The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: Pamela A. Fleenor

Office Address: (including county) Hamilton County Courthouse
Suite 311
625 Georgia Avenue
Chattanooga, TN 37402

Office Phone: 423-209-7380 Facsimile: 423-209-6651

Email Address: [redacted]

Home Address: (including county) [redacted]
Lookout Mountain, TN 37350

Home Phone: [redacted] [redacted]

INTRODUCTION

The State of Tennessee Executive Order No. 54 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.

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website www.tncourts.gov). The Council requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit your original, hard copy (unbound), completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts. In addition, 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 hard-copy application, or the digital copy may be submitted via email to ceesha.lofton@tncourts.gov.

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

I currently serve as Chancellor in Part 1 of the Chancery Court of the Eleventh Judicial District for the State of Tennessee.

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

I became licensed to practice law in the State of Tennessee in 1986. My Board of Professional Responsibility number is 012183.

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.

I have been licensed to practice law in the State of Tennessee since 1986.

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).

From 1986-1989 I practiced law with the firm of Luther, Anderson, Cleary & Ruth, P.C.

From 1989-1994 I practiced law with and became partner in the firm of Grant, Konvalinka & Grubbs, P.C.

From 2001-2002 I practiced law with the firm of Shumacker & Thompson, P.C.

From approx. 2003-2009 I served as Head of the Compliance Department for Cornerstone

Community Bank.

From approx. 2010-2014 I practiced law with the firm of Duncan, Hatcher, Hixson & Fleenor, P.C.

In August of 2014, I was elected Chancellor for Part 1 of the Eleventh Judicial District for the State of Tennessee.

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.

For the period of time between 1995 and 2000, I was blessed to be a stay-at-home mom for our two children.

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 serve as Chancellor, Part 1 in the Eleventh Judicial District for the State of Tennessee. Under our Local Rules I have primary jurisdiction over guardianship cases and conservatorship cases, wherein someone with diminished mental capacity, such as from dementia, has a conservator appointed over them. I entertain a great number of these cases in part because a state mental hospital that serves over 50 counties is in my district along with two other private mental health institutes. As our aging population is growing, these cases are increasing in number. I treat these senior members of our society with the greatest of respect. I understand the difficulties their families are facing.

I also have exclusive jurisdiction in our district over the delinquent tax cases. Our county sells approximately 200 pieces of property every year at the delinquent tax sale. Since Chattanooga is growing, these properties are valuable, and thus each parcel sold often generates additional litigation such as redemptions, protests of redemption, request for additional expenses, and actions challenging the validity of the sale. Understanding that I would be the only judge in Hamilton County to hear these cases for at least the next eight years, I took a deep dive early on into these comprehensive statutes. This is a complex area of the law with which I have developed a great deal of expertise.

My colleague and I share jurisdiction over all other general civil cases filed in chancery court. Chancellors have jurisdiction over all the real estate in their respective counties. Thus I hear many quiet title actions, boundary line disputes, actions regarding easements, surface water runoff issues, spite fences, trespass actions, nuisance actions between landowners, inverse condemnation cases, and applications for declaratory relief for interpretation of covenants and restrictions of homeowners' associations. I also hear a great number of petitions for writ of certiorari wherein a plaintiff seeks judicial review of actions of an administrative/legislative body such as the zoning board, a city council, the beer board, and the taxi board. I also hear many cases seeking to restrain actions taken by the government ordering a condemnation and demolition of private property. Chancery court is referred to as a court of equity wherein the chancellor can fashion a remedy when the law does not provide an exact resolution to the conflict. Thus as Chancellor I have also tried many cases involving fraud and/or negligent misrepresentation wherein the plaintiff seeks a resulting or constructive trust established over the funds at issue. I entertain a great number of cases under the Tennessee Human Rights Act alleging discriminatory employment actions and retaliatory discharge. I also hear divorces, termination of parental rights, adoptions and actions filed by Adult Protective Services. I try a number of breach of contract actions, actions on promissory notes, actions alleging wrongful foreclosure, and construction cases, both commercial and residential.

As chancellor in one of our larger metropolitan areas in the State, I hear many multi-million dollar cases involving government procurement, pensions, corporations, and limited liability companies.

The breadth and scope of the jurisdiction is expansive, and no two days are ever alike. I have taught myself a lot of law these past five years, and I enjoy it. I am excited to get to work every day knowing that it is likely that some unique issue will surface. I enjoy the challenge of resolving the nuances of the law.

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 began practicing law as an insurance defense attorney defending primarily personal injury actions, worker's compensation cases, arson claims, and defending local governments throughout southeast Tennessee. As such I drafted and responded to written discovery including interrogatories, requests for production of documents, and requests for admissions. I directed and defended depositions of lay and expert witnesses. I was fortunate to try several jury trials by myself. I was successful in all but one, which involved a subrogation action for a fire loss. However, we still kept the jury out for half a day for which I was quite pleased. Later as a trial lawyer I tried more commercial litigation cases generally to the bench rather than to a jury. I have tried cases in various county sessions courts, chancery courts, circuit courts and federal courts. I also have prepared appellate briefs. I learned to pay careful attention to detail. I was generally assigned or volunteered for all the novel cases to handle for which there was no template, because I enjoyed teaching myself the law in these obscure areas. I have handled numerous civil cases from both the plaintiff's side and the defendant's side. In my later years of trial practice, I began handling some criminal defense cases, including DUIs, mostly for the college students who resided near our offices. Their parents were very grateful that we kept their child out of jail, in school, and back on the right path.

While most of my time as a practitioner was spent as a trial lawyer, I also worked on some transactional matters in the area of real estate, and I was part of a due diligence team reviewing a potential purchase of a mall. I assisted in an identity theft case against a major charge card company that settled for a confidential amount. I also convinced an insurance company to waive its large subrogation claim against my client, because she had not been "made whole".

As the compliance officer at a local community bank, my job was to ensure that the bank complied with federal and state banking regulations. This included developing procedures to be in compliance with the applicable regulation, teaching and training employees on the regulation and the procedures, and then testing and monitoring for follow-up and compliance. I also handled requests to the bank for financial information under the Tennessee Financial Records Privacy Act. I reviewed loans for compliance with usury laws and federal flood insurance regulations. I was also responsible for reporting to state and federal agencies regarding suspicious activity under the Bank Secrecy Act and the Patriot Act. My banking background and my knowledge of banking laws and regulations has helped me tremendously on the bench,

as I hear many cases involving promissory notes, foreclosures, and loan modifications. I also reviewed transactions regulated by the Uniform Commercial Code including bank holds, secured transactions, and the general flow of money through our nation's payment system. As chancellor I have also entertained cases involving the UCC such as determining priority of creditors to collateral.

As chancellor I work more than 40 hours a week, but I return my opinions timely within the statutory thirty day or sixty day time frame. If the courthouse is open, I am there. I cannot count how many emergency orders I have signed late on a Friday afternoon. I have authored over 5000 pages of opinion and drafted over 1700 orders. I sign on average 280 orders a month.

I am punctual as a courtesy both to the lawyers and the parties. I try to give both sides in the case a little leeway if they need a continuance, but I do not allow one party's dilatory tactics to prejudice a person from having their day in court. I am fair. There are no ex parte communications in my chambers.

I research to ensure that I understand the law before I write my opinion. I adjudge credibility, I make the requisite findings of fact, and I apply the applicable standard to reach my conclusions of law. I revise my drafts many times before I publish the opinion in final to ensure that my legal reasoning is clear.

I treat the parties, their lawyers, and the witnesses that appear before me with respect. I defer to them for breaks in the trial and for adjournment of the day. In one case over which I presided, both the plaintiff couple and the defendant couple thanked me afterwards for listening to their respective positions. Importantly, this case was tried to a jury, not to the bench. I believe that just by the way I ruled on the evidentiary objections and explained my rulings to the jury, that both parties understood that I was listening carefully, and they were getting a fair day in court.

After I had been on the bench for a while, one of my friends asked me if I had made anyone mad yet. I replied, "Yes, in fact, more than half of those who have appeared before me." This is because I am impartial and unbiased, and I seek to reach the correct judgment. I have disqualified myself any time that I believed necessary. Likewise, I have refused to recuse when I determined the motion was filed for an improper purpose such as delaying the trial of the matter. Further I believe I have granted every Tenn. R. App. P. 9 motion for interlocutory appeal except one, because I truly want to reach the correct result and prevent needless protracted litigation. I am a team player and accept many cases by interchange from the other counties when those judges have recused themselves. I have several such out-of-district cases currently pending.

I see many cases wherein families are in turmoil. I understand that they do not want to be there, and that I am not seeing them at their best. I empathize with their pain. I try to help these families feel better when they leave my courtroom than they did when they first walked in. Some of the families for whom I established conservatorships wrote me after their loved one passed and thanked me for treating their mom or dad with respect. After establishing a conservatorship case, I try to make it as convenient as possible for the families. Thus I hear a great many hearings by telephone, so that the families do not have to leave their visitation with their loved one to come to court, find a parking space and pay the parking fee, just to have me approve a necessary expenditure.

In sum, I hear a vast variety of cases. I understand the gravity of the conflict before me. Often the lives of the litigants before me are in turmoil or businesses are stymied. Through dedicated

research and quality writing I strive to reach the correct result. I seek to do justice in each case efficiently, as I truly believe justice delayed is justice denied. If appointed to the court of appeals, I will continue striving for excellence in scholarly research and opinion writing.

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

I was fortunate to sit second chair in an inverse condemnation case we filed in the United States Court of Federal Claims. Before filing our action we first had to be admitted to the court. Then we had to familiarize ourselves with the unique rules applicable for Claims Court. The opposing lawyers were from the Department of Justice and spend their entire careers practicing in the Court of Claims. Despite their decided "home field advantage," we successfully obtained a judgment against the government for property worth approximately one million dollars. The Claims Court judge complimented us on our well-prepared and well-tried case.

While in law school, I applied for an externship with a sitting judge. I was fortunate that Judge Nathaniel R. Jones, with the United States Court of Appeals for the Sixth Circuit, selected me as his extern. I served for one semester as his additional law clerk. I wrote three bench memoranda for three different cases, and Judge Jones used my memoranda as the basis for his opinions in those 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 served as Chancellor in Part 1 of the Eleventh Judicial District for the State of Tennessee since 2014.

I presided over a seven day jury trial in the case of *Headden v. City of Chattanooga*, Chancery Court Part 1 docket # 12-0558, which involved the issue of whether the City of Chattanooga had breached its contract with certain police officers regarding a salary increase, which also affected the officers' pensions. The jury returned a judgment for the officers in excess of $500,000. Post-judgment, I awarded front pay and prejudgment interest. The final judgment award was in excess of $800,000.

Wyatt v. Mueller Company, E2016-02360-SC-R3-WC, 2018 WL 1768734 *6 (January 22, 2018) I was affirmed on appeal, and the Supreme Court Special Workers Compensation Panel noted that I had written a "thorough Memorandum Opinion and Judgment." The issues of note were notice and the determination of permanent total disability.

Hitachi v. Shields, E2015-02121-COA-R3-CV, 2016 WL 5210860 (September 20, 2016) In this case I was affirmed on appeal as to lien priority status between creditors. The issue of note is that a judgment is final even without the taxing of costs.

Strawter v. Mueller, E2015-2374-SC-R3-WC, 2016 WL 7322800 (December 16, 2016) I was affirmed on appeal in this reconsideration case. The issue of note was that collateral estoppel did not apply.

Bettis v. Bettis, E2016-00156-COA-R3-CV, 2016 WL 6161559 (October 24, 2016) In this divorce case I was affirmed on my valuation of stock in a closely-held corporation at over one million dollars.

Gibson v. Bikas, 556 S.W.3d 796 (Tenn. Ct. App. 2018) I was affirmed on appeal in this petition for order of protection wherein I ruled that a mother who had lost custody of her child still had standing to file the petition.

McCants v. McGavock, E2017-01712-COA-R3-CV, 2019 WL 1934868 (May 1, 2019) I was affirmed on appeal in this case involving ouster by a sibling, co-tenant.

Brown v. Brown, 577 S.W.3d 206 (Tenn. Ct. App. 2018), I was affirmed on my award to wife of rehabilitative alimony at $4000 a month for four years even though wife had received 58% of the assets.

Howe v. Howe, E2016-01212-COA-R3-CV, 2017 WL 1324177 (April 10, 2017) I was affirmed on appeal in a modification of a residential parenting schedule and in a finding of contempt.

Butler v. McKee, E2017-02471-SC-R3-WC, 2018 WL 6440748 (December 6, 2018) I was affirmed on appeal in this worker's compensation case wherein I found the employee had overcome the statutory presumption on the opinion of causation of the authorized treating physician.

Robert Palmer v. Colvard, E2018-00454-COA-R3-CV, 2019 WL 3451393 (July 31, 2019) I was affirmed on appeal wherein I dismissed the complaint, because the plaintiffs lacked capacity to prosecute the complaint as the alleged personal representatives of their father's estate.

Little v. City of Chattanooga, E2018-00870-COA-R3-CV, 2019 WL 1308264 (March 21, 2019) My order granting the City's motion to dismiss a complaint for a taking was affirmed on appeal in a case involving the city council's closure/abandonment of a public right-of-way.

Ryan v. Soucie, E2018-01121-COA-R3-CV, 2019 WL 3238642 (July 18, 2019) I was affirmed on appeal in this case involving nuisance and intentional interference with business.

Matthews v. Omanwa, E2019-00168-COA-R3-CV, 2019 WL 5309061 (October 21, 2019) I was affirmed on my order denying recusal.

City of Chattanooga v. Tax Year 2011 City Delinquent Real Estate Taxpayers, E2016-01853-COA-R3-CV, 2017 WL 2304444 (May 26, 2017) I was affirmed on appeal on my conclusion that the delinquent taxpayer's right of redemption was extinguished at the foreclosure sale. Thus the successor in interest to the holder of the deed of trust properly redeemed the property from the tax sale purchaser.

City of Chattanooga v. Tax Year 2011 City Delinquent Real Estate Taxpayers, E2016-00025-COA-R3-CV, 2017 WL 541535 (February 10, 2017) In this case the delinquent taxpayer

transferred the property to a third party after the tax sale but before the redemption period had run. I was affirmed on appeal on my ruling that the third party properly effected the redemption of the property from the tax sale purchaser.

Pinnacle Point Partners, LLC v. The Land Trust for Tennessee, Chancery Court, Part 1 docket # 18-0074. In this declaratory judgment action I ruled that construction of an assisted living facility and construction of a paved roadway did not violate a conservation easement.

Frankenberg v. River City Resort, Inc. et. al., Chancery Court Part 1 docket # 12-0032. This case is of note because it involves the Uniform Fraudulent Transfers Act and prior suit pending.

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.

After my predecessor announced his retirement, I decided to run for chancellor. I had experience with most cases tried in chancery court except for those involving a fiduciary. Because I knew that if I were elected, I would be appointing lawyers to serve in a fiduciary capacity, I desired to learn what was required of a court-appointed fiduciary. So I asked my predecessor, and also other judges to place me on their appointment lists so that I would experience what I possibly would be assigning others to do. I found this experience invaluable. I served as an attorney *ad litem* in termination of parental rights cases. As the AAL, I experienced what it is like to represent someone who did not hire you and does not trust you. I researched the applicable statutory grounds and successfully defended the state's case against the father. I then negotiated a parenting plan for visitation between father and son. However, after I had taken the bench and could no longer represent the father, I learned that the father failed to comply with the conditions and thereafter lost his parental rights. It was disheartening.

As a GAL in a termination of parental rights case, I met a young boy with special needs who was being raised by his elderly grandmother. I investigated his home, church, and school environment. I spoke with relatives, neighbors, teachers, and counselors. His mother suffered from substance abuse and his father was in prison. His grandmother had previously adopted his mother and her siblings when they were children. I realized what a difficult decision each judge faces in such cases. There simply are no easy answers.

While serving as the GAL in a conservatorship case, one of my tasks was to interview our senior friend regarding the action filed against her. I had to explain to her that if her daughter were made conservator over her, the daughter would be solely responsible for making all medical and financial decisions for the mother. She said tearfully "Yep, Pam, I'm ready. I am not remembering things too good anymore, and I trust my daughter." I realized then how scary it was to put your life under someone else's control. As chancellor, I treat all our seniors with the respect they deserve and allow them to retain as much independence and autonomy as possible. Our statute requires the judge to ascertain and impose the least restrictive alternative.

Having served as GAL and AAL, I know what is required of the appointment and the gravity that the case presents. As chancellor, I carefully appoint attorneys in each case that I know will

fully investigate the matter, so that I can do what is in the best interests of the parties involved.

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

Prior to and while attending law school, I worked as a runner for a law firm. I have also worked as a billing clerk and as a file clerk. While practicing with Duncan, Hatcher, Hixson & Fleenor, P.C., I was, of counsel, and thus had to generate business to create a paycheck. From all of which I understand the entire business of the practice of law, including the time demands, the stress, and the very necessary task of billing and collecting. As a judge, I understand the pressures that lawyers who appear in front of me face. There is more to trying a lawsuit than simply proving or defending the elements of the cause of action. I try to be aware of and sympathetic to these extraneous factors while not prejudicing any party.

I have also worked as an adjunct professor of law in the Masters' of Accountancy Program at my alma mater, the University of Tennessee at Chattanooga, teaching Seminar in Business Law. In these classes almost all of my students were graduate students, had worked a full day at his/her place of employment, and were attending this three hour class at night to continue their education. I was inspired by their dedication and tried to make class fun, informative, and relevant for their daily lives. One of the purposes of the class was to develop critical thinking and analysis regarding the legal and regulatory environments in which various businesses operate. While teaching this course I was reminded that our great system of justice, wherein courts follow precedent, is conducive for business as this allows management to have certainty in making decisions that can affect the future of their companies.

I also worked as an adjunct professor of law in the paralegal program at Chattanooga State Community College teaching various legal courses. In these classes my students were almost all undergraduates. Before reaching the legal principles of the course, I spent a great deal of time teaching basic civics, and the students thoroughly enjoyed it. They advised it was the first time they had ever understood how our government operated. I also encouraged my students to register to vote. To teach legal principles to non-lawyers, I had to drill down to basic constitutional concepts that still ground me today as a chancellor. I was keenly reminded of the impact of our system of justice when one of my students submitted a paper entitled, "The Salvation of Probation." Thereafter, I viewed all of my criminal defense appointments in a different light.

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.

I have never before submitted an application for a judgeship.

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.

1977-1978 Samford University--transferred to UTC

1978-1982 University of Tennessee at Chattanooga, B.A. Biology, Magna Cum Laude

Recipient of the Benwood Foundation's Chapin-Thomas Scholarship to the University of Cincinnati College of Law

1983-1986 University of Cincinnati College of Law, Juris Doctorate, Winner of the Dr. William H.L. Dornette Prize for high scholarship in Federal Jurisdiction

PERSONAL INFORMATION

15. State your age and date of birth.

I am 60 years of age and I was born on [redacted] 1959.

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

I have lived continuously in the State of Tennessee since 1998. I was born and raised in Chattanooga and have lived in the Chattanooga area all of my life. From 1990-1998 my husband and I lived just across the Tennessee line in Lookout Mountain, Georgia but we both practiced law in Chattanooga.

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

I have lived in Hamilton County, Tennessee continuously since 1998. I was born and raised in Hamilton County and have lived here for over 50 years of my life.

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

Hamilton County, TN

19. Describe your military service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state

whether you received an honorable discharge and, if not, describe why not.

Not applicable

20. Have you ever pled guilty or been convicted or 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.

No

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

No

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

I have responded to one complaint filed with the Board of Judicial Conduct by a pro se litigant who basically alleged that I was trying to keep all of his cases in my court. The complaint was dismissed. I have been informed of other complaints to which I was not required to respond.

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.

Co-plaintiff in a general sessions case in Hamilton County for negligent construction filed sometime around 1999. The contractor's insurer settled with us.

Plaintiff in a divorce action filed and dismissed in 2008 in Hamilton County Circuit Court. My husband and I will be married 30 years this August.

Plaintiff in a personal injury action in Hamilton County Circuit Court. I settled the case with my UM carrier around 1990.

I apologize, but I do not know the docket numbers of those cases.

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.

Lookout Mountain Presbyterian Church

Leadership Chattanooga Alumni Association

Chattanooga Women's Leadership Institute

Harrison Ruritan Club

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

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

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

No, other than my college sorority, Chi Omega, which was comprised of only female members. I still enjoy participating in alumni events. I recently attended the celebration of the 100th year that the Delta Alpha chapter of Chi Omega had been on the campus of Chattanooga. I am very proud to be a part of this organization.

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.

Tennessee Bar Association

Chattanooga Bar Association

The Justices Ray L. Brock, Jr.-Robert E. Cooper American Inn of Court; president-elect

Southeast Tennessee Legal Association for Women

Tennessee Legal Association for Women

Member of the executive committee for the Tennessee Judicial Conference

Member of the executive committee for the Tennessee Trial Judges Association

I am also a member of the following Tennessee Judicial Conference Committees:

Legislative Committee; Strategic Planning Committee; Public Confidence in the Courts Committee; and the Judicial Family Institute.

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.

Fellow-Tennessee Bar Foundation

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

Not applicable

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 taught the following seminars in the past five years:

The Grinch Who Stole Chancery Court 2016

A Cornucopia of Judgments 2017

Rodeo Round-up of Rules 2018

Guardianships of the Galaxy 2019

Advanced Custody and Support Issues for NBI in Knoxville 2019

What Civil Court Judges Want You to Know for NBI in Chattanooga 2018, 2019

Friday Fundamentals –lunch and learn for young lawyers 2018

Presenter to the chancellors during the March 2019 Judicial Conference on the topic of Tennessee law on Emergency and Nonemergency Involuntary Admissions Tenn. Code Ann. 33-6-301 -- 33-6-501 et. seq.

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.

Chancellor, Part 1 for the Eleventh Judicial District for the State of Tennessee, elected August 2014

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.

Please see attached. Each opinion attached was generated entirely by my own efforts.

ESSAYS/PERSONAL STATEMENTS

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

I am seeking this position, because I singularly possess the skills set necessary to serve as appellate judge. I am honest and will not be swayed by public opinion. I am impartial and unbiased in rendering my opinions, and I am industrious in timely returning my opinions. I treat all litigants, lawyers, and witnesses that appear before me with respect.

I understand the canons of statutory construction, and I do not legislate from the bench. As chancellor in one of the larger metropolitan areas of this State, I often entertain cases involving millions of dollars. I already engage in an appellate function regularly reviewing administrative and legislative bodies in petitions filed for certiorari.

In short, I love research, I know how to write an opinion, and I am prepared to hear any case that is appealed to the Eastern Section.

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)***

Every year I volunteer to serve in our local Mock Trial competition to support civics education for our young people. Last year a public school entered a team for the first time, and I judged their competition. I wrote each student on that team and congratulated them on their performance.

I have served as a liaison to Family Connections-Partnership to help with their efforts in meeting the needs of lower income families who require safe supervised visitations and/or exchanges in custody cases.

I helped coordinate bringing the SCALES program to Chattanooga so that high school students could watch the Tennessee Supreme Court in action. At lunch I sat with students from my high school answering questions about being a judge. I believe just making yourself accessible to the public and especially to young people raises awareness of our justice system and improves the public's perception of the court.

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 seek appointment to the Eastern Section Court of Appeals. Appellate judges in the Eastern Section hear civil cases on appeal from trial courts in the Eastern Grand Division of the State of Tennessee. My selection to the court would have a positive impact as I currently hear a vast variety of cases that are unique to the larger metropolitan areas of the State. I already engage in appellate review when hearing petitions for writ of certiorari.

Additionally, because I hear a great many conservatorships, involuntary committals, and delinquent tax cases, I have singularly developed an expertise in these areas, all of which involve a deprivation of fundamental rights. I would provide great assistance to the court with my understanding of the statutory framework of these actions.

Importantly, there will be no type of case appealed to the Eastern Section with which I am unfamiliar.

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)***

When our children were young, I volunteered and coached in every recreation program in which they were involved, and volunteered in their schools such as with PTA, and taught children's Sunday School classes. After our children were grown, I turned my attention to more legal mentoring as well as civic involvement. I do think it is important for judges to be involved in the community for good will and civic awareness. I speak, when invited, to various organizations regarding my court and attend a good many fund raisers for various causes.

For me it is especially important to mentor young people and young lawyers. At the June Judicial Conference held in Memphis, the Public Confidence in the Courts Committee coordinated with the judges in Memphis to assist in the civics portion of the Memphis Ambassadors Program. Our fun assignment included dividing into groups and then ranking the importance of the ten amendments comprising the Bill of Rights. The students were prepared and worked hard. They posed great questions to us about being lawyers and judges and about our system of justice. When our session concluded, the young lady sitting next to me grabbed my arm and said, "Don't go." I put my arm around her and told I had to leave, but we could take a picture. Then everyone wanted a picture with the judge. It reminded me of how important it is for judges to get out in the community and be a positive influence on our young people.

I will continue to be active in the community if appointed to the court of appeals, but I will be careful to keep my work as a judge as my first and primary commitment.

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)***

I was born and raised in, and have lived almost my entire life in, this Eastern Grand Division of the State. My background in the law is wide and varied. I have practiced both civil and criminal law. I have represented both plaintiffs and defendants. As in house counsel I understand how legal decisions impact business.

I enjoy research and writing. I get business done for the people of Hamilton County efficiently. I understand that before reaching the substance of a cause of action, there is much procedure to navigate. In chancery court, I spend a great deal of time navigating the procedural hurdles that, unless corrected, could render a subsequent judgment a nullity. If appointed I will continue to delve into both procedural and substantive issues raised on appeal. I enjoy the challenge.

I love the law, and I love this great country and all the freedoms that we enjoy. I want the people of the State of Tennessee to continue enjoying their freedoms, and I genuinely try to "get it right" on each matter before me. The lawyers who appear before me know that I prepare for the hearing. I read not only their briefs, but also the cases cited in their briefs, and I do additional research on my own.

In short, I know how to write an opinion, I understand appellate review, and I always strive for excellence when rendering my opinions.

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

As a judge I am sworn to and I do uphold the Constitution of the United States, and the Constitution of the State of Tennessee. Even if I disagreed with the substance of the law, I would uphold the law, because the law is passed by the will of the majority of the people of the great state of Tennessee through their legislators. Under the constitutional separation of powers, a

judge is to interpret the law, not to make the law.

As chancellor I have upheld law with which I disagreed. I questioned that portion of the Public Safety Act, Tenn. Code Ann. 36-3-619(h)(1) that allowed a law enforcement officer to file a petition in a *civil* case for a third party seeking an *ex parte* order of protection. In my opinion, only the alleged victim can file such a petition which, if granted, temporarily restrains someone's rights without notice and an opportunity to be heard. Nonetheless, when these petitions were filed in my court, I entertained these actions despite my reservations.

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.

Flossie Weill, Esq.
[redacted]
Chattanooga, TN 37402
[redacted]

Jeffery V. Curry, Esq.
Chief Legal Officer CBL Properties
[redacted]
Chattanooga, TN 37421
[redacted]

W. Neil Thomas, III, Esq.
[redacted]
Chattanooga, TN 37421
[redacted]

Hugh Morrow, Jr.
President & CEO at Ruby Falls
[redacted]
Chattanooga, TN 37409
[redacted]

Peter T. Frederick

President, Grain Craft, Inc.

[redacted]

Chattanooga, TN 37408

[redacted]

AFFIRMATION CONCERNING APPLICATION

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

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the Court of Appeals for the Eastern Section 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: February 2, 2020.

Pamela A Fleenor

Signature

When completed, return this application to Ceesha Lofton, 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.

Pamela A. Fleenor

Type or Print Name

Pamela A Fleenor

Pamela A. Fleenor
Signature

February 2, 2020
Date

012183
BPR #

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

N/A

AFFIRMATION CONCERNING APPLICATION

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

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the Court of Appeals for the Eastern Section 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: February 2, 2020.

Pamela A. Fleenor
Signature

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

IN THE CHANCERY COURT FOR THE ELEVENTH JUDICIAL DISTRICT OF TENNESSEE

REBECCA M. LITTLE, Plaintiff, VS. THE CITY OF CHATTANOOGA, TENNESSEE, Defendants.	)	NO. 18-0003 PART 1 JURY DEMAND

ORDER

This cause came on to be heard on February 19, 2018 upon the Motion to Dismiss and/or Motion for Judgment on the Pleadings filed by Defendant, the City of Chattanooga, Tennessee (City), the City's Memorandum of Law in Support of Defendant's Motion to Dismiss and/or Motion for Judgment on the Pleadings, the "Response to Motion to Defendant's [sic] Dismiss and/or For Judgment on the Pleadings" filed by Rebecca Little (Plaintiff) and Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss and/or for Judgment on the Pleadings, (Opposition) and argument by Plaintiff, appearing pro se, and argument by counsel for the City. The Court took the matter under advisement.

PROCEDURAL POSTURE

The Plaintiff, pro se, filed a complaint on January 2, 2018. Plaintiff filed her

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Amended Complaint for Declaratory Judgment and Inverse Condemnation (Amended Complaint) on January 12, 2018. An amended complaint supersedes the original complaint and although the original remains a part of the record, its factual allegations are of no effect in framing the issues for trial. *Caudill v. Mrs. Grissom's Salads, Inc.*, 541 S.W. 2d 101, 104 (Tenn. 1976). However, the factual allegations of the original complaint continue to be evidentiary admissions which may be used against the Plaintiff. *Pankow v. Mitchell*, 737 S.W.2d 293, 296 (Tenn. App. 1987). Accordingly this Court will determine the City's motion to dismiss based on Plaintiff's Amended Complaint (A.C.).

Plaintiff asserts in her brief that she is a law student and a pro se litigant, and as such, she should be granted leniency. The law in Tennessee as set forth in *Young v. Barrow*, 130 S.W.3d 59 (Tenn. Ct. App. 2003) states that courts must be mindful of the boundary between fairness to a pro se litigant and unfairness to the pro se litigant's adversary. Thus courts must not excuse pro se litigants from complying with the same substantive and procedural rules that represented parties are expected to observe. *Young*, 130 S.W.3d at 63.

The City alternatively filed pursuant to Rule 12.03 a motion for judgment on the pleadings. A motion for judgment on the pleadings may be filed "after the pleadings are closed." Tenn. R. Civ. P. 12.03. The City has not answered, thus the pleadings are not closed. Thus the motion for judgment on the pleadings is not ripe.

LEGAL STANDARD

A motion to dismiss a complaint for failure to state a claim for which relief may be granted tests the legal sufficiency of the plaintiff's complaint. *Lind v. Beaman Dodge, Inc.*, 356 S.W.3d 889, 894 (Tenn. 2011). The motion requires the court to review the complaint alone. *Highwoods Props., Inc. v. City of Memphis*, 297 S.W.3d 695, 700 (Tenn. 2009). Dismissal under Tenn. R. Civ. P. 12.02(6) is warranted only when the alleged facts will not entitle the plaintiff to relief, *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011).

A Tenn. R. Civ. P. 12.02(6) motion admits the truth of all the relevant and material factual allegations in the complaint but asserts that no cause of action arises from those facts. *Brown v. Tennessee Title Loans, Inc.*, 328 S.W.3d 850, 854 (Tenn. 2010). The Court is to construe the complaint liberally in favor of the Plaintiff, taking all factual allegations in the complaint as true and giving the Plaintiff the benefit of all reasonable inferences. *Webb*, 346 S.W.3d at 426. However, the Court need not accept mere conclusory recitations. *Alfonso v. Bailey*, E2015-02100-COA-R3-CV, 2016 WL 4218521 at *7 (June 22, 2016). Rather a party must allege *facts* in support of the claims that if taken as true would sustain those claims. *Id.*

FACTS ALLEGED IN AMENDED COMPLAINT

Plaintiff owns the property located at 412 Thompson Street in Hamilton County (Property). (A.C. 4) Behind her Property is an alley which is an unopened public right-of-way. (A.C. 8) Taylor Vickers, a resident of 249 Jarnigan Avenue, submitted a

Closure/Abandonment application for the public right-of-way that runs behind Plaintiff's Property and the back yards of certain houses on Beck Avenue and Jarnigan Avenue. (A.C. 10, 17)

Plaintiff attached as Exhibit 13 to the Amended Complaint "Resolution No. 28838", which is "A Resolution to Adopt an Updated Right-of-Way Closure and Abandonment Policy for Chattanooga, Hamilton County, East Ridge, Lakesite, Ridgeside, Walden and Lookout Mountain" (Resolution).

On December 20, 2016 the Chattanooga City Council (City Council or City) passed City of Chattanooga Ordinance 13138 (Ordinance), which granted Ms. Vickers' closure/abandonment application. (Exhibit 19 to A.C.) Thus the City abandoned a public right-of-way, an alley, that runs behind Plaintiff's Property.

LEGAL ANALYSIS

In Plaintiff's prayer for relief she requests that this Court declare the Ordinance invalid, unlawful, null and void. Plaintiff also alleges the abandonment of the public right-of-way was a taking of her property. For this claim Plaintiff seeks damages for the alleged taking. Rather than filing an answer, the City filed this motion to dismiss pursuant to Tenn. R. Civ. P. 12.02(6) for failure to state a claim upon which relief can be granted.

As grounds for its motion to dismiss the City argues that all of Plaintiff's claims are improper and/or time-barred.

I. THE COURT LACKS JURISDICTION TO DETERMINE THE VALIDITY OF THE ORDINANCE AS THE COMPLAINT FAILS TO STATE A JUSTICIBLE CONTROVERSY

Plaintiff has filed an Amended Complaint for Declaratory Judgment pursuant to T.C.A. §29-14-101. In her prayer for relief, Plaintiff sought this Court to declare the Ordinance invalid, unlawful, null and void. In her Amended Complaint Plaintiff alleged the Ordinance was not adopted by the City in accordance with required procedures and is in conflict with the City's adopted Right-of-Way Closure and Abandonment policy.

T.C.A. §29-14-107 provides

> When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of person not parties to the proceedings. . . .

Because of the nature of declaratory relief, every person having an affected interest must be given notice and an opportunity to be heard before declaratory relief can be granted. *Adler v. Double Eagle Properties Holdings, LLC*, W2010-01412-COA-R3-CV, 2011 WL 532948 *3 (March 14, 2011). Proper parties include all those who must be bound by the decree in order to make it effective and to avoid the recurrence of additional litigation on the same subject. *Id.* Here the Amended Complaint alleges that there are property owners who reside on Beck Avenue, property owners who reside on Jarnigan Street, and property owners who reside on Thompson Street that are also affected by the Ordinance. The Amended Complaint also alleges that Taylor Vickers, who lives on Jarnigan, sought the abandonment. However, Plaintiff failed to make any of these property owners parties in this lawsuit. The Court determines that these property owners

are necessary parties to this lawsuit as they have an interest that would be affected by a judgment on the Ordinance.

Huntsville Utility District of Scott County v. General Trust Co., 839 S.W.2d 397, 400 (Tenn. Ct. App. 1992) provides that non-joinder of necessary parties is fatal on the question of a justiciable issue. This Court concludes that Plaintiff's failure to join these necessary property owners is likewise fatal in this case, resulting in no justiciable issue before the Court. Accordingly the Plaintiff's action seeking to invalidate the Ordinance must be dismissed.

II. PLAINTIFF FAILED TO TIMELY FILE HER COMPLAINT TO INVALIDATE THE ORDINANCE

In addition to failing to state a justiciable controversy, the Plaintiff's challenge to the Ordinance was untimely. The City argues that the City Council's passing of the Ordinance which granted Ms. Vickers application for abandonment was an administrative function rather than a legislative act. As such the City argues that Plaintiff should have filed a petition for writ of certiorari rather than a declaratory judgment action. (DJA).

> A party seeking to invalidate an ordinance should file a declaratory judgment action, while a party seeking to challenge a determination **made in accordance with an ordinance** should file a petition for writ of certiorari.

Bernard v. Metropolitan Government of Nashville & Davidson County, 237 S.W.3d 658, 665 (Tenn. Ct. App. 2007). (Emphasis added)

Plaintiff argues that the City Council's passing of the Ordinance is legislative rather than administrative, and thus an action for declaratory judgment is the proper

remedy.

In her Amended Complaint, which is part-complaint/part-brief, Plaintiff cited *Fallin v. Knox County Board of Commissioners*, 656 S.W.2d 338 (Tenn. 1983) for authority. In *Fallin* the county legislative body amended its comprehensive zoning ordinance to change the classification of a specific tract from single-family to multi-family residential. The court held this was a legislative act, because the enactment of ordinances or resolutions, creating or amending zoning regulations is a legislative, rather than an administrative action and is not ordinarily accompanied by a record of evidence, as in the case of an administrative hearing.

Further, Plaintiff cited *MC Props, Inc., v. City of Chattanooga,* 994 S.W.2d 132 (Tenn. Ct. App. 1999) for the proposition that a writ of cert is limited to review of judicial determinations by lower tribunals or administrative agencies, but inappropriate for challenges to the enactment of ordinances.

In her Opposition Plaintiff argues that there was no reason for her to file a writ of cert because the Planning Commission and the Chattanooga Department of Transportation (the inferior boards and tribunals) both recommended denying the application to close the public right-of-way. Plaintiff apparently takes the position that because the City's action in abandoning the public right-of-way was by "ordinance" then the remedy to challenge is by DJA.

However, the Tennessee Supreme Court in *McCallen v. City of Memphis*, 786 S.W.2d 633, 639 (1990) stated that the test is not whether the action taken was by

resolution or by ordinance but rather "whether the action taken (resolution or ordinance) makes new law or executes one already in existence." *Id.* (citing 8A E. McQuillin, *The Law of Municipal Corporations*, § 10-06, at 995 (3rd ed. 1986)).

Further in *Cornish v. City of Memphis*, W2010-02665-COA-R3-CV, 2011 WL 3925664 *1 (August 23, 2011) the court cited *Fallin* and explained

> The remedy of certiorari is the proper remedy for one who seeks to overturn an administrative determination, which is judicial or quasi-judicial in nature. *Id.* at 639 (citing *Fallin v. Knox County Bd. of Comm'rs*, 656 S.W.2d 338, 342 (Tenn. 1983)).
>
> . . .
>
> For example, enacting zoning ordinances and their amendments are clearly legislative acts subject to attack by a complaint for declaratory judgment. *Id.* On the other hand, where municipal legislative bodies reserve to themselves the power to grant or deny licenses or permits, by an ordinance containing a rule or standard to govern them, the decision whether to grant such a permit is regarded as administrative rather than legislative in character. *Id.* (citing McQuillin, §25-217 at 160-61). In order to qualify as an administrative, judicial, or quasi-judicial act, the discretionary authority of the government body must be exercised within existing standards and guidelines.

In *Cornish* the city council had adopted a resolution granting a special use permit to a corporation for the operation of a residential home for the elderly on property that was located in a single family residential district. The court concluded that Chapters 16-32 and Chapters 16-36 of the Memphis and Shelby County zoning ordinance authorized the city council to grant a special use permit if the applicant demonstrated that certain standards were met. Further the court determined the ordinance provided standards of general applicability established for all special use permits, and additional standards

specifically applicable to residential homes for the aged. The court concluded that the city council exercised an administrative function when it determined whether or not the proposed use met the pre-existing standards of the ordinance. The court held that because Plaintiff failed to file a writ of cert within sixty days of the council's approval of the permit, then the plaintiff's DJA must be dismissed.

Likewise in the case of *McCallen v. City of Memphis*, 786 S.W.2d 633 (Tenn. 1990) the Memphis City Council had issued a resolution approving a planned development. The Tennessee Supreme Court stated that in determining whether an action is administrative or legislative, the overriding issue is whether the enabling ordinance provides sufficient standards to preclude the exercise of unbridled discretion. In order to qualify as an administrative, judicial, or quasi-judicial act, the discretionary authority of the government body must be exercised within existing standards and guidelines.

In *McCallen* Section 14 of the Memphis and Shelby County Zoning Ordinance provided for planned developments. The court held Section 14 provided sufficient criteria through established guidelines to require administrative adherence. Thus the court held that the action approving a planned development was administrative rather than legislative.

In the recent case of *McFarland v. Pemberton*, 530 S.W.3d 76 (Tenn. 2017) the Tennessee Supreme Court confirmed the law stated in *McCallen*, that a writ of cert is proper to challenge an administrative action.

In the instant case Plaintiff attached as Exhibit 13 to her Amended Complaint, Resolution No. 28838, which is "A Resolution to Adopt an Updated Right-of-Way Closure and Abandonment Policy for Chattanooga, Hamilton County, East Ridge, Lakesite, Ridgeside, Walden and Lookout Mountain." (Resolution).

The Resolution indicates on its face that it was passed pursuant to T.C.A. §13-4-104. Chapter 4 of the Tennessee Code is entitled, "Municipal Planning." Title 13 of the Tennessee Code is entitled Public Planning and Housing.

T.C.A. §13-4-104 provides in pertinent part

> The widening, narrowing, relocation, vacation, change in use, acceptance sale or lease of any street or public way, ground, place, property or structure shall be subject to similar submission and approval, and the failure to approve may be similarly overruled.

The Resolution provides that the City's right-of-way closure and abandonment policy, "is intended to form a basis of rationale and process for decisions on right-of-way closure and abandonment requests."

This Court finds this Resolution is the enabling ordinance for the City Council's evaluating of Ms. Vicker's application for closure. The Resolution provides definitions, classifies tiers of rights-of-way, and establishes review factors for a closure and abandonment request. Accordingly the Court determines that the Resolution provides sufficient criteria through established guidelines to preclude the City's exercise of unbridled discretion. The Court concludes that the City's granting of Ms. Vickers' application for closure was exercised under the existing standards of the Resolution.

Therefore the Court concludes the City's abandonment of the public right-of-way was an administrative function rather than a legislative act. Accordingly the proper remedy for Plaintiff to challenge the Ordinance was to file a petition for writ of cert.

A court can treat a DJA as a writ of cert and can treat a writ of cert as a DJA. *McCallen*, 786 S.W.2d at 640. Thus whether the Amended Complaint is captioned a writ of cert or a DJA is not the issue. Rather the issue is whether the Plaintiff timely filed her action.

T.C.A. §27-9-102 provides

> Such party shall, within sixty (60) days from the entry of the order or judgment, file a petition of certiorari in the chancery court of any county in which any one (1) or more of the petitioners, or any one (1) or more of the material defendants reside, or have their principal office, stating briefly the issues involved in the cause, the substance of the order or judgment complained of, the respects in which the petitioner claims the order or judgment is erroneous, and praying for an accordant review.

Thus Plaintiff had to file her challenge within sixty days of the "entry of the order or judgment."

Thandiwe v. Traughber, 909 S.W.2d 802 (Tenn. Ct. App. 1994) provides that the sixty day time limit is jurisdictional.

In *Cornish* the court stated that the triggering event for an action by a city council was "the ministerial act by which enduring evidence of the judicial act of rendition of judgment is afforded." In *Brannon v. County of Shelby*, 900 S.W.2d 30, 33 (Tenn. Ct. App. 1994) the sixty day time period began to run when the mayor signed a zoning

resolution approving a special use permit. The City argues that Mayor Berke signed the Ordinance on December 20, 2016. However, the Court finds no proof of the date of the mayor's signing looking only at the Amended Complaint. On a motion to dismiss the Court does not go outside of the complaint. *Highwoods Props, supra.*

What is contained in the Amended Complaint, however, is that the City Council passed the Ordinance on its second reading on December 20, 2016, and that the Ordinance, would take effect two weeks after passage. (A.C. 45) Plaintiff alleged that the Ordinance became effective January 3, 2017. (A.C. 45) Per attached Exhibit 19, the "entry of the order or judgment" was December 20, 2016. Even accepting Plaintiff's date of January 3, 2017, the sixty day time period for Plaintiff to file a writ of cert ran at the latest, on March 3, 2017. Plaintiff failed to file this action until January 18, 2018. Thus the City's decision became final, and the Chancery Court is deprived of jurisdiction. Accordingly Plaintiff's challenge to the Ordinance is time barred.

III. THE COURT DETERMINES PLAINTIFF FAILED TO TIMELY FILE AN ACTION FOR INVERSE CONDEMNATION

Courts are to determine the appropriate statute of limitations based on the gravamen of the complaint. *McFarland v. Pemberton*, 530 S.W.3d 76 (Tenn. 2017). In this case, the Court determines that the gravamen of Plaintiff's Amended Complaint is that the City's abandoning the public right-of-way was a taking of her property interest in the alley.

The City argues it did not take any of Plaintiff's property, rather, the Plaintiff's property was actually augmented as she gained property to her fee.

Tennessee law provides that a city has the right to abandon a street, that is, its easement of way, if for the public interest, and the land reverts to the owner of the ultimate fee. *State v. Taylor*, 64 S.W.766. Where a street has been dedicated and legally closed by an ordinance of a municipal corporation, the land reverted to the abutting property owners. *Beadle v. Crossville*, 7 S.W.2d 992 (1928). Further the fact that as a consequence of closing a street private owners benefit, this still does not convert the main purpose of the legislation from public to private. *Knoxville Ice & Cold Storage v. City of Knoxville*, 284 S.W. 866 (Tenn. 1926). Thus the City is correct to the extent that Plaintiff's fee was increased by the abandonment of the public right-of-way such that Plaintiff's back property line now extends to include to the center of the abandoned right-of-way. (The "City of Chattanooga Right-of Way Closure and Abandonment Policy" notes abandonment of a right-of-way does not determine ownership of land. Rather location of the new property lines is determined through a title search and the plat recording process which is the responsibility of the respective property owners.) (Ex. 13)

In addition however, Tennessee law provides that a city closes a public street subject to the right of the abutting owners to compensation. *State v. Hamilton*, 70 S.W. 619 (1902). Further if the complainant's property is taken when the municipal authority, by ordinance, abandons a street, the remedy is an action for compensation. *Cash & Carry Lumber Co. v. Olgiati*, 385 S.W.2d 115 (1964).

In her Opposition Plaintiff relies on the case of *Jacoway v. Palmer*, 753 S.W.2d 675 (Tenn. Ct. App. 1987). Plaintiff correctly cites *Jacoway* for the proposition that

where property is sold with reference to a plat on which alleys are shown, an easement therein is created in favor of the grantee. Such easement is not destroyed by the public authority's abandonment of it. Rather the grantee cannot be divested of the right without due process. *Id.* at 677.

However, *Jacoway* further states that if there is not public acceptance of the road, there yet remains a collective private easement upon the fee, such that each landowner is entitled to a private road easement over the land shown as a road to their termines with public roads. *Id.* The owner acquires an easement in the way upon which his lot is situated ***as is necessary or convenient to enable him to reach a highway***. *Id. Jacoway* involved a private, not a public, right-of-way. The trial court found plaintiffs had abandoned the right-of-way. The court of appeals found that the plaintiffs would have been land-locked without the right-of-way and reversed. The court noted that plaintiffs had an easement of convenience to enable them to reach a highway.

In the case sub judice the public right-of-way gave Plaintiff access to *the rear of her property*. (A.C. p. 10) However Plaintiff's Property fronts Thompson Street and she can park on and access Thompson Street. (A.C. p. 68) Thus unlike in *Jacoway* the City's abandonment of the public right-of-way did not leave Plaintiff landlocked.

Knierim v. Leatherwood, 542 S.W.2d 806 (Tenn. 1976) noted that an abutting owner has a greater interest than the general public in a public highway and has an easement of access over the road to his premises even after the public road is abandoned. However the *Knierim* court noted that an owner's easement is limited to the street or way

upon which his lot is situated as is necessary or convenient to his ingress or egress, citing, *State v. Hamilton*, 70 S.W. 619 (1902).

An abutting owner who owns merely an easement in the street cannot recover for injuries where the right of ingress and egress is reasonably sufficient. *Brumit v. Virginia S. W. Railroad*, 60 S.W. 505 (1900). Thus since Plaintiff admits in her Amended Complaint that she has ingress and egress from her Property by way of Thompson Street, Plaintiff may not have stated a claim for a "taking" of any property interest. *Brumit*.

However, giving the Plaintiff the benefit of all reasonable inferences as required by *Webb* the Court finds that Plaintiff has stated a prima facie case for a taking. The issue then becomes whether Plaintiff timely filed her action for a taking. Plaintiff asserts that the applicable statute of limitations is T.C.A. §29-16-124.

T.C.A. §29-16-124 provides

> All actions that could be brought under §29-16-123(a), regardless of the cause of action or remedy sought, including actions for trespass or nuisance, shall be commenced within twelve (12) months after the land has been actually taken possession of, and the work of the proposed internal improvement begun; saving, however, to unknown owners and nonresidents, twelve (12) months after actual knowledge of such occupation, not exceeding three (3) years, and saving to persons under the disabilities of infancy and unsoundness of mind, twelve (12) months after such disability is removed, but not exceeding ten (10) years.

Title 29 chapter 16 is entitled "Eminent Domain." T.C.A. §29-16-123 governs actions initiated by the owner rather than those initiated by the taking authority.

Plaintiff asserts that the statute requires an inverse condemnation action to be "commenced within twelve (12) months after the land has actually been taken possession

of . . . ." Plaintiff then asserts that the Ordinance, on its face, states that it becomes effective two weeks after its passage on December 20, 2016 which would be January 3, 2017. Plaintiff then argues that since the Ordinance did not become effective until January 3, 2017, then her Property was not "actually taken possession of" until January 3, 2017. Thus Plaintiff argues that she timely filed her Amended Complaint by filing it on January 2, 2018.

In this case the City will neither trespass nor encroach upon the Plaintiff's Property. The City merely abandoned the public right-of-way when it passed the Ordinance. The Plaintiff asserts in her opposition that she was keenly aware that the Ordinance passed, because she delayed her honeymoon to attend the second reading, but Plaintiff argues that her knowledge of when the Ordinance passed has no bearing on the statute of limitations. However, the Court determines Tennessee law is to the contrary.

In the case of *Bobo v. City of Jackson*, 511 S.W.3d 14 (Tenn. App. 2015) a homeowner brought an inverse condemnation claim against the city. On October 21, 2010 an environmental court had ordered a homeowner, Ms. Lipson, to tear down her home. Ms. Lipson appealed to circuit court. On April 7, 2011 the circuit court affirmed the decision and ordered the home demolished. On May 10, 2011 Ms. Lipson transferred the property to Ms. Bobo. On April 25, 2013 the City demolished the home. On April 22, 2014 Ms. Bobo filed suit for inverse condemnation.

The court noted that although the language of the statute "envisions a physical possession or intrusion upon the land," its interpretation has not been so limited. Indeed,

although the statute "is couched in terms of physical takings, it applies equally to all takings claims." A "taking" of an individual's real property occurs when a governmental defendant pursues any action "which destroys, interrupts, or interferes with the common and necessary use of real property of another." "The questions of what amounts to a taking in a particular case, and of when the taking is completed so as to give rise to a cause of action and start the running of the statute of limitations, depend on the facts in each case." As the Tennessee Supreme Court stated, "the onus is on the property owner to institute his suit within one year after he realizes or should reasonably realize that his property has sustained an injury which is permanent in nature." Citing *Knox County v. Moncier*, 224 Tenn. 361, 455 S.W.2d 153, 156 (1970). "The statute of limitations should be applied in such a manner that the landowner will have the one year period within which to bring his suit 'after injury or after reasonable notice or knowledge of such injury and damage.' " *Id.* (quoting *Morgan County v. Neff*, 36 Tenn. App. 407, 256 S.W.2d 61, 62-63 (1952).

The court rejected Ms. Bobo's assertion that her cause of action could not have accrued until April 2013 when her home was physically demolished. The court noted that the occurrence of a "taking" or permanent injury within the meaning of the statute is not necessarily contemporaneous to the manifested harm about which the plaintiff ultimately complains. If sufficient facts exist to show that the plaintiff should reasonably realize that some type of permanent injury has occurred, the running of the limitations period will commence at that point.

The court found that Bobo had acquired the property with "inquiry" notice that the city had already obtained a demolition order. Thus the court held the statute of limitations began to run when Bobo acquired the property. *See*, *also*, *Loveday v. Blount County*, E2011-01713-COA-R3-CV, 2012 WL 3012631 (July 24, 2012) (the statute of limitations begins to run when the plaintiff is charged with knowledge that the injury to his property is permanent)

In the instant case the Amended Complaint is replete with allegations and exhibits referencing the Plaintiff's awareness of the process of abandonment of the public right-of-way. In September of 2016 Little received a letter from the Chattanooga-Hamilton County Regional Planning Agency (RPA) providing notice that Taylor Vickers a resident of 249 Jarnigan Avenue had submitted a Closure/Abandonment application for the public right-of-way, and advising Plaintiff of a public hearing on the application set for October 10, 2016. (A.C. p. 17) Plaintiff communicated with her city council member about the potential closure. (A.C. p. 33 – 38) Plaintiff attended all three City Council hearings regarding the proposed abandonment including the meeting where the Ordinance passed. (A.C. p. 89) However, rather than file her complaint, Plaintiff wrote her city councilman after passage of the Ordinance regarding "procedural deficiencies" in the passage of the Ordinance. (A.C. p. 90) (Ex. 18). As in *Bobo*, the Plaintiff's cause of action or "taking" accrued upon the passage of the Ordinance. In *Bobo* the property owner had "inquiry" notice. Here the Court concludes Plaintiff had actual notice of the passage of the Ordinance on December 20, 2016 but failed to file her action until January 2, 2018. Thus

this Court concludes that the statute of limitations for Plaintiff's filing of an inverse condemnation claim ran before Plaintiff filed suit.

Plaintiff also makes a conclusory allegation that the City violated the Open Meetings Act. T.C.A. §8-44-101 et. seq. In ruling on a motion to dismiss, a court need not accept mere conclusory recitations. *Alfonso v. Barley, supra.* Rather a party must allege facts in support of the allegations. The only factual allegation that Plaintiff makes is that a meeting was held before the December 13, 2016 meeting that was attended by residents who supported the abandonment, but residents who opposed the abandonment were not provided adequate notice of that meeting. However Tennessee law provides that unless the "meeting" went beyond exchanging information and extended to substantive discussion to develop a consensus the gathering does not constitute a "meeting." *Flat Iron Partners, LP v. The City of Covington*, W2013-02235-COA-R3-CV, 2015 WL 1952290 (April 30, 2015) Moreover, even if members of a public body engage in conduct that violates the Open Meetings Act, the action of the public body will not be deemed void if the ultimate decision was made in accordance with the Act, and the vote on the bill was conducted at the public meeting of the council. *Id.* at *8. Here Plaintiff admits that the hearings regarding the proposed abandonment were scheduled on the agenda (A.C. 34, 36, 40, 45), and she, in fact, attended all three hearings (A.C. 89). Exhibits 1, 7, 10, 11, 15, 16, 17 and 19 further demonstrate the City gave notice of the hearings and publicly voted as required by T.C.A. §8-44-103 and 104. Thus the Amended Complaint does not state a claim for violation of the Open Meetings Act.

Moreover, even if Plaintiff had stated a claim for violation of the Open Meetings Act, the Court finds this claim is time barred as it was filed more than one year after the violation alleged to have occurred by December 20, 2016.

CONCLUSION

In summary the Court concludes that Plaintiff cannot challenge the validity of the Ordinance, because Plaintiff failed to state a justiciable controversy. Additionally the Court concludes that the City Council's passing of the Ordinance was an administrative function, and since Plaintiff failed to file her challenge within sixty days of the passage of the Ordinance the City's decision became final. Lastly the Court concludes that Plaintiff failed to timely file an action for a taking as Plaintiff filed her action more than one year from the passing of the Ordinance.

From all of the above, the Court determines that the City's motion to dismiss is well-taken and should be granted.

Wherefore it is hereby ORDERED, ADJUDGED and DECREED that the motion to dismiss Plaintiff's complaint is GRANTED and the case is dismissed with prejudice.

Costs taxed to Plaintiff.

ENTER

Pamela A. Fleenor

PAMELA A. FLEENOR
Chancellor - Part 1

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of this Order has been placed in the United States Mail addressed to the following person (s):

Rebecca M. Little
412 Thompson Street
Chattanooga, TN 37405

Misty Lavender Foy
Melissa J. Foster
100 E. 11th Street, Suite 200
Chattanooga, TN 37402

This the 16th day of April, 2018.

Robin L. Miller, Clerk and Master

By: _____
Deputy Clerk and Master

IN THE CHANCERY COURT FOR THE ELEVENTH JUDICIAL DISTRICT OF TENNESSEE

PINNACLE POINT PARTNERS, LLC,	)	
	)	NO. 18-0074
Petitioner,	)	
	)	PART 1
VS.	)	
	)	
THE LAND TRUST FOR TENNESSEE, INC.,	)	
	)	
	)	
Respondent.	)	

JUDGMENT

This cause came on for trial on August 28, 2018 upon the Application for Declaratory Judgment filed by Pinnacle Point Partners, LLC (Pinnacle) requesting the Court to declare that a proposed roadway to be built across real property subject to a conservation easement would not violate the terms of that easement when the roadway will provide access to an assisted living facility.

PROCEDURAL POSTURE

To make the record clear the Court will first address the pretrial motions. Respondent The Land Trust for Tennessee, Inc. filed a motion in limine to exclude introduction of parol evidence to interpret the terms of the deed. The Court heard argument on the motion on August 6, 2018. The Court ruled that it would determine admissibility of any proffered evidence at the time of trial based on specific evidentiary trial objections.

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Pinnacle made an oral motion for directed verdict at the close of its proof. Tenn. R. Civ. P. 50 recites "a motion for directed verdict may be made at the close of the evidence offered by an opposing party. . . . " Thus the Court denied the motion as it was not made by the opposing party but rather by the party presenting the proof. Pinnacle renewed its motion for directed verdict at the close of the evidence. The Court again denies the motion, because motions for directed verdicts are appropriate in jury trials but have no place in nonjury trials. *Smith v. Inman Realty Co.*, 846 S.W.2d 819 (Tenn. Ct. App. 1992).

CREDIBILITY

The Court heard from seven witnesses, Tricia Mims, Dr. Chris Moore, Tom Schaffler, Stephen Meyer, Emily Parish, John Mitchum and John Bridger and accepted 12 exhibits into evidence. The Court found all the witnesses to be credible. The Court took the matter under advisement.

FINDINGS OF FACT

In December 2011, Pinnacle and the Land Trust for Tennessee, LLC (Land Trust) entered into a Quitclaim Deed for Conservation Easement (Conservation Easement) (Ex. 1). Pinnacle owns two tracts of real property in Hamilton County, TN totaling approximately 13 acres. Tract One consists of 4.95 acres. Tract Two consists of 8.4 acres. The property is located two miles from Hamilton Place Mall, a heavily developed area of town. On December 28, 2011 Pinnacle granted a conservation easement to Land Trust on Tract Two (Property). A conservation easement is a voluntary legal agreement to restrict property to preserve its conservation values. Land Trust holds 350 other

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conservation easements. Most are much larger tracts than is Pinnacle's. The role of Land Trust is to uphold conservation easements for the benefit of the public. Tract One (Adjoining Parcel) is adjacent to the Property. The Adjoining Parcel is not subject to the conservation easement.

Pinnacle's only assets are the Property and the Adjoining Parcel. Dr. Chris Moore is the CEO of Pinnacle. Prior to entering into this Conservation Easement, Dr. Moore had developed another piece of property that is also subject to a conservation easement. Dr. Moore formed Pinnacle for the purpose of protecting 2/3's of its property while developing the other 1/3 of the property for residential purposes. At some point Dr. Moore's wife had served on the board of Land Trust.

Dr. Moore discussed with Land Trust his intent to develop the Adjoining Parcel for residential purposes. While specifics were not discussed, the Parties discussed that the development would be eco-friendly, meaning energy efficient, and achieve density (i.e. residences are close together rather than spread out.) Originally Pinnacle planned to use an existing roadway to access Shallowford Road from the Adjoining Parcel but due to the topography, Pinnacle was unable to employ the existing road. Dr. Moore advised Land Trust about Pinnacle's inability to use the existing roadway and Pinnacle's need for a paved roadway. Thus the Parties negotiated for a paved roadway (Future Roadway) to be constructed across the Conservation Easement. Land Trust usually only allows gravel roadways over conservation easements.

Tricia Mims currently works for the National Park Service. Prior to that she was employed by the Lula Lake Land Trust. From 2007 – 2012 Ms. Mims was the Southeast

Region Project Manager for Land Trust. As such she negotiated 60 conservation easements with prospective donors. Of those, thirty were completed. Ms. Mims usually prepared the initial draft of the easement. Ms. Mims is familiar with Land Trust's marketing efforts to prospective donors. Land Trust advises prospective donors of the tax benefits of a conservation easement.

Ms. Mims negotiated on behalf of Land Trust with Pinnacle concerning the Conservation Easement. Ms. Mims drafted Section 11(b)(ii) of the Conservation Easement. Ms. Mims did not discuss with Pinnacle the number of residences Pinnacle would construct on the Adjoining Parcel. The draft Conservation Easement was also reviewed by Ms. Emily Parish, attorney and vice-president of Land Trust.

The Conservation Easement at Paragraph 11(b) provides in pertinent part

> (b) No public roadway or right of way may be constructed on the Property **except for a roadway** (the "Future Roadway") **to be located across the Property to connect the future residential development on the adjacent real property** identified as Tract One, Odyssey Land Company Subdivision as shown by plat of record in Plat Book 91, Page 171, the Register's Office of Hamilton County, Tennessee (the "Adjoining Development"), to Shallowford Road, and subject to the following conditions:
>
> . . .
>
> (ii) **The Future Roadway shall be limited to providing motor vehicle ingress and egress for the Adjoining Development** (including construction traffic associated with the Adjoining Development), and for the public to access the Trails and Public Access Area, as permitted in Sections6(c) and 6(d). **The Future Roadway shall not be used for ingress and egress for commercial or industrial development or to serve more development than the approximately thirty (30) residences associated with the above-described categories**; and

> (iii) **The Future Roadway shall not unreasonably interfere with the Conservation Values of the Property**, and Grantee acknowledges that as of the date hereof, the location of the Future Roadway as shown on the drawing attached hereto as Exhibit B and construction of the Future Roadway to meet applicable governmental requirements will not unreasonably interfere with the Conservation Values of the Property.

(bold font added)

Conservation values are characteristics of property to be upheld for a public benefit. Specifically for this Property the Conservation Values denoted were open space, wildlife habitat, and scenic values. (C.E. p. 2)

Pinnacle desires to construct an assisted living facility (ALF) on the Adjoining Parcel, and to construct a roadway from the ALF across the Property to Shallowford Road. Ms. Mims did not discuss construction of an ALF with Pinnacle. Ms. Mims testified that the Conservation Values of the Property would not be any more affected by construction of an ALF on the Adjoining Parcel than they would be by construction of thirty residences on the Adjoining Parcel. The Court finds that construction of an ALF on the Adjoining Parcel would not affect the Conservation Values of the Property any more than would construction of thirty residences on the Adjoining Parcel.

When a property owner grants a conservation easement, the property owner receives a tax benefit. The tax deduction is calculated based on the diminution in value of the property with the easement as compared to the value of the property without the conservation easement. In this case the two tracts were appraised at $749,000 before the Conservation Easement. (Ex. 4) After the Conservation Easement the two tracts was

valued at $332,000. Thus the difference resulted in a $417,000 tax deduction for Pinnacle. Pinnacle also received the benefit of reduced property taxes from the reduced property value. Land Trust does not require an appraisal, but Land Trust did review this appraisal.

Pinnacle entered into a commercial listing agreement with Mr. John Mitchum to market the Adjoining Parcel. Clarity Point Partners (Clarity Point), has agreed to purchase the Property and the Adjoining Parcel for $625,000, in order to construct an ALF on the Adjoining Parcel. The Adjoining Parcel is not as valuable for sale to construct single-family dwellings as it is to construct an ALF.

Clarity Point has built 11 other ALFs. At this proposed ALF employees will provide some care for seniors, such as bathing and dining but the employees are not medically trained, and thus will not provide health care. Caregivers also do the residents' laundry and housekeeping.

The ALF will have 105 beds in 85 bedrooms and one main kitchen. The bedrooms do not have kitchens. The ALF will employ five corporate staff who will work 9 – 5 and will also employ ten to twelve caregivers who will work eight hour shifts. Food Service will be delivered once a day, six days a week to the ALF. The food trucks that will deliver the food are small refrigerated box trucks. The employees do not live at the ALF but instead will commute to work. The other traffic to and from the ALF will consist of families visiting the residents and some doctors may make house calls. Clarity Point intends to develop a park on the Conservation Easement.

Mr. Stephen Meyer, a traffic engineer, performed an evaluation of trips generated if 30 detached dwellings were constructed on the Adjoining Parcel as compared to trips generated if an ALF with 105 beds was constructed on the Adjoining Parcel. The uncontroverted expert opinion was that the traffic from an ALF would result in 104 fewer trips a week than would traffic from 30 single-family dwellings on the Property.

Ms. Parish also had discussions with Pinnacle regarding the Conservation Easement in 2010. However, Ms. Parish did not discuss with Dr. Moore the type of residential development that Pinnacle would construct.

Land Trust does hold another conservation easement with a paved roadway on it. Land Trust used the language from that other conservation easement with a roadway on it to prepare this Conservation Easement. The language "above-described categories" in Paragraph 11(b)(ii) was also taken from that template and was included in the deed by Land Trust in error. It is unusual to allow a paved roadway on a conservation easement and to negotiate with a donor who is planning to develop the parcel adjacent to the easement. On December 27, 2011, the day before the deed was executed, Ms. Sarah O'Rear with Land Trust emailed Pinnacle regarding the approximate number of residences to include in the deed (Ex. 3). Ms. O'Rear noted the number "doesn't have to be exact." Pinnacle's vice-president, Mr. Jimmie Glascock, replied and supplied the number "30." Land Trust did not negotiate the number of residences.

Mr. Moore first discussed construction of an ALF on the Property with Mr. Greg Vital, a Land Trust board member who signed the deed on behalf of Land Trust. Mr. Vital owns Morning Pointe which builds ALFs. The two discussed construction of the

ALF while on-site on the Property. The discussions contemplated Pinnacle selling the two tracts to Morning Point to construct the ALF.

Land Trust's objection to the ALF is that it will have 85 units whereas the deed allows for "approximately 30 residences." Ms. Parish testified that the addition of 30 residences was a material change in the deed and should have been approved by the board. However, there was no board meeting to approve the change. Ms. Parish testified that it was simply an oversight due to year end dead-lines.

The Regional Planning Agency recommended that the City of Chattanooga deny Pinnacle's request to rezone the Adjoining Parcel from R-1 which is only for single-family residences to R-4 to allow for the ALF.

LEGAL STANDARD

> "Conservation easement" means a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations on the owner of the servient estate, the owner's heirs, and assigns with respect to the use and management of the servient land, structures or features thereon, and/or activities conducted thereon which limitations and affirmative obligations are intended to preserve, maintain or enhance the present condition, use or natural beauty of the land, the open-space value, the air or water quality, the agricultural, forest, recreational, geological, biological, historic, architectural, archaeological, cultural or scenic resources of the servient estate and is recorded in the register's office of the county in which the easement is located.

Tenn. Code Ann. §66-9-303(1)(B).

The construction of a deed is a matter of law. *Mitchell v. Chance*, 149 S.W.3d 40 (Tenn. Ct. App. 2004). In construing the language in a written instrument the words expressing the party's intention should be given the usual, natural, and ordinary meaning.

Shew v. Bawgus, 227 S.W.3d 569, 576 (Tenn. Ct. App. 2007). The use of an easement must be confined strictly to the purposes for which it was granted or reserved. *Id.* A principle which underlies the use of all easements is that the owner of an easement cannot materially increase the burden of it upon the servient estate. *Id.*

In interpreting deeds a court should first seek the parties' intention by examining the words in the deed, and by considering these words in the context of the deed as a whole. *Mitchell v. Chance*, 149 S.W.3d 40, 44 (Tenn. Ct. App. 2004). Courts customarily decline to consider parol evidence to explain a patent ambiguity. *Id.* A patent ambiguity is one which appears on the face of the deed. However, parol evidence may be admissible to remove a latent ambiguity in a deed. *Id.* A latent ambiguity is one which is not discoverable from a perusal of the deed but which appears upon consideration of extrinsic circumstances. *Id.*

If the contract is unambiguous, then the court should not go beyond its four corners to ascertain the parties' intention. *Adkins v. Bluegrass Estates, Inc.*, 360 S.W.3d 404, 412 (Tenn. Ct. App. 2011). As an aid to finding the parties's intention, however, the parol evidence rule does not prohibit the court from considering the circumstances surrounding the formation of the contract, the business to which the contract relates, and the construction placed on the contract by the parties in carrying out its terms. *Id.*

CONCLUSIONS OF LAW

Plaintiff has the burden of proof in this declaratory judgment action. *Blake v. Plus Mark, Inc.*, 952 S.W.2d 413 (Tenn. 1977).

I. The Language of the Easement

In Paragraph 11(b) of the Conservation Easement the Parties agreed that "No public roadway . . . may be constructed on the Property except for a roadway (the "Future Roadway") to be located across the Property to connect the future ***residential development*** on the adjacent real property . . . to Shallowford Road." Paragraph 11(b)(ii) recites that the "Future Roadway shall not be used . . . for commercial . . . development." Pinnacle asserts an ALF is a residential development but Land Trust asserts an ALF is a commercial development, because it is for-profit and has employees.

Applying the reasoning of *Shew*, *supra*, to this case, the first question for this Court is whether there is any clear evidence of the specific meaning intended by the Parties in the use of the words "residential development" in the Conservation Easement. In the instant case, the term "residential" is not defined in the deed. The Court notes that a term is not ambiguous just because the parties interpret the term in different ways. *Adkins*, 360 S.W.3d at 412. The Court does not find the term "residential development" to be ambiguous.

Having found that the term "residential development" is not ambiguous the Court then gives the words themselves their usual, natural, and ordinary meaning. *Shew*.

In *Parks v. Richardson*, 567 S.W.2d 465, 469 (Tenn. Ct. App. 1977), the plaintiff filed a DJA to determine whether construction of multi-unit residential buildings would breach a covenant restricting use of property for "residential purposes." In *Parks* the court decided the crucial question was what is the "use" to be made of the property by its occupants. In *Parks*, because the "use" of multi-unit residential buildings was for

permanent dwellings, the court concluded that duplexes, apartment houses, and condominiums constituted "residential purposes."

Similarly in the instant case the Court determines the use of the ALF by its occupants is for a permanent dwelling. Further the Court determines the ordinary meaning of residential development is a place where people live. Seniors will reside/live in the ALF. Land Trust argues that the seniors could not reside in the ALF without the help of the ALF employees. The Court does not find this argument persuasive. Many seniors can only reside in their homes because of the assistance of paid caregivers. However, that does not convert the homes into commercial developments. Accordingly the Court concludes the ALF comports with the term "residential development" in the Conservation Easement.

II. The Circumstances Surrounding the Creation of the Easement

The Parties further agreed that the Future Roadway would be "limited to providing motor vehicle ingress and egress for the Adjoining Development," but "***shall not be used*** for ingress and egress ***for commercial or industrial development or to serve more development that the approximately thirty (30) residences associated with the above-described categories. . . .***" Land Trust argues that in looking to the four corners of the deed the Parties also restricted the "residential development" to "approximately thirty residences." Land Trust objects to the proposed ALF because it will have 85 units which Land Trust asserts is more than the agreed upon number of 30 residences. Pinnacle asserts that the ALF is one residence with 85 bedrooms. Pinnacle argues the bedrooms do not have kitchens and thus are not the same as individual dwellings.

As an aid to finding the Parties' intention, the parol evidence rule does not prohibit this Court from considering the circumstances surrounding the formation of the contract, the business to which the contract relates, and the construction placed on the contract by the Parties in carrying out its terms. *Adkins*, *supra*.

The Court finds that the Parties discussed that the residential development would be eco-friendly and would achieve density. The Court determines an ALF achieves density as the 85 bedrooms are not spread out but instead are under one roof. Further the proof demonstrated that Land Trust did not impose a restriction on the number of residences to be developed. Rather Land Trust, the Party who drafted the Conservation Easement, asked Pinnacle to basically "fill in the blank" as to how many residences it intended to develop. While Ms. Parish testified that the number of residences was a material term to Land Trust, the board never met again to approve the number of residences. Further Mr. Vital, who executed the Conservation Easement on behalf of Land Trust, discussed construction of an ALF on the Adjoining Parcel with Dr. Moore of Pinnacle.

Land Trust asserts that at the time the Parties entered into the Conservation Easement the Property was zoned R-1 which would not allow for construction of an ALF. The Court does not find this argument to be persuasive. There was no proof that Land Trust relied upon the R-1 classification at the time of execution of the deed. The appraisal is based on R-1 residential development, but Land Trust did not require an appraisal. The Court concludes that the circumstances surrounding the granting of the Conservation

Easement indicate that construction of an ALF on the Adjoining Parcel falls within the Parties' intention of a "residential development."

III. The Court Will Construe the Conservation Easement Strictly to the Purpose for which it was Granted

Paragraph 11(b)(ii) provides in pertinent part, the "Future Roadway shall not . . . serve more development than the approximately thirty (30) residences associated with the above-described categories." Land Trust objects to the ALF because it has 85 bedrooms whereas the deed allows for "approximately thirty (30) residences." While the Land Trust asserts it is unusual to allow a paved roadway over a conservation easement, Land Trust had agreed to this previously. In fact Ms. Parish used that prior deed as a template for this deed. She even included the language "above-described categories" from the prior template in this deed in error.

In considering the context of the deed as a whole, *Mitchell*, *supra*, the Court finds the term "approximately thirty (30) residences" is modified by the subsequent language, "associated with the above-described categories." The Court finds "above-described categories" to be a patent ambiguity as it refers to terms that do not exist in the deed, and was included in error.

The use of an easement must be confined strictly to the purposes for which it was granted. *Shew*, 227 S.W.3d at 576. The owner of an easement may not impose thereon an additional burden. *Id.* The Court concludes that in construing the easement strictly, the language that "the Future Roadway shall not be used for ingress and egress . . . to serve more than the approximately thirty (30) residences" does not preclude construction of an ALF when the term "30 residences" is modified by language which is nonsensical and

appears in the deed by Land's Trust's error. To hold otherwise would allow Land Trust to impose an additional burden on the servient estate.

IV. A Paved Roadway to an ALF Will Not Unreasonably Interfere with the Property's Conservation Values

Paragraph 11(b)(iii) provides in pertinent part that "the Future Roadway shall not unreasonably interfere with the Conservation Values of the Property." Land Trust agreed to the construction of approximately 30 residences on the Adjoining Parcel.

The undisputed testimony was that the traffic generated by an ALF on the Adjoining Parcel would be less than would be the traffic generated by thirty residences on the Adjoining Parcel. Ms. Mims, whom the Court finds is an independent witness and who negotiated the Conservation Easement, testified that the ALF would not interfere with the Conservation Values any more than would 30 single-family dwellings. The Court concludes that the use of a paved roadway across the Property to access an ALF does not unreasonably interfere with the Conservation Values listed in the Conservation Easement.

CONCLUSION

WHEREFORE this Court declares that Pinnacle's constructing of an ALF on the Adjoining Parcel comports with the term of "residential development" in the Conservation Easement. Further the Court determines the construction of a paved roadway across the Property to the ALF will not unreasonably interfere with the Conservation Values of the Property.

Costs taxed to Respondent Land Trust.

ENTER

PAMELA A. FLEENOR
CHANCELLOR, PART 1

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of this Order has been placed in the United States Mail addressed to the following:

Philip B. Whitaker, Jr.
Adam C. Sanders
633 Chestnut Street, Suite 1900
Chattanooga, TN 37450

S. Madison Roberts, IV
Erika R. Barnes
401 Commerce Street, Suite 800
Nashville, TN 37219

This the 13th day of September, 2018.

Robin L. Miller, Clerk and Master

By: _____
Deputy Clerk and Master

IN THE CHANCERY COURT FOR HAMILTON COUNTY, TENNESSEE

PAUL FRANKENBERG, III, Petitioner, VS. RIVER CITY RESORT, INC., RIVER HOUSE TRUST, LLC, B. ALLEN CASEY, JR., and S. JACKSON WINGFIELD, III, Respondents.	)	NO. 12-0032 JURY DEMAND PART 1

MEMORANDUM OPINION AND ORDER

This cause came on to be heard on August 20, 2015, upon S. Jackson Wingfield, III's Motion for Summary Judgment (Wingfield); S. Jackson Wingfield, III's Statement of Undisputed Material Facts in Support of Its Motion for Summary Judgment (SUMF); S. Jackson Wingfield, III's Memorandum of Law in Support of His Motion for Summary Judgment; Affidavit of William D. Jones, Esq.; Response of Paul Frankenberg, III in opposition to S. Jackson Wingfield, III's Motion for Summary Judgment filed by Paul Frankenberg, III (Petitioner and Plaintiff); Petitioner's Response to Respondent Wingfield's Statement of Undisputed Material Facts Made in Support of His Motion for Summary Judgment; Petitioner's Statement of Disputed Material Facts; Affidavit of B. Allen Casey, Jr. (Casey); Declaration of Paul Frankenberg; Reply by S. Jackson Wingfield, III to Plaintiff's Response to Motion for Summary Judgment, argument of counsel and the entire record in this cause. The Court took the matter under advisement.

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STATEMENT OF THE CASE

Petitioner filed this action under the Uniform Fraudulent Transfers Act (UFTA) seeking to set aside a sale of realty on the north shore of the Tennessee River in Chattanooga (Property). In 2008, River House Trust, LLC (TRUST) sold the Property for $2,900,000 to Wingfield. Petitioner is a former employee of River City Resort, Inc. (RESORT). Petitioner and RESORT entered into certain promissory notes (Notes) for unpaid earnings. Defendant Casey executed the Notes as CEO of RESORT and also personally guaranteed the Notes (Guaranty). In December 2005, Petitioner, in a separate action, had sued RESORT on the Notes and Casey on his Guaranty. Petitioner filed this UFTA action in 2012 seeking to set aside TRUST's sale of the Property to Wingfield alleging TRUST is the alter ego of RESORT.

PROCEDURAL POSTURE

THE 2012 CASE

Mr. Frankenberg filed this petition on January 13, 2012 against defendants River City Resort, Inc. (RESORT), River House Trust, LLC (TRUST), B. Allen Casey (Casey) and Wingfield and filed an amended petition on July 22, 2015 (2012 Case). In his amended petition, Petitioner alleges that as a former employee of RESORT/TRUST and Casey, he is owed $187,988.92 on one note (Note 1) and owed an additional $250,000 on a second note (Note 2); (Note 1 and Note 2, collectively "Notes"). Petitioner further alleges that Casey personally guaranteed both Notes (Guaranty). Previously on December 29, 2005, Petitioner had sued RESORT on the Notes and Casey on his Guaranty in a separate action in this Court. In this action the Petitioner alleges that on January 16, 2008, RESORT/TRUST sold three parcels of land located at 418

Manufacturer's Road in Chattanooga (Property) to Wingfield for $2,900,000, which Petitioner alleges was below fair market value (FMV). Further Petitioner alleges that at the time of the sale, Casey and RESORT/TRUST were insolvent, thus the sale of the Property to Wingfield was a fraudulent conveyance.

In their original Answer filed in this 2012 Case, RESORT, TRUST and Casey (i) denied that RESORT owned the Property, (ii) denied that RESORT and Casey were liable on the Notes, (iii) denied that the amount paid by Wingfield was below FMV of the Property, and (iv) denied that RESORT sold the Property to Wingfield, but averred instead that only TRUST sold the Property to Wingfield. Furthermore, in their original Answer, RESORT, Casey and TRUST all pled that Petitioner was not a creditor of TRUST.

THE 2005 CASE

At Paragraph 19 of his amended petition, Petitioner states that on December 29, 2005 Plaintiff filed a complaint in this Court, which is currently pending, styled as *Frankenberg v. River City Resort, Inc. and B. Allen Casey, Jr.*, docket #05-1271 (2005 Case). In the 2005 Complaint, which is attached to the SUMF and of which the Court takes judicial notice, Plaintiff alleged that he was an employee of RESORT, and that RESORT owed him for various wage claims which were compromised and settled as set forth in a Settlement Agreement executed January 1, 2005, a copy of which Plaintiff had attached to his Complaint. Plaintiff claimed that as a part of the Settlement Agreement, RESORT executed two promissory notes to Plaintiff, (the Notes referenced in the instant Petition,) both of which were personally guaranteed by Casey. (the same Guaranty referenced in the 2012 Case) Again as averred in the 2012 Case, the first note (Note 1)

was for $187,988.92, and the second note (Note 2) was for $250,000. In their amended answer and counterclaims, Defendants Casey and RESORT assert numerous defenses to the action.

Also on December 29, 2005, Mr. Frankenberg filed a "Notice of Lien Against All Property of River City Resort, Inc." Chancellor Brown dismissed the lien claim and ordered Plaintiff to file a release of lien. The Eastern Section Court of Appeals, affirming Chancellor Brown, held that Petitioner, as President, COO, and managing officer of RESORT, was unable to file a lien under the employee lien statute and remanded for enforcement of the judgment.

BANKRUPTCY PROCEEDINGS

On March 3, 2014, RESORT filed a Suggestion of Bankruptcy of its Chapter 11 filing. Also on March 3, 2014, Casey filed a Suggestion of Bankruptcy of his Chapter 7 filing. On March 20, 2014, RESORT filed a notice of removal of this instant case to its Chapter 11 bankruptcy case. (Adv. Pro. 14-1028) On the same date RESORT filed a notice of removal removing the 2005 Case to its bankruptcy case as well. (Adv. Pro. 14-1027) The bankruptcy court allowed RESORT to amend its answer in the 2012 Case to assert that the purchase price for the Property was below FMV, that RESORT, in addition to TRUST, sold the Property and that RESORT was liable on the Notes. Additionally, the bankruptcy court allowed RESORT to amend to file cross-claims against Wingfield and TRUST claiming fraudulent conveyance of the Property. On July 24, 2014, the bankruptcy court granted Wingfield's motion to remand the adversary proceedings in the 2012 Case to this Court. The bankruptcy court also granted Wingfield's motion to remand the 2005 Case in part. The court remanded the 2005 Case "for determination of

claims and counterclaims therein. To the extent that the Chancery Court awards a judgment and/or equitable lien against any property owned by RCR (RESORT) or Casey, the execution on such judgment remains stayed." (Memorandum July 24, 2014, p. 24)

UNDISPUTED MATERIAL FACTS

In ruling on a motion for summary judgment, the court accepts all the nonmoving party's evidence as true and must view the evidence in the light most favorable to the nonmoving party. *Sykes v. Chattanooga Housing Authority,* 343 S.W.3d 18, 25 (Tenn. 2011). The Court finds the following facts to be undisputed.

1. Casey, at some point in time, was the sole shareholder, sole board of director member, president and secretary of RESORT.
2. Casey had complete control through RESORT of approximately 11 acres of real estate on the North Shore in Hamilton County, Tennessee including the Property at issue in this case. RESORT, acting through Casey, subdivided the property into various LLCs that RESORT owned. Although title to the several tracts of property was in different entities, Mr. Casey maintained control over all of the property through RESORT's 100% ownership of each entity and through use of RESORT's bank account for all bank activity of each entity.
3. RESORT founded TRUST, and was TRUST's only member.
4. TRUST had no corporate purpose separate from RESORT.
5. TRUST had no employees.
6. Trust had no physical address separate from RESORT.

7. Casey controlled a common pool of money under the name of RESORT, or sometimes under the name of TRUST or under Casey's other wholly controlled entities. Other than the timely servicing of debt, there was no business reason for the funds of these companies to be intermingled.

8. When Casey obtained financing for his venture, he placed the funds at his discretion in the account of RESORT or the account of TRUST or in other entities' bank accounts to be used at his convenience.

9. TRUST issued no limited liability membership interest except 100% to RESORT.

10. TRUST did not maintain its own bank account. Instead all of TRUST's banking transactions were through RESORT's bank account.

11. When RESORT or one of its 100% owned entities sold property or borrowed funds, Casey deposited the funds in the RESORT bank account for whatever purpose RESORT needed.

12. TRUST generated no income other than the loans and/or investments that RESORT obtained for it with RESORT's assets and authority.

13. TRUST had no mind, will, or existence of its own beyond that of RESORT.

14. RESORT had no mind, will, or authority beyond Casey's full 100% control.

15. On December 16, 2003, RESORT quitclaimed the Property to TRUST for zero dollars and RESORT's 100% membership interest in TRUST.

16. In 2004-2005 Petitioner was the sole employee of RESORT and his title was President and Chief Operating Officer of RESORT.

17. During the years 2004 and 2005 Petitioner worked with Casey in a real estate development venture designed to develop vacant and/or unused property on Chattanooga's Northshore.

18. Petitioner entered into two Notes with RESORT for unpaid wages. The Notes were guaranteed by Casey as CEO.

19. The parties to the Notes are Petitioner as lender/payee, RESORT as borrower/maker and Casey as guarantor. TRUST is not a maker on the Notes.

20. On December 30, 2005, Petitioner filed a complaint in this Court styled Paul Frankenberg, III v. River City Resort, Inc. and B. Allen Casey, Jr. docket # 05-1271 alleging that RESORT and Casey owed him monies for wages.

21. Petitioner, RESORT and Casey entered into a Settlement Agreement, a copy of which is attached as Exhibit B to the complaint filed in case #05-1271.

22. As of January 16, 2008, TRUST was the titled owner of the Property.

23. On January 16, 2008, TRUST sold the Property to Wingfield for $2,900,000 and the warranty deed reflecting same was recorded on the same date. Casey signed the warranty deed as Chief Manager of TRUST and as president of RESORT, the sole member of TRUST.

24. Casey used the proceeds from TRUST's sale of the Property to Wingfield to pay the co-debt owed by TRUST and RESORT on the Property and placed the excess monies into RESORT's bank account.

25. On February 24, 2014, as the president, sole board member, and sole shareholder of RESORT, Casey authorized the filing of, and signed the Chapter 11 petition, to place RESORT in bankruptcy in the United States Bankruptcy Court for the Eastern District of Tennessee. The case was assigned docket number 1:14-bk- 10745.

PRIOR SUIT PENDING

It is the duty of any court to determine the question of its jurisdiction on its own if the issue is not raised by the parties. *Scales v. Winston*, 760 S.W.2d 952 (Tenn. App. 1988). The instant Petition on its face is strikingly similar to the Complaint previously filed by Petitioner in this Court in 2005 styled *Paul J. Frankenberg, III v. River City Resort, Inc. and B. Allen Casey, Jr.* In the interest to secure the just, speedy, and inexpensive determination of every action, this Court will determine whether it has subject matter jurisdiction to hear this instant action under the doctrine of prior suit pending. Tenn. R. Civ. P. 1.

In the case of *Fidelity & Guaranty Life Insurance Company v. Corley*, No. W2002-02633-COA-R9-CV, 2003 WL 23099685 (Tenn. Ct. App. 2003) then Judge Kirby explained that the doctrine of prior suit pending holds that where two courts have concurrent jurisdiction over a matter, the court first taking jurisdiction acquires exclusive jurisdiction over the matter and the subsequent action must be dismissed. The court noted the following elements are required for a dismissal based on prior suit pending: 1) the

former suit must be pending in a court of this state having jurisdiction of the subject matter and the parties, 2) the two suits must involve the identical subject matter and 3) the two suits must be between the same parties. The *Corley* court also cited *Robinson v. Easter*, 344 S.W.2d 365, 366 (Tenn. 1961) for the proposition that the doctrine applies not only to issues actually raised in the first suit, but also to issues that could have been raised regarding the same subject matter. (emphasis added)

The doctrine of prior suit pending is discussed in Tennessee Jurisprudence which provides,

> "It is not necessary that the former suit should be between the same parties; it may be between their privies. Furthermore, it is not necessary that the subject matter and issue in the two suits are the same, but the purpose and object must be identical. However, it is necessary that the equity of the first suit, and its effect, should be the same. The test is whether the former suit could be pleaded as *res judicata*."

1 Tenn. Jur. Abatement §5 (2014).

Applying the three elements necessary to establish prior suit pending to the facts in this case, the Court first notes that both the 2005 Case and the instant 2012 Case are pending in Chancery Court for the Eleventh Judicial District of the State of Tennessee. Chancery Court has jurisdiction over both the subject matter and the Parties. In *Roy v. Diamond*, 16 S.W.3d 783 (Tenn. Ct. App. 1999) prior suit pending would have applied with both suits having been filed in circuit court in Madison County, but for the fact that the prior suit was non-suited. In the instant action both the 2005 Case and the 2012 Case are pending in a court of this state having jurisdiction of the subject matter and the parties. Thus the first element for prior suit pending is met.

The second element requires that the two suits must involve the identical subject matter. On first blush this requirement is not met as the 2012 Case is based on the UFTA

whereas the 2005 Case is based on breach of contract. However, the test to determine whether the same subject matter is involved in both suits is whether a judgment in the first suit would bar litigation of an issue in the second suit under *res judicata* principles. *Corley* *4. In *Farmers Insurance Exchange v. Shempert*, No. W2013-01059-COA-R3-CV 2014 WL 407903 *3 (February 3, 2014), the Western Section held that the element of "identical subject matter" for the purposes of prior suit pending was not limited to the claims asserted in the complaint but also encompasses the subject matter of the lawsuit.

This Court notes that in the 2005 Case, Mr. Frankenberg sued RESORT for unpaid salary and for non-payment on the Notes and he also sued Casey on his Guaranty. In the instant 2012 Case, Petitioner sued RESORT, Casey, TRUST and Wingfield alleging again that RESORT owes him on the Notes and that Casey owes him on his Guaranty. Petitioner further sued TRUST as the alter ego of RESORT. As the alter ego of RESORT, Petitioner alleges that TRUST is likewise liable to Petitioner on the Notes. Petitioner then asserts that since TRUST, as alter ego of RESORT, is liable to Petitioner on the Notes, then Petitioner is a creditor of TRUST. Petitioner then seeks to set aside TRUST's sale of the Property to Wingfield as a fraudulent transfer based on TRUST's alleged liability to him on the Notes.

In *Corley*, a Husband had purchased a life policy and named his wife as beneficiary. Subsequently, husband changed the beneficiary to his girlfriend. When Husband died he was still married. Both wife and girlfriend made demands for payment on the insurer. The girlfriend filed suit as beneficiary against the insurer in chancery court in Humphreys County. The insurer filed an interpleader action in circuit court in Henry County, against the girlfriend, wife and the estate. The circuit court denied the

girlfriend's motion to dismiss for prior suit pending but granted an interlocutory appeal. The appellate court then determined that in the chancery suit the girlfriend sought the life insurance proceeds, and in the later circuit action the insurer sought to deposit those proceeds with the clerk to avoid multiple liability. The court noted that both the circuit case and the chancery case could proceed to conclusions with different outcomes regarding liability. Thus the court barred the later-filed suit under the doctrine of prior suit pending.

This Court takes judicial notice that RESORT and Casey both filed Answers in the 2005 case denying liability to Mr. Frankenberg under various theories including duress and breach of contract. If RESORT and Casey are successful in their defense of the 2005 Complaint, then that judgment would bar the litigation in this suit as Mr. Frankenberg would not then be a creditor of either RESORT or Casey. If Petitioner be found not a creditor of RESORT as a result of the judgment in the 2005 Case then Petitioner cannot be a creditor of TRUST so as to set aside the sale of the Property to Wingfield under the UFTA. Thus the action against TRUST and Wingfield under the UFTA, if any, is conditioned upon the liability of RESORT and Casey to Petitioner on the Notes. Here, as in *Corley*, both the instant case and the 2005 case could proceed to conclusion, potentially with different outcomes regarding liability. The doctrine of prior suit pending was intended to avoid such duplicative litigation on the same subject matter between the parties that are essentially the same. *Corley* *7. Thus this Court finds that the 2005 Complaint and this 2012 Petition involve the identical subject matter as a judgment in the 2005 Case could bar litigation of an issue in the 2012 Case. *See, also, Oceanics Schools, Inc. v. Barbour*, 112 S.W.3d 135 at 145 (Tenn. Ct. App. 2003). (A suit against an alter

ego in which the plaintiff seeks to pierce the corporate veil in connection with a previously obtained judgment against a corporation is "not a separate and independent cause of action.")

As to the final requirement that the two suits must be between the same parties, the Court notes that Tennessee law requires only that the parties be "sufficiently similar." *Roy v. Diamond*, 16 S.W.3d at 790. In *Corley* the parties in the respective suits were not identical. The court determined that the "same parties" requirement is met where the parties in both suits were "in effect the same." *Corley* *7. The court cited *Cockburn v. Howard Johnson*, 385 S.W.2d 101 (Tenn. 1964), wherein the court dismissed the second suit on prior suit pending even though the second suit involved an additional defendant. The Court held the parties were in effect the same, because the liability of one defendant depended on the liability of the other defendant as his agent. Likewise in the case of *Roy v. Diamond, supra*, even though the suits involved different plaintiffs, the court considered them *sufficiently similar* so as to make no practical difference.

In *Murphy v. Jackson*, No. 02A01-9510-CV-00213, 1996 WL 601597 (October 22, 1996) plaintiff sued a defendant corporation and its officers to collect proceeds due from the corporation to a shareholder who had assigned his rights to the plaintiff. The defendants counter-claimed by filing an interpleader action against the plaintiff and an entity known as Omega Investment which also claimed a right to the proceeds due the shareholder. Omega moved to dismiss based on prior suit pending stating that it had obtained a judgment against the shareholder in a prior suit and that to collect on the judgment, it had issued a garnishment against the proceeds at issue. Although the cases involved different parties and different actions, the appellate court held that because the

prior court had previously obtained jurisdiction regarding the disposition of the proceeds the dismissal of the later filed suit was proper. The court noted the well-settled proposition that courts should not duplicate each other's work in cases involving the same parties and the same issues.

The Parties in the 2005 Case are not "identical" to the Parties in the instant 2012 Case. In the 2005 Case, Petitioner sued RESORT and Casey. In the instant case Petitioner sued RESORT, Casey and added TRUST under an alter ego theory. However, in his amended petition, Petitioner refers to the two parties as "RESORT/TRUST." The Court finds that the Petitioner's action against TRUST in this 2012 Case is dependent on the liability of RESORT in the 2005 Case. *Cockburn, supra.* Thus the Court finds that TRUST is "sufficiently similar" to RESORT according to Petitioner's allegations to meet the "identical" parties element. *Corley, supra.*

The only remaining difference in the parties in the 2005 Case and the parties in the 2012 Case then is the addition of Wingfield as a party. Additional defendants did not preclude dismissal in *Corley* nor did an additional plaintiff preclude dismissal in *Roy.* The Court finds that the addition of Wingfield does not preclude dismissal of the instant case under the doctrine of prior suit pending.

Wherefore, this Court finds that because the Parties in the 2005 Case and the Parties in the 2012 case are sufficiently similar, and the subject matter is identical and the cases are both pending in a court of this State that has jurisdiction over the parties and the subject matter, then the doctrine of prior suit pending applies. Accordingly this Court finds that this instant 2012 Case should be dismissed under the doctrine of prior suit pending.

In the alternative, and in the interest of judicial economy and efficiency, should prior suit pending not apply, the Court rules on this motion for summary judgment, as follows:

LEGAL STANDARD

Frankenberg's Petition to Set Aside Fraudulent Conveyance was filed after July 1, 2011, and Wingfield, the moving party, does not carry the burden of proof at trial. Accordingly, T.C.A. §20-16-101 applies to the Court's analysis of summary judgment. That statue provides:

> In motions for summary judgment in any civil action in Tennessee, the moving party who does not bear the burden of proof at trial shall prevail on its motion for summary judgment if it:
> (1) Submits affirmative evidence that negates an essential element of the nonmoving party's claim; or
> (2) Demonstrates to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim.

In *Rye v. Women's Care Center of Memphis, MPLLC,* No. W2013-00804-SC-R11-CV, 2015 WL 6457768 (October 26, 2015) the Tennessee Supreme Court stated,

> In Tennessee, when the moving party does not bear the burden of proof at trial, the moving party may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the nonmoving party's claim or defense. We reiterate that a moving party seeking summary judgment by attacking the nonmoving party's evidence must do more than make a conclusory assertion that summary judgment is appropriate on this basis. Rather, Tennessee Rule 56.03 requires the moving party to support its motion with a separate concise statement of material facts as to which the moving party contends there is no genuine issue for trial. Tenn. R. Civ. P. 56.03. Each fact is to be set forth in a separate, numbered paragraph and supported by a specific citation to the record. Id. When such a motion is made, any party opposing summary judgment party must file a response to each fact set forth by the nonmovant in the manner provided in Tennessee Rule 56.03. [W]hen a motion for summary judgment is made [and] . . . supported as provided in [Tennessee Rule 56],

> to survive summary judgment, the nonmoving party may not rest upon the mere allegations or denials of [its] pleading, but must respond, and by affidavits or one of the other means provided in Tennessee Rule 56, set forth specific facts *at the summary judgment stage* showing that there is a genuine issue for trial. Tenn. R. Civ. P. 56.06. The nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts. Matsushita Elec. Indus. Co., 475 U.S. at 586. The nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party. If a summary judgment motion is filed before adequate time for discovery has been provided, the nonmoving party may seek a continuance to engage in additional discovery as provided in Tennessee Rule 56.07. However, after adequate time for discovery has been provided, summary judgment should be granted if the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the existence of a genuine issue of material fact for trial. Tenn. R. Civ. P. 56.04, 56.06.

In this new standard, "the focus is on the evidence the nonmoving party comes forward with at the summary judgment stage, not on hypothetical evidence that theoretically could be adduced, despite the passage of discovery deadlines, at a future trial." *Id.*

If there are no issues of material fact, the Court must "take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence" to determine whether the moving party is entitled to a judgment as a matter of law. *Blair v. Town Mall*, 130 S.W.3d 761, 768 (Tenn. 2004).

LEGAL ANALYSIS

WINGFIELD'S SUMMARY JUDGMENT MOTION AGAINST PETITIONER

The issue presented is whether Petitioner has standing to avoid TRUST's sale of the Property to Wingfield.

I. UNIFORM FRAUDULENT TRANSFERS ACT (UFTA)

Petitioner filed this Amended Petition to Set Aside Fraudulent Conveyance pursuant to T.C.A. §§66-3-305 and 66-3-306, seeking to avoid TRUST's sale of the Property to Wingfield on January 16, 2008 pursuant to T.C.A. §§66-3-308 and 66-3-309. Wingfield argues that Petitioner does not have standing under the statute to avoid the sale of the property, because Petitioner is not a creditor of TRUST, the transferor of the Property. In general to establish standing, a party must demonstrate that (1) it sustained a distinct and palpable injury, (2) the injury was caused by the challenged conduct, and (3) the injury is apt to be redressed by a remedy that the court is empowered to give. *City of Brentwood v. Metro Board of Zoning Appeals*, 149 S.W.3d 49 (Tenn. Ct. App. 2004). Further, to vindicate a statutory right of interest, the party must demonstrate its claim falls within the zone of interests protected by the statute in question. *Id.* at 56.

A. To avoid the sale of the Property from TRUST to Wingfield, Petitioner must be a creditor of TRUST.

T.C.A. §66-3-305 entitled "Transfers fraudulent as to present and future creditors" provides in pertinent part as follows:

> (a) A ***transfer*** made . . . by a ***debtor*** is fraudulent as to a ***creditor***, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation:
> (1) With actual intent to hinder, delay, or defraud any creditor of the debtor; or
> (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
> (A) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(B) Intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

. . . .

Emphasis added.

T.C.A. §66-3-306 "Transfers fraudulent as to present creditors" provides in pertinent part as follows:

(a) A ***transfer*** made . . . by a ***debtor*** is fraudulent as to a ***creditor*** whose claim arose before the transfer was made . . . if the debtor made the transfer . . . without receiving a reasonably equivalent value in exchange for the transfer . . . and the debtor was insolvent at the time or the debtor became insolvent as a result of the transfer . . . .

Emphasis added.

T.C.A. §66-3-308 provides that the remedies of the UFTA are for creditors. T.C.A. §66-3-309(b) provides, ". . . to the extent a transfer is voidable in an action by a **creditor** . . . the **creditor** may recover judgment for the value of the asset transferred." "A close review of the UFTA clearly reveals that the remedies provided under the UFTA are limited to *creditors* of *debtors*." *Perkins v. Brunger*, 303 S.W.3d 688, 692. (Tenn. Ct. App. 2009). Thus to seek a remedy under the UFTA, this Court determines that Petitioner must first establish that he is a "creditor" of TRUST.

A "creditor" is a person who has a claim. T.C.A. §66-3-202(4) A "claim" is defined as a right to payment. T.C.A. §66-3-302(3).

Wingfield's proof that Petitioner is not a creditor of TRUST

Petitioner's "claim" for purposes of the UFTA is for non-payment on the Notes and Guaranty. (Amended Petition at 15, 16, 18) Wingfield contends that TRUST is not liable to Petitioner on the Notes, and thus Petitioner has no claim against TRUST. Wingfield has supported his motion with the following statement of material facts:

SUMF 16. The parties to Note 1 and Note 2 are Mr. Frankenberg as the lender, River City Resort, Inc. as the borrower, and B. Allen Casey, Jr. as the guarantor." (citing to the petition and cross-claim)

Petitioner responded that "Neither admitted or denied. The Petition and Cross-Claim speak for themselves."

SUMF 17. River House is not a party to Note 1. (citing to the petition and cross-claim)

Petitioner responded, "It is admitted that River House is not a named debtor in the notes in question, though it is denied that River House has any legal existence separate and distinct from RCR and/or Casey."

SUMF 18. River House is not a party to Note 2. (citing to the petition and cross-claim)

Petitioner responded, "It is admitted that River House is not a named debtor in the notes in question, though it is denied that River House has any legal existence separate and distinct from RCR and/or Casey."

The Court finds Petitioner fails to deny these material facts and fails to cite to the record to support his denial of a separate legal existence of TRUST as required by Tenn. R. Civ. P. 56.03.

Wingfield also attached the complaint in the 2005 Case to his motion which has attached to it as Exhibits C and D copies of the Notes. TRUST was not a signor on the Notes nor did TRUST guarantee the Notes. Petitioner has not disputed the Notes.

Wingfield further set forth the following statement of undisputed material facts in support of his motion, all cited to the 2005 Complaint in the record attached to his motion:

SUMF 22. The 2005 Complaint alleges against RCR and B. Allen Casey, Jr. ("Mr. Casey") essentially the same claims that serve as the underlying basis for Petitioner's claims in the instant suit.

SUMF 23. Specifically, the 2005 Complaint alleges that he was an employee of RCR and Mr. Casey, and that he is owed $268,181.81 for bonus and severance payments.

SUMF 24. The 2005 Complaint further alleges the existence of two separate promissory notes that were executed as a part of the settlement of certain wage claims.

SUMF 25. Specifically, the 2005 Complaint alleges that River City Resort executed a promissory note to Mr. Frankenberg as of November 20, 2005 in the principal amount of $187,988.92.

SUMF 26. The 2005 Complaint further alleges that River City Resort executed a promissory note to Mr. Frankenberg as of November 20, 2005 in the principal amount of $250,000.00.

To the above five statements Petitioner responds, "Neither admitted nor denied. The 2005 Complaint speaks for itself."

Thus through this set of his SUMF Wingfield has demonstrated that the Notes represent obligations for wages incurred by Petitioner as an employee of RESORT which has not been disputed by Petitioner. Further, the Court takes judicial notice that the Eastern Section Court of Appeals in *Paul J. Frankenberg, III v. River City Resort, Inc.*, E2012-01106-COA-R3-CV, 2013 WL 3877617 (Tenn. Ct. App. April 11, 2013) held that Petitioner was a managing officer, President and COO of RESORT. Additionally, Petitioner admits in his Declaration that his titular employer was RESORT.

Thus Wingfield has cited to specific facts in the record demonstrating that Petitioner's claim on the Notes is against RESORT, not TRUST. Since Petitioner's claim is not against TRUST, this Court finds that, under *Rye*, Wingfield has affirmatively negated an essential element of Petitioner's UFTA action by showing that Petitioner is not a creditor of TRUST.

B. In a similar vein, to avoid TRUST's sale of the Property to Wingfield, Petitioner must show that the Property was an asset of a debtor of Petitioner.

To set aside TRUST's sale of the Property to Wingfield, Petitioner must prove there was a "transfer" by a "debtor." T.C.A. §§66-3-605, 66-3-606. *See also Taylor v. George*, E2014-00608-COA-R3-CV, 2015 WL 1218658 (Tenn. Ct. App. March 16, 2015) (T.C.A. §66-3-305 clearly and unambiguously provides that only transfers made by a debtor may be found to be fraudulently conveyed). A "debtor" is defined as a person who is liable on a claim. T.C.A. §66-3-302(6). A "transfer" is defined as a parting with an asset. T.C.A. §36-3-302(12). "Asset" is defined as property of a debtor. T.C.A. §66-3-302(2).

Wingfield's proof that the Property was not an asset of a debtor of Petitioner.

Wingfield further contends that Petitioner cannot avoid TRUST's sale of the Property to Wingfield, because the Property was not an asset of a "debtor".

Wingfield demonstrated through the affidavit of Jones at Paragraph 7 that the Property was titled to TRUST at the time of the sale to Wingfield. Additionally, Petitioner attached the Warranty Deed transferring the Property from TRUST to Wingfield as Exhibit B to his Amended Petition. The Warranty Deed demonstrates that TRUST, not RESORT, conveyed the Property to Wingfield.

Thus Wingfield has cited to specific facts in the record demonstrating that Petitioner seeks to avoid a transfer of an asset belonging to a third-party, not a transfer of an asset belonging to a debtor as required by TCA 66-3-305 and *Taylor*, *supra.* Accordingly, in a similar vein, this Court finds that Wingfield has affirmatively negated an essential element for Petitioner seeking to avoid the transfer by demonstrating that the Property transferred was not an asset of a debtor of Petitioner.

Thus this Court finds that Wingfield has satisfied his burden of production and shifted the burden to Petitioner to show "at the summary judgment stage" that there is a genuine issue of material fact for trial.

Petitioner's response to Wingfield's properly supported motion for summary judgment

The Court having found that Wingfield has affirmatively negated essential elements of Petitioner's claim, Petitioner may not rest upon the mere allegations of his pleadings but must instead respond by affidavit or otherwise setting forth specific facts at this summary judgment stage showing there is a genuine issue for trial. *Rye.*

In response Petitioner submitted the affidavit of Casey and the declaration of Petitioner wherein both asserted that Casey was the 100% shareholder of RESORT and RESORT was the sole member of TRUST. Taking the strongest legitimate view of the evidence in favor of the Petitioner and construing all reasonable inferences to be drawn therefrom also in favor of Petitioner, the Court finds that Casey controlled RESORT and RESORT controlled TRUST and thus Casey also controlled the Property. (see discussion, pp. 26 – 28, *infra*) Petitioner's theory is that this control then makes TRUST the alter ego of RESORT.

However, the Court finds that Petitioner did not set forth specific facts that Casey's control of RESORT and/or RESORT's control of TRUST caused TRUST to be liable on the Notes. Under *Rye*, Petitioner cannot rest upon his mere allegations in his pleadings that TRUST is liable on the Notes as an alter ego of RESORT but instead must set forth facts here at the summary judgment stage showing there is at least a genuine issue for trial.

Instead Petitioner attempts to boot-strap or blend the UFTA inquiry of whether Petitioner is a creditor of TRUST with the inquiry of whether the corporate veil has been pierced. However, these are two separate inquiries. Both Casey and RESORT filed answers to Petitioner's 2005 Case in this Court, of which the Court takes judicial notice, stating that they have no liability on the Notes under numerous theories. If Petitioner is unsuccessful in the 2005 Case, then Petitioner would not be a creditor of either RESORT or Casey. Further res judicata and collateral estoppel would then apply to this 2012 Case. Thus if Petitioner is unsuccessful in the 2005 Case, then Petitioner could in no way be a creditor of TRUST as he would not even be a creditor of RESORT. Hence there would be no reason to inquire if TRUST were the alter ego of RESORT for purposes of the UFTA claim.

Under *Rye* the focus is on the evidence the nonmoving party comes forward with at the *summary judgment stage*, not on hypothetical evidence that may be adduced at a future trial. Here, at the summary judgment stage, Petitioner has failed to set forth specific facts that demonstrate there is a genuine issue for trial. Instead Petitioner has mere allegations that there is some metaphysical doubt as to the material facts. *Rye*. The UFTA does not create claims. *Kraft Power Corp v. Merrill*, 981 N.E.2d 671, 681 (Mass.

2013). "Consequently, if the claim is not established, then the whole proceedings fail and the bill must be dismissed." *Id.*

In his reply brief, Wingfield argues that unless and until a court disregards the corporate identity of RESORT, Petitioner cannot be a creditor of TRUST. This Court agrees. In *Oceanics Schools, Inc. v. Operation Sea Cruise*, 03A01-9904-CV-00153, 1999 WL 1059678 (Tenn. Ct. App. November 19, 1999) the court refused to allow a judgment creditor to execute on its judgment against the shareholder of the judgment debtor, because the shareholder was not a judgment debtor in that case. Instead, the court found the creditor's remedy was to pursue the shareholder in a separate suit in an attempt to pierce the corporate veil. Similarly, in the instant case, Petitioner's UFTA action against TRUST, is conditioned upon and becomes cognizable only if Petitioner first establishes RESORT's liability on the Notes in the 2005 Case. Then Petitioner would still have to successfully reverse pierce the corporate veil to find TRUST somehow liable on the Notes made by RESORT.

In the subsequent *Oceanics* suit against the shareholder, the court pierced the corporate veil after if found the alleged alter ego had ample due process and had full opportunity to litigate the pertinent issues. *Oceanics School, Inc. v. Barbour*, 112 S.W.3d 135, 146 (Tenn. Ct. App. 2003). Here Petitioner seeks to avoid a transfer by a third-party transferor alleging that the transferor is the alter ego of an entity that has yet to litigate its action with Petitioner. Unlike in *Barbour*, *supra*, here RESORT, the alleged alter ego of TRUST, has not had ample due process and full opportunity to litigate the pertinent issues on the Notes.

Under *City of Brentwood*, 149 S.W.3d at 56, *supra*, to establish standing the injury must have been caused by the challenged conduct. Here Petitioner's injury is RESORT's non-payment of the Notes. The challenged conduct is TRUST's sale of the Property to Wingfield. The sale did not cause RESORT's non-payment of the Notes. While under the UFTA a "claim" need not be reduced to judgment, the Court finds that under *Brunger*, the Petitioner must be a creditor of TRUST and thus Petitioner must have a claim against TRUST. Petitioner has failed to set forth specific facts at this summary judgment stage showing there is a genuine issue that Petitioner has such a claim. As such, Petitioner is not a creditor of TRUST. Likewise, the Court finds that Petitioner failed to set forth facts demonstrating there is a genuine issue that the transfer was of an asset belonging to a debtor. Thus under *Brunger*, this Court finds that Petitioner lacks standing to set aside the sale of the Property. Therefore this Court finds that Wingfield's motion for summary judgment is well-taken and should be granted.

II. PIERCING THE CORPORATE VEIL

Additionally and alternatively, the Court determines that Petitioner has failed to produce evidence demonstrating a genuine issue of fact to pierce the corporate veil so as to make Petitioner a creditor of TRUST to avoid the sale of the Property.

A corporation is presumptively treated as a distinct entity separate from its shareholders, officers, and directors. *Schlater v. Haynie*, 833 S.W.2d 919, 925 (Tenn. Ct. App. 1991). A corporation's identity should be disregarded only with great caution and not precipitately. *Id.* In this case Petitioner seeks to pierce the veil of TRUST which is a limited liability company. The doctrine of piercing the corporate veil applies equally to cases in which a party seeks to pierce the veil of a limited liability company. . . ."

Edmunds v. Delta Partners, LLC, 403 S.W.3d 812 (Tenn. Ct. App. 2012) Further, Petitioner seeks to pierce the corporate veil in reverse so as to have TRUST responsible for the actions of its owner, RESORT, on the Notes. In *S.E.A., Inc. v. Southside Leasing Co.*, E2000-00631-COA-R3-CV, 2000 WL 1449852 (September 29, 2000) the court affirmed the trial court's granting of summary judgment refusing to pierce the corporate veil noting no Tennessee court has reversed pierced the veil so as to hold a corporation liable for the acts of its majority shareholder.

Petitioner cites *Continental Bankers Life Ins. Co. of the South v. Bank of Alamo*, 578 S.W.2d 625 (Tenn. 1979) which involved a plaintiff seeking to hold a corporation liable for the acts of its subsidiary. However, here unlike *Alamo*, Plaintiff seeks to hold the subsidiary, TRUST, liable for the acts of the parent, RESORT. This Court will nonetheless examine the Petitioner's proof under the analysis of *Alamo.*

A. The first element of the test for piercing the corporate veil is whether at the time of the transaction complained of, the parent exercised complete dominion over the subsidiary in respect to the transaction under attack so that the subsidiary had no separate existence.

As evidence for this element Petitioner argues that (1) Casey controlled RESORT which controlled TRUST and (2) Casey signed the warranty deed conveying the Property to Wingfield as manager of TRUST and as president of RESORT. Thus apparently Petitioner takes the position that the "transaction complained of" is the sale of the Property. This Court disagrees. Avoiding a transfer is a **remedy, not a claim,** provided under the UFTA to one who already has a claim. The UFTA does not create claims. *Kraft Power Corp v. Merrill, supra*, at 681. Rather, the Court finds that the transaction of

which Petitioner complains, i.e. the transaction that gave rise to Petitioner's injury or claim is the non-payment of the Notes. Thus the issue is whether RESORT/Casey exercised dominion over TRUST so as to make TRUST liable on the Notes.

In the recent case of *F&M Marketing Services, Inc. v. Christenberry Trucking and Farm, Inc.*, E2015-00266-COA-R3-CV, 2015 WL 6122872 (October 19, 2015), the court noted that the Tennessee Supreme Court in *Rogers v. Louisville Land Co.*, 367 S.W.3d 196 (Tenn. 2012) stated that the factors promulgated in *FDIC v. Allen*, 584 F. Supp. 386 (E. D. Tenn. 1984) are applicable when determining whether the corporate veil should be pierced. Generally, no one factor is conclusive in determining whether to pierce the corporate veil; rather, courts will rely upon a combination of factors in deciding the issue. *Id.* (citing *Barbour*, 112 S.W.3d at 140). Applying the Rogers/Allen factors to this case:

(1) whether there was a failure to collect paid in capital;

Petitioner failed to put on proof of whether there was a failure to collect paid in capital;

(2) whether the corporation was grossly undercapitalized;

Petitioner failed to put on proof of whether the corporation was grossly undercapitalized. Petitioner demonstrated that TRUST generated no income.

(3) the non-issuance of stock certificates;

Petitioner put on proof that TRUST issued no liability membership interest except 100% interest to RESORT

(4) the sole ownership of stock by one individual;

Petitioner put on proof that RESORT was 100% member of TRUST;

(5) the use of the same office or business location;

Petitioner put on proof that RESORT and TRUST had the same physical address;

(6) the employment of the same employees or attorneys;

Petitioner put on proof that TRUST had no employees;

(7) the use of the corporation as an instrumentality or business conduit for an individual or another corporation;

Petitioner demonstrated that Casey had exclusive control over a common pool of money under the name of RESORT and under the name of TRUST and at his discretion deposited the funds into any bank account of his choosing;

(8) the diversion of corporate assets by or to a stockholder or other entity to the detriment of creditors, or the manipulation of assets and liabilities in another;

Petitioner failed to demonstrate any diversion of corporate assets to a related entity. Petitioner put on proof that TRUST's sale of the Property was to an independent third party Wingfield.

Petitioner demonstrated that the sale proceeds were used to pay off the co-debt owed by TRUST and RESORT on the Property.

(9) the use of the corporation as a subterfuge in illegal transactions;

Petitioner's proof as to this element is apparently that the sale of the Property to Wingfield was for less than FMV based on the affidavit of Casey;

(10) the formation and use of the corporation to transfer to it the existing liability of another person or entity;

The Petitioner failed to demonstrate that the formation and use of TRUST was to transfer to it the existing liability of another person or entity. Instead the proof demonstrated that RESORT transferred an asset to TRUST (the Property at issue);

(11) the failure to maintain arms length relationships among related entities.

Through the affidavit of Casey, Petitioner demonstrated that the Property was originally transferred in 2003 from RESORT to TRUST by quitclaim deed for RESORT's 100% ownership of TRUST and that Casey as 100% shareholder of RESORT intermingled funds between the entities.

In construing the evidence in the light most favorable to Petitioner, the Court finds that a sufficient number of the *Allen* factors are present to demonstrate that Casey was the sole shareholder of RESORT and RESORT was the sole member of TRUST. As such Casey had complete control of RESORT and of TRUST. Viewing the evidence in the light most favorable to Petitioner then the inference is Casey also had complete control of the Property. However, Petitioner put on no proof that TRUST had control over RESORT as to the "transaction under attack" giving rise to Petitioner's UFTA claim, that is the non-payment of the Notes. Nor did Petitioner put on any proof that RESORT's control over TRUST caused TRUST to be liable on the Notes.

B. The second inquiry under *Alamo* is whether such control was used to commit fraud or an unjust act in contravention to third parties' rights.

In the case cited by Petitioner, *Tennessee Racquetball Investors, Ltd. v. Bell*, 709 S.W. 2d 617 (Tenn. Ct. App. 1986), the court did not pierce the corporate veil to allow a creditor to sue a 100% owner of a corporation on a note executed by the corporation.

While the court found that the shareholder exercised dominance over the corporation, the court determined that the dominance was not the proximate cause of plaintiff's injury. The *Bell* court further noted that in the Tennessee cases wherein the veil was pierced, the rights of the plaintiff arose from some fraud **at the creation of the contract** or some misconduct of the dominant party executed through the agency of the controlled entity. *Id.* at 623.

Petitioner set forth no facts that Casey's control of RESORT and/or RESORT's control of TRUST caused some fraud in the creation of the Notes. Instead Petitioner argues (1) RESORT conveyed the Property to TRUST by quitclaim deed in 2003. (2) RESORT signed the Notes in 2005. (3) When TRUST sold the property to Wingfield in 2008, the 2005 Case against RESORT and Casey for non-payment of the Notes was pending and Petitioner had filed a lien on RESORT's assets. As such he alleges he would have also had a lien on TRUST's asset, the Property. However, the Eastern Section by opinion entered April 11, 2013, *supra*, determined that Petitioner was not entitled to file the lien as he was not an employee for purposes of the employee lien statute.

Petitioner then asserts, without any further foundation, [t]hus the rights of Frankenberg ***may*** have been wrongfully contravened." However here at the summary judgment stage, Petitioner has not set forth specific facts showing what rights of Frankenberg were contravened or how they were contravened.

C. The final inquiry as set forth in *Alamo* is whether the aforesaid control and breach of duty proximately caused the injury or unjust loss of which Petitioner complains.

In *Alamo*, the court found that the control exercised by the parent was not used to commit fraud upon the bank. *Alamo* requires that at the time of the transaction, the parent must exercise complete control over the subsidiary.

Petitioner in his brief makes the assertion that, "the subsidiary, [TRUST] acting under the control of the parent corporation and Casey, breached the duty it owed its creditor, Frankenberg." But the Petitioner put on no proof of what duty TRUST owed to Petitioner nor of how TRUST breached any duty to Petitioner. Instead Petitioner merely alleges, "The **company** did not honor the promissory note it had signed in favor of Frankenberg," and "[t]hen, the **company** sold its only asset." To the contrary, here at the summary judgment stage the only proof is that the "company" that did not honor the Notes was RESORT, whereas the "company" that sold its only asset, i.e. the Property, was TRUST. As noted previously, the sale of the Property did not give rise to Petitioner's "claim." Petitioner's claim, as alleged in his amended petition at 15, 16, and 18 is for non-payment on the Notes in the 2005 Case. While Petitioner has demonstrated Casey's/RESORT's control over TRUST, Petitioner has put on no proof that said control was the proximate cause of Plaintiff's injury, that is, of the non-payment of the Notes.

Thus the Court finds that Petitioner has failed to set forth specific facts here at the summary judgment stage that demonstrate a genuine issue that TRUST is the alter ego of RESORT to pierce the corporate veil in reverse so as to hold TRUST liable on the Notes.

WINGFIELD'S SUMMARY JUDGMENT MOTION AGAINST RESORT

The bankruptcy court allowed RESORT to amend its answer to assert a cross-claim against TRUST and Wingfield. In its cross-claim RESORT seeks to set aside TRUST's sale of the Property to Wingfield under the UFTA. In his motion for summary

judgment against RESORT, Wingfield argues that RESORT is not a creditor of TRUST and thus lacks standing to set aside the sale. Wingfield notes in his brief that in its cross-claim RESORT fails to even allege that RESORT is a creditor of TRUST. Further in his SUMF at 20, Wingfield states, "RCR does not contend that it is or ever was a creditor of River House," citing the cross-claim. RESORT filed no response to the SUMF. The Court finds that Wingfield has demonstrated that RESORT's evidence is insufficient to establish standing, an essential element of its claim. Thus Wingfield has shifted the burden to RESORT to demonstrate some specific fact showing there is a genuine issue for trial. RESORT failed to respond to the motion for summary judgment.

Since RESORT has failed to put on any proof that it is a creditor of TRUST, the Court finds that RESORT lacks standing to avoid TRUST's sale of the Property to Wingfield. *Brunger, supra.*

Wingfield also asserts that RESORT's claims are time-barred.

T.C.A. §66-3-310 ("Extinguishment of Cause of Action") provides as follows:

> A cause of action with respect to a fraudulent transfer or obligation under this part is extinguished unless action is brought:
>
> (1) Under *§66-3-305(a)(1)*, within four (4) years after the transfer was made or the obligation was incurred or, if later, within one (1) year after the transfer or obligation was or could reasonably have been discovered by the claimant;
>
> (2) Under *§66-3-305(a)(2)* or *§66-3-306(a)*, within four (4) years after the transfer was made or the obligation was incurred; or
>
> (3) Under *§66-3-306(b)*, within four (4) years after the transfer was made or the obligation was incurred.

TRUST sold the Property to Wingfield on January 16, 2008. RESORT failed to set forth any facts establishing any obligation of TRUST to RESORT. Accordingly any claim that RESORT may have had on its own under the UFTA had to be brought by

January 16, 2012 pursuant to T.C.A. §66-3-310. As RESORT's cross-claim was filed on July 23, 2014, this Court finds that RESORT's UFTA claim on its own, if any, is time-barred.

Judge Rucker allowed RESORT to amend its answer and assert a counter-claim alleging that RESORT, in addition to TRUST, sold the Property and that the Property was sold for less than FMV even though in its original answer RESORT denied that it owned the Property and denied that the Property was sold for less than FMV. On page 5 of her July 9, 2014 Memorandum (Memo.), Judge Rucker stated, "The Court recognizes that RCR has changed its position in the litigation from defending the transfer to seeking to avoid it, but the legal effect of such a change on the case when the change is made by a debtor in possession following a bankruptcy filing will be left to the court which ultimately hears the case on its merits."

This Court finds that Judge Rucker did not rule on this dispositive statute of limitations issue but only on whether RESORT could amend to raise the cross-claim. In allowing RESORT to amend, the Judge advised that, "[t]o the extent that an actual creditor existing at the time of the bankruptcy filing could have brought a claim to avoid the transfer, the debtor in possession may do so." (Memo p. 7) In allowing the amendment Judge Rucker noted that RESORT is not barred by the four year statute of limitations because it stepped into Frankenberg's shoes to pursue the fraudulent transfer. (Memo. p. 8). Thus RESORT improved its position as to the "timeliness" of its claim by stepping into Frankenberg's shoes but this Court finds that RESORT did not improve its position as to standing. This Court has determined that Frankenberg is not a creditor of TRUST. *supra*. Thus since this Court has ruled that Petitioner does not have standing to

set aside the sale of the Property under the UFTA, then RESORT, which stepped into the shoes of Petitioner, likewise lacks standing to set aside the sale of the Property.

Therefore the Court finds that Wingfield's motion for summary judgment against RESORT is well-taken and should be granted.

CONCLUSION

This Petition is dismissed under the doctrine of prior suit pending.

Alternatively, Respondent Wingfield's Motion for Summary Judgment against Petitioner Frankenberg is GRANTED, as Petitioner does not have standing to bring the UFTA action since he is not a creditor of TRUST.

Respondent Wingfield's Motion for Summary Judgment against cross-claimant River City Resort, Inc. is GRANTED as RESORT lacks standing to bring the UFTA action since it is not a creditor of TRUST. Additionally its action is time-barred.

Costs taxed to Petitioner.

ENTER:

Pamela A Fleenor

PAMELA A. FLEENOR
CHANCELLOR – PART 1

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of Order has been placed in the United States Mail addressed to:

Harry R. Cash
633 Chestnut Street, Suite 900
Chattanooga, TN 37450

Steven F. Dobson
711 Cherry Street
Chattanooga, TN 37402

David J. Fulton
701 Market Street, Suite 1000
Chattanooga, TN 37402

Barry L. Abbott
801 Broad Street, Suite 428
Chattanooga, TN 37402

Scott M. Shaw
835 Georgia Avenue, Suite 800
Chattanooga, TN 37402

This the 14th day of January, 2016.

Robin L. Miller, Clerk and Master

By: _____
Deputy Clerk and Master