trials. I have tried several murder cases, including two capital murder cases. I have also tried a number of white collar criminal cases in Federal court. (They all involved business people charged with bank fraud, wire fraud and or tax evasion). In all my many trials, I have been lead counsel or the only attorney representing my clients. I have taken thousands of discovery depositions and been involved in extensive pretrial motion practice in many complex cases.

I have always been and pride myself on being a zealous advocate for my client. I work hard

and will continue to do so if I were appointed to the Supreme Court. I've always followed some advice given to me my first mentor in the practice of the law (Attorney Charles Gearhiser), who told me that to be the best and most successful trial lawyer, you could not rely upon just have natural talent and good instincts as a trial lawyer. You had to outwork your opponent and put in whatever time and efforts it took to be completely prepared to present your clients case and obtain the best outcome available. That is still the case and that is still how I practice law. I would do the same if I were elevated to the bench. I would scrutinize the technical record and trial transcripts of all cases that came before me for decision, and would render my opinion based upon an exhaustive review of the underlying evidence and in due consideration of the applicable law.

I've also had extensive appellate experience and have approximately 30 reported opinions, including several from the Tennessee Supreme Court. I have had several opinions that helped to expand, define and shape the law in certain areas. Over the years, I've tried and handled cases in all State courts of record and inferior courts, including Circuit, Chancery, Juvenile, General Sessions, the Court of Appeals and the Tennessee Supreme Court. I've tried many cases in Federal District Court, including civil and criminal matters, handled a number of appeals to the 6th Circuit Court of Appeals, and I'm admitted to practice before the Supreme Court of the United States. I have handled and tried big cases and little cases, and believe strongly that every client, no matter what their case involves, deserves my best efforts on their behalf to achieve the best result possible and or maximize their recovery if it is a plaintiff's case.

Given the wide diversity of cases I've personally handled, I know that I can relate to and understand any type of case that would come before me as a Jurist. I have represented the poor, the wealthy and every type of client who has been involved in our legal system in the last 42 years. I treat all litigants, clients, opposing counsel and all involved in the Judicial process with respect and conduct myself in accordance with our professional standards. I always had fought hard for my clients, but do so fairly and in compliance with our rules of procedure and the applicable laws.

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

I'm not sure what you're looking for here. If by "special note" you mean large verdicts or big wins, I've had a lot of those. My largest verdict was for 15.6 million in a legal malpractice case I tried in the Eastern District of Tennessee Federal Court. I have also won a 10.4 million verdict in the Eastern District of Tennessee Bankruptcy Court, also in a legal malpractice claim. I apologize if this is not what you are looking for.

As mentioned, I have many reported appellate opinions, several of which are often cited to in other cases.

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

I have not served as a Judge or a neutral before, other than on a few occasions when one of the Hamilton County General Sessions Court Judges and the local City Court Judge asked me to sit in for them. I have not authored any Judicial opinions thus far.

I have not served as a mediator before, but as a trial attorney I have been involved in at least 50 mediations. Also, I have not served as an arbitrator before, but I have been involved in and tried 9-10 arbitration proceedings.

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

None other than as an attorney representing my clients.

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

None, other than I have mentored a number of young lawyers.

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

This is the first time I have ever submitted an application for consideration to be a Judge.

EDUCATION

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

In undergraduate school, I attended the University of Tennessee at Knoxville 1971-1972 and then attended and graduated from the University of Tennessee at Chattanooga in 1977. I then attended and graduated from what was then known as Memphis State University School of Law from 1977-1980. (Cecil C Humphreys School of Law).

PERSONAL INFORMATION

15. State your age and date of birth.

I'm 68 years old (In extremely good health), and was born [redacted] 1953

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

My whole life.

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

The last 42 years.

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

Hamilton County

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

None

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

None

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

No

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

I had a BPR complaint filed against me 4 years ago by a client named [redacted] who claimed I would not file a lawsuit against a bank that he wanted me to file, after his house had been foreclosed upon. (His potential claim turned out to have no merit, and I will not file any lawsuit unless it does have substantial merit). I did receive a public censure, as the board hearing panel found that I had committed a technical violation because I did not get the client to sign my engagement letter with him. The hearing panel did find, as a mitigating factor, that I had well represented the client and done him a good job.

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

No

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

No

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

I had an uncontested divorce back in 1988.

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

None, other than Church and professional associations.

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

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

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

Not applicable

ACHIEVEMENTS

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

Just the Chattanooga, Tennessee and American bar associations.

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

I have been an AV rated trial attorney in Martindale- Hubbell for the last 26 consecutive years, including being so rated by the Judges. I've been listed in the Best Lawyers in America for the last 12 years, for legal malpractice cases. I've also been listed in Thomas Reuters as a Super Lawyer for Business Litigation.

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

None

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

I have not taught any seminars in the last 5 years.

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.

None

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

No

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

Two briefs are attached hereto. I have always written all my briefs myself and have never delegated that important task to an associate lawyer. If I were to be appointed to the Bench, I would write my own opinions. (Even though I'm sure I would welcome the input of a law clerk).

ESSAYS/PERSONAL STATEMENTS

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

I've been a busy and successful trial lawyer for 42 years and I think it is time for me to aspire to a higher calling. I've always held the Tennessee Supreme Court in high honor and I think it would be the ultimate culmination to a great legal career to serve on the Court for the rest of my career. (I plan to continue to practice for a long time, as I still enjoy the practice and still find it highly stimulating). I've had this great esteem for the Supreme Court going back to a relationship I had with a former Justice, Ray L. Brock Jr. I knew Judge Brock before he retired from the Supreme Court in 1987 and I invited him to join my then law firm, Patrick, Beard and Richardson and to my great delight, he did join us and practiced with us in an of counsel capacity until he died. (Judge Brock and I even tried a two week jury trial together, the reported case of Bethlehem Steel Corp. v Ernst and Whiney). He and I had many long talks about Judicial philosophies and the law, and ever since then I've thought that serving on the Tennessee Supreme Court would be the highest calling for any trial lawyer who cares about people and the law. I think that now is my time.

I know I have all the qualifications to be a good Jurist and I can still say that after 42 years, I still love the law (I learned to love the law in my first semester in law school). Serving on the Court would give me a chance to do honor to my profession and all the people who are affected by rulings and the legal precedents established by our Highest Court.

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

I have represented many people over the years and not charged them. I have also agreed to represent a number of people when I knew they did not have the financial ability to pay me or did not have the financial resources to litigate. (litigation continues to be increasingly expensive for the average citizen). I have done so because I've always believed that everyone is entitled to competent representation and to be able to have his or her day in court, and I know that if someone does not have a good lawyer (Or at least one that is going to fight for them), they are never going to get justice. I have always advocated for the underdogs in our world, and have taken on many large interests, without backing down for my otherwise disadvantaged or disenfranchised clients.

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 submitting my application for consideration to appointment to the Tennessee Supreme Court. I don't know how or if my appointment would impact the Court, but I vow that I would be relentless in continuing the rich and high traditions of the court.

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

I have not been active politically in the past. (I've been asked by a Hamilton county political party twice in the past to run for Congress, but have stayed out of politics). As a Judge, I think it is important to remain non-partisan. If I were to be appointed to the Tennessee Supreme Court, I would continue to be non-partisan and not let myself be swayed or influenced by the political winds that may be blowing or popular at any given time. I would want to speak to youth groups and others to spread the work about our amazing Judicial system in America.

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

The primary thing I will say here is that I believe I possess all the personal criteria that a good Judge needs. I've been successful as an advocate for my clients and have made them a lot of money and got many of them out of trouble or difficult situations. I have the temperament necessary to listen to both sides, consider applicable precedents, rule accordingly and in so doing, being fair to all. I also possess what I consider to be the proper mind set required of a good Judge, including the intelligence, analytical and deductive reasoning that I think effective Judges have.

Many of my life experiences for the past 45 years (3 years in law school and 42 years in a very active practice), aside from my vast experiences arising from my wife and our three children,

have evolved from my law practice and my representation of hundreds of people and helping them through their problems and difficult times, whether it was for injury cases, domestic relation cases or because they were in trouble with the law or with others. I've always had a knack for going to the heart of the problem and focusing on what is important to resolve or address a situation, especially in lawsuits. I would do the same in passing judgment on all cases that come before me. I believe in doing the right thing and getting the right result. I have always been devoted to my family and to my law practice and have always done my best to see that their needs are taken care of.

It is important to me (and everyone), that our law be reliable, predictable and consistently applied to all litigants who come through our courts. To that end, I would ensure that our body of common law that has developed for generations will be applied fairly to all. I would never be an activist Judge, and would strive to assure that all new laws are in accordance with our constitutional principles and do no violence to the personal and civil rights of our citizens. I do believe strongly in civil liberties and would always uphold the rule of law.

One of the areas of law I have had great involvement in has been in the area of legal malpractice cases. I have brought a number of lawsuits against attorneys who have done their clients wrong, thereby causing them damages. If an attorney commits negligence, (or worse), he should be held accountable for his or her misconduct. I mention this because I think one of the many important functions fulfilled by the Supreme Court is its role as the final decision maker for punishments that are meted out or may be appropriate for attorneys who have been determined by the Board of Professional Responsibility to have committed an ethical infraction. I believe it is most important for the Supreme Court to continue to uphold the integrity of our Judicial system in reviewing appropriate sanctions to attorneys who have by their actions breached the fiduciary duties they owe to their clients, and in so doing, subject our noble profession to disrepute. My experience with litigating standards of care applicable to attorneys well positions me to help perform this important function for a Tennessee Supreme Court Justice. I have also represented attorneys who have been cited by the Board for ethical misconduct.

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)***

I will always strive to uphold and defend our existing common law and precedents, even if they are unpopular with the general public, and even if I personally disagree with the particular law at issue. It would not be my place as a Judge to legislate changes in the law. That is for the legislative branch of our government. I will not be influenced by any special interests or by any particular political cycle that may be presently popular or prevalent.

I believe strongly in our Constitutional form of government and understand how the three branches (executive, legislative and Judicial), interact and serve as checks and balances upon each other. If the legislature were to enact new legislation that ran afoul of our constitution or infringed upon civil rights, as guaranteed by the bill of rights, I would not hesitate to analyze such legislation to determine its' compliance with our common law and constitution, but would proceed in a careful and Judicious manner before I would vote to invalidate such legislation.

I would offer one example of a case I took where I did not agree with the existing law, yet zealously represented my client. I was asked by a Hamilton county criminal court Judge to take an appointment to represent a defendant who had been convicted of capital murder and who was sitting on death row. It was an unpopular case that had been highly reported locally, but I knew the defendant had a right to have post-conviction counsel appointed to him. (I was qualified to handle a capital case as I had tried one before and the Judge who asked me to take the case knew that). Even though I did not want to take this case, I did so because the law called for some qualified attorney to do so and I had to do my duty. I was actually successful in getting the client a new trial based upon ineffective assistance of counsel. (Case was State of Tennessee v Michael Lee McCormick). After getting him a new trial, I was asked to continue on and try the retrial of a 16 year old murder case. Again, I did so, because the law demanded that defendant McCormick have competent representation for the retrial of a case where he had been on death row for 16 years. Upon the retrial, we got a not guilty verdict, which was devastating to the victims' family. I did my job, as called for by our laws, because the law gave the defendant rights that many disagreed with.

I have always and will continue to uphold the substance of our laws. One of the most important functions of the Judiciary is to ensure that laws that our constitutional valid be fairly and even handedly enforced, even if they may be unpopular to the general population.

REFERENCES

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

A. Retired Judge William A. Barker
[redacted]
Chattanooga, TN 37450
[redacted]

B. Judge Barry Steelman
[redacted]
Chattanooga, TN 37402
[redacted]

C. Former Senator Bob Corker
[redacted]
Chattanooga, TN 37405
[redacted]

D. Sam Elliott
Gearhiser, Peters, Elliott and Cannon
[redacted]
Chattanooga, TN 37402
[redacted]

E. James Kennedy III
[redacted]
Alexander City, AL 35010
[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] Supreme Court of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended application with the Administrative Office of the Courts for distribution to the Council members.

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

Dated: 12/6, 2022.

Signature

When completed, return this application to John Jefferson at the Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

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

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

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

WAIVER OF CONFIDENTIALITY

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

Michael Eugene Richardson

Type or Print Name

Signature

12/16/22

Date

BPR No. 7191

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

TWO WRITING SAMPLES

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE

KENCO GROUPO INC., JANE KENNEDY GREENE and SHELIA CRANE,	)	
Petitioners,	)	Case No. 1:20-CV-00129
v.	)	JUDGE CORKER
	)	MAGISTRATE STEGAR
JAMES KENNEDY III	)	
Respondent,	)	

MOTION TO CONFIRM ARBITRATON AWARD

James Kennedy, III, by and through counsel, hereby moves the court to confirm the Arbitration Award which has been challenged in this cause by the Petitioners and make the Arbitration Award a judgment of this court. In support of this motion, as will be discussed here and after, the Arbitration Award is valid in all respects and under applicable law, including both the Federal Arbitration Act and the Tennessee Arbitration Act, the Arbitration Award must be confirmed.

The parties have previously agreed, by contract, to submit any claims they had against each other pertaining to alleged disparagement-defamation of each other to binding arbitration. Pursuant to the parties' contract, the allegations of defamation made by each side were submitted to an arbitrator, who was agreed to by the parties, and the arbitrator properly addressed each and every claim made by either side and the arbitrator's final award should be confirmed, pursuant to 9 U.S.C. § 9 or T.C.A. §29-5-312.

FACTUAL AND PROCEDUAL BACKGROUND

Petitioners Kenco Group Inc., Jane Kennedy Greene and Shelia Crane have filed a petition and amended petition seeking to vacate an arbitration award previously entered against them after an American Arbitration proceeding was had between the parties. Petitioner Jane Kennedy Greene and Respondent James Kennedy III are siblings and are two of four living children of James Kennedy Jr., (who is now deceased). Mr. Kennedy Jr. founded a trucking and logistics business headquartered in Chattanooga, Tennessee named Kenco Group Inc., (Kenco) and his four children all became stockholders of Kenco. Petitioner Shelia Crane worked for many years for Kenco.

Mr. Kennedy III became the Chief Executive Officer of Kenco, but he was removed from the company in 2010. He then filed a lawsuit in 2013 against Jane Kennedy Greene, Shelia Crane and other individuals whom he blamed for his wrongful ouster from Kenco. That lawsuit was filed in the Hamilton County Circuit Court and the parties reached a settlement of that lawsuit and entered into a settlement agreement effective May 7, 2015. (A copy of the parties' settlement agreement is filed herewith and attached as Exhibit 1 to the Declaration of Michael Richardson). In the parties May, 2015 settlement agreement, there was a mutual non disparagement provision that stated that neither side would disparage the other for three (3) years and the parties contract provided that if either side claimed that they had been disparaged, then the parties agreed to submit their dispute to binding arbitration and agreed that a sole arbitrator would decide if one side or the other had committed disparagement. This is Paragraph 7 of the parties' settlement agreement. The parties' settlement agreement also

provided that Kenco would hold back $250,000 of the amount it had agreed to pay James Kennedy III in the settlement and this amount would be held back for three years until the expiration of the time frame within which the parties agreed to not disparage each other.

Three years after execution of the parties settlement agreement, Kennedy III called upon Kenco to release the $250,000 held back, but rather than pay Kennedy III, Kenco, Jane Kennedy Greene and Shelia Crane filed a demand for arbitration, claiming that they all have been disparaged or defamed by Kennedy III, in violation of the non-disparagement provisions of the parties settlement agreement. Kennedy III filed an answer and counterclaim in the arbitration proceeding denying that he had defamed any of the Petitioners and claiming that Jane Kennedy Greene and Shelia Crane had defamed him. Pursuant to the American Arbitration Association's Commercial Rules, the parties agreed upon an Arbitrator and Erika Birg was designated as the sole arbitrator to handle the matters the parties were submitting to arbitration. The only issues to be arbitrated were the claims of defamation-disparagement asserted by both sides. Prior to the arbitration trial, the parties engaged in extensive discovery and the arbitrator put down three separate scheduling orders, copies of which are filed herewith as Exhibits 2, 3, and 4 to the Declaration of Richardson. Among other things, the Petitioners specifically requested the Arbitrator enter a scheduling order which stipulated that the Tennessee Arbitration Act would apply to and govern the arbitration proceeding. (See Exhibit 3 to Richardson Declaration) The Arbitration trial was continued a couple of times at the request of the Petitioners, but eventually went to trial for five (5) days at the end of January, 2020. At the Arbitration trial, both sides were allowed to submit all of their evidence and witnesses and the parties were given unlimited closing argument. At the conclusion of the

case, the Arbitrator posed several legal issues that she desired the parties to submit post-trial briefs upon and both sides did submit post-trial briefs to the Arbitrator.

Prior to the trial, at the request of respondent's counsel, the Arbitrator required both sides to submit a written list of issues to be tried and those issues were actually read into the record on January 27, 2020 prior to opening statements. (This is set forth in the April 27, 2020 Arbitration Award, which is filed again with this court as Exhibit 5 to the Declaration of Richardson).

The Arbitrator then rendered her Partial Final Award on April 27, 2020 and the Arbitrator found that James Kennedy III had not disparaged or defamed Kenco, Jane Kennedy Greene or Shelia Crane and she found in his favor on all of their claims. The Arbitrator did find that Jane Kennedy Greene had made two defamatory statements about her brother, James Kennedy III. Based upon her findings of fact and conclusions of law, the Arbitrator ordered Kenco to release the $250,000 held-back from the original May, 2015 settlement agreement and based upon her determination that Jane Kennedy Greene had defamed James Kennedy III, she awarded Kennedy III liquidated damages of $250,000. (An amount the parties' contract specifies) Also, as a prevailing party, James Kennedy III was entitled to recover his attorney fees and expenses and pursuant to the arbitration award, the parties entered into an agreement that requires Kenco to pay an additional $250,000 to James Kennedy III for his legal fees and expenses. This stipulation of the parties is Exhibit 6 to the Richardson Declaration. The total Arbitration Award to Kennedy III is $750,000, plus interest that has accrued.

Even though the Petitioners had agreed by contract to submit their defamation claims to binding arbitration, the Petitioners are disgruntled losers and dissatisfied with the arbitration

award and rather than pay the arbitration award, they filed the instant petition in this court seeking to vacate the arbitration award. In their original petition, the Petitioners alleged that the Arbitrator exceeded her authority, that the Arbitrator exhibited manifest disregard for the law, that the Arbitrator displayed evident partiality toward James Kennedy III and they also allege that the Arbitrator failed to issue a reasoned award. The Petitioners later moved to amend their petition and have also alleged that the Arbitration Award was procured by fraud, which related to the Petitioner's claim that a caregiver for Mr. James Kennedy Jr. had deleted some conversation she had recorded and they allege that James Kennedy III directed the deletion of those recordings.

As demonstrated by the arbitration award and the arbitration record, none of the claims asserted by the Petitioners have any merit and the arbitration award must be confirmed. With respect to the Petitioner's last claim that the arbitration award was procured by fraud, Gail Caylor, the caregiver for James Kennedy Jr. has been deposed in this cause and she emphatically denied that anyone, including James Kennedy III, had ever directed or asked her to delete any recordings. Mrs. Caylor had also been deposed by the Petitioners in the arbitration proceeding and her testimony was presented to and considered by the Arbitrator and that specious claim must also be dismissed and the arbitration award confirmed.

STANDARD OF REVIEW

The Petitioners have alleged in their petition that the Federal Arbitration Act applies. This is an odd assertion given the fact that the Petitioners previously asked for the Arbitrator to put down an order which specifically stated that the Tennessee Arbitration Act applies. (See Exhibit 3 to Richardson Declaration) The only reason counsel can think that the Petitioners

would try to ignore the Arbitrators order, which they requested, is that the Petitioner's claim of Manifest Disregard for the law does not appear to a legally cognizable claim under the Tennessee Arbitration Act. However, the provisions of the Federal Arbitration Act and the Tennessee Arbitration Act are substantially similar and this court may refer to both Acts in determining to confirm the Arbitration Award. The standards of judicial review of an arbitration decision is very limited. The late Judge Reeves well described the standards for judicial review of an arbitration act in the Case of Nuclear Fuel Servs. V. United Steel, Paper & Forestry Rubber, Mfg. Energy, Allied-Indus. & Serv. Workers Int'l Union, 2018 U.S. Dist. LEXIS 69244, wherein she stated the following:

"Judicial review of an **arbitration** decision is "very limited" *Tenn. Valley Auth.* v. *Tenn. Valley Trades & Labor Council*, 184 F.3d, 510, 514-15 (6th Cir, 1999) (Review of an **arbitration award** is "one of the narrowest standards of judicial review in all of American jurisprudence"). Courts are not authorized to review an arbitrator's decision on the merits despite allegations that the decision rests on factral errors or misinterprets the parties' agreement. *Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 509, 121 S. Ct. 1724, 149 L. Ed. 2d 740 (2001).* If an arbitrator "is even arguably construing or applying the contract and acting within the scope of his authority, the fact that a court is convinced he committed serious error does not suffice to overturn his decision." Id

This approach reflects "a decided preference for private settlement of labor disputes without the intervention of government." *United Paperworkers Int'l Union v. Misco. Inc. 484 I/S/ 29, 37, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987).* Because the parties contracted to have disputes settled by an arbitrator chosen by them rather than by a Judge, "it is the arbitrator's

view of the facts and the meaning of the contract that they have agreed to accept." *Id. at 37–38*. Accordingly, it is only when the arbitrator strays from interpretation and application of the agreement and **{*8}** effectively dispenses "his own brand of industrial justice" that his decision may be vacated. Id.

The court's scope of review is limited to three questions: (1) did the arbitrator act outside his authority by resolving a dispute not committed to arbitration: (2) did the arbitrator commit fraud, have a conflict of interest or otherwise act dishonestly in issuing the **award**; and (3) in resolving any legal or factual disputes in the case, was the arbitrator "arguably construing or apply the contract? *Mich. Family Resources. Inc. v. SEIU Local 517M, 475 F. 3d 746, 753 (6th Cir. 2007).* So long as the arbitrator does not offend any of these requirement, the request for judicial intervention should be resisted even if the arbitrator made "serious, improvident or silly errors in resolving the merits of the dispute." Id.

A review of the arbitration award clearly demonstrates that the arbitrator did exactly what she was asked to do and demonstrates the arbitration award must be confirmed.

THE ARBITRATION AWARD

A review of the arbitration award shows that the arbitrator did not exceed her authority, did follow and apply applicable law, properly addressed, analyzed and discussed every issued submitted to her, and she did not demonstrate any bias or partiality, but rather, treated both sides fairly and evenly.

On page 2 of the arbitration award, the arbitrator confirms that she required each party to submit a written list of the issues to be tried prior to the hearing and throughout the course of the arbitration award, the arbitrator specifically addressed each and every defamation claim

asserted by either party. While both sides may disagree with some of her conclusions, the arbitrator did specifically address, discuss, analyze and rule upon every defamation claim, and this is what the parties contracted to have the arbitrator do.

On Pages 4 and 5 of the arbitration award, the arbitrator sets forth the applicable substantive law of Tennessee that pertains to defamation and throughout her arbitration award, the arbitrator referred to and applied applicable Tennessee Law, which is what the parties' contract required her to do.

Kenco asserted that James Kennedy III had made five (5) defamatory statements about Kenco and the arbitrator specifically addressed each of Kenco's claims and found that none of that statements Kenco attributed to James Kennedy III were defamatory. (Pages 5 thru 11 of the Arbitration Award). In some of her discussion, the arbitrator specifically found that Ms. Greene's testimony that Kenco's reputation had been hurt was "both speculative and unpersuasive." Page 9 of the Arbitration Award, footnote 6. There are other instances in the arbitration award where the arbitrator found Ms. Greene's testimony to not be credible, and an arbitrator's assessment of the lack of credibility of a witness is not a matter that this court can second guess. Evidentiary decisions of arbitrators "should be reviewed with unusual deterrence." Cook v. American S.S. Co., 53 F3d, 733 (6th Cir. 1995).

Also, included in the Arbitrator's discussion of her denial of Kenco's defamation claims was the arbitrator's conclusion that alleged republication of a defamatory statement was not applicable simply because none of the statements Kenco claimed to have been made by James Kennedy III were defamatory, therefore, republication was not even an issue.

The arbitrator also addressed accusations made by the Petitioner at the hearing about alleged spoliation of evidence and the arbitrator specifically found that any such accusations about alleged spoliation were not properly raised by the Petitioner and she ruled against them. See Page 8, footnote 5 where the arbitrator stated as follows: "There were accusations at the hearing about alleged spoliation and refusal to produce documents. The time for these matters to be considered were **before** the hearing. Indeed, the procedural orders contained deadlines for raising issues and requesting adverse inferences and the like well before the hearing. Reserving discovery disputes for resolution during an arbitration hearing wastes time and money. Because claimants did not properly raise those issues during discovery or in the amended issues to be tried, I decline to find in favor of claimant on those grounds." Of course, there was no spoliation of evidence.

The Petitioners are unhappy with the arbitrators ruling in this regard, but James Kennedy III would point out that the arbitrator also ruled against him at the arbitration trial on evidentiary issues and pre-hearing discovery issues. Specifically, Kennedy III's counsel objected on several occasions to the Petitioner introducing documents between Kennedy III and his counsel which were attorney/client privileged. In the course of discovery, Kennedy III had his iPad imaged and his IT vendor produced in excess of 25,000 pages of documents to the other side, and several attorney/client privileged communications were inadvertently produced. At the arbitration trial, counsel for James Kennedy III objected to the Petitioners use of attorney/client privileged documents and asked that those documents be clawed back and not be admitted into evidence. Consistent with her ruling against the Petitioners, the arbitrator also denied Kennedy III's objections to the use of attorney/ client privileged information

because a motion had not been filed prior to trial. (See Page 18, footnote 13 of the Arbitration Award).

Both sides to the arbitration were displeased with rulings made by the Arbitrator regarding discovery matters, but this is to no avail for either side. "Discovery disputes or misunderstandings on discovery matters in arbitration proceedings are not grounds to vacate an arbitration award." Caldwell v. Wachovin Sec. LLC, 2007 U.S. Dist. LEXIS 76639.

After the arbitrator concluded that Kenco had not been defamed in any respect, the arbitrator also discussed that Kenco had not brought its claims within the three year hold-back period, but that conclusion was stated to just be in the alternative and was not dispositive to her conclusions that Kenco had not been defamed. (Page 10 of the Arbitration Award)

The arbitrator then specifically addressed, discussed, analyzed and ruled upon the 13 claims made by Ms. Greene of defamation. (Pages 11 - 26 of the Arbitration Award). The arbitrator found against Ms. Greene on all of her claims and while Ms. Green may be a disgruntled loser and unhappy with the arbitrator's conclusion, it is the arbitrator's decision that Ms. Greene contracted for and she is bound by her agreement to submit her claims to binding arbitration. It is clear that the arbitrator did not find much of Ms. Greene's testimony to be credible. For example, in response to Ms. Greene's arguments that her father's attitude and treatment of her changed because of statements she claimed her brother made to their father, the arbitrator concluded that she was convinced that the deterioration of Ms. Greene's relationship with her father was not caused by anything her brother may have said. (See Pages 12 – 13 of the Arbitration Award). The arbitrator also commented that other testimony of Ms. Greene was not credible. In analyzing some of the claims Mr. Kennedy III made against his

sister for defamation, the arbitrator specifically found Ms. Greene's testimony as to why she went to visit her father when she disparaged her brother to not be credible. (See Page 26 of the Arbitration Award).

Likewise, the arbitrator specifically reviewed, analyzed, discussed and ruled upon all of the defamation claims which Shelia Crane asserted against Mr. Kennedy III. Crane had 11 claims and the arbitrator found against her on each of them. (See Pages 19 -26 of the Arbitration Award). Among her significant findings regarding Shelia Crane's claims, the arbitrator specifically noted the Delaware Trust in which Ms. Crane was given control over the disbursement of 11 million dollars of Mr. Kennedy Jr's money as being a problem. The arbitrator also stated that Ms. Crane had "apparently falsified meeting minutes of a Kenco shareholders meeting that never occurred." (See Page 20 of the Arbitration Award)

One of Crane's defamatory claims against James Kennedy III was that it had been stated that Crane had a conflict of interest and on that issue, the arbitrator discussed that claim and concluded that it was not a false statement made by Kennedy III or republished by him. (See Page 21 of the Arbitration Award)

As previously stated, the Petitioners disagree with the Arbitrators findings and conclusions, but it is what they contracted for and both sides are bound by the Arbitrator's view of the facts.

After denying all of the Petitioners defamation claims, the arbitrator then discussed Mr. Kennedy's claims of defamation against Greene and Crane and she found that Greene had made two defamatory statements about her brother. Greene had stated that he was "crooked" and "had devious plans," and both of these statements were found to be

defamatory. There were a number of other statements made by Greene that Kennedy III thinks were defamatory, but the arbitrator found against him on those other issues and he is bound by her conclusions.

The Petitioners had raised an affirmative defense to Kennedy III's claims of defamation and argued that Greene's defamatory statements should be protected under the qualified privilege of being a fiduciary. This issue, which was raised by the Petitioners, was addressed and discussed by the arbitrator on Pages 31 and Pages 32 of the Arbitration Award. After stating applicable Tennessee law, the arbitrator found as follows: " (I conclude that even if Ms. Greene's discussion was undertaken in the context of her having a moral or social obligation, I do not conclude that she was there as a fiduciary), I do not find that neither statement was made in good faith. Moreover, it is clear that the statements that Mr. Kennedy III was "crooked" and had "devious plans" were made with actual and express malice in the hopes of turning her father against Mr. Kennedy III. Her other statements that Mr. Kennedy III "should be shot" and her admitting that she called him "evil' demonstrate her malice toward him. Thus, her statements are not protected by qualified privilege because they are overcome by her malice. The qualified privilege assertion is denied."

While the Petitioners may not like the arbitrator's conclusion, the arbitrator properly applied Tennessee Law and reached her conclusions based upon the evidence and finding that there was not qualified privilege available to Ms. Greene to shield her from her defamatory statements. The Arbitrator's conclusions about Ms. Greene's malice and bad faith are not a basis upon which an arbitration award can be vacated.

The last issue addressed and disposed of by the arbitrator was a claim by the Petitioners that Kennedy III's claims should not be allowed because they alleged he had breached the May, 2015 settlement agreement first. This is discussed on Page 32 of the Arbitration Award and the arbitrator points out that Greene raised this issue in her post hearing brief. The arbitrator disagreed with the Petitioner's construction and interpretation of the parties' settlement agreement and concluded that Ms. Greene had not met her burden of proof of showing a prior material breach of the settlement agreement and denied that affirmative defense.

All of the arbitrator's findings and fact and conclusions of law are supported by the evidence and are not subject to judicial review, because the parties contracted for the arbitrator's decision.

THE PETITIONER'S CLAIM

Kennedy III will now briefly address the specific claims asserted by the Petitioners.

a. WHETHER THE ARBITRATOR EXCEEDED HER AUTHORITY

A review of the parties settlement agreement and arbitration award clearly demonstrate that the arbitrator did exactly what she was asked by the parties to do. She addressed each and every claim of defamation asserted by either side and ruled on each and every defamation claim. The only other issues the arbitrator ruled upon were those presented to her by the Petitioner, having to do with whether qualified immunity applied and who first breached the parties' settlement agreement.

b. DID THE ARBITRATOR DISPLAY EVIDENT PARTIALITY

The arbitrator treated both sides fairly and evenly and both sides were probably dissatisfied with evidentiary rulings she made. As previously, discussed the arbitrator overruled objections made by Kennedy III which allowed the other side to use attorney/client privileged information, because an appropriate motion to exclude or a motion in limine that had not been filed before the hearing. Same goes for the Petitioners argument regarding spoliation of evidence. Of course, there was no spoliation of evidence as the Petitioners and their counsel are well aware. The six recordings of James Kennedy Jr. talking to attorney Wayne Peters were not produced because the arbitrator indicated that she could not and did not have the authority to order a nonparty to the arbitration to violate attorney/client privilege. The Petitioners admit in their amended petition that those six recordings were later produced in the separate State Court lawsuit which Jane Kennedy Greene has filed, after the death of their father.

In addition, the alleged spoliation of evidence was specifically discussed and addressed by counsel at the arbitration trial for the Arbitrator's consideration. (See Page 1293 of the Arbitration Trial Transcript which is attached as Exhibit 7 to the Richardson Declaration). This was stated at trial, "*There has been all sorts of theatrical argument about spoliation of evidence which is ridiculous and offensive. We had a hearing with you in February of last year when that issue came up about those tape recordings. We had voluntarily produced tape recordings, and all we did was we had a master flash drive and when we burned a copy to produce to counsel, we did not copy tape recorded conversations that included Wayne Peters because Mr. Kennedy Jr. raised the attorney/client privilege. We filed a privilege log. There is no evidence that has*

been withheld. Ira Starr - We did not produce that because it is not relevant. And in the last year, counsel has never followed up and asked any motion to compel or require us to produce that." There was no spoliation of evidence.

Both sides were dissatisfied with some of the arbitrator's evidentiary rulings, as previously discussed. However, that is not a basis to attack or try to vacate an arbitrator's award. It is well established in the Sixth Circuit that "Arbitrators are not bound by Formal Rules of Procedure and Evidence, and the standard for Judicial Review of arbitration proceedings is merely whether a party to arbitration has been denied a fundamentally fair hearing." Sound Inpatient Physicians Inc. v. Carr, 2020 U.S. Dist. LEXIS 151071.

The Petitioner's argument that the arbitrator demonstrated evident partiality is frivolous on its face and must be dismissed. "A party asserting evident partiality must establish specific facts that indicate improper motives on the part of the arbitrator." Commonwealth Coatings Corp. v. Continental Gas Co., 393 US 145 at 150. The alleged partiality must be direct, definite, and capable of demonstration, the party asserting must establish specific facts that indicate improper motives on the part of the arbitrator. Dawahare v. Spencer, 210 F. 3d 666, 669 (6th Cir. 2000). The Petitioners have failed to do so here. The Arbitrator treated both sides the same.

c. THE ARBITRATOR DID NOT EXHIBIT MANIFEST DISREGARD OF THE LAW

As previously mentioned, the Tennessee Arbitration Act does not appear to recognize this as a claim, but the movant will address the Petitioner's argument as it is completely devoid of any merit.

To prove manifest disregard of the law. The Petitioners would have to show that "the applicable legal principle was clearly defined and that the arbitrator refused to heed that legal principle. Merrill Lynch Pierce, Fennel & Smith v. Jarus, 70 F. 3d 418 (6th Cir. 1995). An arbitrator's "mere error in interpretation or application of the law is insufficient." Id. at 421 To be in "manifest disregard of the law" the arbitrators "decision must fly in the face of clearly established legal precedent." Id.

There is no conceivable such showing here. The Petitioners argue in their amended petition their skewed and flawed interpretation of some of the testimony introduced, but they failed to even refer or attempt to refer to any well-established legal principles which the arbitrator ignored. The arbitrator referred to the applicable Tennessee Law on defamation and applied it.

d. DID THE ARBITRATOR RENDER A REASONED AWARD

For an arbitrator's award to be reasoned, at a bare minimum, it should include a basic statement addressing why each claim, counterclaim, theory or defense was accepted or rejected by the arbitrator. Galloway Constr. LLC v. Utilipath, LLC, 2014 US Dist. LEXIS 111755.

The arbitrator's award does specifically address every claim of defamation and each affirmative defense asserted by the Petitioners and the arbitrator's award discusses each defamation claim and reaches a conclusion on each claim and therefore is a reasoned award.

e. THE ARBITRATION AWARD WAS NOT PROCURED BY FRAUD

The amended petition filed in this cause asserts that a caregiver for James Kennedy Jr., Gail Caylor, recorded a number of conversation that Mr. Kennedy Jr. had with others. The Petitioners did not object at the Arbitration trial to any recorded conversations and, in fact one of those recordings was introduced into evidence and played by the Petitioners at the arbitration trial and that was a conversation that Jane Kennedy Greene had with her father, at which time Greene made defamatory statements about her brother, for which the arbitrator has found her liable. The Petitioners have asserted that they have recently discovered that the caregiver, Caylor, deleted eleven recordings from her cell phone and allege that she did so at the direction of James Kennedy III and argued that Kennedy III thereby procured by fraud the arbitration award.

This claim is ludicrous. Gail Caylor has recently been deposed and specifically denied that anyone, including James Kennedy III, ever asked or directed her to delete any recordings from her cell phone. Excerpts from Caylor's deposition is filed herewith and is Exhibit 8 to the Declaration of Richardson submitted herewith. Caylor completely debunked the Petitioner's frivolous argument that James Kennedy III was involved in her deletions of any recordings. She testified that no one, including specifically James Kennedy III, ever asked, requested or directed her to delete or destroy any recordings of communication with James Kennedy Jr. (See Page 125 of Caylor's deposition)

For an arbitration award to be vacated on the basis that it was procured by fraud, the movant must show (1) clear and convincing evidence of fraud, (2) that the fraud materially relates to an issue involved in the arbitration, and (3) that the diligence would not have

prompted the discovery of the fraud during or prior to the arbitration. Int' Bd of Teamsters, v UPS, 335 F3d, 497, (6th Cir. 2003). A finding of fraud requires proof of intentional misconduct or bad faith. Bauer v. Carty, 2007 R.S. App. LEXIS 21575.

There is absolutely no plausible evidence that James Kennedy III did anything to procure the arbitration award by fraud. To the contrary, as discussed in detail, the arbitrators' award speaks for itself and shows that the arbitrator reached all of her findings and conclusions based upon the evidence submitted to her.

CONCLUSION

The parties by contract agreed to submit their defamation and disparagement claims to binding arbitration. This was done, the arbitrator conducted a fair hearing and ruled on every claim made by either side. The Petitioners claims are an affront to both the Federal and Tennessee Arbitration Acts. A conclusion reached by Judge Bernice Donald in the case of Crye-Leike v. Thomas, 196 F. Supp. 2d, 680 2002, is completely applicable here where it was stated, "In sum, Plaintiffs have not presented sufficient grounds for vacatur. It is apparent that Plaintiffs' motion is nothing more than an attempt to convince the Court to revisit the arbitration award because they didn't like the outcome. That task does not fit within the limited role this Court may play when called upon to vacate or modify an arbitration award. See id.: see also *Gingiss Interantional Inc. v. Bormet*, 58 F.3d 328, 333 (7th Cir. 1995 {**21} ("Thinly veiled attempt to obtain appellate review of an arbitrator's decision" are not permitted under the FAA.)"

The arbitration award should be confirmed in full and made a judgment of this court. In addition, the Petitioners should be ordered to pay the additional fees incurred by James Kennedy III in this matter. This court has the authority to award Mr. Kennedy the additional fees he has incurred in defending this petition and enforcing the arbitration award, pursuant to the settlement agreement which provides the prevailing party shall receive their legal fees and expenses and based upon T.C.A § 29-5-315, and Lasco Inc. v. *Inman Const. Corp.*, 467 SW 3d, 467 (Tenn. T. App. 2015).

Respectfully submitted,

THE RICHARDSON LAW FIRM

By: /s/ Michael E. Richardson

Michael E. Richardson, TN BPR# 7191
633 Chestnut Street, Suite 1580
Chattanooga, TN 37450
Tele: (423) 602-9623
Fax: (423) 498-2824
E-mail: mer@mrichardsonlaw.com
Counsel for James Kennedy III

IN THE CHANCERY COURT FOR HAMILTON COUNTY, TENNESSEE

Hayward Giraud, Jr., Individually, as Beneficiary of the Anne H. Nixon Living Trust and as Beneficiary of the Hayward Giraud, Jr., Trust and Anne Giraud, Individually, as Beneficiary of the Anne H. Nixon Living Trust and as Co-Trustee of the Hayward Giraud, Jr. Trust,	)	No. 17-0689 Part II
Plaintiffs,	)	
v.	)	
Carl Henderson, Individually, as Trustee of the Anne H. Nixon Living Trust, and as Co-Trustee of the Hayward Giraud Jr. Trust,	)	
Defendants,	)	
The Estate of Anne H. Nixon, by and through its Administrator Ad Litem, Anne Giraud,	)	
Plaintiff,	)	No. 19-0841 Part II
v.	)	
Carl Henderson and Henderson, Hutcherson & McCullough PLLC,	)	
Defendants,	)	

PLAINTIFF'S BRIEF IN RESPONSE TO DEFENDANTS MOTION FOR SUMMARY JUDGMENT

The Plaintiff Estate of Anne H. Nixon hereby responds to the Defendants Motion for Summary Judgment filed in Case No. 19-0841 and would show that the Plaintiff's claims are not barred by any applicable Statute of Limitations and the Defendants Motion should be denied. Anne Giraud, the daughter of Anne H. Nixon deceased, who has been appointed the

Administrator Ad Litem for her mother's estate, only obtained financial information that led to the discovery of the causes of action asserted in this lawsuit in February of 2019. Therefore, the causes of action did not accrue until February of 2019 and none of the Plaintiff's claims are time barred. The equitable doctrines of laches and waiver also do not apply as the Plaintiffs brought this action within a year of discovering the financial documents which Defendant Carl Henderson had for many years intentionally concealed and withheld from the Plaintiff. The Doctrine of Fraudulent concealment has also tolled any earlier accrual of the causes of action based upon the fraudulent concealment of Defendant Carl Henderson.

The Defendant's Motion for Summary Judgment does not challenge the factual allegations or legal sufficiency of the causes of action set forth in the Plaintiff's Complaint. The only arguments set forth by the Defendant in its Motion for Summary Judgment is that the Plaintiff's claims are barred by the Statute of Limitations. Therefore, the factual averments and allegations set forth in the Plaintiff's Complaint should be considered as well-taken for purposes of consideration of the pending motion.

FACTUAL AND PROCEDURAL BACKGROUND

The relevant factual background is set forth in the Plaintiff's Complaint and also in various documents filed by the Defendant in support of this Motion for Summary Judgment. Anne H. Nixon passed away on November 6, 2016, at the age of 94, and was survived by her daughter Anne Giraud and by a grandson, Hayward Giraud, Jr. Anne H. Nixon was married for many years to Robert Nixon, who died in January of 1999. Robert and Anne Nixon owned and operated a business known as Nixon Enterprises. When her husband passed away in 1999, Anne Nixon was already not in good health and the complaint alleges that Carl Henderson,

whose accounting firm, Henderson, Hutcherson & Mccullough, PLLC had performed work for Robert Nixon and Nixon Enterprises, saw an opportunity to take financial advantage of an elderly widow who had assets. The complaint alleges that Carl Henderson embarked on a mission to obtain the confidences of Anne Nixon and he eventually convinced her to let him manage her money and monies she was to receive from the estate of her husband and the liquidation of Nixon Enterprises. Among other things, Carl Henderson got Anne H. Nixon to give him her Power of Attorney and Anne H. Nixon eventually established an Anne H. Nixon Living Trust, and designated Carl Henderson as the Trustee of her Trust. At all times relevant to the relationship between Anne H. Nixon and Carl Henderson, Henderson became her fiduciary and owed her and the beneficiaries of her trust, Anne Giraud and Hayward Giraud, fiduciary duties.

In 2004, Anne H. Nixon, who was in failing physical and mental health, was relocated from her home in Nashville, Tennessee to an assisted living facility in Pensacola, Florida, through the actions of Carl Henderson and Peggy Scruggs. The relocation of Mrs. Nixon to Florida was only done after Henderson got her Power of Attorney and became trustee of the Anne Nixon Living Trust, which was created in 2004. Peggy Scruggs had previously been married to Anne H. Nixon's son, Rob, who is deceased. Anne Giraud claims she was denied access to her mother for many years by Carl Henderson and Peggy Scruggs.

Anne Giraud eventually obtained information about the whereabouts of her mother and did learn that Carl Henderson was the trustee of a trust her mother apparently had established. Anne Giraud did begin to request from Carl Henderson information about her mother's health and financial affairs, as her mother became increasingly diminished, both physically and

mentally. Henderson for years steadfastly refused to provide any financial information to Anne Giraud, even though Anne Giraud and her son, Hayward Giraud, Jr., the grandson of Anne H. Nixon, had always understood that they were the beneficiaries of Anne H. Nixon Estate Planning as her only heirs.

In October, 2013, Anne Giraud requested a meeting with Carl Henderson and she and her Uncle, Leonard Nixon, did meet with Carl Henderson in October 2013. At that time, the only thing Henderson would tell Anne Giraud is that he did confirm her mother had established a trust of which she and her son, Hayward Giraud, Jr., were the beneficiaries and Carl Henderson confirmed that he was the trustee and managed all financial aspects of the trust. Henderson did confirm that there was money in the trust but refused to provide any other financial information to Anne Giraud. Henderson refused to provide any information about the financial situation of Anne Nixon, even though he held her Power of Attorney. In fact, Henderson even wrote a letter to Anne Giraud and Hayward Giraud, Jr. to tell them they had no right to receive any financial information. (See Exhibit 1 to the Declaration of Anne Giraud).

When Carl Henderson told Anne Giraud and Hayward Giraud, Jr., in October 2013 that they had no right to receive financial information, he intentionally deceived them and withheld financial information from them to which they were entitled. What Henderson did not tell the Giraud's in October 2013, was that he had requested and received a medical certificate from the physician at Azalea Trace, the nursing home where Anne H. Nixon was residing, that certified Anne H. Nixon was completely physically and mentally incapacitated and there was no chance she would ever regain mental capacity. As such, the Anne H. Nixon Revocable Trust then became irrevocable as Anne H. Nixon could not revoke it during her lifetime due to her

incapacity, and Carl Henderson thereby owed fiduciary duties to the beneficiaries of the trust, Anne Giraud and Hayward Giraud, Jr. Henderson admitted that he owed a duty to the Giraud's as of October 2013 in a discovery deposition he has given in the Trust Lawsuit, Docket No. 17-0689. Excerpts from Henderson's Deposition are filed herewith as Exhibit 1 and demonstrate that he knew he owed a duty to the Giraud's, but intentionally refused to provide them requested financial information. As will be discussed later in this brief, this was fraudulent concealment and Henderson engaged in fraudulent concealment until after the death of Anne H. Nixon in November 2016 thereby tolling the accrual of any of the causes of action set forth in the instant lawsuit.

By the early part of 2015, Anne Giraud was concerned that her mother was not receiving needed medical attention and she did file in May, 2015, a petition in the Circuit Court of Escambia County Florida (where her mother was located in a nursing home) asking that she be appointed Guardian of her mother. She did receive an Order of Temporary Guardianship, but the Temporary Guardianship was only directed to the physical and mental well-being of her mother and did not involve the financial affairs of her mother. In fact, as set forth in the Order referred to by the Defendant which was entered in the Florida proceeding, refusing to extend the emergency temporary guardianship, there was no evidence presented of any of the financial affairs of Anne H. Nixon. This was because, as set forth in the Declaration of Anne Giraud, Henderson refused to produce any financial information and continued to fraudulently conceal information from Anne Giraud about the financial affairs of her mother, Anne H. Nixon. In fact, Henderson even refused to produce a copy of the Anne H. Nixon Living Trust in the Florida proceeding.

Immediately after Anne Giraud filed to be appointed temporary guardian for her mother, Carl Henderson filed an Emergency Motion to have her Temporary Order set aside and Anne Giraud did not obtain any information about her mother's financial condition, as Henderson did not produce any financial information or documents pertaining to the financial condition of Anne Nixon. (See Exhibit 3 to Giraud Declaration)

During this timeframe, 2015, Anne Giraud did draft several letter which are referred to in the Defendant's Motion, expressing her concern about her mother's physical and mental well-being. Some of the draft letters were never sent. (See Giraud's Declaration). However, of the letters that were sent, they were not directed at financial issues pertaining to her mother, her father Robert Nixon, the family owed business of Nixon Enterprises and another trust established by her father, the Robert A. Nixon Trust. In 2015 Anne Giraud did not have financial information about upon which to reach any conclusion or determination that Carl Henderson had taken advantage of her mother, father, the family business and the Robert A. Nixon Trust. In 2015, the only financial matter of her mother's she was aware of was the 2004 trust and Henderson had led her to believe that all of her Mother's assets had gone into the 2004 trust.

Anne Nixon passed away in October, 2016. When this happened, Henderson wrote a letter to Anne Giraud and Hap Giraud, the only beneficiaries of the Anne Hixon Living Trust, and for the first time, provided them a copy of the trust. In his letter, Henderson advised the Giraud's to seek counsel as they would only have 120 days within which to challenge the4 validity of the trust. The Giraud's did obtain counsel and were finally furnished, in early 2017, some financial statements of the trust, which appeared to have only been prepared by HHM, after Mrs. Nixon's death. (They went back 12 years). The Giraud's then retained litigation

counsel and filed the first lawsuit, as it appeared Henderson had breached fiduciary duties, as at the trustee of the Anne Nixon Trust. (See Giraud Declaration)

Anne Giraud did not obtain information that led her to discover the causes of action asserted in the instant lawsuit until a document production was obtained in February 2019 in the trust lawsuit. In the trust lawsuit, Anne Giraud, through counsel, had served a third Request for Production of Documents and sought the permanent files pertaining to Anne H. Nixon, Robert A. Nixon and Nixon Enterprises and when those documents were produced, Anne Giraud discovered that Carl Henderson had taken advantage of her mother, her father, Nixon Enterprises and the Robert A. Nixon Trust, thereby breaching fiduciary duties owed to her deceased mother, Anne H. Nixon. Mrs. Giraud, based upon documents that had long been in the possession of the defendants, but withheld from her, discovered that a considerable amount of assets and money that her father, mother and Nixon Enterprises had when Carl Henderson became the fiduciary for Anne Nixon, after the death of her husband, were unaccounted for. This discovery is what led to the filing of the lawsuit.

What Anne Giraud did not know and could have not reasonably discovered before the document production in February 2019, were financial documents which she had never seen before and which Carl Henderson had always withheld. One document of particular significance was an evaluation of Nixon Enterprises, Inc. which Henderson, Hutcherson & McCullough had conducted in January 1999, shortly after the death of Robert Nixon. Anne Giraud had previously been a shareholder in Nixon Enterprises and was familiar with the company and corporate charter, but Henderson had never furnished to her a copy of this evaluation. (Exhibit 6 of the Declaration of Anne Giraud) It revealed a number of financial

matters to Anne Giraud which led to the filing of this lawsuit. Among other things, the Nixon Enterprises Evaluation, which Anne Giraud had never seen until February 2019, revealed that there were substantial assets belonging to her father, Robert Nixon, which appeared to have vanished or been unaccounted for after Mr. Nixon died and after Carl Henderson undertook to manage his widow's, Anne H. Nixon, financial affairs. The evaluation also indicated that gifts of stock in Nixon Enterprises, which gifts were not allowed by the Corporate Charters of Nixon Enterprises, had been made to others, including Peggy Scruggs, who was close to Carl Henderson. (See Giraud Declaration)

Another set of financial documents produced by Carl Henderson in February 2019 were Amended Estate Tax Return of Robert Nixon and those tax returns revealed that Henderson and his accounting firm, Henderson, Hutcherson & McCullough, PLLC., had amended the Estate Tax Returns to document gifts to people which Anne Giraud had reason to believe were not valid. (See Giraud Declaration)

The February of 2019 document production also showed that Carl Henderson had directed how funds of the Robert A. Nixon Trust were to be managed and invested, while Henderson had no right to have any control over the Robert A. Nixon Trust. Attorney William Myers from Knoxville was the trustee of Robert A. Nixon Trust and the plaintiff discovered in February 2019, that Henderson had interjected himself into that trust as if he were the trustee, which he was not. (See Exhibit 7 to Giraud Declaration) Among other things, Henderson even directed trustee Myers to not distribute income from the RAN trust to Mrs. Nixon. The plaintiffs allege that the Robert N. Nixon Trust, of which Anne Nixon was the beneficiary, lost money because of the actions of Henderson.

LEGAL ARGUMENT

The Defendant's Motion for Summary Judgment is predicated upon their argument that the Statute of Limitations has already run as to all causes of action set forth in the Plaintiff's Complaint. The Plaintiff respectively disagrees, as the causes of action set forth herein did not accrue until the Plaintiff discovered documents in February 2019 which led to the filing of this lawsuit.

There are at least three substantial and disputed material questions of fact that preclude the grant of summary judgment the defendants seek, in an effort to avoid answering for their past actions. First, when should the plaintiff have known that her mother had suffered actual financial damages or loss as a result of the defendant's actions. Second, when should the plaintiff have known that the defendants committed negligent or wrongful conduct that caused actual financial harm to her mother, father, Nixon Enterprises and the RAN Trust. Third, did the defendants engage in fraudulent concealment of the causes of action and damages complained of in the Complaint.

A Statute of Limitations begins to run when a claim accrues. (Kohl v. Dearborn & Ewing, 977 SW 2d 528, (Tenn. 1998). When a cause of action accrues is determined by the Discovery Rule in Tennessee, which provides that a cause of action accrues when a Plaintiff knows, or in the exercise of reasonable diligence, should have known that the alleged injury was caused by the Defendants negligent or wrongful conduct. (Kohl v. Dearborn & Ewing id).

A Statute of Limitations may be tolled when a Defendant engages in conduct intended to conceal an injury from the Plaintiff and this is fraudulent concealment. In order to establish fraudulent concealment, the Plaintiff has to show:

1. that the Defendant took Affirmative Action to conceal the cause of action or remained silent and failed to disclose material facts despite a duty to do so;

2. that the Plaintiff could not have discovered the cause of action despite exercising reasonable care and diligence;

3. that the Defendant had knowledge of the facts giving rise to the cause of action;

4. that the Defendant concealed material facts from the Plaintiff by withholding information or making use of some device to misled the Plaintiff, or by failing to disclose information when he or she had a duty to do so. (Shadrick v. Coker, 963 SW 2d 726, (Tenn. 1998). If there is sufficient circumstantial evidence presented to create a genuine issue of material fact with respect to whether the Defendant has engaged in fraudulent concealment, Summary Judgment must be denied. (In Re. Estate of Davis), 308 SW 3d 832, (Tenn. 2010).

In order to establish a fraudulent concealment that serves to toll a Statute of Limitations, there must be proof that the cause of action was knowingly concealed from the Plaintiff by an actor who withheld information, misled the Plaintiff, or failed to disclose despite a duty to do so, and because of this concealment, the plaintiff could not have discovered the cause of action while a exercising reasonable care and diligence. (Pero's Steak & Spaghetti House, 90 SW 3d, 614).

The Defendant argues that the Plaintiff should have discovered her causes of action in 2015, but this argument is misplaced due to the fraudulent concealment committed by

Defendant Carl Henderson. Mere ignorance and failure of the plaintiff to discover the existence of cause of action is not sufficient to toll the running of Statute of Limitations. There is an exception to this rule. Fraudulent concealment of the cause of action by the defendant tolls the Statute of Limitations. It begins to run as the time of the discovery of the fraud by the plaintiff... where a fiduciary relationship exists and there is a duty to speak, mere silence may constitute a fraudulent concealment. (Soldano v. Owens, Corning Fiberglass Corp. 696 SW 2d 887, (Tenn. 1985).

In the case at bar, Carl Henderson owed fiduciary duties to Anne Nixon by no later than October 2013,and by his own admission, owed a fiduciary duty to disclose financial information concerning Anne Nixon, who was by then totally incapacitated, to Anne H. Nixon's designated beneficiaries, Anne Giraud and Hayward Giraud, Jr. Henderson actively concealed financial information by telling the Giraud's they were not entitled to any financial information and Henderson misled them and actively concealed information from them.

With respect to when the Plaintiff should have discovered her causes of action, in general, the inquiry as to when a plaintiff knew of or should have discovered a cause of action is a question of fact not properly decided on summary judgment. (City State Bank v. Dean Witter Reynolds, Inc., 948 WE 2d 729 (Tenn. App. 1996).

While Tennessee cases have held to the contrary, there is substantial authority for the proposition that whether a plaintiff discovered, or the exercise of reasonable diligence, should have discovered an injury resulting from defendants act creates a genuine issue of fact, precluding this position by summary judgment. (City State Bank v. Dean Witter Reynolds, Inc., id., and multiple case cited therein. It has also been stated that "the question of whether due

diligence under the circumstances required any other particular form of investigation is properly a question for the trier of fact after hearing all the evidence, whether than a question of law to be determined by summary judgment. (Hathaway v. Middle Tennessee Anesthesiology, 724 SW 2d 355, (Tenn. App. 1986).

Based upon the record currently before this court, the Defendant's Summary Judgment Motion based upon their argument that the Statute of Limitations had already expired must be denied. There are substantial questions of fact as to when the plaintiff reasonably discovered that her mother had suffered actual injuries, before the creation of the 2004 trust, at the hands of the defendants. There is also a substantial question of fact as to when the plaintiff should have discovered that the defendants had been guilty of negligence or wrongful conduct that injured her mother, her father, Nixon Enterprises and the RAN Trust.

The plaintiff agrees with the defendant's assertion that in assessing what Statute of Limitations applies to what causes of action, the court must consider the gravamen of the complaint. The real thrust of the complaint brought on behalf of the estate of Anne Nixon is that the defendants asserted undue influence and obtained dominion and control over Anne Nixon after her husband, Robert Nixon, passed away on January 7, 1999 and the defendants thereafter obtained control over the assets of Robert Nixon, Anne Nixon, the family business, Nixon Enterprises and the RAN Trust. The gravamen of the complaint is that when Anne Nixon formed her Anne Nixon Living Trust in 2004, all of her assets did not go into that trust and there are substantial assets that she should have had that are unaccounted for and the complaint seeks to hold the defendants accountable for their financial mismanagement and require them to account for substantial missing funds.

The gravamen of the first lawsuit involves the management of the corpus of the 2004 trust and it was not until discovery was obtained in early 2019 in the first lawsuit that the plaintiff realized that her mother and father's estate had been potentially depleted by misconduct by the defendants.

The defendant's primary argument is that Anne Giraud should have obtained all of this financial information about her mother's assets in 2015 when Anne Giraud filed an Emergency Guardianship Petition in Florida. The limited record before this court from that Florida guardianship proceeding belies the defendants contention. The basis upon which Anne Giraud filed the Emergency Guardianship Petition in Florida was simply to ensure that her mother was being well cared for physically and mentally. As set forth in the Declaration of Anne Giraud, Anne Giraud had been denied access to her mother and denied any access to her mother's medical records and she felt the only way she could protect her mother was to file the Guardianship Petition in Florida. By way of other background, as early as 2013, Anne Giraud had sought to have her mother moved out of the Azalea Trace nursing home and relocated to Ashville, North Carolina, where Anne Nixon could live near her daughter and Anne Giraud could help take care of her mother. Carl Henderson, as will be discussed in this brief, resisted those efforts.

When Mrs. Giraud did file the guardianship proceeding in Florida in 2015, the emergency is set forth in the transcript of the initial hearing, which transcript is attached as Exhibit 19 to the defendant's motion and brief. Attorney Bushnell told the Florida Judge that the emergency is that "the guardian is wanting to access her mother's medical condition and insure that she is getting all available care for the different issues that she has physically and

mentally." Bushnell also told the court that "the emergency is that the daughter has not been able to be in contact with her mother and have information related to her medical care to ensure that she actually getting proper treatment and proper care." (Page 2 of Exhibit 19 to the Defendant's brief). The Guardianship Petition was not brought about money.

There is a reference in the petition to the 2004 Revocable Trust that established Carl Henderson as the trustee of her mother's trust, but nothing in the Florida guardianship proceeding happened with respect to that trust. In fact, it can be seen by reading the transcript, (Exhibit 19), that this was not going to be an issue unless the Petitioner could obtain information about what was in the trust. On Page 6 and 7 of the transcript this is discussed by the Court Appointed Attorney for Anne Nixon, Attorney John Glassman, who specifically states that "the trust – the court is not going to require Petitioner to account for the trust at this time." The Magistrate Judge then goes on to state that only a $15,000 bond will be required, unless the Petitioners is able to assert control over assets in the trust." This never happened, as Carl Henderson immediately took steps to block Anne Giraud from discovering any information about the 2004 trust. Keep in mind that in 2015, the plaintiff was not aware of the financial issues involving her mother, father, Nixon Enterprises and the RAN Trust which are at issue in this lawsuit.

Within a week of Anne Giraud obtaining the Emergency Guardianship, Henderson and Peggy Scruggs both filed Emergency Motions seeking to block Anne Giraud efforts to get access to her mother or obtain medical information about her mother. (See Exhibits 3 and 4 to the Declaration of Giraud). Henderson would not even produce a copy of 2004 trust instrument and Anne Giraud was denied any access to information about the assets contained within the

2004 trust. (See Giraud Declaration) Giraud's Guardianship Petition was later dismissed, without her obtaining any financial information about the trust. (Again, bear in mind in that 2015 the plaintiff had no idea that her mother and father's assets had been misappropriated before the creation of the 2004 trust). The fact that Anne Giraud was denied any assess to any financial information about the trust is confirmed by an inventory and accounting she prepared to have filed with the Florida Probate Court. (See Exhibit 5 to Giraud Declaration) This confirmed that Mrs. Giraud was not able to access any financial information about the trust and did not obtain any information what so ever about any assets belonging to her mother.

After the Temporary Guardianship in Florida was dismissed, Anne Giraud did not think she was financially able to further litigate with Henderson about her mother's medical well-being. As set forth in Giraud Declaration, Paragraph 12. Henderson had told Anne Giraud that he would use any and all of the assets contained within her mother's trust to resist her efforts to get possession or control over her mother. It was only after her mother passed away in November 2016, that Henderson finally sent Anne Giraud and Hap Giraud, the two beneficiaries of the Anne Nixon Living Trust, a copy of the trust instrument and a few months later gave them financial statements for the trust, prepared after Anne Nixon's death, which led to the filing of the first lawsuit. (See Giraud Declaration Paragraph 13).

The Defendant's also argue that Anne Giraud wrote several letters in 2015 which somehow demonstrate that she was aware that the assets of her mother, father, Nixon Enterprise and the RAN Trust had been misappropriated by the defendants, before the creation of the 2004 trust. Several of the letters which are referred to and attached to the defendant's brief, were never published or mailed by Anne Giraud to anyone. They were simply draft

letters she had prepared, but never sent. A review of the letters that were sent simply show that any references to finances refer to the 2004 trust, and do not refer to the financial issues set forth in this lawsuit, most of which predate the 2004 trust.

The other primary reasons the Defendant's Motion for Summary Judgment must be denied has to do with the fraudulent concealment of Carl Henderson of the causes of action that belong to the Anne Nixon estate. Carl Henderson withheld financial information from Anne and Hayward Giraud regarding the Anne Nixon Living Trust along with all the other financial information pertaining to Anne Nixon, when he had a legal duty to do so.

A review of some of the testimony given by Carl Henderson in a deposition of the first lawsuit, along with some exhibits shown to Henderson are extremely probative and telling on the fraudulent concealment issue. (Page 147 – 161 of Carl Henderson's deposition are filed herewith and are attached as Exhibit 1 to this brief) Also, several exhibits Henderson was questioned about in his deposition are attached as a Collective Exhibit 2 to this brief. (Henderson's deposition Exhibits 81,82, 83, 84 and 85).

In Henderson's deposition taken in the first case, he admitted that if Anne Hixon became incapacitated, then her 2004 trust would become irrevocable and he would thereby owe fiduciary duties to the beneficiaries of the trust, Anne Giraud and Hayward Giraud, Jr. This fiduciary duty would include the duty to disclose financial information to them. (Pages 147 – 148 of Henderson Deposition) When asked if Mrs. Anne Nixon had ever lost mental capacity before she died, Henderson indicated that he did not know and stated that he had never sought information before November of 2016 as to whether Anne Nixon may have lost capacity. (Page 147 of Henderson deposition) He was then shown Deposition Exhibit 82, (Part of Collective

Exhibit 2). On November 6, 2013, Henderson wrote to the Azalea Trace Nursing Home, where Anne Nixon had lived for many years. Henderson was apparently concerned because Anne Giraud was wanting to have her mother released from the Azalea Trace Nursing Home and relocated to Ashville, North Carolina to live near her daughter. Despite having denied ever having done so, Henderson had asked for the medical director at the Azalea Trace to review Mrs. Nixon case and give a professional opinion about her medical status. In his e-mail, Henderson even asks "how long has Mrs. Nixon been at Willow Brook?" This is quite interesting as it appears Henderson did not know where Anne Nixon had been living. The responsive e-mail from Willow Brook indicated that Mrs. Nixon "has lived at Willow Brook since November of 2007." (Apparently, Henderson had not kept up with his ward for six years, just her money).

Henderson then denied becoming aware at any time in 2013 or 2014 that Anne Nixon had become incapacitated. (Henderson deposition 150 – 151) He was then shown a Certificate of Incapacity from the Azalea Trace Medical Director pertaining to Anne Nixon, dated October 29, 2013. (Exhibit 81 to Henderson's deposition and Part of Collective Exhibit 2 to this brief). In this document, the Attending Physician of Azalea Trace certified that Anne Nixon was incapacitated and that there was no reasonable probability that this patient would recover capacity. Henderson denied ever having seen this document and indicated that neither Azalea Trace nor Peggy Scruggs ever sent him this document. (Page 151 of Henderson deposition) After having denied ever having seen the Certificate of Incapacity, Henderson was shown an e-mail chain between him and Peggy Scruggs. (Henderson deposition Exhibit 85) In this e-mail, Peggy Scruggs sent Carl Henderson a copy of the medical certificate of incapacity of Anne Nixon

and asked for Henderson to advise as to whether to share it with Anne Giraud. In his response, Deposition Exhibit 83, Henderson suggested that Scruggs just send a simple response to Anne Giraud telling her that Mrs. Nixon should not move to North Carolina to live with her daughter and there is no mention of sharing the Certificate of Incapacity with Anne Giraud. The medical certificate of incapacity from Mrs. Nixon's treating physician from Azalea Trace was never shared with Anne Giraud until after the first lawsuit was filed and discovery untaken. (Declaration of Giraud) Henderson was then asked, "now that Mrs. Nixon is incapacitated, don't you owe duties of disclosure and reporting to the beneficiaries?" and he answered, "yes sir in my previous statement, I said I did." (Henderson deposition Page 161) Incredibly however, he was then asked, "what, if anything did you do in relation to the beneficiaries, Anne and Hap Giraud, after you were made aware of this doctor's Certificate of Incapacity?" He stated, "I took no action on it." (Henderson deposition Pages 160 -161.

The fraudulent concealment gets worse. During the same time frame, Anne Giraud has asked to meet with Henderson in Chattanooga to discuss her mother's well-being and Anne Giraud and her uncle, Leonard Nixon, met with Henderson in September of 2013 at which time Henderson told Anne Giraud she was not entitled to any financial information about her mother. (Giraud Declaration Paragraph 7) At about the same time, Hap Giraud had contacted Henderson to try to get information about his grandmother's well-being and Henderson wrote Hap Giraud a letter dated October 4, 2013. (This is Deposition Exhibit 84 and is Exhibit 1 to the Giraud Declaration). In his letter, in the Fourth Paragraph, Henderson told Giraud, "Respectfully, neither you nor your mother had or has any right to detailed financial information about your grandmother." Henderson never corrected himself, even after he got a

Medical Certificate of Incapacity a few weeks later and even though Henderson admitted in his own deposition that he owed a fiduciary duty to Anne Giraud and Hap Giraud to provide them detailed financial information after Anne Nixon became incapacitated.

The fact that Henderson had a duty to the Giraud's to provide them financial information is shared by one of the Plaintiff's expert in the first case, Albert Secor, who is an expert witness in Tennessee on trusts. Attached to this brief is Exhibit 3 are the Expert Witness Disclosure from Secor, which confirm that Carl Henderson had a duty to provide financial information to the Giraud's which he always refused to do.

In Henderson's letter to Hap Giraud, (Exhibit 1 to Giraud Declaration), Henderson also told him that "the trustee has no duty to provide any reports to anyone other than your mother." Whether this statement is true or not will be an issue in the trial of the first lawsuit, but it was a misrepresentation. Henderson testified and admitted in his deposition that he sent reports of the 2004 trust to Peggy Scruggs for several years, and Peggy Scruggs was not in any way authorized under the trust to receive financial information about the 2004 trust. More of Henderson's concealment.

Henderson goes on in his October 4, 2013 letter to state, "when your grandmother passes, then you and your mother will become distributees, and my duty will be to fully disclose and report financial matters to you and her, but only after her death." Again, Henderson never revealed to the Giraud's that he had received a Medical Certificate of Incapacity for Anne Nixon and under Henderson's own omission, thereby owed a duty to them to disclose financial information to them.

Respectfully submitted,

THE RICHARDSON LAW FIRM

By: _____
Michael E. Richardson

Michael E. Richardson, BPR# 7191
633 Chestnut Street, Suite 1580
Chattanooga, TN 37450
Tele: (423) 602-9623
Fax: (423) 498-2824
E-mail: mer@mrichardsonlaw.com
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a copy of this pleading has been served upon counsel via E-mail and First-Class Postal Service this 5th day of April, 2021.

Joshua A. Powers, BPR# 15639
Alexandra E. Weiss, BPR# 36246

BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, P.C.
633 Chestnut Street, Suite 1900
Chattanooga, TN 37450
Tele: (423) 756-2010
E-mail: jpowers@bakerdonelson.com
aweiss@bakerdonelson.com
Counsel for Defendants

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