Tennessee Judicial Nominating Commission

Application for Nomination to Judicial Office

Rev. 26 November 2012

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(including county) Memphis, Tennessee

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(including county)

Home Phone: [redacted]

INTRODUCTION

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

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

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Member, Burch, Porter & Johnson

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

1989

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

Tennessee

No. 013876

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).

Judicial Law Clerk to Honorable Jerome Turner, United States District Court for the Western District of Tennessee (1989-1990).

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

Not Applicable.

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

I have a diverse litigation practice and have appeared before both state and federal court in numerous jurisdictions. I have represented both plaintiffs and defendants in employment, constitutional and civil rights cases. On behalf of plaintiffs, I have litigated several mass tort cases and have represented plaintiffs in multidistrict litigation. I have also represented clients in personal injury and products liability matters, as well as in various commercial litigation claims on behalf of corporations and municipalities. Currently a large segment of my practice is insurance defense for my law firm's largest insurance carrier client. I personally handle the large complex matters including personal injury cases involving fatalities, bad faith claims against the carrier, and coverage issues. On smaller matters I assign numerous cases yearly to the associates and younger members at my law firm and both supervise and train those attorneys through the completion of the case.

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

See Resume and list of significant cases, proceedings and experience attached hereto.

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

See list of significant cases, proceedings and experience attached hereto.

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

I served for three years as a volunteer mediator for the Shelby County Courts. My role as mediator was to listen to disputes between private citizens in an attempt to settle and remove these disputes from the Shelby County Criminal Court System. I served one afternoon, once a week if there were two parties willing to mediate their case. I conducted approximately fifty mediations which most of my cases resolved by settlement.

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

None.

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

None.

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

The only other process in which I have been involved in seeking a judicial position was to submit my application and resume to the Selection Committee to interview with the United States District Court for the Western District of Tennessee for the position of Magistrate Judge. I applied on three separate occasions, and interviewed as one of five finalists with the Court twice.

EDUCATION

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

See Resume attached hereto.

PERSONAL INFORMATION

15. State your age and date of birth.

January 23, 1957: 56 yrs.

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

Since 1963: approximately 50 years

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

Since 1980: approximately 33 years

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

Shelby

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

Not Applicable

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

No

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

No

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

Not applicable

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

No

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

No

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

1982, Shelby County Circuit Court, Divorce proceeding as a litigant. Matter was resolved by default judgment. December 10, 2013 served as Trustee of the Estate of Mary V. Maravich, filed in Murfreesboro, Rutherford County, Tennessee, Probate Court.

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

United States Hunter Jumper Association; West Tennessee Hunter Jumper Association; United States Dressage Foundation; American Kennel Club; for professional and civic affiliations see

Resume attached hereto.

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

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

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

No

ACHIEVEMENTS

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

Memphis Bar Association; Tennessee Bar Association; American Association of Justice; Federal Bar Association, ALFA International, the Global Legal Network. For dates and additional associations and professional societies see Resume attached hereto. I consider particularly significant my involvement with the Community Legal Center of Memphis and the successes which I had on behalf of the legal center serving as Chair of the Fund Raising Committee and organizing our annual banquet for many years.

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

See Resume attached hereto.

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

See Resume attached hereto.

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.

See Resume attached hereto.

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.

Not applicable

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

No

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

See article Opening Statement Considerations published in Jan. 2013, of the Memphis Lawyer Magazine. This was totally written by me for presentation at the ALFA International Transportation Practice Group Annual Seminar held in Amelia Island, Florida in May of 2012. See also Brief in Support of Motion for Summary Judgment recently filed in matter pending before Judge Mays and which resulted in Summary Judgment being granted to my client on June 17, 2013, a copy of which is attached hereto. This was my work; although, associates under my supervision performed much of the legal research.

ESSAYS/PERSONAL STATEMENTS

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

I feel over the past twenty-two years my experience as a civil litigation attorney and my participation in community events and membership on various boards seeking to improve my community has given me a very rounded background from a legal, professional and a willingness to consider issues from different viewpoints.

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

My most significant achievement in this area is the ten years I served as a Board Member of the Community Legal Service of Memphis. During those ten years I also handled many cases on a pro bono basis for the Community Legal Center and participated on a monthly basis in serving as an intake attorney for many of the years that I was a Board Member.

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

I am seeking a judicial appointment on the Tennessee Court of Appeals, Western Division (Civil) (5). The diversity of my practice in the civil arena I believe would be an asset to the Court.

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

I always seek to support my community, but would not participate in any community services or organizations which may create a conflict. I would continue to support organizations in which I have a personal interest as a rider and horse enthusiast.

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

As a child, I lived both in Murfreesboro, Tennessee and Newport Beach, California as my parents were divorced in 1963, which was an unusual situation at the time. This did allow for me at a very early age, to accept the views and differences amongst people of different regions, cultures and heritages. It also gave me a strong sense of independence. My work experience has additionally included two professions, before going to law school I was one of the youngest buyers with one of the highest gross margin percentages in the Federated Department Store Chain. I think some of these very different experiences, among many others give me a broad and diverse.

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

Yes- As a defense attorney, I have sometimes had sympathy for the plaintiff but have raised all defenses applicable to my client which at times resulted in dismissal of the plaintiff's suit.

REFERENCES

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

A. Beth Weems Bradley, Member, Burch, Porter & Johnson, PLLC, (901) 524-5133
B. Reva Kriegel, Attorney, (901) 527-1319
C. C. Thomas Cates, Member, Burch, Porter & Johnson, PLLC, (901) 524-5104
D. Karen and Richard Thomas, neighbors for twelve years [redacted]
E. Barbara Butterworth, friend [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] Court of Appeals of Tennessee, and if appointed by the Governor, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended questionnaire with the Administrative Office of the Courts for distribution to the Commission members.

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

Dated: June 18, 2013.

Signature

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

TENNESSEE JUDICIAL NOMINATING COMMISSION

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

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

WAIVER OF CONFIDENTIALITY

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

Melissa B Jaravich
Type or Printed Name

Melissa B Jaravich
Signature

June 17 2013
Date

013876
BPR #

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

MELISSA ANN MARAVICH

1384 Goodbar Avenue
Memphis, Tennessee 38104

(901) 276-4216 (H)
(901) 524-5142 (W)
(901) 485-8135 (C)

LEGAL EXPERIENCE:

1990 - Present	Burch, Porter & Johnson, PLLC, Memphis, TN, Attorney. Equity Member: 50 attorney civil litigation law firm. Experience includes: personal injury; worker's compensation; federal criminal defense; L-Tryptophan and Gammaguard multi-district litigation; Section 1983 Civil Rights litigation; Federal Employer's Liability Act defense; Title VII Employment Discrimination; products liability; commercial litigation; class actions and insurance defense. A listing of noteworthy representations and experience is attached.
1989 – 1990	United Stated District Court, Western Division of Tennessee, Judicial Law Clerk to Honorable Jerome Turner.
1987 – 1989	Memphis State University, Research Assistant to Law Professor Barbara Kritchevsky (Constitutional Law; Civil Rights) for research and publication of article comparing state and federal constitutions.

PRE-LEGAL EXPERIENCE:

1985 - 1986	Service Merchandise (Corporate Headquarters), Nashville, TN, Assistant Buyer. Responsible for sales, inventory purchasing and advertising for specific merchandise areas in 300 stores; all departments increased performance during tenure.
1980 - 1985	Federated Department Stores, Goldsmith's, Memphis, TN, Buyer. Responsible for sales, mark down, gross margin and inventory shortage percentages; shopping the New York garment market monthly; advertising promotions for specific departments, all of which held highest store gross margin during tenure.
1979 - 1980	United States Government, Department of the Census, Murfreesboro, TN, Supervisor. Supervised approximately 150 clerks employed by the federal government to process 1980 census forms. Closed office three months early due to excellent performance.

EDUCATION:

1989	Memphis State University, Memphis, TN, Cecil C. Humphreys School of Law. Juris Doctorate Degree, With Honors; Class Standing: Upper 5%.
1980	Middle Tennessee State University, Murfreesboro, TN. Study towards Masters of Business Administration Degree.
1979	Middle Tennessee State University, Murfreesboro, TN, Bachelor of Science Degree, Magna Cum Laude. Major: Biology; Minor: Business Administration; Chemistry.

MELISSA ANN MARAVICH (cont.)

PUBLICATIONS AND PRESENTATIONS:

Co-Author: Relevance: The Tennessee Balancing Act, 57 Tenn. L Rev. 33 (1989).
Seminar Presentation: Federal Motion Practice and Oral Advocacy presented on behalf of the U.S. District Court of the Western District of Tennessee (2000)
Author: Navigating the Potholes - Opening Statements, ALFA International Transportation Practice Group Publication (2012)
Seminar Presentation: ALFA International Transportation Practice Group Annual Seminar, Plaintiff's Attorney in Mock Trial Presentation (2012)
Author: Opening Statement Considerations, 29, Isu. 6, Memphis Law., Mag. of M.B.A. 14 (Dec. 2012)

CERTIFICATIONS AND PROFESSIONAL AFFILIATIONS:

Various National, State and Local Bar Associations
American Inns of Court, Leo S. Bearman Chapter
Member Civil Rules Advisory Committee, United States District Court, Western District of Tennessee (1995-2000)
Tennessee Rule 31 General Civil Mediator, Tennessee Supreme Court Alternative Dispute Resolution Commission
Volunteer Mediator, Shelby County Criminal Court Pre-Trial Services, Citizen Disputes
Memphis Bar Association, Committee Chair, Fee Dispute Committee
Memphis Bar Foundation, Fellow

ACTIVITIES/HONORS:

Joe A. Moore Memorial Award (Outstanding achievement in trial advocacy)
The Order of Barristers
Best Oral Advocate Award and Finalist, Mock Trial Competition
National Mock Trial Team
Moot Court Competition Finalist
American Jurisprudence Awards
Student Bar Association – ABA/LSD Representative
ABA Bronze Key Award
Who's Who Among American Law Students, 8th Ed. & 9th Ed.
Memphis Women's Foundation Honoree, 2007
The Global Directory of Who's Who (Top Lawyers) (2013)

CIVIC AFFILIATIONS:

Board Member, Fogelman YMCA of Memphis and the Mid-South (6 years)
Board Member, Community Legal Center of Memphis; Chair Fundraising Committee (10 years)
Board Member, Girls, Inc. of Memphis (2 years)

COURT ADMISSIONS:

United States Supreme Court
United States Court of Appeals, Sixth Circuit
Federal District Courts:
- Western District of Tennessee
- Middle District of Tennessee
- Northern District of Mississippi
- Eastern District of Arkansas
- Middle District of California
- Middle District of North Carolina
- Tennessee Supreme Court and Lower Tennessee Courts

REFERENCES: Furnished upon request.

MELISSA A. MARAVICH
LIST OF SIGNIFICANT CASES, PROCEEDINGS AND EXPERIENCE

1. United States of America v. Roderick Muhammad Ali
United States District Court, Western District of Tennessee

Appointed by United States District Court for the Western District of Tennessee (Honorable Jerome Turner) to defend Roderick Muhammad Ali charged with unlawful possession, intent to distribute and possession of handgun. Trial resulted in conviction of Mr. Ali; although, the Sixth Circuit Court of Appeals reversed the guilty verdict as to the handgun charge. Handled defense of the matter at trial, briefed and presented argument to the Sixth Circuit Court of Appeals; ultimately overturning Honorable Jerome Turner for whom counsel clerked.

2. Carr v. Tipton County, Tenn.
United States District Court, Western District of Tennessee

Represented family of deceased, a county police officer shot by his co-deputy in Section 1983 Civil Rights action; participated in all briefing, trial and argument before the Sixth Circuit Court of Appeals. Trial resulted in a $2,000,000 verdict and settlement following argument at Sixth Circuit Court of Appeals.

3. Seaton v. Tipton County, Tenn.
United States District Court, Western District of Tennessee

Represented plaintiff in Section 1983 Civil Rights action for sexual harassment against county supervisor; participated in all briefing, trial preparation and settlement negotiations resulting in $750,000 settlement.

4. Weaver v. Tipton County, Tenn.
United States District Court, Western District of Tennessee

Represented family of deceased in Section 1983 Civil Rights action against county corrections after Weaver was found deceased in a jail cell following DUI arrest; participated in all briefing, trial preparation and settlement negotiations resulting in $600,000 settlement.

5. Multi-District Litigation/Class Actions

Represented various plaintiffs associated with Mass Tort actions in various Federal District Courts in which matters were consolidated for injuries in multi-district proceedings involving L-Tryptophan; Gammagard and Dow Chemical Breast Implants. Representation included expert consultation, court appearances in various federal courts and participation with the respective steering committees.

6. Ross v. State Farm
United States District Court, Western District of Tennessee

Represented plaintiffs in case brought against State Farm Insurance Company for use of aftermarket parts in the repair of vehicles which ultimately resulted in a national class

certification. Proceedings before the United States District Court for the Western District of Tennessee included draft and presentation of brief requesting that District Court certify statewide class action for both Tennessee and Arkansas.

7. Citizens for Community Values

Represented Citizens for Community Values in drafting county zoning ordinances for Shelby County, Fayette County, City of Germantown and the City of Collierville applicable to sexually oriented business for restrictions consistent with United States Supreme Court First Amendment interpretation. Representation included meetings with county and city officials and providing advice as to nature and validity of municipal ordinances and regulations.

8. Estate of Linda Faye Jones v. Eagle Global Logistics, LP
Shelby County Circuit Court, Tennessee

Defended Eagle Global Logistics in fatal commercial vehicle accident; representation included participation at scene of accident; interview of witnesses; pleadings and trial preparation and negotiation of $2,000,000 settlement with the plaintiff's estate.

9. Liberty Mutual Ins. Co.

Defense of Liberty Mutual Insurance Company and related entities in multitudes of litigation, including matters involving products liability, medical malpractice, fatal construction and commercial vehicle accidents. Additionally trains and supervises numerous associates in the defense of automobile, property and general liability claims.

10. Moling v. O'Reilly Automotive
United States District Court, Western District of Tennessee

Defended automobile retailer in sexual harassment case in which the court granted summary judgment in client's favor after years of litigation and trial preparation, including depositions, retention of experts, independent psychological exams and unsuccessful settlement conference.

11. Community Legal Center

Represented numerous claimants pro bono on behalf of the Community Legal Center, which offers free legal services to the working poor of Memphis and Shelby County, including cases involving landlord/tenant matters, products liability, social security and other government benefits and, personal injuries.

12. Parrett v. The Southeastern Boll Weevil Eradication Foundation, Inc.
United States District Court, Western District of Tennessee

Perry v. The Southeastern Boll Weevil Eradication Foundation, Inc.
United States District Court, Western District of Tennessee

Defended Southeastern Boll Weevil Eradication Foundation, Inc. in two separate employment discrimination matters in which the defense was that the organization was essentially an agent of

the United States of America and that employees needed to exhaust their administrative remedies through Civil Service Reform Act of 1978. Cases received contradictory rulings from two separate federal district court judges, and the cases were consolidated and presented to the United States Sixth Circuit Court of Appeals, requiring both briefing and argument.

13. City of Germantown, Tennessee

Defended the City of Germantown, Tennessee in numerous land use actions in which the defense was that the respective plaintiffs must exhaust their administrative remedies as provided by Germantown's Municipal Code prior to filing suit in Chancery Court.

14. EEOC Prosecution

Defended international trucking company in employment discrimination case and worked with Equal Employment Opportunity Commission in its investigation of the case, interviews of employees and reaching settlement where the EEOC pursued a claim against entity on its own behalf.

15. Equal Employment Opportunity Commission

Represented numerous plaintiffs and defendants in either presenting their claims through the EEOC prior to filing suit in federal district court or defending numerous corporate entities in which claimants have sought relief through the EEOC and filed suit against the respective employer for employment discrimination.

16. Claims for Tennessee Unemployment Benefits

Represented both plaintiffs and defendants during agency proceedings in which either the plaintiff seeks unemployment compensation benefits and has been denied or the defendant is presenting its case in defense of such claims.

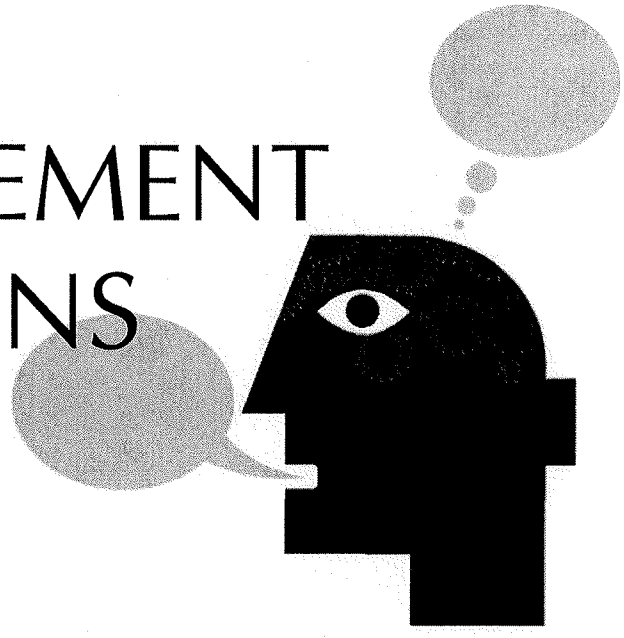
17. Memphis Bar Association Fee Dispute Committee

As chair of the Memphis Fee Dispute Committee for three years, participated as a hearing officer in numerous matters in which a procedural process governed by the Memphis Bar Association allows for claimants to bring claims against attorneys for improper representation. As hearing officer, heard argument, accepted evidence and made a ruling following the completion of the hearing.

18. Mediator for Shelby County Pretrial Services

As a volunteer mediator for Shelby County Pretrial Services, presided over numerous proceedings and head argument, accepted evidence and issued a ruling through program which was established to assist in the management of the Shelby County Criminal Courts (Circuit and General Sessions) docket.

OPENING STATEMENT CONSIDERATIONS



by MELISSA A. MARAVICH, Burch Porter & Johnson, PLLC

FIRST IMPRESSIONS

"You never get a second chance to make a good first impression." We have all heard this phrase and its many variations. Whether fortunate or not, most people will judge you within the first seconds of meeting you and their opinion will most likely never change. In a recent article from Forbes, the author provides five ways to make sure that people's first impression of you is a good one:

1. ***Set an intention.*** The most important thing to do for giving a good impression is to set your intention. As you are getting ready or driving to an event, think about what kind of people you want to meet and what kind of intentions you want to have.
2. ***Think about your ornaments.*** Clothes, makeup, jewelry, watches and shoes are all types of ornamentation and people definitely take these into account when making initial judgments. According to the Forbes author, watches can say a lot about men while purses and jewelry lead to assumptions regarding women.
3. ***Be conscience of your body language.*** Body language is a crucial part of first impressions. Everything from your posture, how you carry yourself, to the way that you angle your body, sends a message to your audience.
4. ***Avoid bad days.*** Anxiousness can be expressed through facial expressions, comments and body language.
5. ***Be interested and interesting.*** If you are truly interested in meeting people and are open to learning about who they are, they will get this in a first impression.

The comments expressed by the Forbes author are equally applicable whether one is attending a party, going to a job interview or preparing for the first day of trial. (Unfortunately, we cannot necessarily avoid a bad day and stay home if the court's calendar requires otherwise.)

Peter Pearlman in his article *The Compelling Opening Statement: Two Minute Markers*, makes this same connection in addressing opening statements specifically. Quoting from the book "*I Can See You Naked*", Pearlman advises that:

> The first ninety seconds of any presentation are crucial. Maybe the audience has never seen you before. The eye is taking snapshots of you, impressions are being registered. It doesn't take long for the mind to react, tune in, or tune out (television and instantaneous channel changers have taught us how to do that). As college speech professor Ralph Podrian puts it, "Your audience will scan every personal detail about you for clues to character and temperament". Think back. How many times have you heard someone in an audience say, "I knew in the first couple of minutes it wasn't going to be any good". Or, conversely, "The minute she started, the very first minute, I just knew it was going to be sensational." These aren't impulsive reactions. There is a good reason for them: presentation is a skill where preparation and attitude are apparent almost immediately. Everything you do and say during a presentation will be considered, but the first ninety seconds are crucial.

Applying these principles to opening statements, opportunities are presented in the first two minutes of argument to educate and inform the jury about the case, to enhance the credibility of the lawyers, and to motivate the jury to return a favorable verdict. Choice of language and communication techniques are critical to these objectives.

If there is any doubt as to the need to present a favorable impression within the first two minutes of an opening statement, statistics find that jurors make a decision early in the case and once made, these decisions are difficult to change. Thus, jury selection, opening statements, evidence presentation, witness testimony and closing arguments are not necessarily created equal. Harry J. Plotkin, a jury consultant writing for the *Los Angeles Daily Journal* notes that in a respected Cornell University mock juror decision-making study, it was found that 85% of prospective jurors showed "pre-decisional bias" in their decision making. The jurors' interpretations of incoming evidence were

biased to support the party they favored early in the case. In a similar study conducted over a 26-month period by Plotkin's consulting firm, it was found that only 12.4% of jurors changed their verdicts between the conclusion of opening statements and the end of trial. While Plotkin feels that these statistics do not necessarily indicate that juries make their minds up quickly, he believes that jurors make up their minds quickly about who is credible and who is suspect. "Once a juror has decided that someone is not credible, they tend to disregard even the most compelling evidence that person presents".

A similar finding from the University of Chicago in viewing human behavior in trial advocacy found that 80% of jurors form opinions following opening statements and do not change those opinions after hearing the evidence. Other studies are consistent. As published in *The American Jury*, Harry Kalven and Hans Zeisel found that 80% of jurors ultimately made up their mind during opening and did not change it during trial. A study from the University of Chicago Law School indicated that 65% of jurors in civil trials decided a case consistent with their first impressions. And this is not surprising when you think about it—could you completely reserve an opinion about a movie or television show until the final credits appear?

So, assuming that you are having (or attempting) a good day, you have avoided flashy watches or sparkling earrings, you are clean and prompt to court and that you plan to be interesting, below are several specific points to consider in making a successful opening statement.

START STRONG

You have from 90 seconds to 4 minutes to make a good first impression, so the opening statement should have a strong start. Think of the first scene of a movie or the first few minutes of a television show and you will be reminded how important it is that the opening grabs the attention of the jury early. "You must immediately take your best shot, so fire your silver bullets".

The opening should begin with a short statement that gives the jury a clear capsule of the case in two or three statements. You want to capture your case theme in simple language and then proceed with the story in a manner in which the jury can follow and understand. Avoid introductory remarks at the beginning and overused clichés such as "this is a road map" or "jigsaw puzzle". Long or unnecessary introductory remarks will lose the jury's attention early and cause them to focus on something else other than your presentation. If you don't get your point across early, the "window" will close.

Some examples of a strong opening sentence could include the following:

- This is a case about safety.
- This is a case about a company that puts profits over people.
- This case is not about alcohol and driving, it is about indifference.
- This is a case in which the defendant's choice cost Mary her life.
- This is a case in which the Plaintiff is looking for someone to blame other than herself.

HAVE A THEME

Having a theme is important throughout the trial and should be conveyed to the jury within the crucial first two to four minutes of the trial. In fact, some attorneys (if court procedure allows) begin developing the theme during voir dire of the jury. Jurors process information in light of the theme that is introduced. Thus, there is no reason not to introduce your theme immediately. Any information that is consistent with the adopted theme is more easily remembered by the jury. Information not consistent with the theme will be forgotten or disregarded. Accordingly, you win a significant battle when the jury views the evidence in the case from their perspective through the frame work that you have constructed. This frame work needs to start immediately.

While jurors may not have any information with regard to the case that is to be presented, they do not come to the courtroom with a blank slate. Jurors absorb information based upon their own personal values, their experiences and their concepts on what is just. Commentators have stated that every case turns or is decided on a few fundamental concepts that are universal to people as individuals. Identifying those concepts and weaving them into your theme is the key to success throughout the trial, including your opening statement.

A theme is a simple concept that summarizes your case. It should be a summarization which will provide meaning to the jury and help them to organize and remember case facts. This theme should not be developed immediately prior to trial, but is something that should be considered from the moment that a case is accepted for representation. A noted plaintiff's attorney in western Tennessee adopts his theme immediately and, based upon my personal experience, begins his telephone calls to defense counsel with a short statement of his theme before giving his name. Many years later, I still recall that the represented plaintiff was "squashed like a pecan" as a result of using the defendant's product. This case settled early.

It goes without saying, that a theme should be easy to remember, short and clear. In developing a theme, you might consider how you would explain your case in a few words or less to a neighbor, child or non-attorney friend. Themes should be based on life experiences with a consideration of human values and principles that are inherent within our society. If you fail to connect the theme to the values of the jury, the jury will not find in your favor. In this same regard, you want to avoid the jury developing their own theme or, worse, adopting the theme presented by the opposing side.

Once you develop a theme, arrange the facts in your presentation to support the theme in order to ultimately persuade the jury. Of course, the theme presented in opening statement must be consistent throughout the presentation of the evidence and the closing argument. Thus, like your closing argument, your opening statement should be drafted after the consideration of all of the evidence to be presented to the jury.

Perhaps one of the most memorable themes is "If the glove does not fit, you must acquit". Other themes suggested by commentators include the following:

- Life, Liberty and Property
- Right vs. Wrong
- Quality of Life
- Improved Safety
- Failure to Follow the Rules
- Profits Over Safety
- This is a case about a women entitled to keep her job, her dignity and her life
- Safety First, Not Last

One commentator suggests that in conveying a theme, adages and proverbs can be effective in seeking juror identification with your case. Such statements may include:

- A chain is only as strong as its weakest link
- A small hole can sink a big ship
- Actions speak louder than words
- Birds of a feather flock together
- Familiarity breeds contempt
- The fruit never falls far from the tree
- There is no such thing as a non-working mother

As illustrated above, themes need to be in plain English. As lawyers, we tend to use eight words for what can be said in one or two. In seeking to be precise we become redundant and in seeking to be cautious, we become verbose. Run-on sentences may only result in the glazing of eyes. Avoid legalese, jargon and trendy words and descriptions that are tedious and technical. Winston Churchill once said that "short words are best, and the old words when short are best of all".

In Peter Pearlman's article, *Two Minute Markers*, he gives the example of a well-chosen and clearly stated theme from an actual trial as follow:

> [Plaintiff] was a coal miner who expected to work with a safe product in the mines. He did not get one and has suffered severe closed head injuries. [Manufacturing Company] is the largest manufacturer of coal mining equipment in the world. The company has not accepted this responsibility, and that's the reason why we are here today.

Pearlman notes in his article that in less than thirty seconds, the theme of the entire case has been clearly stated to the jury: "although coal mining is a tough and hazardous occupation, a coal miner should expect to work with a safe product". In these same few sentences, the company has also been identified as the largest manufacturer of coal mining equipment in the world, providing a contrast between a large sophisticated corporate manufacturer and an individual coal miner in a rugged environment.

Pearlman's example also illustrates the consistency between the opening statement and closing argument which should follow. From the above, Pearlman restates the theme in an example closing remark as follows:

> While the coal miner may accept certain aspects of mining as being dangerous and some tragedies as being 'acts of God', the miner should not be forced to assume

the responsibility on behalf of any manufacturer who has chosen to make a product in an unsafe manner.

Elliott Wilcox writes an interesting article with regard to the development of case themes for opening statements. In his article, Wilcox sets forth numerous case theme examples taken from motion picture taglines. As Wilcox notes, Hollywood does its best to arouse your desire to go to the movies and, therefore, movie themes may provide a starting point for developing your own case theme. One of my favorites taken from the legal thriller "Michael Clayton" is "the truth can be adjusted".

Words and phrases that convey images are also very good ways to illustrate your theme. Using words and phrases such as "collide", "mangled", "impaled", "crushed", "cooked" and "burned alive" can make themes and descriptions stronger. As above, in considering words and images with impact, I am again reminded of the plaintiff who was "squashed like a pecan".

TELL A STORY

Nobody can resist a good story. For centuries people have used storytelling to communicate complex information about history, culture and morals. Commentators note that the key to an interesting and effective trial opening is to tell a thoughtful factual story that appeals to the jurors' common sense and experience. Such a story can operate as a framework for the juror to use in their respective filter and organization of evidence as the testimony unfolds at trial. It also keeps them engaged during the opening long enough to understand the case.

For purposes of the opening statement, the story of the case must be reduced to its core and should make complex facts simple to understand. The best stories are, of course, interesting and exciting and should have a defined beginning, middle and end. In sequencing the facts of the story, you should consider who you want the trial to focus on and what conduct you want to draw attention to. One commentator feels that you achieve the most impact in your storytelling if the story begins with the opponent's conduct.

The story should of course revolve around the theme which you have developed for the trial and should provide a summary of the facts to be presented in evidence. The end of the introductory story should be powerful and leave the jury with the desire to reach a right and just decision.

A good illustration of storytelling presented in an opening statement is actually taken from the movie "A Few Good Men" where the key issue was whether two Marines killed a third Marine deliberately or accidentally. As you may recall, in his opening statement, the prosecutor [Kevin Bacon] effectively tells the story by focusing on a very few, but discreet and powerful facts:

> The facts of the case are this: at midnight on August 6th, the defendants went into the barracks room of their platoon-mate, PFC William Santiago. They woke him up, tied his arms and legs with rope, and forced a rag into his throat. A few minutes later, a chemical reaction in Santiago's body called lactic acidosis caused his lungs to begin bleeding. He drowned in his own blood and was pronounced dead at 32 minutes past midnight. These are the facts of the case – and they are undisputed.

Commentators and legal scholars addressing opening statements are also consistent in advising that you should account in the opening statement for the bad facts on your side of the case. Some have found that embracing bad facts can go a long way in preserving, if not even building, counsel's credibility with the jury. It has been found that what jurors hold against lawyers isn't so much the weaknesses of their case, it is that lawyers often try to hide those weaknesses. Thus, at a minimum, an effective opening must set out a theory of the case that accommodates bad facts, even if the opening does not expressly mention them.

In defending Imelda Marcos in her 1990 trial on racketeering and fraud charges, Jerry Spence conceded with the jury what he knew would be presented throughout the trial. Spence, in his opening, addresses those bad facts in this manner.

> She spent money. No question about that. She is a world class spender. She is a world class shopper.

Spence, however, went on to develop his theme at trial portraying Imelda Marcos as a "small, fragile woman" with little grasp of "the intricacies of finance" who was manipulated by others.

In telling a good story, you should consider the rules of persuasion. We all know that there are three primary channels of delivery: verbal (words), vocal (how the message is delivered) and non-verbal (facial expressions, eye movement, body positions). Commentators note that words alone account for only 10% of the impact. The voice message, inflection and resonance account for 40% of the message. By far the most significant is non-verbal, which delivers 50% of the impact. (This is an interesting statistic in considering the positive and negative impact of electronic communication). Albert Mehrabian, a professor emeritus of psychology at UCLA, agrees that in face-to-face communication, non-verbal behavior carries the most impact, especially for communicating feelings and attitudes. "If words disagree with the tone of voice and non-verbal behavior, people strongly tend to believe the tonality and non-verbal cues".

Keeping these thoughts in mind, you should practice making eye contact rather than reading from a script and minimize any fumbles with visual aids or use of electronic equipment. One commentator advises that you practice posture, hand placement and voice inflections. The ease and confidence in your non-verbal presentation can magnify the persuasive power of your words.

In telling a persuasive story, consider using the present tense and repeat words and themes which will be used throughout the trial. Social scientists tell us that we remember information when presented in groups of three. The rule of three tells us that individuals are more capable of understanding concepts if data consists of three pieces of information, i.e., it's as simple as 1, 2, 3; the good, the bad and the ugly; I came, I saw, I conquered; three blind mice, etc. Other persuasive techniques include changes in

voice inflection, the use of rhetorical questions (is that fair? why would a company fail to do that?) and anchoring. Anchoring is a rhetorical device in which you refer to a certain event, theme or piece of evidence at a particular place in the court room. Every time you return to that spot in the courtroom, jurors are anchored by that position.

While you do not want to ignore the weaknesses in your case, similarly you do not want to overstate your case. As noted before, credibility is an important factor in a jury trial and overstatement of facts and argument can lead to loss of credibility.

Avoid legalese and use everyday language. In *The Miracle of Language*, Richard Leder writes that eleven words account for 25% percent of all spoken English and 50% of the most common spoken words are one syllable. This simple statistic should remind you to avoid legalese, hypertechnical terms and lengthy sentences.

THE LAST TWO MINUTES—END STRONG

The principle of recency is "that which is said last is remembered best". You want to use the last two minutes of your opening argument to your greatest advantage, remembering that the last statement will be the easiest one to remember. It should be powerful.

Your theme should be reinforced throughout the opening and repeated in the last two minutes of the opening statement. This is also a good time to emphasize universal principles and to project your own conviction and sincerity.

With regard to sincerity, Gerry Spence has stated that: "A lawyer who has a choice shouldn't take cases he can't get his guts into. You gotta love your client. A jury can tell if you care. They won't if you don't".

I believe that Spence summarizes the need for sincerity and conviction from opening statement throughout the trial. If you are not sincere and caring about your client and your argument, you certainly cannot expect any different reaction from the jury.

USE OF VISUAL AIDS

Studies conclude that retention may be as much as six times greater when information is presented by visual and oral means then when the same information is presented by oral means alone. "This is powerful math". Studies also indicate that individuals remember only 10% of what is verbally presented and 20% of what is visually presented. However, when a verbal presentation is combined with a visual presentation, we remember 65% of the presentation.

A few words of caution in using visual aids in the opening statement are necessary. You should be careful not to use too many. Visual aids must be well thought out and effective in conveying a point. Those who counsel against using visuals in opening statements feel that exhibits can distract the jury's attention and once seen, will no longer be new evidence when reused later during trial.

Not all demonstrative exhibits may be used in opening and, trial exhibits may be precluded all together. One commentator notes that exhibits used in opening statements should be addressed in pretrial conferences to avoid objection from the other side. Perhaps this is why the most common are timelines, photographs, medical illustrations, computer animations and computer presentations.

OTHER CONSIDERATIONS

Humor

Humor should come with a warning label, "apply product sparingly". While humor is a valuable product for lawyers, you should plan your humor and delivery, be true to your own nature in using humor and, "when in doubt, don't open your mouth".

In *Mejia v. United States* (1990), a court appointed defense attorney representing a client who had been convicted of cocaine charges advised the jury in his opening statement as follows: "I am a local attorney who has been appointed by the court to represent an indigent defendant . . . I am happy to announce that this appointment will help me with my indigent problem".

In his petition for certiorari to the United States Supreme Court, the defendant asserted that the lawyer's joke improperly emphasized his status as court appointed counsel. Kenneth Starr responded for the United States, "although counsel's attempt at humor may have been lame, the Sixth Amendment does not bar attorneys from using humor in an effort to win sympathy for a defense lawyer and, by extension, for the defendant."

The good news is that the court denied review; however, the above is a good example in warning that humor should be used with caution.

Too Much Zeal

While movie themes, fables and popular stories are good places to start in developing your opening statement, as with all good things, use in moderation. In *United States v. Signer*, 482 Fed. 3d 394 (6th Cir. 1973), the Sixth Circuit held that comments made by the prosecutor in opening argument and closing statement depicting the defendant as a thief were prejudicially erroneous. In *Signer*, the defendant was criminally charged with income tax evasion and signing false income tax returns. The prosecuting attorney in his opening argument recited a fable which he composed with apologies to Mr. Aesop, identifying defendant Singer with the fox in the chicken coop. Due to the length of the prosecutor's argument, I have not quoted the entire fable but will note that drawing analogies between Aesop's foxes and chickens and tax evading accountants and clients may go a little too far. Comments or suggestions in the opening statement with regard to the motives behind a party's filing of a lawsuit have also been grounds for reversal. See *Young v. Washington Hospital*, 761 A. 2d 559 (PA. Sup. Ct. 2000); *Furnier v. Drury*, 840 N.E. 2d 1082 (Ohio Ct. App. 2004).

Always Check Local Practice.

Always review the local rules in the relevant jurisdiction to determine whether the jurisdiction or the particular judge has

a rule or custom regarding opening statements. In Florida, the Florida Bar has adopted a rule which prohibits lawyers from alluding to any matter in opening statement that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence. Some caution is needed in all jurisdictions in addressing specific evidence in opening as we all know that the evidence can change during trial, especially if a witness changes his or her testimony.

An excellent article regarding opening statements is found at Chapter 8 of *Florida Civil Trial Practice* published by the Florida Bar, currently in its 8th edition. Although the case citation throughout the article is from Florida court decisions, the topics addressed are equally applicable to almost all opening statements.

Of course, each judge has his or her own idiosyncrasies as to trial presentation and it is always advisable to learn the court's preferences as to all trial matters, including opening statements, if possible. See *Travieso v. State*, 480 S. 2d 100 (Fl. 4th 1985). Federal Rule of Evidence 611 gives the judge broad discretion in managing the order of poof at trial, as do similar state evidentiary and procedural rules.

Don't Waive the Opportunity.

Irving Younger counsels that in civil jury trials, opening statement should never be waived by the plaintiff. Younger also advises against defense counsel waiving opening statement or choosing to delay the defense's opening statement in a civil jury trial until after the plaintiff has closed the plaintiff's proof. Younger advises that there are two main reasons for wanting to avoid deferring opening statement by the defense: (1) First, the jury expects symmetry and (2) Second, deferring the presentation of the defense's opening statement may give an appearance of insincerity on the part of defense counsel. In this regard, defense counsel may be viewed as delaying his or her defense until the plaintiff has "put all of the plaintiff's cards on the table".

Addressing Damages

The "jury is out" as to whether plaintiff's counsel in a personal injury case should address a specific amount of damages to be awarded in opening statement. Some personal injury attorneys believe that it is best to "sell the contents of a product before stating the price". Others believe that jurors begin to think about damages early in the case. For the plaintiff, commentators note that this is something to be considered on a case-by-case basis. Of course, as a practical matter, should plaintiff's attorney choose not to mention a specific amount of damages in the opening statement, plaintiff's counsel allows some flexibility based upon the strength or weakness of the case as it develops before the jury. If the case goes well, plaintiff's counsel has room to increase the demand. Conversely, plaintiff's counsel also has the flexibility to lower the demand should the proof not develop as desired.

Defense counsel should be prepared for either scenario and review the applicable rules of practice for the jurisdiction. In Connecticut, a discussion of the amount of damages is permitted in final argument only. See *Bartholomew v. Schweizer*, 217 Conn. 671, 587 A. 2d 1014 (1991); *Compare Baum v. Woodfield*, 244 Maryland 207, 223 A. 2d 364 (1966). Thus, Melvin Belli, who has stated that plaintiff's counsel should always discuss the amount of damages in opening, would find himself in trouble in Connecticut's trial courts. Conversely, the Maryland Court of Appeals has held that it is permissible for counsel to use a per diem argument in the opening and closing argument to the jury.

PLATO GOT IT RIGHT

There is a wealth of resources on opening statement and much of it is interesting, thought-provoking and entertaining. Based on the brief commentary and statistics reviewed above, it is clear that your opening statement is a very significant component of the trial and may determine its outcome. Give it time and attention.

Remember, as Plato said some time ago, "The beginning is half of the whole". ♦

ABOUT THE AUTHOR

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

LOUIS P. BARBAGLIA and MARILYN BARBAGLIA, Individually and as Husband and Wife,	)	
Plaintiffs,	)	
vs.	)	No. 2:11-cv-02205-SHM-cgc
NONCONNAH HOLDINGS, LLC,	)	
Defendant.	)	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT NONCONNAH HOLDINGS, LLC'S MOTION FOR SUMMARY JUDGMENT

COMES NOW the Defendant, Nonconnah Holdings, LLC ("Nonconnah"), and submits this Memorandum of Law in Support of its Motion for Summary Judgment.

I. INTRODUCTION

Plaintiffs Louis P. Barbaglia ("Plaintiff") and Marilyn Barbaglia ("Mrs. Barbaglia") (collectively, "Plaintiffs") filed their Amended Complaint alleging Nonconnah breached its duty of care to Plaintiffs resulting in injury and damages. (Am. Compl., D.E. 86.)

This Court should grant summary judgment in favor of Nonconnah because Plaintiffs have failed to submit evidence sufficient to establish their negligence action against Nonconnah.

II. UNDISPUTED MATERIAL FACTS

Nonconnah adopts and incorporates by reference herein its Statement of Undisputed Material Facts filed under separate cover this same date.

III. STANDARD OF REVIEW

Summary judgment is appropriate where the record shows "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When faced with a properly supported motion for summary judgment, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Reeves v. Swift Transp. Co.*, 446 F.3d 637, 640 (6th Cir. 2006) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). The nonmovant must "go beyond the contents of its pleadings to set forth specific facts that indicate the existence of an issue to be litigated." *Slusher v. Carson*, 540 F.3d 449, 453 (6th Cir. 2008). The non-moving party may not rest merely on conclusory allegations, but must respond with affirmative evidence supporting his or her claims and that establish the existence of a dispute as to genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

"[A] mere 'scintilla' of evidence in support of the non-moving party's position is insufficient to defeat summary judgment; rather, the non-moving party must present evidence upon which a reasonable jury could find in [his or her] favor." *Tingle v. Arbors at Hilliard,* 692 F.3d 523, 529 (6th Cir. 2012) (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251 (1986)).

IV. CHOICE OF LAW

In a diversity action, state substantive law governs. *Erie R.R. Co. v. Tompkins,* 304 U.S. 64 (1938). A federal court exercising diversity jurisdiction must apply the choice of law rules of the state in which it sits. *Klaxon Co. v. Stentor Elec. Mfg. Co.,* 313 U.S. 487, 496 (1941). For an action in tort, "Tennessee follows the 'most significant relationship' rule, which provides that 'the law of the state where the injury occurred will be applied unless some other state has a more significant relationship to the litigation.'" *Youngblood v. Linebarger Googan Blair & Sampson,*

LLP, 2012 WL 4597990, at *4 (W.D. Tenn. Sept. 30, 2012)[1] (quoting *Hataway v. McKinley,* 830 S.W.2d 53, 59 (Tenn. 1992)). In this case, Plaintiffs' alleged injuries occurred in Tennessee, and Plaintiffs do not allege that another state has a more significant relationship to this litigation. Therefore, the Court should apply Tennessee substantive law.

IV. LAW AND ARGUMENT

Under Tennessee law, to establish a prima facie case for negligence, a plaintiff must prove: "(1) a duty of care owed by the defendant to the plaintiff; (2) conduct by the defendant that was below the standard of care, amounting to a breach of a duty; (3) an injury or loss; (4) causation in fact; and (5) proximate causation." *Williams v. Linkscorp Tenn. Six, L.L.C.,* 212 S.W.3d 293, 296 (Tenn. Ct. App. 2006). In addition to the elements of negligence, for a premises owner to be liable for a dangerous condition on its property, a plaintiff must also prove that "(1) that the condition was caused or created by the premises owner or his agent, or (2) if the condition was created by someone other than the owner or his agent, that the premises owner had actual or constructive notice of the dangerous or defective condition prior to the accident." *Id.*

In the present case, Plaintiffs have failed to set forth specific facts sufficient to establish that (1) Nonconnah breached the duty it owed to Plaintiffs to maintain its premises in a reasonably safe condition and (2) Nonconnah either created or had actual or constructive notice of the alleged dangerous condition on its premises. Alternatively, even if this Court determines that a question of fact does exist with respect to whether Nonconnah breached its duty of care, reasonable minds could not differ that Plaintiff's fault was equal to or greater than that of Nonconnah's.

[1] All unpublished cases attached hereto as collective Exhibit 1.

A. Nonconnah Did Not Breach its Duty of Care to Plaintiffs.

Tennessee law is clear that premises owners are "not insurers of their patrons' safety." *Blair v. W. Town Mall*, 130 S.W.3d 761, 764 (Tenn. 2004). In fact, in Tennessee, "[d]angerous conditions created by the natural accumulations of snow or ice are considered to be among the normal hazards of life." *Clifford v. Crye-Leike Commercial, Inc.*, 213 S.W.3d 849, 853 (Tenn. Ct. App. 2006) (internal quotations omitted). As such, "it is well-settled under Tennessee law that property owners are not required to keep their premises free of natural accumulations of snow and ice at all times." *Williams v. Goodyear Tire & Rubber Co.*, 2012 WL 1228391, at *5 (W.D. Tenn. Apr. 11, 2012) (citing *Clifford*, 213 S.W.3d at 853; *Bowman v. State*, 206 S.W.3d 467, 473 (Tenn. Ct. App. 2006)) (internal quotations omitted). Rather, property owners are "expected to take reasonable steps to remove snow and ice within a reasonable time after it has formed or accumulated." *Bowman*, 206 S.W.3d at 473; *see also Grizzell v. Foxx*, 348 S.W.2d 815, 817 (Tenn. Ct. App. 1960) (holding that "the general duty of the landlord to keep common passageways in good repair and in a safe condition includes the duty of removing natural accumulations of snow and ice within a reasonable time".)

To determine whether a property owner's efforts to remove ice are reasonable, Tennessee courts have found the following factors relevant: "(1) the length of time the accumulation has been present, (2) the amount of the accumulation, (3) whether the accumulation could be, as a practical matter, removed, (4) the cost of removal, and (5) the foreseeability of injury." *Bowman,* 206 S.W.3d at 474 (citations omitted). Importantly, the mere "presence of ice or snow on the premises is not a *per se* dangerous condition." *Goodyear Tire & Rubber Co.,* 2012 WL at *5. In this case, Plaintiffs have adduced no evidence to show any of the relevant factors listed

about and, as such, Plaintiffs cannot establish that Nonconnah failed to act in a reasonable manner.

In 2006, the Tennessee Court of Appeals, in *Bowman v. State of Tennessee*, discussed the reasonableness of a property owner's efforts to remove natural accumulations of ice and snow. 206 S.W.3d at 474. The relevant facts in *Bowman* were as follows: A winter storm hit Nashville in the late evening hours of Sunday, March 14, 1999 and in the early morning hours of Monday, March 15, 1999. *Id.* at 470. The storm left roadways, driveways, and parking lots covered with ice. *Id.* The weather forecast on that Sunday evening had predicted occasional snow mixed with sleet. *Id.* The administrator of the Tennessee State office building complex ("office complex") did see these forecasts, but decided against commencing snow and ice removal procedures on that Sunday evening. *Id.* On Monday morning around 5:30 a.m., the administrator awoke and "was surprised to see the amount of frozen precipitation on the ground." *Id.* at 470-71. Concerned for the safety of his employees on the icy roads, the administrator did not call his employees into work early to begin removing the ice. *Id.* at 471. The administrator knew that one of his employees would arrive to work at 7:00 a.m. and begin salting the roadways and parking lots at that time. *Id.* The plaintiff arrived at the office complex Monday morning for a 9:00 a.m. interview. *Id.* On her drive to the office complex, she noticed that the driveways and parking lots were covered with ice. *Id.* After parking her truck, she began walking to a nearby office building. *Id.* The plaintiff then slipped and fell in the icy parking lot sustaining a head injury. *Id.*

On these facts, the Tennessee Court of Appeals, in affirming the dismissal of the case, found that:

> The ice storm at issue in this case did not begin until 3:00 a.m. on the morning of March 15, 1999. The State had no duty to monitor the weather conditions during the evening hours of March 14th or the early morning hours of March 15th and likewise had no duty to initiate measures to prevent ice from forming on the parking lots at the [office complex]. The State's duty extended only to removing the ice from the parking lot within a reasonable time after its formation. Under the circumstances of this case, beginning to salt the roadways and parking lots of the [office complex] at 7:00 a.m. rather (sic) 5:30 a.m. was not unreasonable. Accordingly, the Commission was correct when it decided that the State's efforts to remove the ice on the parking lot at the [office complex] did not breach the duty it owed to the public to maintain its premises in a reasonably safe condition.

Id. at 474.

What *Bowman* reiterates is that, simply put, Tennessee law does not require property owners to undertake extraordinary measures to remove natural accumulations of ice; rather, a property owner's legal duty is to "take reasonable steps to remove snow and ice within a reasonable time after it has formed or accumulated. *Id.* at 473. The facts discussed below conclusively demonstrate that Nonconnah acted in a reasonable manner on the days leading up to and on February 16, 2010.

Nonconnah owns the property in which Plaintiff allegedly fell - 1910 Nonconnah Boulevard ("1910 Nonconnah"). (Def.'s Statement of Undisputed Material Facts ("SUMF") ¶ 1.) Premium Assets, Inc. ("Premium") managed this property for Nonconnah. (*Id.* ¶ 5.)

During February 2010, Plaintiffs allege that Memphis, Tennessee "suffered several bouts of winter weather, including varying levels of winter accumulation" and that the "weather and environmental conditions allowed for ice and other winter precipitation to take hold on the ground." (Am. Compl. ¶ 12, D.E. 86 (hereinafter referred to as "Am. Compl.").) Weather reports indicated that in the early afternoon of February 15, 2010, Memphis did receive a trace amount (less than one tenth of an inch) of snow. (SUMF ¶ 22.) Plaintiffs have adduced no

evidence, however, of the length of time the alleged black ice at issue had been present on the parking lot or the amount of accumulation present at 5:00 a.m. on February 16, 2010.

In fact, what is more telling is that when Plaintiff arrived at 1910 Nonconnah at approximately 5:00 a.m. (three hours before Premium's maintenance employees usually arrived at work) (*id.* ¶ 26), Plaintiff did not see any water or snow in the parking lots and did not notice his tractor-trailer slipping or sliding (*id.* ¶ 32); and that no tenant at 1910 Nonconnah requested Premium to perform ice and/or snow removal on the afternoon of February 15, 2010 or, for that matter, at any time at all on February 16, 2010. (*Id* ¶ 20).

Moreover, 1910 Nonconnah consists of 158,160 square feet of parking surfaces. (*See* Aff. of Mary McDowell.) Plaintiff allegedly parked and fell on one patch of black ice near IKON's loading dock in the U-shaped parking area behind the office building. (*Id.* ¶ 34) Accordingly, with no other known ice on the ground in the parking areas of 1910 Nonconnah, with no evening or overnight icy precipitation to alert Premium's maintenance to an icy condition, *see id.* ¶ 17, with no calls from any tenants reporting any icy conditions on the evening of February 15 or at any time on February 16, and with the Plaintiff arriving at 1910 Nonconnah at 5:00 a.m., three hours prior to the arrival of Premium's maintenance staff, no circumstance exist under which Nonconnah should have *reasonably* been aware of this alleged patch of black ice and, therefore, no corresponding duty to remove the alleged ice in the early morning hours prior to Plaintiff's arrival.

In fact, in a related case, the Tennessee Court of Appeals, in *Howard v. FMS, Inc.*, discussed the duty of a landlord to remove frozen precipitation from its premises when the plaintiff fell on ice that had accumulated on the sidewalk of a common area in her apartment complex. 1998 WL 195960, at *1 (Tenn. Ct. App. Apr. 24, 1998). Without a full recitation of

the facts, to determine whether the trial court properly granted summary judgment, the *Howard* court relied on, among other things, the idea that "[i]t is simply neither feasible nor fair to impose a duty on a landlord to continuously remove ice and snow as it accumulates during an ongoing and worsening winter storm[,]" and on the fact that there was "no proof in the record that [the landlord] could have taken any precautions to avoid this accident." *Id.* at *4. On these facts, the court found that summary judgment was proper: "Because the accumulation was recent and ongoing, and because there was no proof of any feasible preventative measures that [the landlord] could have taken to avoid the accident, we hold that [the landlord] did not have a duty to remove the frozen precipitation from the sidewalk." *Id.*

While the facts in *Howard* are admittedly different than the facts in this case due to the ongoing nature of the winter weather in *Howard*, Plaintiffs here have similarly provided no proof of any "feasible preventative measure" that Nonconnah could have taken to avoid the Plaintiff's accident. Contrary to Plaintiffs' allegations, Tennessee law does not require a property owner to ensure its premises is free and clear of ice twenty-four hours a day during the winter months. *Williams,* 2012 WL 1228391, at *5 (W.D. Tenn. Apr. 11, 2012) ("[I]t is well-settled under Tennessee law that property owners are not required to keep their premises free of natural accumulations of snow and ice at all times.")

On these facts, it becomes readily apparent that Plaintiff's injury was not reasonably foreseeable and that Plaintiffs' claim rests solely on the alleged presence of one patch of ice on Nonconnah's premises. This fact, standing alone, is insufficient to indicate a triable issue. Therefore, because Plaintiffs have failed to set forth specific facts sufficient to establish that

Nonconnah breached any duty of care it owed Plaintiffs, summary judgment is appropriate in this case.[2]

B. Nonconnah Did Not Have Actual and/or Constructive Notice of the Alleged Ice.

Irrespective of whether Plaintiffs can demonstrate that Nonconnah breached its duty of care to Plaintiffs or that Nonconnah was the cause in fact of Plaintiffs' injuries (which they cannot), Nonconnah cannot be held liable for failing to remove natural accumulations of snow or ice when it had no notice of the condition. *Bowman,* 206 S.W.3d at 473. For a premises owner, such as Nonconnah, to be liable for a dangerous condition on its property, the Plaintiffs must show that "(1) that the condition was caused or created by the premises owner or his agent, or (2) if the condition was created by someone other than the owner or his agent, that the premises owner had actual or constructive notice of the dangerous or defective condition prior to the accident." *Williams,* 212 S.W.3d at 296. Plaintiffs have specifically pled the latter. *See* Am. Compl. ¶ 15 ("Agents and/or employees of Defendant had actual and/or constructive notice that ice and/or winter accumulation existed at 1910 Nonconnah Boulevard, including but not limited to the area where Plaintiff fell, prior to the time that Plaintiff fell, including, but not limited to, February 15, 2010 and afterwards."). Plaintiffs, however, have failed to submit evidence supporting their claim, i.e. that Nonconnah had notice of the alleged ice, sufficient to establish the existence of a dispute as to genuine issues of material fact.

Notably, Plaintiffs have not adduced *any* evidence to show that Nonconnah had actual notice of the alleged black ice.

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[2] Arguably, under the provisions of the lease between Nonconnah and Ikon Office Solutions ("IKON"), Plaintiff's employer, IKON was the cause in fact of Plaintiff's injuries. Nonconnah, however, reserves this argument for a later date.

Rather, Plaintiffs attempt to prove Nonconnah had constructive notice of the ice by arguing, in a conclusory fashion, that Nonconnah "knew or should have known" that "winter precipitation was accumulating at 1910 Nonconnah Boulevard in February 2010," and that Nonconnah "failed to take appropriate reasonable steps to remediate such accumulation of winter precipitation," permitting "a dangerous and/or hazardous condition to exist at 1910 Nonconnah Boulevard on February 16, 2010, during the time that Plaintiff [] was making his delivery to the premises." Am. Compl. ¶¶ 12-14. Wintery precipitation did fall in February 2010, including a trace amount in the afternoon of February 15, 2010 (SUMF ¶ 22); however, it does not necessarily follow that Nonconnah had constructive notice of an alleged black ice condition at 5:00 a.m. on February 16, 2010.

There are two ways in which Plaintiffs may demonstrate Nonconnah had constructive notice of the alleged natural accumulation of ice: (1) "by showing a pattern of conduct, a recurring incident, or a general or continuing condition indicating the dangerous condition's existence," *Blair v. W. Town Mall,* 130 S.W.3d 761, 765-66 (Tenn. 2004), or (2) "by proving that the particular dangerous or defective condition existed for such a length of time that the defendant, in the exercise of reasonable care, should have become aware of the condition." *Id.* at 766 n.1; *see also Ailsworth v. Autozone, Inc., et al.,* 2001 WL 1683805, at *4 (Tenn. Ct. App. Dec. 31, 2001). In the present case, there is no evidence of a pattern of conduct or recurring incident with respect to ice on Nonconnah's premises. Instead, Plaintiffs are seemingly arguing that the alleged black ice existed for a lengthy period of time and, as such, Nonconnah should have been aware of the patch of ice.

Importantly, besides the conclusory statements alleged in the Amended Complaint mentioned above, Plaintiffs have put forth no evidence to show how the alleged ice came to be in

the U-shaped area of 1910 Nonconnah much less how long the alleged patch of black ice had been present. **Absent evidence that the alleged ice existed for any significant period of time, prior to the accident, a jury cannot reasonably infer that Nonconnah had constructive notice of the hazardous condition.** Consequently, Plaintiffs have not established a genuine issue of material fact with respect to whether Nonconnah had actual or constructive notice of the condition which allegedly caused Plaintiffs' injuries.

C. Plaintiff's Fault was Equal to or Greater than that of Nonconnah's.

Alternatively, even if this Court determines that a question of fact does exist with respect to Nonconnah breaching its duty of care, reasonable minds could not differ that Plaintiff's fault was equal to or greater than that of Nonconnah. Plaintiff, by exiting his tractor-trailer in the manner that he did, failed to exercise reasonable care in the face of a perceived hazard. Under Tennessee's system of modified comparative fault, "so long as a plaintiff's negligence remains less than the defendant's negligence the plaintiff may recover[.]" *McIntyre v. Balentine,* 833 S.W.2d 52, 57 (Tenn. 1992). While summary judgment is "generally not an appropriate judicial mechanism by which to determine comparative fault[,] [i]f [] the evidence is evaluated in the light most favorable to the plaintiff and reasonable minds could not differ that [his] fault was equal to or great[er] than that of the defendants, summary judgment in the defendant's favor may be granted." *Elrod v. Cont'l Apartments,* 2008 WL 425947, at *2 (Tenn. Ct. App. Feb. 13, 2008) (citations and quotations omitted).

For example, in *Elrod v. Continental Apartments*, a case in which the plaintiff was injured after slipping and falling on accumulated ice and snow, the Tennessee Court of Appeals, on a motion for summary judgment, found that reasonable minds could not differ that the

plaintiff's fault was greater that the defendants' fault, and, as such, the defendants were entitled to summary judgment. *Id.* at *3. In so ruling, the Court explained:

> [Plaintiff] was well aware that snow and ice had accumulated on the parking lot due in part to the fact her car slid as she was parking. As she exited her vehicle, she saw that snow and ice was all around her. She explained that she took reasonable precautions to prevent injury to herself by "tiptoeing" from her car to the deposit box. However, and for reasons that defy logic, as she returned to her car, she moved in a "little trot like" manner on pavement she knew was slippery due to ice and snow, she fell and fractured her ankle.

Id. The court thus found it "indisputable that [the plaintiff] failed to exercise reasonable care in the face of a known hazard." *Id.*

In the present case, Plaintiff failed to exercise reasonable care when he exited his tractor-trailer on what he *perceived or thought* to be a parking area being treated with salt. Although Plaintiff stated he did not see water or snow on the ground as he drove into the parking lot of 1910 Nonconnah, interestingly, he did state that he noticed what he believed to be people spreading salt and "preparing the parking areas" (SUMF ¶ 32), an observation which should have put Plaintiff on some sort of notice regardless of the actual activity occurring upon the property. Once parked, Plaintiff, prior to exiting the cab of his tractor-trailer, grabbed his laptop with his right hand and held the steering wheel with his left hand. (*Id.* ¶ 35, 37.) He then stepped onto the step attached to the side of his tractor-trailer. (*Id.* ¶ 35) This step was made of steel and was approximately one foot below the cab. (*Id.* ¶ 36.) Plaintiff then stepped to the ground, letting go of the steering wheel. (*Id.* ¶ 38.) While Plaintiff was stepping out of the cab, he was still looking into the cab of his truck - not at the ground where he was stepping (*Id.* ¶ 39). When Plaintiff touched the ground, he slipped sideways and came down with his right hand "punching" the pavement. (*Id.* ¶ 40.) The laptop was still in his right hand as Plaintiff stated that he "wasn't about to drop the laptop." (*Id.* ¶ 41.)

Like the plaintiff in *Elrod*, the Plaintiff here was aware of activity around the property. However, "for reasons that defy logic," Plaintiff stepped to the ground from his tractor-trailer with a laptop in one arm, not holding on to anything with the other, and without looking at the ground on which he was stepping. On these facts, Plaintiff failed to exercise reasonable care in exiting his tractor-trailer. Due to Plaintiff's unreasonable actions, reasonable minds could not differ in that Plaintiff's fault was greater that of Nonconnah. Consequently, Nonconnah is entitled to summary judgment.

IV. CONCLUSION

For the reasons stated above, Defendant Nonconnah Holdings, LLC, respectfully requests that its Motion for Summary Judgment be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to:

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