The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

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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.

Special Counsel, Office of the Tennessee Attorney General and Reporter

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

1979; B.P.R. No. 6683.

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; Date of Licensure: October 6, 1979; Active.

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any state? If so, explain. (This applies even if the denial was temporary).

No.

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

I began my practice of law with Hanover, Walsh, Jalenak & Blair, PLLC ("Hanover Walsh") in 1979, and became a member of the firm in 1985. We merged our practice in January 2005 with Harris, Shelton, Dunlap, Cobb & Ryder, PLLC, forming Harris Shelton Hanover Walsh, PLLC ("Harris Shelton").

While practicing law at Harris Shelton, I served as Special Master ("Special Master") of the Chancery Court of Shelby County from November 2010 until January 2015. This was a part-time position by appointment of the sitting Chancellors.

I practiced with Harris Shelton until my appointment as Chancellor by Governor Bill Haslam in September 2015. I served as Chancellor of Part III of the Chancery Court of Tennessee for the Thirtieth Judicial District through August 31, 2016. I unsuccessfully sought election to serve the remainder of the unexpired term as Chancellor in the August 2016 general election.

Following the completion of my duties as Chancellor, I briefly pursued a mediation practice in the fall of 2016, forming Newsom Conflict Resolutions, LLC for that purpose. Late in 2016, Tennessee Attorney General Herbert Slatery employed me as Special Counsel. I now supervise the Memphis Office. We have four full-time attorneys, with an emphasis on West Tennessee litigation, as discussed in more detail below.

I was part owner of NewSwank Aircraft, LLC, a Tennessee limited liability company, from 2004 to 2011. My co-owner and I formed NewSwank to purchase and operate a small private aircraft to allow our sons to accumulate flight time in pursuit of their aviation careers. I sold my interest in NewSwank in 2011.

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

I have been employed continuously as an attorney since I was licensed to practice law.

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.

Since December 2016 I have served as Special Counsel for the Tennessee Attorney General. With my appointment we revived the Memphis Office of the Attorney General. We presently have a staff of four Memphis-based attorneys. The organization of the Nashville Office is by practice area. We handle a great variety of cases, most of which are focused on litigation in Memphis and West Tennessee.

Among the cases that I have had the opportunity to litigate with the assistance of my colleagues are: (a) defense of Americans with Disabilities Act and Family and Medical Leave Act claims for the Department of Children's Services; (b) defense of Fair Labor Standards Act and Tennessee Public Protection Act claims for District Attorneys General who operate a Joint Drug Task Force; (c) defense of inverse condemnation claims for the Department of Transportation; (d) defense of wrongful death claims for Memphis Mental Health Institute; (e) defense of tort liability claims against the Department of Transportation; (f) defense of the constitutionality of Tennessee legislation; (g) advice to State witnesses in class action litigation brought by families whose deceased relatives had been improperly interred by a cemetery company; and (h) defense of class action litigation against Department of Correction officials on behalf of hepatitis-C infected inmates incarcerated in Tennessee prisons. I also provide assistance to various divisions in the Office where our proximity to and knowledge of Shelby County courts is useful.

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.

Prior to my governmental service, I had 35 years of litigation experience in private practice.

I am admitted to practice in the following courts (with dates of admission):

- Tennessee State Courts, October 6, 1979
- United States District Court, Western District of Tennessee, April 4, 1980.
- United States District Court, Middle District of Tennessee, September 9, 1987.
- United States District Court, Eastern District of Tennessee, October 27, 1987.
- United States Court of Appeals for the Sixth Circuit, September 15, 1981.
- United States Supreme Court, November 15, 1982.

I have also been admitted *pro hac vice* or as otherwise permitted in cases before the United States District Courts for the Eastern District of Michigan, the Eastern District of Arkansas and the Northern District of Mississippi. I have also been a certified Rule 31 mediator.

I have been lead counsel in jury trials in the Circuit Court of Tennessee for the Thirtieth Judicial District at Memphis and the United States District Court for the Western District of Tennessee.

I formerly had a civil practice concentrated on commercial litigation. My practice involved the provision of litigation services and legal advice to commercial clients, insurance companies, small businesses, not-for-profit corporations, multi-employer pension and welfare trusts, municipalities and individuals. The matters in which I was engaged in recent years (with approximate weighting as to each) involved breach of contract claims and claims of tortious commercial conduct in state and federal courts and in arbitration (40%); claims for violation of ERISA obligations (5%); claims for

copyright infringement (10%); disputes involving decedents' trusts (10%); provision of advice on ethics matters and transactional matters (10%).

My private litigation practice was extensive. Of special note, from 2007 to 2013 I actively pursued claims related to restoration of cemetery and funeral trust funds associated with the Forest Hill Cemeteries of Memphis that had been stolen by the owners and their associates in 2004 and 2005. This theft placed at risk the pre-need funeral arrangements paid for by over 13,000 citizens of Shelby County and caused the future of the cemetery properties to be in doubt.

My former law partner, Max Shelton, was appointed as Receiver of the cemeteries by then-Chancellor Arnold B. Goldin in 2007 after the State of Tennessee sought the appointment of a receiver after deficiencies in the trust funds were discovered in an administrative audit. As counsel for Mr. Shelton, I worked as part of a team of lawyers and assistants, including the Attorney General's office. I personally prepared civil pleadings against those responsible, sought and obtained temporary injunctions, argued for and obtained civil contempt remedies against a former officer, negotiated tolling agreements with potential corporate defendants, negotiated terms of settlement by which millions of dollars in trust fund assets were recovered and placed back into trust, represented the Receiver in numerous evidentiary hearings, argued multiple additional motions before the Chancery Court and argued before the Tennessee Court of Appeals, prepared extensive timelines involving key facts and transactions by which trust funds were transferred out of trust, interviewed and deposed key witnesses, briefed and argued successfully that the United States District Court for the Western District of Tennessee should stay putative class action lawsuits pending the conclusion of the Receivership proceedings based on *Burford* abstention principles, prepared extensive proposed findings of fact and conclusions of law in aid of the Receiver's motions for summary judgment based on the entirety of the record, argued successfully that the Receiver was entitled to a civil judgment against the key defendants in an amount in excess of $25 million and assisted the Receiver in proceedings by which the cemetery and funeral assets were sold in a court-approved sale. We later filed suit in Chancery Court against the employer of one of the co-conspirators that was removed to Federal Court based on diversity of citizenship jurisdiction and then ordered to arbitration. Due to my familiarity with the matters at issue, I was engaged, with the Court's approval, as Tennessee counsel for further proceedings before a FINRA arbitration panel. In that context, I assisted Indiana co-counsel in the preparation of the claims for arbitration, including extensive pre-hearing discovery matters and preparation of key witnesses. The claims were resolved by settlement.

Over the course of my legal career, I have represented a wide variety of clients in multiple areas of the law. As lead counsel, I successfully briefed and argued on appeal to the Tennessee Court of Appeals that a claim against an employer was barred after no motion to substitute party was made within the ninety day period set out in TENN. R. CIV. P. 25.01, mandating dismissal of the case with prejudice and resulting in the reversal of the Circuit Court's judgment; tried, briefed and upheld on Sixth Circuit appeal a jury verdict enforcing promissory notes on behalf of an assignee under the "shelter rule" of

Tennessee law despite defendant's contention that plaintiff was not a holder of the notes when the action was commenced; defended the owner of a shopping center before a jury regarding a claim that there had been violations of the lease terms regarding a similar business conducted by another tenant; and obtained trial court judgment and briefed and argued successfully on appeal that a lender had conformed to the Uniform Commercial Code in repairing a repossessed aircraft and conducting a commercially reasonable sale. Other cases have included claims for and advice concerning: accountings by trustees and other fiduciaries; claims of breach of contract, tortious interference with contractual relations and prospective economic advantage; breach of fiduciary duty; application of Tennessee Consumer Protection Act; bad faith refusal to pay insurance claims; copyright infringement of musical compositions, motion pictures, and photographs posted on the internet; alleged violations of the Tennessee Personal Rights Protection Act; enforcement of employer agreements to pay employee benefits to multiemployer plans established and maintained pursuant to ERISA; awards of attorney's fees to prevailing parties pursuant to statute; requests for awards of exemplary damages; violations of covenants not to compete; issues of due process and personal jurisdiction over foreign entities; enforcement of foreign judgments; products liability actions; wrongful death claims arising from varied factual circumstances, including health care liability actions and failure of a nursing home to prevent elopement of resident with dementia; removal of lawsuits to federal court based on federal question jurisdiction and/or diversity of citizenship jurisdiction; review of Reports of Examination by administrative examiners; indemnity claims pursuant to industry-wide uniform agreement; determination of entitlement of broker to commission income; negotiation of employment agreements, separation agreements and stock repurchase agreements involving corporate officers; claims pursuant to Federal Debt Collection Practices Act; housing discrimination claims; alleged Americans with Disabilities Act violations; mechanics lien issues; adversary proceedings in bankruptcy; interpleader actions on behalf of interpleading plaintiffs and claimants; declaratory judgment claims; conciliation agreements with Tennessee Human Rights Commission resolving housing discrimination complaints; avoidance of fraudulent transfers; post-foreclosure proceedings; establishment of constructive or resulting trusts; hospital liens; advising client of likelihood of success on the merits of prospective tax refund litigation; negotiation of assurance of voluntary compliance agreement with Division of Consumer Affairs of Tennessee Department of Commerce and Insurance; claims for breach of transfer and presentment warranties pursuant to Articles 3 and 4 of the Uniform Commercial Code in circumstances in which forgery and alteration of commercial instruments is at issue; matters involving "litigation holds" in the context of pending litigation; and enforcement of terms and conditions of Small Business Administration loans.

As co-counsel, I have litigated or settled a variety of claims, including: breach of contract claims against a liability insurer regarding claims of violation of terms of negotiated settlement; statutory interpretation of "any willing pharmacy" statute; claims pursuant to the Real Estate Settlement Procedures Act; environmental claims relating to alleged negligence in regard to provision of environmental impact statement; declaratory judgment on validity and applicability of Solid Waste Disposal Act regarding landfill proposals; claims pursuant to Tennessee Prompt Pay Act; claims against public

performance bonds; claims seeking restitution; claims for establishment of prescriptive easements; claims for enforcement of partnership agreements; claims for breach of fiduciary duties and for accountings; applications for temporary restraining order, attachment pro corpus, and temporary injunction based on fraud; putative class actions involving antitrust allegations; declaratory judgment proceedings regarding obligations of foreclosing creditor to owner of fee; predatory lending practices; construction delay; products liability; wrongful death; seniority issues related to memorandum of understanding between governmental entity and public employee union; public nuisances; statutory interpretation regarding delegation of eminent domain power to privately owned utilities; determination of merits of claim pursuant to employment practices liability insurance following denial of coverage, including interpretation of Tennessee Insurance Trade Practices Act; misappropriation of trade secrets; defamation actions; waiver of right to jury trials under rules of civil procedure; enforcement of guaranty agreements; challenges to validity of annexation ordinance; intentional and negligent misrepresentation; entitlement of parties to domestic litigation to conduct discovery in connection with TENN. R. CIV. P. 60.02 motions; matters of permissive intervention and intervention as of right; reach of Public Records Act to matters in litigation; and modification of protective orders regarding discovery previously taken.

My service as Special Master for the Chancery Court consisted of approximately one-quarter of my work as an attorney during the period of my employment. The Chancellors typically referred matters to the Special Master for report pursuant to TENN. R. CIV. P. 53. Commonly the litigants would find it financially difficult to afford the services of a private master. My work as Special Master consisted primarily of hearing contested proof and rendering reports, including the preparation of detailed fact findings and conclusions of law in matters involving issues such as child custody, accountings of monies received and owed, contractual disputes, allocation of insurance proceeds among injured minors, and competing claims of heirs to family-owned real property. On occasion the Chancery Court assigned me to act as a neutral. In that capacity I oversaw the management of a homeowners' association and have inspected property in preparation to provide testimony to the Court. I also mediated cases referred to me by then-Chancellor Armstrong involving parenting plans and contractual disputes in my dual capacities as Special Master and Rule 31 mediator. I also mediated disputes concerning ownership of church property on assignment from Chancellor Kyle. Further, I conducted numerous reference hearings related to tax sales for the City of Memphis and Shelby County.

When Reports were required of me as Special Master, it was my intention to write Reports that were thorough and accurate with respect to the facts at issue and consistent with applicable legal principles. These Reports set forth fact findings and identified the legal principles at issue so that the Chancellors were fully informed as to the basis for my findings, and to allow the litigants an opportunity to take exception to my findings. I always sought to be fair, impartial and engaged and to assist the Chancellors with the performance of their judicial function. I sought to prepare Reports and perform my tasks in a manner that would expedite the progress of each case.

As Special Master I mediated cases involving proposed modifications to Permanent Parenting Plan Orders relating to child custody and education and contract disputes regarding construction contracts. I inspected premises to evaluate whether equipment had become fixtures on the property. I made recommendations regarding the proportional recovery that should be allotted to victims injured in a collision between a day care van and an SUV when the sole insurer had tendered its policy limits. I conducted a hearing regarding the identity and value of automotive tools and parts allegedly misappropriated by one dirt-track racing enthusiast from another.

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

As noted above, I served as litigation counsel for the Receiver in the Forest Hill Cemetery litigation. The outcome of this matter benefited thousands of families who had purchased preneed cemetery contracts. It also helped families, like my own, whose loved ones are buried at one of the three Forest Hill cemeteries in Memphis, as the trust funds recovered in the lawsuit allowed maintenance and improvement of the cemetery properties to continue.

Early in my legal career I took part in a case that climaxed with a hearing and decision by the United States Supreme Court. Our client's involvement began with an injunction hearing before the federal district court in Memphis. The district court ruled against our client. The Sixth Circuit affirmed. The Supreme Court granted certiorari. Our firm briefed and argued the case. The Court reversed the courts below in *Firefighters Local Union No. 1784 v. Stotts,* 467 U.S. 561 (1984). The case resolved issues related to competing interests where a consent decree had previously controlled. I drafted the appellate briefs at each stage, and assisted our lead counsel, Allen S. Blair, as he prepared for oral argument. I also sat at counsel table for the oral argument with Mr. Blair and Solicitor General Rex Lee.

I discuss my judicial experience separately below.

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.

As noted above, I served as Chancellor in Shelby County from September 2015 to August 2016. The Chancery Courts of Tennessee hears the greatest variety of civil cases of all trial courts. In response to Question 34 below, I have attached copies of orders

that I prepared and entered as Chancellor in cases that came before me as a judicial officer. As a trial judge, I felt the need, as often as possible, to articulate in writing the reasoning by which I reached my conclusions. Justice also required the careful management and prompt disposition of the cases before me.

- *In re: Investigative File Tennessee Bureau of Investigation, Investigative File: ME-76C-000007* (*State ex rel. Weirich, et al. v. Schilling*); Memorandum and Order re: Standing and Intervention (Shelby Chancery No. CH-15-1472-3, Nov. 30, 2015)

- *In re: Investigative File Tennessee Bureau of Investigation, Investigative File: ME-76C-000007* (*State ex rel. Weirich, et al. v. Schilling*); Order Directing Disclosure of TBI Investigative File Pursuant to Tenn. Code Ann. § 10-7-504(a)(2)(A) (Shelby Chancery No. CH-15-1472-3, Dec. 8, 2015)

This case came before the Court on the petition of the District Attorney General and the Director of the Tennessee Bureau of Investigation pursuant to Tenn. Code Ann. § 10-7-504(a)(2)(A) for an order directing the public disclosure of a confidential TBI investigative file. The case arose from an officer-involved shooting that resulted in the death of a young man. The grand jury had returned a "no true bill" as to criminal charges against the police officer. There was intense public interest in the case. It was important to manage the case with dispatch. I made preliminary rulings on intervention, standing, and jurisdiction. I later considered an issue of first impression regarding the court's authority to order the disclosure of the TBI investigative file under the Tennessee Public Records Act. This required close scrutiny of the text of the Public Records Act to discern and apply the Legislature's intent. Deciding in favor of disclosure, I crafted a protective order to redact personal information from public view. I entered a temporary stay of the effect of the order to allow for potential interlocutory review. No party appealed.

- *Jackson, et al. v. CitiMortgage, Inc.*, Order Granting in Part and Denying in Part Defendant's Motion for Summary Judgment (Shelby Chancery No. CH-14-1217-3, Jan. 5, 2016)

- *Jackson, et al. v. CitiMortgage, Inc.*, Order Granting Defendant's Motion to Alter or Amend Judgment and Awarding Attorney's Fees (Shelby Chancery No. CH-14-1217-3, Mar. 1, 2016)

This case is one example of the commercial disputes I decided. On the defendant's motion for summary judgment, I determined that there were no material facts in dispute and granted the motion. The plaintiffs had raised claims of breach of contract, promissory estoppel, breach of the covenant of good faith and fair dealing, violation of the Truth In Lending Act, and intentional misrepresentation. When the plaintiffs appealed, the Court of Appeals commented that it found "the findings of fact provided by the trial court to be an exhaustive and relevant summation of the record" and drew from those in its opinion. *Jackson v. CitiMortgage, Inc.*, No. W2016-00701-COA-R3-

CV, 2017 WL 2365007, at 1 (Tenn. Ct. App. May 31, 2017). The Court of Appeals affirmed the ruling in all respects.

- *In re: M.M.P, et al.*, Findings of Fact and Conclusions of Law Pursuant to Tenn. R. Civ. P. 52.01 and 41.02(2) and Tenn. Code Ann. § 36-1-113(k) (Shelby Chancery No. CH-14-1307-3, Feb. 16, 2016)

The most solemn obligation of our courts is to adjudicate matters involving the best interests of children on statutory grounds, including matters of child custody and support and petitions for termination of parental rights.

In this case prospective adoptive parents petitioned for termination of the Mother's parental rights and adoption. They alleged that the Mother, the only surviving parent, had abandoned the children by her willful failure to visit and provide support and due to persistent conditions that prevented the children's safe return. They asserted also that the Mother was mentally incompetent to provide further care and supervision of the children. The Mother contested the petition with the assistance of appointed counsel. Following trial, I prepared findings of fact and conclusions of law. I found that only a single ground for termination had been proven by clear and convincing evidence. Further, I assessed that the termination of the Mother's parental rights was in the best interest of the children, utilizing the statutory factors. On appeal, the Court of Appeals affirmed, stating that the findings of fact and conclusions of law were "well-reasoned and detailed." *In re Makenzie P., et al.*, No. W2016-00400-COA-R3-PT, 2016 WL 5851876, at *2 (Tenn. Ct. App. Sept. 30, 2016), perm app. denied (Tenn. Nov. 22, 2016).

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

None.

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

I thank the Council for the opportunity to share some insights that I gained as a judicial officer.

I experienced the generosity of other judges throughout my time on the bench. Judges often commented at judicial conferences that we should feel free to call if we felt the need to seek advice. Some even offered to come off the bench if the need was urgent. I often needed such advice. At those times I did not hesitate to ask, and always got a receptive hearing. Judges in leadership positions within the judiciary, while often the busiest, were bountiful in their rich advice. I tried my best to put their advice into practice, and found that it made my judging more effective. For instance, in a small

group setting our Chief Justice suggested that trial judges, when possible, should make oral rulings from the bench fresh after hearing. Putting that advice into practice, I found that I was able to make oral rulings after a trial with relative ease. Sometimes those rulings were as long as two hours. It surprised me how well-organized and detailed those rulings turned out to be. This helped to expedite the progress of the cases before me and to lessen the costs of litigation for the parties. Should I be selected to fill this judicial vacancy, I too wish to become a helpful resource for my colleagues. Also, a wise judge on the Tennessee Court of Criminal Appeals regularly provides advice to judges on ethical matters. I frequently called him for advice, which he most patiently provided. I was always grateful for his service.

Judges should not overlook the contribution of court clerks and their staffs to the efficient operation of the courts. When I served on the Chancery bench I received great assistance that I received from our Clerk and Master's office. The staff very generously gave me a nickname which I hope reflected the kind of cheery disposition that I projected. As much as possible, we had a very positive and friendly relationship.

The best judges are both decisive and fair. Part of being a good judge is the willingness to accept constructive criticism and learn from mistakes. Humility is an essential part of a successful judge's 'DNA.' There were occasions in which my trial court rulings were reversed on appeal. *See Associates Asset Mgmt. LLC v. Blackburn,* No. W2016-00801-COA-R3-CV, 2017 WL 1077060 (Tenn. Ct. App. Mar. 22, 2017); *George v. Shelby Cnty. Bd. of Educ.,* W2016-01191-COA-R3-CV, 2017 WL 511884 (Feb. 8, 2017). I was no longer on the bench when these rulings were made, but I view those rulings as an opportunity to learn from my fellow judges.

Finally, appeals of final judgments to the Court of Appeals are of right. By contrast, appeals to the Tennessee Supreme Court are usually discretionary. This consideration challenges the judges of the Court of Appeals to take great care to accurately assess the facts and the law, as their review may be the last that the parties receive. I wish to accept that challenge.

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 submitted an application for judgeship to the Governor's Council for Judicial Appointments for the vacancy in Part III of the Chancery Court of Tennessee for the Thirtieth Judicial District at Memphis resulting from the appointment of the Honorable Kenny W. Armstrong to the Tennessee Court of Appeals. The Governor's Council met on September 10, 2014 to consider all applications for that position. The Governor's Council submitted my name to the Governor as a nominee.

I submitted an application for judgeship to the Governor's Council for Judicial Appointments for the vacancy in Part III of the Chancery Court of Tennessee for the Thirtieth Judicial District at Memphis resulting from the passing of Chancellor Oscar C. Carr, III. The Governor's Council met on June 17, 2015 to consider all applications for that position. The Governor's Council submitted my name to the Governor as a nominee.

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.

Rhodes College, B.A. 1976 (joint degree in Economics and Political Science)
(attended 1972-1976)
Phi Beta Kappa (Rhodes College)
Omicron Delta Kappa honor society (Rhodes College)

Vanderbilt School of Law, J.D. 1979
(attended 1976-1979)
Associate Executive Editor Vanderbilt Law Review (Received Associate Editor's Award in 1979)

PERSONAL INFORMATION

15. State your age and date of birth.

64 years of age. [redacted] 1954.

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

I am a life-long Tennessee resident.

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

I have lived in Shelby County throughout my life, except only for the three years I attended Vanderbilt School of Law.

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

Shelby County

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

I had no military service.

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.

To my knowledge, I am not.

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 know of no formal complaints filed against me.

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

No.

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

No.

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

I was named as a defendant in a federal lawsuit filed in the United States District Court for the Western District of Tennessee by Theodore G. Cook in 1988. Mr. Cook had been a defendant in a lawsuit that J. Alan Hanover and I litigated in Chancery Court in Shelby County on behalf of William F. Trimble in the mid-1980s. After Mr. Cook lost that lawsuit, he filed suit against a number of defendants who were involved in litigation against him, including the Honorable D. J. Alissandratos, former Chancellor of Part III of the Chancery Court of Shelby County, Glen Reid, Mr. Hanover and me. Then-United States District Judge Julia Gibbons dismissed all claims asserted by Mr. Cook as frivolous pursuant to 28 U.S.C. § 1915(d). The District Court also declined to exercise jurisdiction over certain state claims asserted by Mr. Cook. The Sixth Circuit Court of Appeals affirmed. *See Cook v. Trimble*, 1989 WL 16189, 869 F.2d 1489 (6th Cir. 1989) (Table Case).

In the mid-1980s, I filed a suit in General Sessions Court in Shelby County against a driver who backed into my car in a commercial parking lot. She left the scene of the accident after refusing to provide her insurance information to me. I later filed suit against her. I do not recall the docket number of the case or the name of the defendant. I obtained a civil judgment in the approximate amount of $400.00.

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.

Riveroaks Reformed Presbyterian Church, (Presbyterian Church of America)
Ruling Elder, 2011 to 2017;
Trustee, January 2014 to present.

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.

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 Trial Lawyers' Association (2015-2016)
Memphis Bar Association (1979 to present)
Director (2017 to present)
Co-Liaison between Directors and Professional Practice Committees (2017-2018)
Tennessee Bar Association (1979 to present)
American Bar Association (2009 to present)
The Federalist Society (2018 to present)

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, Memphis Bar Foundation (2016 to present)
Fellow, Tennessee Bar Foundation (2018 to present)
Fellow, American Bar Foundation (2017 to present)
AV Rating Martindale Hubbell
Best Lawyers in America; Commercial Litigation
Super Lawyers

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

Case Comment, Constitutional Law—Confrontation Clause—Admission at Trial of Slain Informant's Prior Grand Jury Testimony Against Defendants Does Not Violate Confrontation Guarantee Despite Lack of Cross-Examination, 31 VAND. L. REV. 682 (1978)

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.

CLE presentation re: Practice Before the Chancery Court of Shelby County (1 hour live CLE, Memphis Bar Association, 2016)

Faculty, National Attorneys General Training & Research Institute (NAGTRI)—Advanced Litigation Techniques, Mobile Training for Oregon Department of Justice (Salem, Oregon, 2018)

CLE presentation re: The Work of the Office of the Tennessee Attorney General (1 hour live CLE, Memphis Chapter of the Federalist Society, 2018)

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 of Part III of the Chancery Court of Shelby County (2016); candidate to complete unexpired term.
- Chancellor of Part III of the Chancery Court of Shelby County (2015-2016); appointed.
- Chancellor of Part II of the Chancery Court of Shelby County (2014); candidate to fill open seat.
- Special Master of the Chancery Court of Shelby County (2010-2015); appointed.

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.

- *In re: Investigative File Tennessee Bureau of Investigation, Investigative File: ME-76C-000007* (*State ex rel. Weirich, et al. v. Schilling*); Memorandum and Order re: Standing and Intervention (Shelby Chancery No. CH-15-1472-3, Nov. 30, 2015)

- *In re: Investigative File Tennessee Bureau of Investigation, Investigative File: ME-76C-000007* (*State ex rel. Weirich, et al. v. Schilling*); Order Directing Disclosure of TBI Investigative File Pursuant to Tenn. Code Ann. § 10-7-504(a)(2)(A) (Shelby Chancery No. CH-15-1472-3, Dec. 8, 2015)

- *Jackson, et ux. v. CitiMortgage, Inc.*, Order Granting in Part and Denying in Part Defendant's Motion for Summary Judgment (Shelby Chancery No. CH-14-1217-3, Jan. 5, 2016)

- *Jackson, et ux. v. CitiMortgage, Inc.*, Order Granting Defendant's Motion to Alter or Amend Judgment and Awarding Attorney's Fees (Shelby Chancery No. CH-14-1217-3, Mar. 1, 2016)

- *In re: M.M.P, et al.*, Findings of Fact and Conclusions of Law Pursuant to Tenn. R. Civ. P. 52.01 and 41.02(2) and Tenn. Code Ann. § 36-1-113(k) (Shelby Chancery No. CH-14-1307-3, Feb. 16, 2016)

Each of these writings reflect my own personal effort, including research, following briefing by the parties.

ESSAYS/PERSONAL STATEMENTS

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

"Justice and only justice, you shall follow." I have great respect for the judges of the Tennessee Court of Appeals. Their work is outstanding. I have taken in each and every one of their opinions issued since 2014 to prepare myself, first, to be a trial judge, then, should opportunity arise, to become an appellate judge. Due to varied training, practice, and experience I am ready to accept the challenge of this public trust, and the duties and responsibilities that it entails. I will endeavor to be an asset to the Court of Appeals and to the people of this State—who deserve justice from our courts in their application of law.

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

I am serving an elected three-year term as a member of the Board of the Memphis Bar Association. I participate in the Saturday Legal Clinic at the Main Library in Memphis. This program provides advice and counsel to those who have legal problems but do not know what their legal options are. As an employee of the Tennessee Attorney General's Office, I cannot provide representation to individuals, but participation in such clinics is permitted and encouraged.

While I was a Chancellor, I served as presiding judge for National Adoption Day. This special annual event takes place on a Saturday in November. We participate with courts across the nation in conducting this event. It allows working families to invite their extended friends and families to celebrate together their new relationship with their adoptive children. Court personnel give generously of their time each year. It is a gratifying experience with many tears and great joy.

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

The Tennessee Court of Appeals is a unitary court that hears civil appeals. Twelve judges serve on the Court, four of whom reside in each Grand Division. The judges usually sit in panels of three to hear appeals from final and interlocutory orders of the trial courts.

I will strive to assure that the outcome of cases are grounded in textual statutory interpretation, judicial precedent, and application of the proper standard of review. Trial courts are entitled to due deference to their exercise of discretion and their credibility determinations. I will strive to write opinions that foster public confidence in the integrity and impartiality of the Judiciary. I will accept criticism with humility. I will acknowledge my faults and take appropriate action to improve when needed. I will pursue excellence and will assist my fellow judges whenever I can.

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 participated in scouting from the time I was eight years old, rising to the rank of Eagle Scout. In college I served as a Scoutmaster for an inner-city troop, providing to many their first trip away from the city. My wife and I have been involved in assisting a local urban church with their ministry to children of the community. We support local agencies who provide relief to the homeless and single-parent families. We anticipate that our support of these local agencies will continue if I am appointed to the Court of Appeals. We have sponsored the needs of a child in Uganda through Compassion International for many years.

I serve as a volunteer judge in moot court competitions sponsored by the Memphis Bar Association Young Lawyers' Division. I enjoy seeing the effort that high school students put into these competitions. The quality of their work is impressive.

If appointed, I will initiate a program to invite classrooms throughout the State to communicate with my chambers via Skype. I will give students the opportunity to discuss the role of the courts in our system of government and promote interest in the law as a career path they might follow. I will offer my law clerks a role so the students can envision that they too might aspire to a career that relates to the law.

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)***

My father was born in 1911 and grew up on a farm in Hardeman County. My mother grew up on a farm in Haywood County. There they suffered the privations of the Depression. Neither went to college. They later moved to Memphis. We often visited our relatives north of Whiteville and east of Brownsville when I was young.

I was only child. I was taught to be hard-working, reverent and self-sacrificial. I worked forty-hour weeks each summer after I was 16 at the hardware warehouse where my parents worked. From a young age some of my best friends were African-American there and in school.

Most recently I have practiced law in the Office of the Tennessee Attorney General. I am impressed by the skill and professionalism of the attorneys and staff of the Office. I have had an opportunity to practice in some areas of the law that are new to me, and have received and given training in writing and advocacy that will be of great benefit if I am to be appointed as an appellate judge.

I am blessed to have a loving wife of 36 years, three wonderful children, two daughters-in-law, a son in law and three grandchildren (and one more on the way!). My wife is a pediatrics nurse who works in the night clinic at LeBonheur Children's Hospital in Memphis.

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)***

The Tennessee oath of office requires a judge to "support the Constitution of the United States of America and the Constitution of the State of Tennessee," to "administer justice without respect of persons, "and to "faithfully and impartially discharge" my duties as a judge. I will be bound by that oath to uphold the law regardless of my personal beliefs. It is responsibility of the Court of Appeals to apply the law as written by the Legislature, and as interpreted by controlling precedent. I will do so to the best of my ability.

To illustrate my commitment, while on the Chancery bench, I heard a case involving a local company that manufactured RNA slides for use in diagnosing childhood cancers. Its primary source was St. Jude Children's Research Hospital. The State Department of Taxation had ruled that the sale of these slides to research laboratories was a taxable event. The manufacturer appealed that ruling to the Chancery Court. It represented that the adverse ruling would cause it to cease operations. The controlling statute provided that the determination of the Commissioner within his discretion could only be altered by him, and not the Court. The law did give the Commissioner the authority to reconsider his ruling on the Court's request. I asked the Commissioner to reconsider his ruling pursuant to statutory authority. He declined to do so. While my sympathies were with the manufacturer, I upheld the Commissioner's ruling based on the controlling statutes.

REFERENCES

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

A.	The Honorable Herbert H. Slatery III Tennessee Attorney General and Reporter Office of the Tennessee Attorney General P.O. Box 20207 Nashville, Tennessee 37202-0207 [redacted]
B.	The Honorable Paul C. Ney General Counsel United States Department of Defense 1600 Defense Pentagon, Room 3E788 Washington, D.C. 20103-1600 [redacted]
C.	David Bearman, Esq. Shareholder Baker, Donelson, Bearman, Caldwell & Berkowitz, PC 165 Madison Avenue, 20th Floor Memphis, Tennessee 38103 [redacted]
D.	Rev. William Spink, Jr. Senior Minister Riveroaks Reformed Presbyterian Church 1665 S. Germantown Road Germantown, Tennessee 38138 [redacted]
E.	Ms. Alissa Holt Retired Operations Manager Office of the Clerk and Master Shelby County Chancery Court [redacted] Cordova, Tennessee 38018 [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 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 12, 2019.

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.

James R. Newsom III

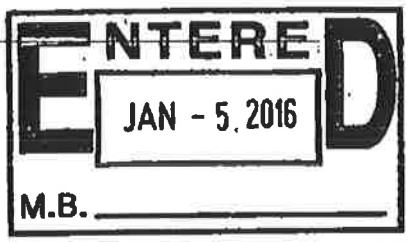
James R. Newsom III
Signature

February 12, 2019
Date

6683
BPR #

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

IN THE CHANCERY COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS



L.J. JACKSON and BRENDA JACKSON	]	
Plaintiffs,	]	
vs.	]	No. CH-14-1217-3
CITIMORTGAGE, INC.	]	
Defendant.	]	

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This cause came to be heard before the Honorable James R. Newsom III, Chancellor of Part III of the Chancery Court of Tennessee for the Thirtieth Judicial District at Memphis on September 16, 2015 upon the Motion for Summary Judgment pursuant to TENN. R. CIV. P. 56.02 filed by Defendant CitiMortgage, Inc. ("Citi") as to the claims asserted in this cause by Plaintiffs L.J. Jackson and Brenda Jackson (together "Plaintiffs" or the "Jacksons"), the statements of material facts (the "SMFs") filed by Citi[1] and Plaintiffs pursuant to TENN. R. CIV. P. 56.03, the affidavits filed by Citi and Plaintiffs in support of and in opposition to the motion, upon receipt

[1] The court notes that the numbering "system" contained in Citi's Statement of Undisputed Facts in Support of Defendant's Motion for Summary Judgment filed on July 6, 2015 sowed confusion into the record by haphazard numbering which omitted 3, 4 and 9, and repeated 11, 12 and 13 in no particular order.

of proposed findings of fact and conclusions of law (the "PFFCL") filed of record by Citi and Plaintiffs and upon the entire record in this cause.

Citi seeks summary judgment dismissing Plaintiffs' claims for breach of contract and promissory estoppel, for breach of the covenant of good faith and fair dealing, for violation of TENN. CODE ANN. § 35-5-107, for violation of Regulation Z of the Truth-In-Lending Act, and for negligent and intentional representation. Plaintiffs also seek summary judgment finding that the foreclosure sale was valid pursuant to Tennessee law and the Deed of Trust. Citi further asserts, in regard to its counterclaim, that it has presented *prima facie* evidence of title to the property at issue and that Citi has a greater right to possession of that property. Citi contends that it is entitled to an award of its attorney fees. Plaintiffs contend that genuine issues of material fact are present which preclude summary judgment for Citi.

Based on the record and the arguments of counsel for Citi and for Plaintiffs, the court makes the following findings of fact and conclusions of law:

MATERIAL FACTS

Taking the facts in the light most favorable to Plaintiffs, the following material facts ("MF") are undisputed for the purpose of summary judgment:

1. At all times material hereto, Plaintiffs have been the owners of the property commonly known as 4776 Ross Creek Drive, Memphis, TN 38141 (the

"Property"). Affidavit of Brenda Jackson ("Jackson Aff.") at ¶ 3. *See also* Plaintiffs' Amended Response to Undisputed Material Facts ("Plaintiffs' Amended Response") at ¶ 1.

2. On or about May 26, 2005, Plaintiffs refinanced their purchase money mortgage on the Property. In connection with the refinancing, Plaintiffs executed a thirty-year Adjustable Rate Note in the principal amount of $118,750.00 (the "Note") payable to Argent Mortgage Company, LLC ("Lender"). Plaintiffs' PFFCL at ¶ 1; Jackson Aff. at ¶¶ 4-5; Citi's Response to Plaintiffs' Statement of Additional Undisputed Material Facts at p. 1, ¶¶ 1-2.[2] *See also* Citi's Proposed Order Granting Motion for Summary Judgment (hereafter "Citi PFFCL") at p. 1, ¶ 1.

3. In connection with the refinancing, Plaintiffs executed a Deed of Trust ("DOT") which was recorded in the Office of the Shelby County Register of Deeds (the "Shelby County Register") on June 10, 2005 as Instrument 05090896 (filed of record in this cause on July 6, 2015) in favor of Argent, conveying a security interest in the Property to Argent. Plaintiffs' Amended Response at p. 1, ¶ 1; Jackson Aff. at p. 1, ¶ 4; DOT.

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[2] Plaintiffs' Statement of Additional Undisputed Facts requests that Citi agree that the Note contained an "artificially low teaser rate with a first payment change date about three years after they had made the loan." *Id.* at p. 1, ¶ 2, citing Jackson Aff. at ¶¶ 5-6. As the Note speaks for itself, Plaintiffs' conclusory characterizations of the Note as containing an "artificially low teaser rate" (*id.*) and referring to increases in monthly payments due under the Note (*id.* at p. 1-2, ¶¶ 3, 5; *see also* Plaintiffs' PFFCL at p. 1, ¶ 2; Jackson Aff. at p. 2, ¶ 6) do not inject disputed issues of material fact into the record which preclude summary judgment in favor of Citi.

4. The Note at p. 1, ¶ 1 provides that Plaintiffs "understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the 'Note Holder.'" Further the Note provides: "I will make my payments at: 505 City Parkway West, Suite 100, Orange, CA 92868 or at a different place if required by the Note Holder." *Id.* at p. 1, ¶ 3(A). Also, the Note states in part:

> Oral agreements, promises or commitments to lend money, extend credit, or forbear from enforcing repayment of a debt, including promises to extend, modify, renew or waive such debt, are not enforceable. This written agreement contains all the terms the Borrower(s) and the Lender have agreed to. Any subsequent agreement between us regarding this Note or the instrument which secures this Note, must be in a signed writing to be legally enforceable.

Plaintiffs' PFFCL at ¶ 1; Citi's PFFCL at p. 1, ¶ 2; First Affidavit of Travis Nurse at ¶ 5, Exh. A at p. 3.[3]

5. The DOT and the Note do not contain any other provisions regarding future loan modifications or the right of Plaintiffs to be considered for a loan modification. Citi PFFCL at ¶ 2. *See* First Nurse Aff. at p. 2, ¶ 5, Exh. A; DOT.

6. Effective July 1, 2008 the servicing of Plaintiffs' mortgage account was transferred to Citi. First Nurse Aff. at p. 2, ¶ 5, Exh. B; *see also* Plaintiffs' Amended

[3] The court notes that Citi filed two documents under the undifferentiated title "Affidavit of Travis Nurse." The first was filed on July 6, 2015 ("First Nurse Aff."). The second was filed on September 14, 2015 ("Second Nurse Aff."). The court reminds counsel that "judges are not like pigs, hunting for truffles" that may be buried in the record, ***Flowers v. Bd. of Professional Responsibility***, 314 S.W.3d 882, 899 n.35 (Tenn. 2010) (citation omitted), and that unnecessary "archeological digs" are no more enjoyed by trial judges than by appellate judges.

Response at p. 1, ¶ 2; Jackson Aff. at p. 2, ¶ 7. Notice of that fact was provided to Plaintiffs on or about June 11, 2008. *Id.* That notice stated that "the servicing of your mortgage account will be transferred to [Citi].... You are hereby notified that the servicing of your mortgage loan, that is, the right to collect payments from you, is being assigned, sold or transferred from CitiFinancialMortage Corporation to ["Citi"]....The assignment, sale or transfer of the servicing of your mortgage loan does not affect any terms or conditions of the mortgage instruments, other than the terms directly related to the servicing of your loan." First Nurse Aff. at p. 2, ¶ 5, Exh. B at pp. 1-2; Citi's Response to Plaintiffs' Statement of Additional Undisputed Material Facts at ¶ 4.[4]

7. The DOT and the Note permit the lender, in the event of default, to enforce its security interest by acceleration of the debt and by sale of the Property at foreclosure. Citi's PFFCL at ¶ 6; First Nurse Aff. at p. 2, ¶ 5, Exh. A at p. 2, ¶ 7, p. 3, ¶ 11; DOT at p. 13, ¶ 22.

8. Plaintiffs began to have trouble making their mortgage payments, largely because of the payment increases from the adjustable rate mortgage, but also because their family income declined because of the downturn in the economy. Citi's

[4] Plaintiffs dispute Citi's contention that the DOT and the Note were assigned to Citi and that notice of the assignment was provided to Plaintiffs. *See* Plaintiffs' Amended Response at p. 1, ¶ 2. The First Affidavit of Travis Nurse asserts that the DOT and the Note were transferred to Citi and notice of same was provided to Plaintiffs. First Nurse Aff. at p. 2, ¶ 5. The materials on which Citi rely contain neither an assignment of the DOT and the Note to Citi, nor any other proof to show that the DOT and the Note, as distinct from the servicing rights, were transferred to Citi. However, it is undisputed that the servicing rights were transferred to Citi. *See* Plaintiffs' PFFCL at p. 1, ¶ 3.

Response to Plaintiffs' Statement of Additional Undisputed Material Facts at p. 2, ¶ 5; Jackson Aff. at ¶¶ 8, 9.

9. Plaintiffs failed to make scheduled payments under the DOT and the Note as required by their terms from and after October 1, 2008. Citi PFFCL at p. 2, ¶ 5; Plaintiffs' Amended Response at ¶ 3;[5] First Nurse Aff. at p. 2, ¶ 6; Second Nurse Aff. at p. 2, ¶ 6, Exh. A (billing history); Citi's Response to Plaintiffs' Statement of Additional Undisputed Material Facts at p. 2, ¶ 5; Jackson Aff. at p. 2, ¶¶ 8, 9, 13.

10. When Plaintiffs had fallen as much as three months behind on their mortgage payments, Citi stopped accepting payments for anything less than the full amount of past due payments to cure the arrearage. Citi's Response to Plaintiffs' Statement of Additional Undisputed Material Facts at p. 3, ¶ 12; Jackson Aff. at p. 3, ¶ 16; First Nurse Aff. at p. 2, ¶ 7, Exh. C.

11. After default, Plaintiffs were given notice by Citi that failure to cure the default by January 10, 2011 would result in acceleration of the maturity of the unpaid balance in accordance with the terms of the Note and the DOT. Plaintiffs' Amended

[5] Plaintiffs do not dispute the fact that they stopped making their scheduled note payments, but contend that they were counseled to do so by an unnamed Citi representative from Citi's Loss Mitigation Department "to make them qualify for a HAMP loan modification" or "to stop making [their] regular payments until the loan modification application was processed." Plaintiffs' Amended Response at pp. 1-2, ¶ 3; Jackson Aff. at p. 2, ¶ 13. Plaintiffs also assert that they were not in default on their mortgage at the time they started the loan modification process, a contention that Citi denies. *See* Citi Response to Plaintiffs' Statement of Additional Undisputed Facts at pp. 2-3. ¶ 8; Jackson Aff. at p 2, ¶ 12. Plaintiffs' assertions are not material to the claims at issue.

Response at ¶ 4; First Nurse Aff. at p. 2, ¶ 7, Exh. C (letter dated December 10, 2010); DOT.

12. Plaintiffs failed to make the required payment to cure the default, and, as a result, the maturity of the unpaid balance was accelerated. Citi PFFCL at p. 2, ¶ 7; Plaintiffs' Amended Response at ¶ 5;[6] First Nurse Aff. at p. 2, ¶ 8.

13. Plaintiffs had heard about the Home Affordable Modification Program ("HAMP") and other programs that offered help in terms of reduced monthly mortgage payments to struggling consumers like themselves. Plaintiffs' PFFCL at p. 1, ¶ 4; Citi Response to Plaintiffs' Statement of Additional Undisputed Material Facts at p. 2, ¶¶ 10; Jackson Aff. at p. 2, ¶ 10.

14. Plaintiffs contacted Citi (at a time that Plaintiff and Citi fail to specify)[7] to seek reduction in their monthly mortgage payments through HAMP, "but felt like they were making no progress." Plaintiffs' PFFCL at p. 1, ¶ 5; Citi's Response to

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[6] Plaintiffs do not deny that they failed to cure the default (Plaintiffs' Amended Response at p. 2, ¶ 5), but assert as well that "they were in the process of applying for a loan modification at the time and their ability to make cure would have been incompatable [sic] with their eligibility for a HAMP loan modification." *Id.* These assertions are not material to the claims at issue.

[7] Citi submits a letter from Citi's Bankruptcy Department addressed to Earnest Fiveash, Attorney dated June 30, 2011 denying a HAMP loan modification request made on behalf of Plaintiffs. *See* Second Nurse Aff. at p. 2, ¶ 7, Exh. B. That letter informed Mr. Fiveash provisionally that Citi was unable to offer Plaintiffs a "Home Affordable Modification" at that time because Plaintiffs' current monthly housing expense was then less than or equal to 31% of their gross monthly income of $4,014.00. The letter does not indicate when Plaintiffs' HAMP loan modification request was made. However, Citi had notified Plaintiffs that their Note was in default as of January 10, 2011. Similar HAMP denials (or denial of other loss mitigation options) are reflected in Citi's correspondence to Plaintiffs dated November 25, 2013 and June 5, 2014. Second Nurse Aff. at p. 2, ¶ 7, Exh. B. Another such HAMP denial (or denial of other loss mitigation options) is reflected in Citi's correspondence to Mr. Fiveash dated June 16, 2014. *Id.*

Plaintiffs' Statement of Additional Undisputed Material Facts at p. 2, ¶ 7; Jackson Aff. at p. 2, ¶ 11.

15. On or about March 28, 2014, Brock & Scott, PLLC ("Brock & Scott") sent each of the Plaintiffs a notice via United States First Class mail, postage prepaid, advising Plaintiffs of the initiation of foreclosure proceedings upon the Property, and provided certain other information pursuant to the Federal Fair Debt Collections Practices Act ("FDCPA"), 15 U.S.C. §§ 1692, *et seq.* Plaintiffs' Amended Response at p. 2, ¶ 10; Affidavit of Mary Coleman ("Coleman Aff.") at p. 2, ¶ 6, Exh. A.

16. In accordance with the terms of the DOT, Citi appointed Brock & Scott as Substitute Trustee for the purpose of conducting foreclosure proceedings on the Property on or about April 8, 2014. Citi PFFCL at p. 2, ¶ 7; Plaintiffs' Amended Response at p. 2, ¶ 8; Appointment of Successor Trustee filed with the Shelby County Register on April 11, 2014 as Instrument No. 14038873 (filed of record in this cause on July 6, 2015) at p. 13, ¶ 22.

17. On or about April 29, 2014, Brock & Scott sent each of the Plaintiffs a notice via United States First Class mail, postage prepaid and by certified mail, return receipt requested, advising Plaintiffs of a foreclosure sale of the Property scheduled for May 27, 2014. Citi PFFCL at p. 2, ¶ 8; Plaintiffs' PFFCL at p. 2, ¶ 7; Plaintiffs' Amended Response at p. 3, ¶ 11; Coleman Aff. at p. 2, ¶ 7, Exh. B.

18. Notice of such foreclosure sale was published in the *Memphis Daily News* on May 1, 2014, May 8, 2014, and May 15, 2014. Citi PFFCL at p. 2, ¶ 9; Plaintiffs' Amended Response at p. 3, ¶ 11; Coleman Aff. at p. 2, ¶ 8, Exh. C.

19. Because of their frustrations in trying to get a modification, the Jacksons eventually hired Chris Mitchell of Everything Financial Company in Collierville, Tennessee to assist them in pursuing a loan modification from Citi. Plaintiffs' PFFCL at pp. 1-2, ¶ 6; Citi Response to Plaintiffs' Statement of Additional Undisputed Material Facts at p. 3, ¶ 9; Jackson Aff. at p. 2, ¶ 11; First Nurse Aff. at p. 2, ¶ 9, Exh. D.

20. There were e-mail exchanges between Ms. Mitchell and Stephen Ortwerth, a Making Homes Affordable Executive Response Unit Specialist for Citi regarding the status of Plaintiffs' loan modification application. Plaintiffs' PFFCL at p. 2, ¶ 12. Copies of those e-mail exchanges are attached to the First Affidavit of Travis Nurse as Exhibit D. First Nurse Aff. at p. 2, ¶ 9, Exh. D.

21. With the help of Ms. Mitchell, Plaintiffs submitted documentation in support of their loan modification application. Plaintiffs' PFFCL at p. 2, ¶ 8; Plaintiffs' Amended Response at pp. 3-4, ¶ 13; Citi Response to Plaintiffs' Statement of Additional Undisputed Material Facts at p. 4, ¶ 14.

22. Ms. Mitchell was able to get the sale scheduled for May 27, 2014 postponed because of the loan modification process. Citi Response to Plaintiffs' Statement of Additional Undisputed Material Facts at p. 4, ¶ 14; Jackson Aff. at p. 3, ¶

18; *see also* First Nurse Aff. at p. 2, ¶ 9, Exh. D (Mr. Ortwerth's e-mail to Ms. Mitchell dated Fri., May 23, 2014 @ 8:01 a.m.).

23. On May 27, 2014, the scheduled foreclosure sale was postponed by announcement until June 24, 2014. Citi PFFCL at p. 2, ¶ 10; Coleman Aff. at p. 2, ¶ 9.

24. Brock & Scott sent each of the Plaintiffs a notice via United States First Class mail, postage prepaid, dated May 28, 2014, advising of the postponement and the new sale date of June 24, 2014. Plaintiffs' PFFCL at p. 2, ¶ 10; *See* Citi PFFCL at p. 2, ¶ 12; Plaintiffs' Amended Response at p. 3, ¶ 12; Coleman Aff. at p. 2, ¶ 11, Exh. D; Citi's Response to Plaintiffs' Statement of Additional Undisputed Material Facts at p. 3, ¶ 13; Jackson Aff. at p. 3, ¶ 17.

25. On June 24, 2014, the scheduled foreclosure sale was postponed by announcement until July 29, 2014. Plaintiffs' PFFCL at p. 2, ¶ 11; Citi PFFCL at p. 2, ¶ 11; Coleman Aff. at p. 2, ¶ 9.

26. Brock & Scott sent each of the Plaintiffs a notice via United States First Class mail, postage prepaid, dated June 25, 2014, advising of the postponement and the new sale date of July 29, 2014. Plaintiffs' PFFCL at p. 2, ¶ 11; *see* Citi PFFCL at p. 2, ¶ 12; Plaintiffs' Amended Response at p. 3, ¶ 12; Coleman Aff. at p. 2, ¶ 11, Exh. D.

27. After the foreclosure sale had been postponed, Ms. Mitchell informed Plaintiffs that the sale was scheduled again for July 29, 2014. Citi Response to

Plaintiffs' Statement of Additional Undisputed Material Facts at p. 4, ¶ 16; Jackson Aff. at p. 3, ¶ 20.

28. On July 21, 2014 at 7:41 p.m., Ms. Mitchell sent an e-mail message to Mr. Ortwerth expressing concern about the pending foreclosure sale date of July 29, 2014 and the fact that she had not heard from him in the previous twelve days and asking if other information was needed from Plaintiffs. Plaintiffs' PFFCL at p. 2, ¶ 13; Plaintiffs' Amended Response at pp. 3-4, ¶ 11; Citi Response to Plaintiffs' Statement of Additional Undisputed Material Facts at p. 5, ¶ 19; First Nurse Aff. at p. 2, ¶ 9, Exh. D (Ms. Mitchell's e-mail to Mr. Ortwerth dated Mon., Jul. 21, 2014 @ 7:41 p.m.).

29. Mr. Ortwerth, whose offices were located in O'Fallon, Missouri, promptly responded the next morning, July 22, 2014 at 7:39 a.m., requesting additional information from Plaintiffs in support of their application for loan modification in an e-mail message which stated:

> Good morning, Ms. Mitchell.
>
> I hope you're well. Our Underwriter has requested some additional information from your client to complete their review file.
>
> - provide supporting documents for L.J's new employment position
> - 2014 year-to-date profile (sic) and loss statement for Brenda
> - most recent statement (all pages) for Orion Federal Credit Union showing schedule C income
> - provide three months of proof of boarder income bank statements and copies of cancelled rent checks.

> You may reply by email using HOST.Citilinkdocs@citi.com or fax using 1-866-940-8125 and please inscribe your client's full name and mortgage account number on each document. I need this information as soon as possible and will follow up to confirm receipt or check progress by 07/29/14. Please call with any questions. Thank you for your patience and cooperation. Have a great day!
>
> Remember, during any point of your treatment review you can reach me at 877-791-1328, EXT 0475534, Monday-Friday 7:00 a.m.-6:00 p.m. or email me atstephenortwerth@citi.com. I look forward to working with you.

Plaintiffs' PFFCL at pp. 2-3, ¶¶ 14, 15; Citi PFFCL at p. 3, ¶ 15; Plaintiffs' Amended Response at pp. 3-4, ¶ 13; Citi Response to Plaintiffs' Statement of Additional Undisputed Material Facts at pp. 3, 4, ¶¶ 11, 18, 19; Jackson Aff. at p. 3, ¶ 2; First Nurse Aff. at p. 2, ¶ 9, Exh. D (Mr. Ortwerth's e-mail to Ms. Mitchell dated Tue., Jul. 22, 2014 @ 7:39 a.m.).

30. Mr. Ortwerth's e-mail to Ms. Mitchell does not contain any promise regarding postponement or cancellation of the July 29, 2014 foreclosure sale. Citi PFFCL at p. 2, ¶ 13; First Nurse Aff. at p. 2, ¶ 9, Exh. D (Mr. Ortwerth's e-mail to Ms. Mitchell dated Tue., Jul. 22, 2014 @ 7:39 a.m.).

31. Ms. Mitchell told Plaintiffs that the sale had been postponed again[8] and that Citi was asking for a number of new documents, such as verification of Mr.

[8] Plaintiff's Amended Response to Undisputed Material Facts states in part: "The Plaintiffs contend that Mr. Ortwerth told Ms. Mitchell, their representative, that the [foreclosure] sale [scheduled for July 29, 2014] was being postponed ...." Plaintiffs' Amended Response at p. 4, ¶ 13. This statement is unsupported in the record. Mr. Ortwerth's e-mail message to Ms. Mitchell of July 22, 2014 does not so state. *See* First Nurse Aff. at p. 2, ¶ 9, Exh. D (Mr. Ortwerth's e-mail to Ms. Mitchell dated Tue., Jul. 22, 2014 @ 7:39 a.m.). The Affidavit of Brenda Jackson states that "[Ms. Mitchell] later

Jackson's new employment, a profit and loss statement from Mrs. Jackson's self-employment and documentation of rent payments from Plaintiffs' daughter. Plaintiffs' PFFCL at p. 3, ¶ 16; Citi Response to Plaintiffs' Statement of Additional Undisputed Material Facts at p. 4, ¶ 17; Jackson Aff. at p. 3, ¶ 21.

32. The Affidavit of Brenda Jackson does not contain any statements of personal knowledge on her part indicating that a promise was made regarding postponement or cancellation of the July 29, 2014 foreclosure sale. Citi PFFCL at p. 3, ¶ 14; Jackson Aff. at p. 3, ¶ 21.

33. Plaintiffs gathered this information and submitted it to Ms. Mitchell. Plaintiffs' PFFCL at p. 3, ¶ 17; Citi Response to Plaintiffs' Statement of Additional Undisputed Material Facts at p. 5, ¶ 20; Jackson Aff. at p. 3, ¶ 22.[9]

34. The information and documents were not received by Citi. Citi PFFCL at p. 3, ¶ 16; First Nurse Aff. at p. 2, ¶ 10.

35. On July 29, 2014, the Property was sold at foreclosure to Citi. Citi PFFCL at p. 3, ¶ 17; Plaintiffs' Amended Response at p. 4, ¶ 13; First Nurse Aff. at p.

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told us that [the sale] had been postponed again ...." (Jackson Aff. at p. 3, ¶ 21), but does not attribute a statement to Mr. Ortwerth. Taking the evidence in the light most favorable to Plaintiffs, the court credits Ms. Jackson's statement at the summary judgment stage that Ms. Mitchell told her that the sale scheduled for July 29, 2014 had been postponed. However, Ms. Mitchell's statement to Plaintiffs is inadmissible hearsay. There is no evidence in the record regarding Mr. Ortwerth's statement to Ms. Mitchell or of Ms. Mitchell's account of her communications with Mr. Ortwerth apart from their e-mail correspondence.

[9] There is no evidence in the record at the summary judgment stage which demonstrates that Ms. Mitchell forwarded the additional information received from Plaintiffs to Citi. The record does not contain an affidavit or deposition testimony by Ms. Mitchell. Ms. Jackson's Affidavit states that Ms. Mitchell died in November 2014. Jackson Aff. at p. 4, ¶ 26.

2, ¶ 10; Coleman Aff. at p. 3, ¶ 12; Substitute Trustee's Deed recorded with the Shelby County Register on August 21, 2014 as Instrument 14085885 (filed of record in this cause on July 6, 2015).

36. Having never received information concerning a decision made by Citi on their loan modification application, Plaintiffs, to their knowledge, were still waiting on a decision on their loan modification application when Plaintiffs were contacted by a real estate agent who said he represented Citi, who informed them that their house had been sold at a foreclosure sale, and that he would be trying to sell their house. Plaintiffs' PFFCL at pp. 3-4, ¶¶ 18, 19; Jackson Aff. at pp. 3-4, ¶ 23.

37. On May 6, 2015, the court entered an Agreed Order Regarding Occupancy of Property and Payments into Court During Pendency of Case. Citi agreed that it would not proceed with any attempt to evict Plaintiffs from the Property until further order of the court. Plaintiffs agreed to make monthly payments of $800.00 into the court's Registry during the pendency of the proceedings beginning on May 15, 2015.

CONCLUSIONS OF LAW

Based upon the above findings and a review of the relevant statutory authority and case law, the court makes the following conclusions of law:

I. Summary Judgment Standard

For actions initiated on or after July 1, 2011, such as the one at bar, the standard of review for summary judgment delineated in TENN. CODE ANN. § 20-16-101 applies. *See* ***Rye v. Women's Care Center of Memphis, MPLLC***, ___ S.W.3d ___, ___, 2015 WL 6457768, at *11 (Tenn. Oct. 26, 2015). The statute 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.

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." TENN. R. CIV. P. 56.04. The moving party has the ultimate burden of persuading the court that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. ***Town of Crossville Hous. Auth. v. Murphy***, 465 S.W.3d 574, 578 (Tenn. Ct. App. 2014) (citing ***Byrd v. Hall***, 847 S.W.2d 208, 215 (Tenn. 1993)). "If the moving party makes a properly supported

motion for summary judgment, the burden of production shifts to the nonmoving party to demonstrate the existence of a genuine issue of material fact requiring trial." *Id.* (citing ***Byrd***, 847 S.W.2d at 215).

When the moving party does not bear the burden of proof at trial, the moving party may make the required showing and shift the 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." *See* ***Rye,*** 2015 WL 6457768, at *22. However, "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." *Id.* Rule 56.03 requires that the moving party support its motion with "a separate concise statement of the 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.* If the moving party fails to meet its initial burden of production, the nonmoving party's burden is not triggered, and the court should deny the motion for summary judgment. ***Town of Crossville Hous. Auth.***, 465 S.W.3d at 578-79 (citing ***Martin v. Norfolk S. Ry. Co.***, 271 S.W.3d 76, 83 (Tenn. 2008)).

If the moving party does satisfy its initial burden of production, "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.'" *See* ***Rye***, 2015 WL 6457768, at *22 (quoting TENN. R. CIV. P. 56.06). The nonmoving party must demonstrate the existence of specific facts in the record that could lead a rational trier of fact to find in favor of the nonmoving party. *Id.* If adequate time for discovery has been provided and 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, then the motion for summary judgment should be granted. *Id.* (emphasis by the Court). Thus, even where the determinative issue is ordinarily a question of fact for the trier of fact, summary judgment is still appropriate if the evidence is uncontroverted and the facts and inferences to be drawn therefrom make it clear that reasonable persons must agree on the proper outcome or draw only one conclusion. ***White v. Lawrence***, 975 S.W.2d 525, 529-30 (Tenn. 1998).

The burden-shifting analysis differs if the moving party bears the burden of proof at trial. "For example, a plaintiff who files a motion for partial summary judgment for an element of his or her claim shifts the burden by alleging undisputed facts that show the existence of that element and entitle the plaintiff to summary judgment as a matter of law." ***Brown v. Mapco Exp., Inc.***, 393 S.W.3d 696, 702 (Tenn. Ct. App. 2012) (citations omitted). "Similarly, a defendant asserting an affirmative defense ... shifts the burden of production by alleging undisputed facts that show the existence of the affirmative defense." *Id.* (citations omitted).

TENN. R. CIV. P. 56.04 requires that a trial court must "state the legal grounds upon which the court denies or grants the motion" for summary judgment. *See* TENN. R. CIV. P. 56.04 (emphasis added). Rule 56.04 provides that the trial court must determine whether any genuine issue of material facts exist that would preclude the grant of summary judgment. *Id.* If such a genuine issue of material fact exists, the court is to deny the motion. *Id.* Rule 56.04 does not therefore require that a trial court enter findings of fact in its order granting or denying summary judgment. *See id.*; TENN. R. CIV. P. 52.01 ("Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 . . . ."). ***In re Estate of Kysor***, No. E2014-02143-COA-R3-CV, Slip op. at 7 (Tenn. Ct. App. Dec. 28, 2015).

II. Breach of Contract

Plaintiffs seek to enforce an "alleged contract [agreed to by Citi] to process their loan modification application to completion and honor agreements to postpone foreclosure pending a decision." Plaintiffs' PFFCL at p. 4, ¶ 1. Plaintiffs contend that neither the Tennessee Statute of Frauds, codified at TENN. CODE ANN. § 29-2-101, nor Paragraph 22 of the DOT require a signed writing for the "alleged contract" to be enforceable. Plaintiffs' PFFCL at p. 4, ¶ 1. Plaintiffs deny that their breach of contract claim is based upon an alleged enforceable promise made by Citi to modify the terms of the Note or the DOT. *Id.* Citi responds that the terms of the Note require any agreement or promise between the parties regarding postponement or cancellation of

the foreclosure sale scheduled for July 29, 2014 to have been in a writing signed by Citi. Citi PFFCL at p. 3, ¶ 1.

In order to plead a valid breach of contract claim under Tennessee law, a plaintiff must allege the existence of an enforceable contract, a breach of that contract, and damages resulting from the breach. ***ARC LifeMed, Inc. v. AMC-Tennessee, Inc.***, 183 S.W.3d 1, 26 (Tenn. Ct. App. 2005). "A mortgage, or a deed of trust, in its legal aspect is a conveyance of an estate or an interest in land and as such [is] within the meaning of the Statute of Frauds." ***Lambert v. Home Federal Sav. & Loan Ass'n,*** 481 S.W.2d 770, 772-73 (Tenn. 1972) (citing 49 Am. Jur., *Statute of Frauds*, §197, a "mortgage or deed of trust of land cannot be made by parol.").

Under Tennessee's Statute of Frauds, TENN. CODE ANN. § 29-2-101, contracts "to alter, amend, renew, extend or otherwise modify or supplement any written promise, agreement or commitment to lend money or extend credit" must be in writing and signed by the lender or creditor to be enforceable." TENN. CODE ANN. § 29-2-101(b)(1). However, the lender or creditor need not sign such a contract if the "promise or commitment is in the form of a promissory note or other writing that describes the credit or loan" and the terms of the writing indicate that only the debtor must sign the writing, the debtor has signed the writing, and delivery of the writing has been accepted by the lender or creditor. TENN. CODE ANN. § 29-2-101(b)(2).

Citi has both affirmatively negated an essential element of Plaintiffs' breach of contract claim and demonstrated that Plaintiffs' evidence at the summary judgment

stage is insufficient to establish Plaintiffs' breach of contract claim. Plaintiffs rely on Paragraph 22 of the DOT. However, that paragraph does not indicate that only the debtor must sign the writing for it to be binding on Citi. The court, therefore, must examine the Note to determine if TENN. CODE ANN. § 29-2-101(b)(2) is applicable. The Note states in part:

> Oral agreements, promises or commitments to lend money, extend credit, or forbear from enforcing repayment of a debt, including promises to extend, modify, renew or waive such debt, are not enforceable. This written agreement contains all the terms the Borrower(s) and the Lender have agreed to. Any subsequent agreement between us regarding this Note or the instrument which secures this Note, must be in a signed writing to be legally enforceable.

This provision of the Note explicitly excludes the applicability of TENN. CODE ANN. § 29-2-101(b)(2), because the terms of the writing do not indicate only the debtor must sign the writing. Also, the court peruses the record in vain for a writing signed by the Plaintiffs and delivered to Citi memorializing an agreement that Citi would process their loan modification application to completion and honor agreements to postpone foreclosure pending a decision. *See* TENN. CODE ANN. § 29-2-101(b)(2).

As Citi has satisfied its initial burden of production, Plaintiffs must demonstrate the existence of specific facts in the record that could lead a rational trier of fact to find in favor of Plaintiffs on their breach of contract claim. Taking the facts in the light most favorable to Plaintiffs, the "alleged contract [agreed to by Citi] to process their loan modification application to completion and honor agreements to postpone foreclosure pending a decision" (Plaintiffs' PFFCL at p. 4, ¶ 1.) – is not in

writing. Because this alleged agreement is a "promise or commitment to … modify or supplement [a] written promise … to lend money or extend credit," Plaintiffs' claim must fail under the Statute of Frauds because Plaintiffs have not alleged that such an agreement was put into writing and signed by Citi, or that it falls into the exception for such a requirement. *See* TENN. CODE ANN. § 29-2-101(b)(2). *See also* ***Vaughter v. BAC Home Loans Serv., LP***, No. 3:11-cv-00776, 2012 WL 162398, at *7 (M.D. Tenn. Jan. 19, 2012) (applying Tennessee law); *see also* ***Elias v. A & C Distributing Company, Inc.***, 588 S.W.2d 768, 771 (Tenn. Ct. App. 1979) ("While the decisions of [f]ederal … [c]ourts are not binding authority upon this Court and other State Courts in Tennessee, yet from time to time we find the reasoning in the decisions of a Federal District Court to be useful and persuasive.").

III. Promissory Estoppel

Plaintiffs seek to proceed on a promissory estoppel theory, asserting that Citi agreed "that [Citi] would not proceed with a foreclosure sale of their home while their loan modification application was pending, that the promises were unambiguous; that the Plaintiffs reasonably relied on these promise; and that in reliance on its promises, Plaintiffs failed to take other actions to save their home and have suffered substantial damages." Plaintiffs' PFFCL at p. 4, ¶ 2. Plaintiffs deny that their promissory estoppel claim is based upon a claim that they were given an enforceable promise to modify the terms of their Note or DOT. *Id.* Citi responds that Plaintiffs' promissory estoppel claim fails because it is barred by the Tennessee Statute of Frauds and for the

additional reason that neither the e-mail chain between Ms. Mitchell and Mr. Ortwerth nor the Affidavit of Brenda Jackson contain an unambiguous promise on the part of Citi regarding postponement or cancellation of the July 29, 2014 foreclosure sale. Citi PFFCL at p. 4, ¶ 2.

The Tennessee Supreme Court has approved a definition of promissory estoppel as "[a] promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance." ***Alden v. Presley***, 637 S.W.2d 862, 864 (Tenn. 1982) (quoting Restatement of Contracts § 90). Such promise "is binding if injustice can be avoided only by enforcement of the promise." *Id.* The court in ***Alden*** defined the following limits of the theory: "(1) the detriment suffered in reliance must be substantial in an economic sense; (2) the substantial loss to the promisee in acting in reliance must have been foreseeable by the promisor; (3) the promisee must have acted reasonably in justifiable reliance on the promise as made." *Id.* (quoting Simpson, Law of Contracts § 61 (2d ed. 1965)). The doctrine of promissory estoppel is also known as "detrimental reliance" because the plaintiff must show not only that a promise was made, but also that the plaintiff reasonably relied on the promise to his detriment. ***Calabro v. Calabron***, 15 S.W.3d 873, 879 (Tenn. Ct. App. 1999). Tennessee does not liberally apply the doctrine of promissory estoppel. Rather, the doctrine is available only in exceptional cases where the circumstances border on actual fraud. ***Baliles v. Cities Serv. Co.***, 578 S.W.2d 621 (Tenn. 1979);

Shedd v. Gaylord Entm't Co., 118 S.W.3d 695, 700 (Tenn. Ct. App. 2003) (limiting the application to "exceptional cases where to enforce the statute of frauds would make it an instrument of hardship and oppression, verging on actual fraud").

The key element in finding promissory estoppel is the promise. ***Amacher v. Brown-Foreman Corp.***, 826 S.W.2d 480, 482 (Tenn. Ct. App. 1991). It is the key because the court must know what induced the plaintiff's action or forbearance; only then would the court be able to prevent the injustice resulting from a failure to keep the promise. *Id.* Regardless of how one arrives at a conclusion that a promise has been made, however, the resulting promise must be unambiguous and not unenforceably vague. *Id.*

Citi has both affirmatively negated an essential element of Plaintiffs' promissory estoppel claim and demonstrated that Plaintiffs' evidence at the summary judgment stage is insufficient to establish Plaintiffs' promissory estoppel claim. Citi contends that there is no evidence in the record that Citi made a promise that it would not proceed with a foreclosure sale of Plaintiffs' home while Plaintiffs' application for a loan modification was pending. This is an essential element of Plaintiffs' promissory estoppel claim. Without it, Plaintiffs' evidence at the summary judgment stage is insufficient to establish their promissory estoppel claim. Citi having satisfied its initial burden of production, Plaintiffs must demonstrate the existence of specific facts in the record at the summary judgment stage that could lead a rational trier of fact to find in favor of Plaintiffs on their promissory estoppel claim. This Plaintiffs fail to do.

Taking the facts in the light most favorable to Plaintiffs, the crucial events occurred between the postponement of the foreclosure sale that had been scheduled for June 24, 2014 and the foreclosure sale that went forward on July 29, 2014. *See* MF 25-34. On the evening of July 21, 2014, Ms. Mitchell inquired of Mr. Ortwerth by e-mail if additional information was needed from Plaintiffs regarding the application for loan modification. MF 28. Mr. Ortwerth responded by e-mail early the next morning that additional information was needed, and specified in detail what his underwriter had requested. MF 29. Mr. Ortwerth stated "I need this information as soon as possible and will follow up to confirm receipt or check progress by 07/29/14" and provided various ways in which Ms. Mitchell could communicate with him, including telephone, fax and e-mail. *Id.*

Mr. Ortwerth's e-mail to Ms. Mitchell does not contain any promise regarding postponement or cancellation of the July 29, 2014 foreclosure sale. MF 30. Ms. Mitchell informed Plaintiffs concerning the specific information requested by Citi and told Plaintiffs that the sale had been postponed again. MF 31. While Ms. Mitchell may have advised Plaintiffs that the sale had been postponed, the evidence in the record at the summary judgment stage does not support Plaintiffs' contention that Citi, through Mr. Ortwerth or otherwise, communicated any such promise to Ms. Mitchell. *Id. See also* MF 31, n. 8.

Having been confronted with Citi's evidence that the Plaintiffs' evidence at the summary judgment stage is insufficient to support Plaintiffs' claim, to survive

summary judgment, Plaintiffs "may not rest upon the mere allegations or denials of [their] pleading," but are required to respond, and by affidavits or one of the other means provided in TENN. R. CIV. P. 56, "set forth specific facts" at the summary judgment stage "showing that there is a genuine issue for trial." TENN. R. CIV. P. 56.04, 56.06. The Affidavit of Brenda Jackson does not set forth specific facts demonstrating that a promise was made by Citi on which Plaintiffs could rely regarding postponement or cancellation of the July 29, 2014 foreclosure sale. MF 32.

Even taking the facts in a light most favorable to Plaintiffs, Plaintiffs have failed to demonstrate the existence of specific facts in the record that could lead a rational trier of fact to find in favor of Plaintiffs on an essential element of their promissory estoppel claim, that a promise was made by Citi regarding postponement or cancellation of the July 29, 2014 foreclosure sale. Plaintiffs' promissory estoppel claim fails.

Having found on other grounds that there is no evidence at the summary judgment stage to support Plaintiffs' promissory estoppel claim, the court declines to consider whether Plaintiffs' promissory estoppel claim fails on the additional ground that it is barred by the Tennessee Statute of Frauds.

IV. Breach of Covenant of Good Faith and Fair Dealing

Plaintiffs assert that a "legitimate" issue of material fact exists as to whether Citi carried out its duty of good faith and fair dealing in carrying out its contractual responsibilities vis-à-vis Citi's relationship with Plaintiffs as the servicer of their

mortgage loan. Plaintiffs' PFFCL at pp. 4-5, ¶ 3. Plaintiffs argue that this duty extended to the handling of Plaintiffs' request for a loan modification, which Citi undertook as part of its servicing role. *Id.* Citi argues that the alleged breach, that is, Citi's proceeding with the foreclosure sale before giving Plaintiffs a decision on their loan modification is an attempt to create new contractual rights or obligations and circumvent or alter the specific terms of the parties' agreement.

The Tennessee Court of Appeals recently had occasion to analyze a similar covenant of good faith and fair dealing claim in ***Cadence Bank, N.A. v. The Alpha Trust,*** ___ S.W.3d ___, No. W2014-01151-COA-R3-CV, 2015 WL 867452 (Tenn. Ct. App. Feb. 25, 2015), perm. app. denied (Tenn. June 11, 2015). As the court observed: It is well-settled in Tennessee that " 'the common law imposes a duty of good faith in the performance of contracts.' " ***Dick Broad. Co. v. Oak Ridge FM, Inc.***, 395 S.W.3d 653, 660 (Tenn. 2013) (quoting ***Wallace v. Nat'l Bank of Commerce***, 938 S.W.2d 684, 686 (Tenn. 1996)). The duty of good faith, however, does not extend beyond the terms of the contract and the reasonable expectations of the parties under the contract. ***Wallace***, 938 S.W.2d at 687. The obligation of good faith and fair dealing does not create additional contractual rights or obligations, and it cannot be used to avoid or alter the terms of an agreement. ***Lamar Adver. Co. v. By–Pass Partners***, 313 S.W.3d 779, 791 (Tenn. Ct. App. 2009). The purpose of the implied duty is "(1) to honor the reasonable expectations of the contracting parties

and (2) to protect the rights of the parties to receive the benefits of the agreement into which they entered." *Id.* (citations omitted).

The duty of good faith is not specifically defined by our courts. As explained in the Tennessee Practice Series:

> The term "good faith" resists an exact definition ... because it arises in various contexts and its meaning will vary accordingly. Indeed, "good faith" is "a term frequently defined in the negative," i.e., it represents the absence of bad faith. Another authority makes these helpful observations about the "good faith" concept:
>
> > [G]ood faith is an "excluder." It is a phrase without general meaning (or meanings) of its own and serves to exclude a wide range of heterogenous forms of bad faith. In a particular context the phrase takes on specific meaning, but usually this is only by way of contrast with the specific form of bad faith actually or hypothetically ruled out.
>
> Notwithstanding this uncertainty over the exact nature of "good faith," parties are presumed to know the law and that the contract contains this implied duty.
>
> The implied covenant of good faith and fair dealing is not limited to the specific contract terms but is a method of effectuating the parties' intent in unforeseen circumstances. Further, a party may violate the covenant when it interprets the contract purposely in a way to prevent the other party from performing in a timely fashion or when a party conjures up a pretended dispute with its interpretation.

21 *Tenn. Prac. Contract Law & Practice* § 8:33 (2014) (footnotes and internal citations omitted).

Because Citi is the moving party on the motion for summary judgment, the court must first analyze whether it met its burden by showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *See* TENN.

R. CIV. P. 56.04. Regarding Plaintiffs' claim that Citi violated the implied duty of good faith and fair dealing, the thrust of the claim arises out of their allegations that Citi improperly handled Plaintiffs' request for a loan modification, proceeding with the scheduled foreclosure sale without communicating Citi's decision on their request. However, while Citi concedes for purposes of summary judgment that Plaintiffs provided Ms. Mitchell with the documents requested by Mr. Ortwerth, the record is devoid of evidence that Ms. Mitchell delivered those documents to Citi or otherwise communicated with Citi between the time of Mr. Ortwerth's request and the scheduled date and time of the sale. Thus, the "evidence is insufficient to establish an essential element of the nonmoving party's claim." ***Rye***, 2015 WL 6457768, at *22. Having submitted evidence demonstrating that Mr. Ortwerth was open to the timely receipt of the requested information from Plaintiffs, Citi met its burden under the summary judgment standard. Accordingly, the court now must consider whether Plaintiffs met their burden to establish a material factual dispute regarding this issue.

Once the moving party has met its burden, the burden of production shifts to the nonmoving party to show that a genuine issue of material fact exists. ***Byrd***, 847 S.W.2d at 215. The nonmoving party, here, Plaintiffs, may accomplish meeting their own burden by:

> (1) pointing to evidence establishing material factual disputes that were overlooked or ignored by the moving party; (2) rehabilitating the evidence attacked by the moving party; (3) producing additional evidence establishing the existence of a genuine issue for trial; or (4) submitting an

affidavit explaining the necessity for further discovery pursuant to TENN. R. CIV. P., Rule 56.06.

Martin v. Norfolk S. Ry. Co., 271 S.W.3d 76, 84 (Tenn. 2008) (citations omitted).

The court begins with the actual language in the written contract between the parties, the Note and the DOT. In its motion for summary judgment, Citi argued that Appellants "failed to point to any specific contractual provision that had been breached," as the loan documents do not contain any representations regarding Plaintiffs' alleged right to a loan modification or even a loan modification consideration. A thorough review of the record indicates that Plaintiffs point to no specific provision in the Note and the DOT that Citi failed to perform in good faith.

Appellants were clearly obligated to pay the balance due on the Note, but the Note does not obligate Citi to grant a loan modification at some later date. The Note and the DOT do not include a modification provision that allows either party to unilaterally modify the terms of the loan. Because there is nothing in the parties' written contract that indicates that Citi had a duty to modify the loan on different terms than those agreed, it cannot be said that Citi failed to perform its duties under the written contract by allegedly failing to modify the debt. *See* ***Wallace***, 938 S.W.2d at 687 ("the duty ... does not extend beyond the agreed upon terms of the contract"). The court cannot impose the implied duty of good faith and fair dealing in such a way as to add new obligations. ***Barnes & Robinson Co. v. OneSource Facility Svcs., Inc.***, 195 S.W.3d 637, 643 (Tenn. Ct. App. 2006). Further, to hold that Citi's alleged

actions in failing to modify the loan were in violation of the duty of good faith and fair dealing implied in the written contract would "circumvent or alter the specific terms of the parties' agreement." ***Dick Broad. Co.***, 395 S.W.3d at 665; *see also* ***Solomon v. First Am. Nat'l Bank of Nashville***, 774 S.W.2d 935, 945 (Tenn. Ct. App. 1989) (noting that without an underlying breach of contract, a breach of good faith is not an "actionable" claim); ***Duke v. Browning-Ferris Indus. of Tenn., Inc.***, No. W2005–00146–COA–R3–CV, 2006 WL 1491547, at *9 (Tenn. Ct. App. May 31, 2006), perm. app. denied (Tenn. Nov. 13, 2006) (holding that a breach of the duty of good faith is merely an element of a claim for "recognized torts, or breaches of contracts"). Accordingly, summary judgment is appropriate with respect to Plaintiffs' claim that Citi violated the implied duty of good faith and fair dealing, as such duty may not create independent rights and obligations on the part of Citi that do not exist under the specific terms of the Note and DOT.

Plaintiffs argue, however, that despite the lack of modification terms in the parties' written agreement, they submitted considerable information to Citi through Ms. Mitchell in furtherance of their efforts to obtain a loan modification that would reduce their monthly payments and, perhaps, their loan balance. According to Plaintiffs' allegations, they got no clear response to their request for modification and, instead, their home was foreclosed upon without Citi communicating a decision to Plaintiffs. Again, however, Plaintiffs can point to no evidence in the record that

establishes that Ms. Mitchell provided the requested information to Citi in advance of the scheduled foreclosure sale.

The parties' discussions concerning a potential loan modification do not constitute either an oral modification of the contract or a new agreement upon which a breach of the duty of good faith could be found. As noted above, the Note excludes the possibility of an enforceable oral agreement that would modify the terms of the Note. Compare ***Cadence Bank, N.A.***, 2015 WL 867452, at *11 n. 8 (noting therein the lack of any provision in the note or other underlying agreements that prohibited the parties from entering into subsequent oral agreements). "The determination of whether a contract has been formed is a question of law." ***German v. Ford***, 300 S.W.3d 692, 701 (Tenn. Ct. App. 2009) (citations omitted). Taking the evidence in the light most favorable to the nonmoving party, summary judgment is appropriate. Without a contract, Plaintiffs cannot sustain a claim for breach of the implied duty of good faith and fair dealing.

Plaintiffs allege that Citi breached the covenant of good faith and fair dealing inherent in every contract "by encouraging the Plaintiffs to engage in a protracted loan modification process and invest substantial time, effort, and money in submitting documents and information over a considerable period." (Plaintiff's Second Amended Petition to Set Aside Foreclosure Sale and Complaint for Damages, ¶ 44). Additionally, Plaintiffs allege that this covenant was breached when Citi "forg[ed]

ahead with foreclosure proceedings while Plaintiff's loan modification request was pending." *Id.*

Here, as Plaintiffs have not raised a valid breach of contract claim, there is no cause of action for breach of implied covenant of good faith and fair dealing. Since Plaintiffs failed to properly state a breach of contract claim, Plaintiffs' claim for breach of the implied duty of good faith and fair dealing claim must fail.

V. Violation of TENN. CODE ANN. § 35-5-107

Plaintiffs allege that Citi is liable under TENN. CODE ANN. § 35-5-107 for its failure to inform them of the new dates of the foreclosure sales. TENN. CODE ANN. § 35-5-101(f)(3) sets forth the requirements for notification to a borrower of the postponement of a foreclosure sale and stipulates that:

> If the postponement or adjournment is for more than thirty (30) days, notice of the new date, time, and location must be mailed no less than (10) calendar days prior to the sale date via regular mail to the debtor and co-debtor…

Citi has satisfied its burden of production by affirmatively negating the essential element of the Plaintiffs' claim – lack of compliance by Citi with the statutory notice requirements of TENN. CODE ANN. § 35-5-101. Following notice of the foreclosure sale (MF 17-18), the foreclosure sale scheduled for May 27, 2014 was postponed by Citi at Plaintiffs' request to June 24, 2014, a postponement of less than thirty (30) days. MF 22-24. Citi was not required to provide notice of the first postponement pursuant to TENN. CODE ANN. § 35-5-101(f)(3), but did so regardless. MF 24.

On June 24, 2014, the foreclosure sale was again postponed to July 29, 2014, a postponement of more than thirty (30) days. MF 25. Citi satisfied the statutory requirement in that instance by providing notice to Plaintiffs through a letter dated June 25, 2014. MF 26. Plaintiffs' evidence (such as it is) at the summary judgment stage is insufficient to establish the existence of a genuine issue of material fact for trial. Taking the facts in a light most favorable to Plaintiffs, Plaintiffs' claim against Citi under TENN. CODE ANN. § 35-5-107 for failure to inform Plaintiffs of the new dates of the foreclosure sales lacks merit and must fail.

VI. Truth-In-Lending Act Violation

Plaintiffs assert a claim under the Truth In Lending Act, 15 U.S.C. §§ 1601, *et seq.* ("TILA"). Taking the facts in a light most favorable to Plaintiffs, CitiFinancial Mortgage Corporation gave notice of the change in *servicing* of Plaintiffs' mortgage account to Plaintiffs on or about June 11, 2008. MF 6. Plaintiffs contend that correspondence failed to provide notice of change of ownership of the mortgage account to Citi. Plaintiffs assert that Citi violated TILA and Regulation Z, 12 C.F.R. § 226.39 by failing to notify Plaintiffs of the change in ownership of their mortgage. Plaintiffs' PFFCL at pp. 5-6, ¶ 5. Citi responds that 15 U.S.C. § 1640(e) requires Plaintiffs' claim to have been brought within one year of the occurrence of the violation, arguing that the statute began to run no later than November 1, 2008. Citi PFFCL at p. 4, ¶ 4.

15 U.S.C. § 1640(a) provides that:

> any creditor who fails to comply with any requirement under this chapter ... including any requirement under ... subsection (f) or (g) of section 131 [15 U.S.C. § 1641] ... with respect to any person is liable to such person in an amount equal to the sum of—(1) any actual damage sustained by such person as a result of the failure; (2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction; ... or (2)(A)(iv) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $400 or greater than $4,000.

15 U.S.C. § 1640(a).

"On its face, the statute provides that if a creditor violates the § 1640(g) notice requirement as to a mortgage loan, it is liable to the consumer in the amount equal to the sum of the consumer's actual damages ... and statutory damages of double the finance charge, subject to lower and upper limits of $400 and $4000." *See* ***Brown v. CitiMortgage, Inc.***, 817 F.Supp.2d 1328, 1330–31 (S.D. Ala. 2011). The "right of a TILA plaintiff to recover statutory damages, irrespective of the presence or absence of actual damages, is firmly entrenched in the case law." *Id.*; *see also, e.g.,* ***Purtle v. Eldridge Auto Sales***, 91 F.3d 797, 800 (6th Cir. 1996) ("The purpose of the statutory recovery is to encourage lawsuits by individual consumers as a means of enforcing creditor compliance with the Act.... A plaintiff in a TILA case need not prove that he or she suffered actual monetary damages in order to recover the statutory damages and attorney's fees." (internal citations omitted)).

Citi has failed to affirmatively negate an essential element of Plaintiffs' TILA claim. 15 U.S.C. § 1641(g), the statutory parallel to Regulation Z, states that:

> In addition to other disclosures required by this title, not later than 30 days after the date on which a mortgage loan is sold or otherwise transferred or assigned to a third party, the creditor that is the new owner or assignee of the debt shall notify the borrower in writing of such transfer, including—(A) the identity, address, telephone number of the new creditor; (B) the date of transfer; (C) how to reach an agent or party having authority to act on behalf of the new creditor; (D) the location of the place where transfer of ownership of the debt is recorded; and (E) any other relevant information regarding the new creditor.

15 U.S.C. § 1641(g). Citi has failed to demonstrate that it gave notice to Plaintiffs of the transfer or assignment of their loan to Citi. Citi assumes that the July 11, 2008 notice of transfer of servicing rights equates to a notice of transfer of the assignment of the debt as well for purposes of 15 U.S.C. § 1641(g). This does not follow. A necessary inference need not be drawn from the fact that notice is given of transfer of servicing rights, that the ownership of the loan also has been assigned or transferred. Taking the facts in a light most favorable to Plaintiffs, the court finds that there is a genuine issue of material fact requiring trial on the issue of violation of the TILA and denies Citi's motion for summary judgment on the TILA issue.

VII. Misrepresentation Claims

Plaintiffs base their misrepresentation claim on the allegation that "their representative, [Chris Mitchell], had been assured by Mr. Ortwerth on July 22, 2014 that the sale scheduled for July 29, 2014 would not go forward but would be rescheduled pending the loan modification decision." *See* Plaintiffs PFFCL at p. 5, ¶ 4. Citi responds that Plaintiffs' misrepresentation claim is deficient because Tennessee

law requires that the false statement consist of statements of [present] or past fact. Citi PFFCL at p. 4, ¶ 5. The alleged misrepresentation, Citi contends, relates to postponement of a pending foreclosure sale – a statement of a future event. *Id.* Plaintiffs respond that "the alleged false statement … is based upon pertains to a present event and is not speculative or conjectur[al]." Plaintiffs' PFFCL at p. 5, ¶ 4.

In ***Hodge v. Craig***, 382 S.W.3d 325, 342-43 (Tenn. 2012), the Tennessee Supreme Court explained that the terms "intentional misrepresentation," "fraudulent misrepresentation," and "fraud" all refer to the same tort, and expressed its preference for the term "intentional misrepresentation." A claim for intentional misrepresentation is comprised of six elements:

> 1) the defendant made a representation of an existing or past fact; 2) the representation was false when made; 3) the representation was in regard to a material fact; 4) the false representation was made either knowingly or without belief in its truth or recklessly; 5) plaintiff reasonably relied on the misrepresented material fact; and 6) plaintiff suffered damage as a result of the misrepresentation.

Town of Crossville Housing Authority v. Murphy, 465 S.W.3d 574, 582 (Tenn. Ct. App. 2014); *see* ***Walker v. Sunrise Pontiac–GMC Truck, Inc.***, 249 S.W.3d 301, 311 (Tenn. 2008). Tennessee courts require that the false information consist of statements of material past or present fact, rendering statements of future intent inactionable. ***McElroy v. Boise Cascade Corp.***, 682 S.W.2d 127, 130 (Tenn. Ct. App. 1982).

Plaintiffs assert alternatively that Citi is liable for negligent misrepresentation. "[T]o succeed on a claim for negligent misrepresentation, a plaintiff must establish 'that the defendant supplied information to the plaintiff; the information was false; the defendant did not exercise reasonable care in obtaining or communicating the information and the plaintiffs justifiably relied on the information.'" ***Walker***, 249 S.W.3d at 311 (quoting ***Williams v. Berube & Assocs.***, 26 S.W.3d 640, 645 (Tenn. Ct. App. 2000)). "Tennessee has adopted Section 552 of the Restatement (Second) of Torts 'as the guiding principle in negligent misrepresentation actions against ... professionals and business persons.'" ***Robinson v. Omer***, 952 S.W.2d 423, 427 (Tenn. 1997) (quoting ***Bethlehem Steel Corp. v. Ernst & Whinney***, 822 S.W.2d 592, 595 (Tenn. 1991)). The Restatement (Second) provides as follows:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Restatement (Second) of Torts § 552(1) (1977).

Citi has both affirmatively negated an essential element of Plaintiffs' misrepresentation claims and demonstrated that Plaintiffs' evidence at the summary judgment stage is insufficient to establish Plaintiffs' claims for intentional and negligent misrepresentation. Citi contends that there is no evidence in the record that Citi made a false or negligent representation that it would not proceed with a

foreclosure sale of Plaintiffs' home while Plaintiffs' application for a loan modification was pending. These are essential elements of Plaintiffs' misrepresentation claims. Without them, Plaintiffs' evidence at the summary judgment stage is insufficient to establish their misrepresentation claims. Citi having satisfied its initial burden of production, Plaintiffs must demonstrate the existence of specific facts in the record at the summary judgment stage that could lead a rational trier of fact to find in favor of Plaintiffs on their misrepresentation claims. This Plaintiffs fail to do.

Taking the facts in the light most favorable to Plaintiffs, the crucial events occurred between the postponement of the foreclosure sale that had been scheduled for June 24, 2014 and the foreclosure sale that went forward on July 29, 2014. *See* MF 25-34. Ms. Mitchell inquired of Mr. Ortwerth by e-mail on the evening of July 21 if additional information was needed from Plaintiffs regarding the application for loan modification. MF 28. Mr. Ortwerth responded by e-mail early the next morning that additional information was needed, and specified in detail what his underwriter had requested. MF 29. Mr. Ortwerth stated "I need this information as soon as possible and will follow up to confirm receipt or check progress by 07/29/14" and provided various ways in which Ms. Mitchell could communicate with him, including telephone, fax and e-mail. *Id.*

Mr. Ortwerth's e-mail to Ms. Mitchell does not contain any representation or information that was false regarding postponement or cancellation of the July 29, 2014 foreclosure sale. MF 30. Ms. Mitchell informed Plaintiffs concerning the specific

information requested by Citi and told Plaintiffs that the sale had been postponed again. MF 31. While Ms. Mitchell may have advised Plaintiffs that the sale had been postponed, the evidence in the record at the summary judgment stage does not support Plaintiffs' contention that Citi, through Mr. Ortwerth or otherwise, communicated any such promise to Ms. Mitchell. *Id. See also* MF 29, 31, n. 8.

Having been confronted with Citi's evidence that the Plaintiffs' evidence at the summary judgment stage is insufficient to support Plaintiffs' claim, to survive summary judgment, Plaintiffs "may not rest upon the mere allegations or denials of [their] pleading," but are required to respond, and by affidavits or one of the other means provided in TENN. R. CIV. P. 56, "set forth specific facts" at the summary judgment stage "showing that there is a genuine issue for trial." TENN. R. CIV. P. 56.04, 56.06. The Affidavit of Brenda Jackson does not set forth specific facts demonstrating that a false representation was made by Citi or that false information was supplied by Citi regarding postponement or cancellation of the July 29, 2014 foreclosure sale. MF 32.

Even taking the facts in a light most favorable to Plaintiffs, Plaintiffs have failed to demonstrate the existence of specific facts in the record that could lead a rational trier of fact to find in favor of Plaintiffs on an essential element of their intentional or negligent misrepresentation claims. Plaintiffs' intentional and negligent misrepresentation claims fail.

VIII. Validity of Notice of the Foreclosure Sale

A defendant asserting an affirmative defense shifts the burden of production by alleging undisputed facts that show the existence of the affirmative defense. ***Brown v. Mapco Exp., Inc.,*** 393 S.W.3d at 702. Citi's Answer and Counterclaim asserted as an affirmative defense that it and its agents administered all foreclosure proceedings in conformity with all applicable state and federal laws. Answer and Counterclaim at p. 5, ¶ 3.

Pursuant to TENN. CODE ANN. § 35-5-101(a), "[i]n any sale of land to foreclose a deed of trust, mortgage or other lien securing the payment of money or other thing of value or under judicial orders or process, advertisement of the sale shall be made at least three (3) different times in some newspaper published in the county where the sale is to be made." The first publication must occur at least twenty days prior to the sale. TENN. CODE ANN. § 35-5-101(b). Additionally, a trustee's failure to comply with statutory requirements does not render the foreclosure sale void or even voidable. ***CitiFinancial Mortgage Co., Inc. v. Beasley***, No. W2006-00386-COA-R3-CV, 2007 WL 77289, at *6 (Tenn. Ct. App. Jan.11, 2007) (citing TENN. CODE ANN. § 35-5-106; ***Doty v. Fed. Land Bank of Louisville***, 169 Tenn. 496, 89 S.W.2d 337 (Tenn. 1936); ***Williams v. Williams***, 25 Tenn.App. 290, 156 S.W.2d 363, 369 (Tenn. Ct. App. 1941)).

Citi has presented undisputed evidence that it satisfied the advertisement requirements within TENN. CODE ANN. § 35-5-101(a) by advertising the sale three

times on May 1, 2014, May 8, 2014, and May 15, 2014 in the *Memphis Daily News*, with the first publication more than twenty days before the original advertised sale date of May 27, 2014 and twenty days before the actual sale date of July 29, 2014. MF 18. Plaintiffs produce no evidence disputing the material facts. Considering the record as a whole, Citi is entitled to summary judgment as to its compliance with Tennessee law regarding the validity of notice of the foreclosure sale.

IX. Validity of the Foreclosure Sale Pursuant to the Terms of the DOT.

A defendant asserting an affirmative defense shifts the burden of production by alleging undisputed facts that show the existence of the affirmative defense. Citi's Answer and Counterclaim asserted as an affirmative defense that all proper notice requirements were provided to Plaintiffs in conformity with the terms of the Note, the DOT, and all applicable state and federal laws. Answer and Counterclaim at p. 5, ¶ 4.

A counter-plaintiff, such as Citi, which files a motion for summary judgment for an element of its claim shifts the burden by alleging undisputed facts that show the existence of that element and entitle the counter-plaintiff to summary judgment as a matter of law. ***Brown v. Mapco Exp., Inc.***, 393 S.W.3d at 702.

Under Tennessee law, a foreclosure sale may be set aside where the trustee fails to comply with the notice requirements of the deed of trust. The Tennessee Supreme Court long ago held that

> When, by the terms of the deed, the trustee is required before making sale to give notice to the bargainor of the time and place of sale, the giving of such notice is in the nature of a condition precedent, and, if not complied with, the sale is unauthorized and void and will communicate no title to the purchaser. And if the requirement be that personal notice shall be given, the trustee cannot substitute notice by advertisement in a newspaper, or at some public place or places, because not within the scope of his authority and also because such a departure on the part of the trustee might be made to defeat the very object of the requirement by enabling him to sell the property without the knowledge of the party making the deed.

Henderson v. Galloway, 27 Tenn. 692, 695-96 (Tenn. 1848). In the instant case, DOT provides that "prior to acceleration," the lender shall send notice to the borrower which specifies:

> (a) the default; (b) the action required to cure the default; (c) a date, not less than thirty days from the date of the notice by which the default must be cured; and (d) that failure to cure the default may result in acceleration of the sums secured by the security instrument and sale of the property.

Paragraph 22 also sets out that the notice shall inform the borrower of the "right to reinstate after acceleration and the right to bring a court action to assert the non-existence of default or any other defense to acceleration and sale." Additionally, DOT Paragraph 15 stipulates that all notices given by the borrower or lender in connection with the DOT must be in writing and are deemed to have been given to the borrower when mailed by the lender. DOT Paragraph 24 provides that the Lender may remove the Trustee and appoint a successor, or Substitute Trustee. Citi appointed Brock & Scott as Substitute Trustee pursuant to the terms of DOT Paragraph 24. MF 16.

Citi sent Plaintiffs a notice dated December 10, 2010 after they defaulted on their mortgage payments and prior to acceleration with all of the required information. MF 11. This letter was in compliance with DOT Paragraph 22, which provides that, prior to acceleration, the lender shall send a notice to the borrower specifying (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default may result in acceleration of the sums secured by the DOT and sale of the Property. MF 11. On or about April 29, 2014, the Substitute Trustee, Brock & Scott, published a notice of sale and mailed notices to Plaintiffs properly notifying them of the foreclosure and published a notice of sale. MF 17, 18.

Citi has presented undisputed evidence that it satisfied the contractual terms of the DOT. Plaintiffs produced no evidence disputing the material facts. Considering the record as a whole, Citi is entitled to summary judgment as to the validity of the foreclosure sale as per the terms of the DOT.

X. Title to and Possession of the Property

A counter-plaintiff, such as Citi, which files a motion for summary judgment for an element of its claim shifts the burden by alleging undisputed facts that show the existence of that element and entitle the counter-plaintiff to summary judgment as a matter of law. ***Brown v. Mapco Exp., Inc.***, 393 S.W.3d at 702.

Prima facie evidence is that which, standing alone and uncontradicted, is sufficient to establish a fact, and, if not rebutted, remains sufficient for that purpose. ***Macon Cnty. v. Dixon,*** 100 S.W.2d 5, 20 Tenn App. 425 (1936). Pursuant to TENN. CODE ANN. § 24-5-101, a trustee's deed is *prima facie* evidence of its recitals. ***Williams v. Williams***, 25 Tenn.App. 290, 156 S.W.2d 363 (1941).

TENN. CODE ANN. § 24-5-101 provides:

> All instruments of conveyance executed in official capacity by any public officer of this state or by any person occupying a position of trust or acting in a fiduciary relation shall be admitted, held, and construed by the courts as prima facie evidence of the facts in such instruments recited, insofar as such facts relate to the execution of the power of such office or trust. All such instruments now of record shall be admitted, held, and construed in accordance with this section.

DOT Paragraph 22 provides that if the Property is sold, the Trustee shall deliver a deed to the purchaser conveying title, and that "[t]he recitals in the Trustee's Deed shall be *prima facie* evidence of the truth of the statements made therein." DOT Paragraph 22 further provides that if the Property is sold at foreclosure, the borrower shall immediately surrender possession.

The Substitute Trustee's Deed is *prima facie* evidence of Citi's title to and superior right of possession of the Property. MF 35. By signing the DOT, Plaintiffs agreed that the recitals in the Substitute Trustee's Deed are *prima facie* evidence of the truth of the statements contained within, and they agreed to immediately surrender possession to the purchaser at the sale. Citi is entitled to title to and possession of the Property.

Citi has presented undisputed evidence that it is the owner of the Property and that Plaintiffs are contractually bound to immediately surrender possession of the Property. Considering the record as a whole, Citi is entitled to summary judgment as to its ownership of the Property and its entitlement to immediate possession of the Property.

XI. Attorney's Fees

A counter-plaintiff, such as Citi, which files a motion for summary judgment for an element of its claim shifts the burden by alleging undisputed facts that show the existence of that element and entitle the counter-plaintiff to summary judgment as a matter of law. ***Brown v. Mapco Exp., Inc.***, 393 S.W.3d at 702.

DOT Paragraph 14 of the DOT states that:

> Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorney's fees . . .

Plaintiffs have instituted this litigation to set aside a proper and valid foreclosure sale. Plaintiffs agreed when signing the DOT, that Citi would be entitled to charge its attorney's fees to Plaintiffs. Therefore, Citi is awarded its reasonable attorney's fees and costs.

Citi has presented undisputed evidence that it is entitled to an award of its attorney's fees. Considering the record as a whole, Citi is entitled to summary judgment as to its entitlement to attorney's fees. Citi is directed to submit proof of its

entitlement to an award of reasonable attorney's fees in conformity to Tenn. Sup. Ct. Rule 8, Chap. 1, Rule 1.5 and relate Tennessee law within fifteen (15) days of the entry of this order. Plaintiffs shall have fifteen (15) days of the filing of Citi's proof to file rebuttal proof. The court retains the option to set the application for hearing.

CONCLUSION

The court **GRANTS** Citi's motion for summary judgment on Plaintiffs' claims for breach of contract; for promissory estoppel; for breach of covenant of good faith and fair dealing; for violation of TENN. CODE ANN. § 35-5-107; for intentional and negligent misrepresentation; regarding the validity of the foreclosure sale; and regarding Citi's title to and right of possession of the Property. The court **DENIES** Citi's motion for summary judgment for violation of the Truth-In-Lending Act.

IT IS SO ORDERED.

This the 5th day of January, 2016.

James R. Newsom III

JAMES R. NEWSOM III
CHANCELLOR

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed, United States Mail, First Class Postage Prepaid to:

Nicholas H. Adler, Esq.
Brock & Scott, PLLC
277 Mallory Station, Suite 115
Franklin, Tennessee 37067

Webb A. Brewer, Esq.
Brewer & Barlow PLC
1755 Kirby Parkway, Suite 110
Memphis, Tennessee 38120

this 5th day of January 2016.

Deputy Clerk

IN THE CHANCERY COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

L.J. JACKSON and BRENDA JACKSON	]	
Plaintiffs,	]	
vs.	]	No. CH-14-1217-3
CITIMORTGAGE, INC.	]	
Defendant.	]	

ORDER GRANTING DEFENDANT'S MOTION TO ALTER OR AMEND JUDGMENT AND AWARDING ATTORNEY'S FEES

This cause came to be heard before the Honorable James R. Newsom III, Chancellor of Part III of the Chancery Court of Tennessee for the Thirtieth Judicial District at Memphis on February 26, 2016 upon the timely Motion to Alter or Amend pursuant to TENN. R. CIV. P. 59.04 filed by Defendant CitiMortgage, Inc. ("Citi") on February 3, 2016 as to that portion of the court's January 5, 2016 Order Granting in Part and Denying in Part Defendant's Motion for Summary Judgment (the "Summary Judgment Order") which found that there is a genuine issue of material fact requiring trial on the issue of violation of the Truth In Lending Act, 15 U.S.C. §§ 1601, *et seq.* claim asserted in this cause by Plaintiffs L.J. Jackson and Brenda Jackson (together "Plaintiffs").

In its January 5, 2016 Order, the court found that "Citi assumes that the July 11, 2008 notice of transfer of servicing rights equates to a notice of transfer of the assignment of the debt as well for purposes of 15 U.S.C. § 1641(g). This does not follow." (Order at 35). The court did not make a finding in the Summary Judgment Order as to when the transfer of the Note and Deed of Trust to Citi occurred, if at all. However, Plaintiffs have alleged that "[a]ccording to records from the Shelby County Register of Deeds' office, the Deed of Trust was assigned by Argent to CitiMortgage in August 2009." (Am. Compl. ¶ 12). In order for a claim under 15 U.S.C. § 1641(g) to exist, there must be an ownership transfer alleged.

Citi has shown that the current version of 15 U.S.C. § 1641 was not effective until July 21, 2011. The version that was effective to May 19, 2009 did not contain subsection (g). As indicated by publication in the Federal Register, of which the court takes judicial notice pursuant to TENN. R. EVID. 201, the Board of Governors of the Federal Reserve System made compliance with the provisions of 15 U.S.C. § 1641(g) optional until January 19, 2010, stating, "This interim final rule is effective upon publication in the Federal Register. Institutions may rely on the rule immediately to ensure that they are complying with the statutory requirements. However, to allow time for any necessary operational changes, compliance with the interim final rules is optional until January 19, 2010." 74 Fed. Reg. 223, 60143, 60145 (Nov. 20, 2009).

Because compliance with 15 U.S.C. § 1641(g) was optional until January 19, 2010, Citi cannot be liable as a matter of law for failure to send the required notice

thereunder for a transfer of ownership that occurred on August 31, 2009. The court **GRANTS** Citi's Motion to Alter or Amend the Summary Judgment Order. Considering the record as a whole, Citi is entitled to summary judgment as to its compliance with the Truth In Lending Act, 15 U.S.C. §§ 1601, *et seq.*

Further, as the Summary Judgment Order found, Citi is entitled to summary judgment as to its entitlement to attorney's fees. Citi submitted proof of its entitlement to an award of reasonable attorney's fees in conformity to Tenn. Sup. Ct. Rule 8, Chap. 1, Rule 1.5 and related Tennessee law within fifteen (15) days of the Summary Judgment Order, as directed by the court. Plaintiffs failed to file rebuttal proof within the subsequent fifteen (15) days of the filing of Citi's proof. The court awards Citi a judgment for its reasonable attorney's fees in this cause in the sum of $13,996.50.

The costs of this cause are taxed against the Plaintiffs, for which execution may issue. All matters in controversy are resolved and this is a final order in this matter. Any claims, motions or outstanding issues not specifically addressed in the Court's prior orders are hereby denied as if specifically denied and dismissed with prejudice.

IT IS SO ORDERED.

This the 1st day of March, 2016.

JAMES R. NEWSOM III
CHANCELLOR

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed, United States Mail, First Class Postage Prepaid to:

Nicholas H. Adler, Esq.
Brock & Scott, PLLC
277 Mallory Station, Suite 115
Franklin, Tennessee 37067

Webb A. Brewer, Esq.
Brewer & Barlow PLC
1755 Kirby Parkway, Suite 110
Memphis, Tennessee 38120

this 1st day of March, 2016.

Deputy Clerk

IN THE CHANCERY COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

In re: M.M.P.,[1] DOB: 12/7/2010, and M.R.P., DOB: 5/14/2009, Minor Children Under 18, C.W. and M.W., A Married Couple, Petitioners, vs. J.R.A., Natural Mother, Respondent.	No. CH-14-1307 Part III

FINDINGS OF FACT AND CONCLUSIONS OF LAW PURSUANT TO TENN. R. CIV. P. 52.01 AND 41.02(2) AND TENN. CODE ANN. § 36-1-113(k)

This cause came on to be heard on the 28th day of October, 2015 upon the Petition for Termination of Parental Rights and Adoption (the "Petition") filed by Petitioners, C.W. and M.W., a married couple ("Petitioners") on August 29, 2014; the Order of Appointment of Attorney for Respondent J.R.A. (the "Mother"); the Order

[1] In cases involving minor children, it is the policy of this court to redact the parties' names so as to protect their identities.

appointing Guardian Ad Litem Stacey Graham; and the Answer to the Petition filed by the Mother. The court heard testimony from Petitioner C.W., the maternal grandmother P.A., the Mother and attorney Ray Glasgow. Upon review of the entire record, the exhibits introduced into evidence, the sworn testimony presented at trial and having had the opportunity to observe all witnesses and to adjudge their credibility and demeanor, the statements of counsel for the parties and the minor children, M.M.P. and M.R.P., and the sworn testimony at trial, the court makes the following findings of fact and conclusions of law pursuant to TENN. R. CIV. P. 52.01 and 41.02(2) and TENN. CODE ANN. § 36-1-113(k) as follows:

I. TERMINATION OF PARENTAL RIGHTS

Under both the United States and Tennessee Constitutions, a parent has a fundamental right to the care, custody, and control of his or her child. ***Stanley v. Illinois***, 405 U.S. 645, 651 (1972); ***Nash–Putnam v. McCloud***, 921 S.W.2d 170, 174 (Tenn. 1996). But parental rights, although fundamental and constitutionally protected, are not absolute. ***In re Angela E.***, 303 S.W.3d 240, 250 (Tenn. 2010). Thus, the state may interfere with parental rights only if there is a compelling state interest. ***Nash–Putnam***, 921 S.W.2d at 174–75 (citing ***Santosky v. Kramer***, 455 U.S. 745 (1982)).

Our termination statutes identify "those situations in which the state's interest in the welfare of a child justifies interference with a parent's constitutional rights by

setting forth grounds on which termination proceedings can be brought." ***In re Jacobe M.J.***, 434 S.W.3d 565, 568 (Tenn. Ct. App. 2013) (quoting ***In re W. B.***, Nos. M2004–00999–COA–R3–PT, M2004–01572–COA–R3–PT, 2005 WL 1021618, at *7 (Tenn. Ct. App. Apr. 29, 2005)). A person seeking to terminate parental rights must prove both the existence of one of the statutory grounds for termination and that termination is in the child's best interest. TENN. CODE ANN. § 36–1–113(c); ***In re D.L.B.***, 118 S.W.3d 360, 367 (Tenn. 2003); ***In re Valentine***, 79 S.W.3d 539, 546 (Tenn. 2002).

Because of the fundamental nature of the parent's rights and the grave consequences of the termination of those rights, courts require a higher standard of proof in deciding termination cases. ***Santosky***, 455 U.S. at 769. Consequently, both the grounds for termination and the best interest inquiry must be established by clear and convincing evidence. TENN. CODE ANN. § 36–3–113(c)(1); ***In re Valentine***, 79 S.W.3d at 546. Clear and convincing evidence "establishes that the truth of the facts asserted is highly probable ... and eliminates any serious or substantial doubt about the correctness of the conclusions drawn from the evidence." ***In re M.J.B.***, 140 S.W.3d 643, 653 (Tenn. Ct. App. 2004). Such evidence "produces in a fact-finder's mind a firm belief or conviction regarding the truth of the facts sought to be established." ***Id.*** at 653.

II. ASSERTED GROUNDS FOR TERMINATION

In this case, Petitioners assert three grounds for termination of Mother's parental rights.[2] These are: (1) abandonment by willful failure to visit the children other than token visitation during the four month period prior to the filing of the Petition, (that is, during the period beginning on April 29, 2014 through August 29, 2014 (the "Relevant Period"), pursuant to TENN. CODE ANN. §§ 36-1-113(g)(1) and 36-1-102(1)(A)(iv); (2) abandonment by willful failure to support the children during the Relevant Period pursuant to TENN. CODE ANN. §§ 36-1-113(g)(1) and 36-1-102(1)(A)(iv); and (3) persistence of conditions pursuant to TENN. CODE ANN. §§ 36-1-113(g)(3).

In pertinent part, TENN. CODE ANN. § 36-1-113(g) provides:

> (g) Initiation of termination of parental or guardianship rights may be based upon any of the grounds listed in this subsection (g). The following grounds are cumulative and non-exclusive, so that listing conditions, acts or omissions in one ground does not prevent them from coming within another ground:
>
> (1) Abandonment by the parent or guardian, as defined in § 36-1-102, has occurred; ....

TENN. CODE ANN. § 36-1-113(g)(1).

TENN. CODE ANN. § 36-1-102 defines "abandonment," in relevant part as follows:

---

[2] Following the conclusion of Petitioners' proof, Petitioners agreed in response to the Mother's motion for involuntary dismissal that a fourth ground for termination asserted in the Petition, the ground of mental incompetence, as defined in TENN. CODE ANN. § 36-1-113(g)(8), was not proven. TT 165, 166. The court grants the Mother's motion to dismiss on that ground.

> (1)(A) For purposes of terminating the parental or guardian rights of a parent or parents or a guardian or guardians of a child to that child in order to make that child available for adoption, "abandonment" means that:
>
> (i) For a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of the a [sic] parent or parents or a guardian or guardians of the child who is the subject of the petition for termination of parental rights or adoption, that the parent or parents or a guardian or guardians ... have willfully failed to support or have willfully failed to make reasonable payments toward the support of the child;....
>
> (iv) A parent or guardian ... has been incarcerated during all or part of the four (4) months immediately preceding the institution of such action or proceeding, and either has willfully failed to visit or has willfully failed to support or has willfully failed to make reasonable payments toward the support of the child for four (4) consecutive months immediately preceding such parent's or guardian's incarceration, or the parent or guardian has engaged in conduct prior to incarceration that exhibits a wanton disregard for the welfare of the child

TENN. CODE ANN. § 36-1-102(1)(A)(i), (iv).

TENN. CODE ANN. §§ 36-1-102(1)(C), 36-1-102(1)(E) and 36-1-102(1)(F) define the terms "token visitation" and "willfully failed to visit" as follows:

> For purposes of this subdivision (1), "token visitation" means that the visitation, under the circumstances of the individual case, constitutes nothing more than perfunctory visitation or visitation of such an infrequent nature or of such short duration as to merely establish minimal or insubstantial contact with the child.

TENN. CODE ANN. § 36-1-102(1)(C).

> For purposes of this subdivision (1), "willfully failed to visit" means the willful failure, for a period of four (4) consecutive months, to visit or engage in more than token visitation.

TENN. CODE ANN. § 36-1-102(1)(E).

> Abandonment may not be repented of by resuming visitation or support subsequent to the filing of any petition seeking to terminate parental or guardianship rights or seeking the adoption of a child.

TENN. CODE ANN. § 36-1-102(1)(F).

In ***In re Audrey S.***, 182 S.W.3d 838 (Tenn. Ct. App. 2005), the court discussed willfulness in the context of termination of parental rights cases:

> The concept of "willfulness" is at the core of the statutory definition of abandonment. A parent cannot be found to have abandoned a child under TENN. CODE ANN. § 36–1–102(1)(A)(i) unless the parent has either "willfully" failed to visit or "willfully" failed to support the child for a period of four consecutive months.... In the statutes governing the termination of parental rights, "willfulness" does not require the same standard of culpability as is required by the penal code. Nor does it require malevolence or ill will. Willful conduct consists of acts or failures to act that are intentional or voluntary rather than accidental or inadvertent. Conduct is "willful" if it is the product of free will rather than coercion. Thus, a person acts "willfully" if he or she is a free agent, knows what he or she is doing, and intends to do what he or she is doing. . . .;
>
> Failure to visit or support a child is "willful" when a person is aware of his or her duty to visit or support, has the capacity to do so, makes no attempt to do so, and has no justifiable excuse for not doing so.
>
> The willfulness of particular conduct depends upon the actor's intent. Intent is seldom capable of direct proof, and triers-of-fact lack the ability to peer into a person's mind to assess intentions or motivations. Accordingly, triers-of-fact must infer intent from the circumstantial evidence, including a person's actions or conduct.

Id. at 863-64 (citations and footnotes omitted).

The ground for termination known as "persistence of conditions" is based on the following statutory language codified at TENN. CODE ANN. § 36–1–113(g)(3):

> The child has been removed from the home of the parent or guardian by order of a court for a period of six (6) months and:
>
> (A) The conditions that led to the child's removal or other conditions that in all reasonable probability would cause the child to be subjected to further abuse or neglect and that, therefore, prevent the child's safe return to the care of the parent or parents or the guardian or guardians, still persist;
>
> (B) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent or parents or the guardian or guardians in the near future; and
>
> (C) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home[.]

"A parent's continued inability to provide fundamental care to a child, even if not willful, ... constitutes a condition which prevents the safe return of the child to the parent's care." ***In re A.R.***, No. W2008–00558–COA–R3–PT, 2008 WL 4613576, at *20 (Tenn. Ct. App. Oct. 13, 2008). The failure to remedy the conditions which led to the removal need not be willful. ***In the Matter of T.S.***, No. M1999-01286-COA-R3-CV, 2000 WL 964775, at *6 (July 13, 2000). "Where ... efforts to provide help to improve the parenting ability, offered over a long period of time, have proved ineffective, the conclusion is that there is little likelihood of such improvement as would allow the safe return of the child to the parent in the near future is justified." ***Id.*** The purpose behind the "persistence of conditions" ground for terminating

parental rights is "to prevent the child's lingering in the uncertain status of foster child if a parent cannot within a reasonable time demonstrate an ability to provide a safe and caring environment for the child." ***In re A.R.***, *supra*, 2008 WL 4613576, at *20.

In cases involving this ground, it is not necessary to prove that a parent-child relationship cannot be salvaged, nor is it necessary to show that a parent is currently harmful to a child's safety or future emotional stability. ***In re Saliace P.***, No. M2015–01191–COA–R3–PT, 2016 WL 304543, at *8 (Tenn. Ct. App. Jan. 26, 2016). The statutes governing termination of parental rights recognize a child's need for a permanent, stable environment. ***Id.*** Accordingly, the question is the likelihood that the child can be safely returned to the custody of the parent, not whether the child can safely remain in foster care with periodic visits with the parent. ***Id.*** When analyzing this ground for termination, the court is to focus on the results of the parent's efforts at improvement rather than the mere fact that he or she made them. ***In re Audrey S.***, 182 S.W.3d at 874.

III. FINDINGS OF FACT

A. Factual Overview

Petitioners are residents of Shelby County, Tennessee and have been residents for at least six months prior to filing their Petition. Mother is a resident of Shelby County, Tennessee. The children are: M.R.P., who was born on May 14, 2009; and M.M.P., who was born on December 7, 2010 (the "Children"). The Children's legal

and biological father is deceased. Trial Transcript ("TT") 9, 119. No other individual has claimed paternity of the Children. Petitioners desire to adopt the Children. TT 80, 81. Petitioners have been approved in all aspects to adopt the Children.

The Children were adjudicated dependent and neglected on March 28, 2012 by Order of the Juvenile Court of Memphis and Shelby County Tennessee ("JCSC") (Docket No. Y5235), entered on April 5, 2012. Trial Exhibit ("TE") 7; TT 120. The basis for that determination was that JCSC found that Mother had tested positive for methamphetamines, benzodiazepines, propoxyphene, amphetamine, cocaine and THC. TE 7.

The Children were removed from the custody and care of Mother and the biological father by the Department of Children's Services ("DCS") in late March 2012 after an unnamed person reported drug usage by Mother and the biological father. TT 29. The father died of a drug overdose within twelve hours after DCS removed the Children. TT 71, 144. The Children have not been in the custody or care of the Mother since they were removed by DCS. TT 28, 119, 143-44. SCJC granted custody of the Children to the maternal grandparents on March 28, 2012. Findings and Recommendations of Magistrate filed on April 5, 2012. TE 7, TT 119. The maternal grandparents placed the Children in the Safe Families program with Bethany Christian Services, a licensed adoption agency ("Bethany"). TE 1; TT 33-34, 47, 48, 69-70. Mother was still represented by an appointed attorney during the initial SCJC

proceedings, but not thereafter until after the commencement of the instant action. *See* TE 7 (The Magistrate recommended (and the JCSC Judge affirmed the recommendation) "That the Court appointed attorney for the mother, Alicia Washington … shall be relieved from the case upon the expiration of the statutory time for a rehearing and/or appeal."); TT 38, 69, 70, 71, 149, 150.

The Children remained in the Bethany program until January 2014 when it was clear that Mother was still unable to care for the Children due to her drug addiction and unstable life. TT 36, 122, 158, 159. At that time, Mother and the maternal grandmother went to the Bethany office and reviewed the profiles of three interested families who were interested in receiving temporary custody of the Children. TT 36. The immediate purpose was to choose a family that would receive the Children into their home until either Mother was able to take them back into a home, or if not, the family would be willing to adopt the Children. TT 36. Mother and the maternal grandmother chose Petitioners over the other two applicant families under this arrangement. TT 36.

The Children have been in the physical custody of Petitioners since January 2014 (TT 75, 80, 82), and the legal custody of the Petitioners since May 19, 2014. TE 8; TT 98.[3] Although Mother testified that she hoped the Children would be returned to her, the testimony, including the testimony of Mother herself, was that Mother was

[3] The hearing before JCSC occurred on April 30, 2014. TE 8; TT 98. The Findings and Recommendations of Magistrate awarding custody and guardianship to Petitioners was filed of record in the SCJC on May 19, 2014. TT 8.

not able to care for the Children and remains unable to care for them. TT 158, 159. During the pendency of this action, this Court ordered Mother to submit to a drug test. TT 120; *See* Order Granting Motion to Require Respondent to Submit to Drug Test, entered April 21, 2015. Mother tested positive for methamphetamine, xanax, and THC. *See* TT 120.

B. Testimony of Petitioner C.W.

Petitioner C.W. testified at trial. The court found C.W. to be a credible witness with a mature and responsible demeanor. From her testimony the court discerns that Petitioners have had physical custody of the Children since January 2014. TT 80, 81. Petitioners met with the Mother, the maternal grandmother and the case worker from Bethany on Christmas Eve in 2013. TT 81. The maternal grandparents had legal custody at that time. TT 81. It was understood by all present, including Mother, that if Mother, due to her on-going drug usage, remained unable to take the Children, Petitioners would receive legal custody and termination proceedings would be initiated, without Bethany's participation. TT 81, 82.

The Children's first few weeks with Petitioners were difficult. The Children were very young, but appeared to be apprehensive about the possibility that they might be required to move again. TT 83. In the previous two years the Children had been with three other families in the Safe Families program. TT 83.

Petitioners sought to maintain contact between the Children and Mother. TT 83. There is no written agreement concerning visitation times for the Mother. TT 97. Petitioners set up weekly phone calls to occur at a set time each Friday evening, so Petitioners could be sure they would be at home at the scheduled time to receive Mother's call. TT 84. Mother missed the very first call. TT 84. After that, Mother was regular with the phone calls for the first few months. TT 84. Petitioner was not questioned on whether, after the first few months, the telephone contact ceased or continued during the balance of 2014 or the first half of 2015. C.W. testified that she could not get Mother on the telephone throughout the summer of 2015, other than to allow the Children to leave voice messages on occasion. TT 93. At those times, Mother would call the Children back. TT 94. At other times, Mother's voice mail was full and did not allow a message to be left. TT 93. A few weeks before the trial, Mother called and gave C.W. her new cell number. TT 94-95.

C.W. arranged for visits with Mother at public places, such as Chick-fil-A, McAlister's, McDonald's, and the Bellevue Baptist playground to allow interaction with the Children at places they liked to go. TT 84-85, 104. These visits occurred about once each month. TT 85. The Children's interaction with Mother did not last throughout the entire visit. TT 85. All of the visitations of the Mother with the Children have been supervised by Petitioner C.W., who was always there. TT 110.

Petitioner C.W. credibly testified that she was aware of all of the visitations that had taken place. TT 110.

During the Relevant Period, Mother visited the Children at Chick-fil-A on May 2 for a two hour visit. TT 107. On May 10, Mother attended M.R.P.'s birthday party. On May 28, the Mother again visited the Children at Chick-fil-A. TT 108. At an unspecified time during the summer of 2014, Mother had a visit with the Children at a McDonald's. TT 108-09. Mother left after thirty to forty-five minutes. TT 89-90, 104. Mother had received a telephone call around 10:30 or 11:00, then said that she needed to go to work, even though she had said that she had to be at work only at 1:00. TT 90. Over the 4th of July weekend of 2014, Mother told C.W. that she had four days off from work. TT 86, 87. Mother verbalized to Petitioner C.W. that she could not meet on two of those days saying, "[N]o, I'm at a friend's house, I can't make that," and "[N]o, I'm still going to be at my friends house. I can't get there." TT 86. Eventually, Petitioner C.W. rearranged her plans to visit with her parents and met Mother at Bellevue Park for a visit with the Children on July 5 that lasted about two hours. TT 87, 89, 104, 108. On July 30, 2014, the Mother saw M.R.P. on her first day of kindergarten. TT 108. The final visit during the Relevant Period was on August 15, 2014 at M.R.P.'s kindergarten, where Mother brought a pair of shoes for one of the Children. TT 108. In total there were six visits by the Mother during the Relevant

Period. TT 109. Petitioner C.W. kept a journal in which she noted all visits and telephone contacts involving Mother by date and description. TT 104-05.

Petitioner C.W. credibly testified that during the whole time that the Children have lived with Petitioners, Petitioners have never refused a request from Mother to visit with the Children. TT 88. In the event of a schedule conflict, Petitioner C.W. invariably would suggest a time for a visit the next available weekend. TT 89.

Mother has not visited with the Children since April 2015. TT 92-93, 107, 108, 109, 110. In their last visit, Petitioner C.W. testified that Mother was "agitated." TT 87-88. While a lay witness, the court gives significant weight to the testimony of Petitioner C.W., who suspected, due to her demeanor, that Mother was under the influence due to the way she was acting. TT 88. On that occasion, as M.R.P., the younger Child, sat in Mother's lap, Petitioner C.W. reasonably feared for the Child's immediate safety because of the unstable way that Mother comported herself. TT 88. Over time, the relationship between the Mother and the Children has diminished. While at first, Petitioner C.W. testified, the older Child referred to the Mother as "Mama J[ ]," more recently she merely calls her "J[ ]." TT 111. The younger Child has followed a similar pattern. TT 111. On the other hand, the Children refer to Petitioners as "Mom" and "Daddy," and to their adoptive daughter as "Sister." TT 111-12.

As to the subject of support, there is no legal order for support which binds the Mother. TT 98. Mother has paid approximately $20 toward the expenses of the minor children during the entire time they have been in the care of the Petitioners. TT 91, 92, 93. Mother has given a pair of shoes to M.R.P. (TT 99, 100, 101), Easter baskets in 2014 (TT 100, 101), lip gloss two or three times (TT 99-100), about fifteen dollars worth of birthday presents for one of the Children in 2014 (TT 102, 103), Christmas presents in 2014 in the nature of a board game or coloring books (TT 101, 103), and provided a bin of clothes that were not usable items. TT 101-02. Petitioner C.W. has observed that Mother tends to favor M.R.P., the older Child, over M.M.P., the younger of the two. TT 113-14. Petitioner C.W. has not seen Mother give money to either of the Children. TT 104.[4] During the Relevant Period, the only items that Mother purchased for the Children was a set of Easter baskets for each (TT 100) and a pair of shoes for M.R.P. TT 99-100.

Following the filing of the Petition, Diane Brower, Interim Executive Director of Bethany, wrote a message to Petitioner C.W. on November 7, 2014 in which she stated, in part:

> I had a long meeting with [Mother] yesterday morning. I tried to help her come to some acceptance that [Petitioners] are in the role of Mom and Dad and the [Children] will see you all as such. In essence that [Petitioners] are their parents and [Mother] is not, without being so blunt about it. [Mother] does not seem to realize that her rights have been

[4] "Money" is inaccurately transcribed as "Monday." TT 104.

> terminated. ...[5] [Mother] voiced that she knew the girls would stay with [Petitioners]. [Mother] grieved and said she didn't want to be out of the [Children's] lives. We talked through that and I did tell her that she represents uncertainty and change to the [Children], so it can be hard for [M.R.P.] when she interacts with [Mother]. I tried to help [Mother] to see that this isn't a personal attack on her, but that the [Children] typically have moved about this time and they yearn for stability and have that now. I said some hard things to her. We talked about specific things she can do to help the [Children] and the situation. [Mother] said she would now call exactly when she is supposed to, even not going to work on Fridays when called in, because then sometimes she can't get away at the right time to make the call. [Mother] asks that [Petitioner C.W.] be able to take the call when she is supposed to call. [Mother] feels that has not always happened. We talked about the next visit with the [Children] that she spend time interacting with them and even reassuring them that they are staying where they are.
>
> I think [Mother] realizes she can't care for the [Children], she voiced that, but she hates the reality that she has lost them. I think her acceptance of that will be a long process. [Mother] fears that [Petitioners] won't allow her to have a relationship with [Children] and I assured her your heart is to do that, but there might be a time that [M.R.P.] needs a bit of distance to know for sure she is not moving again. ...

TE 6; TT 118.

The Petitioners desire to adopt the Children in the event that the Mother's parental rights are terminated. TT 97. Petitioners have maintained and intend to maintain a relationship with P.A., the maternal grandmother for the Children, even after a potential adoption of the Children. TT 96. Petitioners have maintained the

[5] Ms. Brower did not appear to testify before the court. The court finds that Ms. Brower should be admonished that parental rights cannot be terminated absent order of a court possessing jurisdiction to do so. That someone in Ms. Brower's position might so inform persons who in the position of Petitioners is problematic and must not be condoned. No termination of Mother's parental rights had occurred in this matter as of November 7, 2014, the date of Ms. Brower's e-mail message.

Children's relationship with their biological uncle and aunt, the Mother's brother and sister, and their families, who include them in family events such as holidays and birthdays. TT 96. Petitioners intend to allow those relationships to continue as well. TT 96-97. Petitioners have enrolled M.M.P. at Christ the King preschool. TT 95. M.R.P. attends Shady Grove Elementary School, where she is in the gifted program, and reading well above her grade level. TT 95.

C. Testimony of Maternal Grandmother, P.A.

P.A., the maternal grandmother, testified to the following: Mother contacted P.A. one night to ask her to come and pick up the Children shortly after they had returned from Florida, but she could not do it. TT 28-30. P.A. communicated to Mother that if DCS was there that evening because DCS thought Mother was doing drugs or cooking meth, then the Children needed to go to DCS. TT 30. The Children went into foster care at that point. TT 30. The Children were adjudicated dependent and neglected by the SCJC. TE 7; TT 46.

P.A. and her husband were awarded custody of the Children. P.A. knew the extent of Mother's drug addiction through the years and that the Children would not be able to return to Mother's care for a long time, if at all. TT 32. After the Children were removed from her home by DCS, Mother was admitted to Lakeside Hospital for rehabilitation. TT 71.

The Children never went to live with P.A. and her husband, R.A. TT 32. The maternal grandparents placed the Children in the Safe Families program on March 28, 2012. TE 1; TT 32-33; 47-48. It was P.A. who signed the placement forms with the Safe Families program, for the purpose of allowing the Children to reside with one family for a full year. TE 1; TT 32, 47-49. Mother cooperated in the process and did not want the Children to be in the custody of DCS. TT 33, 35, 47. It was explained to Mother at that time that "if she didn't get her act together, that she could lose her children." TT 59.

About that time, Mother went into rehab at Moriah House. TT 34. P.A. knew that Mother needed drug or alcohol rehabilitation. TT 58-59. While Mother was at Moriah House, she was in contact with the Children. TT 59. P.A. would pick the Children up from foster care on Friday and Mother would have the Children over the weekend at Moriah House. TT 59. P.A. offered to help Mother get off drugs and to take parenting class several times. TT 34, 78. DCS informed Mother what she needed to do to get the Children back in her custody, including getting a job, securing a place to live, completing parenting classes and passing drug tests. TT 58, 78. Mother did not accept P.A.'s offers of assistance in getting off drugs. TT 34. Mother went to the parenting class, but did not stay to take the test for the certificate. TT 35.

P.A. and her husband, R.A., had some health problems in their family later in 2014, which caused P.A. to conclude that they no longer needed to have legal custody

of the Children. TT 60. Along with P.A., Mother cooperated with Bethany to choose the Petitioners as custodians. TT 36, 37, 38. Mother understood that the Petitioners desired to adopt the Children if Mother continued to be unable to care for the Children. TT 38-39. Mother consistently expressed her desire to take the Children back to live with her and did not see eye-to-eye with P.A. TT 39, 64. At trial, P.A. expressed her love for Mother (her daughter), but testified that she had to advise Mother that when they got out of the Safe Families program, they were then "down to the nitty-gritty … [Mother] either has to do what she needs to do to get the girls back, or she might lose them." TT 66.

Mother worked a job at a retail store. TT 67. At the same time, Mother was asking for financial assistance from P.A. to pay for cigarettes, fuel, title loans on her automobile, and for other expenditures. TT 67. On October 1 2013, Diane Brower, of Bethany wrote to P.A., stating:

> [Mother] is in no place to parent, she can't even take care of herself. I think we meet with [Mother] in the next month and give a time frame, maybe four months out? … [A]t the end of the time frame if she is not able to take the [Children] into her care, then we start the termination of rights process. [Mother] needs to know that is the plan as the girls need permanency and then it is on her to move forward or not.

TE 4; TT 59-61. P.A. responded "You are right….I will discuss with her too the plan and termination. This is so hard." TE 4. Since that time, Mother had opportunities to enter into drug rehabilitation programs and did not take advantage of those opportunities. TT 77, 78. During this period, and until after the filing of the Petition,

Mother did not have the assistance of counsel of her own, nor did P.A. recommend to Mother that she obtain counsel. TT 68.

Ms. Abernathy has maintained a relationship with the Children while they have been in the care of foster families and with Petitioners. TT 40, 41, 42, 74. Ms. Abernathy has observed that the Children are happy. The Children love the Petitioners and have adjusted well in their care. She believes it is in the Children's best interest to be adopted by the Petitioners. TT 45. The Children's father died of an overdose of drugs. TT 71. The court finds the testimony of Patricia Abernathy to be credible.

D. Testimony of Mother

Mother testified to the following: DCS removed the Children from Mother's custody in 2012. TT 119. At the time of removal Mother and the biological father were engaged in using and "cooking" crystal methamphetamine. TE 9, TT 119. The father soon after overdosed on heroin, resulting in his death. TT 119. While there have been periods in which Mother did not use illegal drugs, she has continued to use illegal drugs since January 2012. TT 119. Mother's memory is not clear regarding the two years immediately following the removal of the Children from her custody. TT 122 ("Everything has a fuzzy face from the time my children got taken away until about the time I got into rehab and got my head cleared.") It is the observation of the court that Mother was agitated throughout the hearing, unable to control her

emotions or to testify credibly as to her allegations that Petitioners denied her requests to visit the Children. *See, e.g.,* TT 122-25.

Mother was represented by counsel at the time the Children were removed from her custody and adjudicated dependent and neglected. TT 145, 148, 149, 150. After the Children were found dependent and neglected and her court-appointed attorney was discharged, Mother did not have another lawyer to represent her until after the Petition was filed, nor was she advised that she had a right to have an attorney. TT 136-37, 142-43. Mother testified that no one told her that she could have had an attorney appointed to represent her at that time. TT 136. She did not appeal the adjudication and cooperated with placing the Children in the care of Bethany. She also testified that she did not know she could ask for an attorney in the juvenile court proceedings and was not advised of her right to appeal. TT 138, 141, 150, 162, 163.

Mother was aware that she needed to stop using drugs if she hoped to regain custody of the Children, but only did so for a while. TT 125. Mother admits that she "has been" addicted to crystal meth. TT 126. Mother tested positive for drugs in April 2015, particularly amphetamine and methamphetamine. TT 120. At trial, Mother was asked if she still used crystal meth, and responded "I have, yes." TT 135. Mother denied that she still used pot, took Xanax or drank alcohol. TT 135.

Mother knew that she needed to keep a job in order to regain custody of the Children. TT 125. Mother has not been able to keep a job. TT 125. Mother attended

in-patient drug and alcohol rehabilitation treatment at Moriah House from early 2012 to July 2013, when she was "kicked out" of treatment due to alcohol usage. TT 126. She has not visited with the Children since April 20, 2015 ("[t]he day I took my drug test."). Mother claimed to have called the Petitioners "probably 50 times since April [2015], and I have not gotten one person to answer the phone. They change their number on me without telling me." TT 128, 129, 134. The court did not believe this testimony by Mother to be truthful.

Mother was confronted with a letter that she wrote to the Children early in the morning hours of February 18, 2014. TT 126. The letter, which Mother insisted that she wanted the Children to get when they turned eighteen years of age (TT 127), read in part:

> Tell my girls I love them more than anything. They are the last thing I thought of here on this earth. And mommy is sorry so very sorry. They are the last [thought] I had in my life.
>
> * * *
>
> This letter will tell you my ideas, thoughts and feelings I have toward [you Children].
>
> First, I just want ya'll to know that I love ya'll so much. You two are my greatest accomplishment. You two are the only thing I did right. I regret everyday what me and your daddy did to ya'll. We put your life in danger just to get high & make money. I didn't want to lose ya'll. That night when they took you away crying haunts me everyday. I tried to get ya'll back I really did. But its [sic] hard when I had no financial support or moral support. I'm sorry I put drugs (crystal meth) before you. I put it before myself & God. Your parents are both addicts. Your daddy lost his battle with drugs on 2-25-2012 15 hours after CPS took you away.

> I'm still here so I am still fighting my battle. I will win my battle one day. If I do lose my parental rights its gonna destroy me.
>
> * * *
>
> I can't tell you enough how sorry I am that I put ya'll through this. Ya'll have gone thru more by age 3 & 4 then [sic] most adults. For that I'm truly sorry. I hope I can make this right & we can be a family again. I totally understand if ya'll grew up hating me. Because I deserve it. I don't deserve your forgivness [sic]. I didn't do my motherly duties & protect you. Instead [sic] I exposed you to harmful things such as cooking meth at the house when you were there, smoking / doing meth in front of ya'll, left ya'll with just anyone, and stayed up for so long I couldn't think or do anything straight, slept & didn't wake up with ya'll, kept ya'll in play pens all day as a baby-sitter.... I want ya'll. Ya'll are my girls. A lot of people think I shouldn't get ya'll back. They think I can't take care of ya'll. They don't know [expletive deleted]. Any I may not be rich and be able to give you all the things you want, BUT AS GOD IS MY WITNESS you will have all you need. Food, house, clothing You will have it by Hook or Crook.

TE 9; TT 126.

After reading the first sentence of the letter under examination, Mother stated,

> Yes. I have thought about killing myself because of – because of the situation. [Addressing Petitioners' counsel] Would you love your kids? You never had a kid. You don't know what it's like to have them ripped away because you made a [expletive deleted] mistake. A mistake. I failed a drug test. They found no drugs in my house. They found nothing at my house. I failed a drug test, and I lose my kids forever? That's [expletive deleted]. I'm sorry. I'm sorry. I'm sorry. I'm sorry, Your Honor. I'm sorry.

TT 127-28. When asked when she was planning to kill herself, Mother responded "Which time? ... Which time do you think I wanted to kill myself?" TT 127-28.

As to visitation, during the Relevant Period, Mother contended that she was denied seeing the Children. TT 134. The court did not credit Mother's testimony as being truthful, or Mother's memory of the specific facts to be reliable. Mother recalled visiting with the Children at McAlister's Restaurant for a couple of hours. TT 135. There were a total of six visits that Mother had with the Children during the Relevant Period. TT 140. Mother admitted that she did not complete her parenting class, stating "I got called into work that day. I think work is important." TT 129. She explained her action in leaving visitation with the Children at McDonald's early by saying "I got called in early at work." TT 129.

Mother was working part-time between ten and thirty hours per week, then began to work full-time around June 2014 (TT 151, 152), working between 30 and 40 hours per week, earning $9.00 per hour. TT 152. As of April 2014, at the start of the Relevant Period, Mother was working about thirty to forty hours a week making $9.00 per hour. TT 130. Mother testified that she was "broke". TT 137. During the Relevant Period, Mother was paying $300 each month for a car note (TT 153, 154), $200 each month for car insurance (TT 154), and $50 each month for a cell phone. TT 154. Sometimes, Mother paid $200 per month to stay with a friend. TT 153. The only other expenses she had were her food, toiletries, and clothes. TT 154, 161.

Other than the total of $20.00 in cash that she gave Petitioners for pizza for a birthday party and to contribute to her own dinner during one of the visits with the

Children, together with the Easter baskets, Christmas gifts, shoes and supported clothing items mentioned above, Mother did not provide support for the Children during the Relevant Period. TT 130, 133. When asked how much support she had provided to the Children during the Relevant Period and other times in which the Children had lived with Petitioner, Mother responded "Not much, but I didn't know I had to. … I thought I had to be ordered [to pay] child support." TT 130, 132. Mother testified that she was informed by a friend, but not a legal advisor, that she needed to start giving what child support she could. TT 133-34. The court finds by clear and convincing evidence that Mother was financially capable of providing additional, but not full, support for the Children during the Relevant Period.

Mother has been represented by counsel during these proceedings and yet has not paid support for the Children. TT 160-61. Mother has continued to use drugs (TT 119, 135), which is the main reason the Children were initially removed from her care and placed in the custody of the maternal grandmother. Mother has been aware that to get her Children back, she had to stop using drugs, obtain employment, and obtain suitable housing, which she contends that she cannot afford to obtain. TT 125. She appeared before this court upon the filing of the Petition and requested that an attorney be appointed for her. *See* Motion for Appointment of Counsel filed *pro se* on November 19, 2014.

Mother has not maintained consistent and suitable housing. TT 125, 152, 153. She goes from couch to couch. TT 158. Mother testified that she is not living somewhere that would be safe or appropriate for the Children. TT 158. Mother has continued to use meth, marijuana and Xanax. She last used marijuana three months before the trial, last used meth two months before the trial and used Xanax approximately 6 months before the trial. TT 155, 156. Mother is not currently employed. TT 157, 158. She has not worked since April, 2015. TT 157. She lost her job because she could not get rides to work and was late. TT 157, 158.

E. Testimony of Mr. Glasgow

Ray Glasgow was offered by Mother as an expert witness in child welfare law. Mr. Glasgow is licensed to practice law in Tennessee. TT 169. A large portion of his practice is in the areas of child welfare law, dependency and neglect, post-dependency and neglect, termination of parental rights and appointment of attorneys for parents. TT 169-171. Mr. Glasgow testified that after a dependency and neglect proceeding when the children are placed in the custody of DCS, DCS has certain obligations, such as providing a permanency plan. TT 175-76. Mr. Glasgow testified that he has not been involved in cases in which private agencies other than DCS prepare permanency plans. TT 177.

Mr. Glasgow testified that once a child is no longer in the dependency and neglect stage, the child is no longer in foster care with the State of Tennessee and the

child is placed with an adoption agency, and the parent is not entitled to a free appointed attorney. TT 177. When a child is placed with an adoption agency the parent's rights are affected. TT 179. In Mr. Glasgow's view, the appointment of counsel for Mother after the Petition was filed did not cure pre-Petition procedural defects. TT 179-83.

IV. CONCLUSIONS OF LAW REGARDING GROUNDS FOR TERMINATION

A. Abandonment for Willful Failure to Visit the Children Within the Relevant Period.

The court's first task is to determine whether the Mother's parental rights should be terminated on the basis that she abandoned the Children by willful failure to visit within the four-month Relevant Period. Such ground must be proven by clear and convincing evidence.

Petitioners established by clear and convincing evidence that Mother only exercised visitation with the Children a total of six times within the Relevant Period. Petitioners contend that the visitation was merely "token visitation."

The Tennessee Court of Appeals has held a parent has "a duty to make every reasonable effort to arrange and insist upon visitation with her children." ***In the Matter of S.Y.***, 121 S.W.3d 358, 369 (Tenn. Ct. App. 2003). TENN. CODE ANN. § 36-1-102(1)(C) defines "token visitation" as "visitation, under the circumstances of

the individual case, constitutes nothing more than perfunctory visitation or visitation of such an infrequent nature or of such short duration as to merely establish minimal or insubstantial contact with the child." TENN. CODE ANN § 36-1-102(1)(C). "Whether visitation is 'token' under this definition is a fact-intensive inquiry to be decided on a case-by-case basis." ***In re Keri C.,*** 384 S.W.3d 731, 748 (Tenn. Ct. App. 2010). "Courts may find a parent's subjective intent and interest in the child relevant, but the termination statutes generally require that such interest manifest in the form of objectively reasonable action geared toward establishing a healthy parent-child relationship." ***Id.*** at 751 (finding token visitation when mother did not have a significant bond with the child before the four month time period and made once a month, half-hour contacts at large family gatherings); *accord* ***In re Destiny M.,*** No. W2013-01802-COA-R3-PT, 2014 WL 712545, at *10 (Tenn. Ct. App. Feb. 24, 2014) (finding token visitation when Mother exercised only twelve percent of her visits and twenty-nine percent of allowed telephone calls). "When considering whether an abandonment exists, courts do not look at protestations of affections and intentions expressed by the natural parents, but look at the past course of conduct." ***Matter of Gordon***, 980 S.W.2d 372, 375 (Tenn. Ct. App. 1998).

During the Relevant Period, Petitioners made a good faith effort to make the Children available for frequent visitation with Mother at locations that were enjoyable to the Children and accessible to Mother. Mother failed to use the visitation periods

to effectively bond with the Children. There is clear and convincing proof in the record that Mother, was noticeably under the influence during one of the visits during the Relevant Period at a time when she continued to use, and was addicted to, illegal drugs, including ampheramines and methamphetamines. Mother also cut short at least one of the visits on what the court concludes was a pretense that she needed to go to work, when she most certainly did not. However, the court does not find that there is clear and convincing proof in the record that Mother's visitation with the Children during the Relevant Period was merely "token" visitation. The visits, while not exemplary, were not so infrequent or perfunctory as to be merely "token" or to constitute abandonment due to failure to visit during the Relevant Period. The record does not reflect the presence of clear and convincing proof of statutorily defined abandonment due to failure to visit the Children on the part of Mother during the Relevant Period. Mother's TENN. R. CIV. P. 41.02 motion for involuntary dismissal on the grounds of abandonment due to willful failure to visit during the Relevant Period made at the close of Petitioners' proof is **GRANTED.**

B. Abandonment for Willful Failure to Support the Children Within the Relevant Period.

"The parental duty of visitation is separate and distinct from the parental duty of support. Thus, attempts by others to frustrate or impede a parent's visitation do not provide justification for the parent's failure to support the child financially." ***In re Audrey S.***, 182 S.W.3d at 864. Furthermore, "the law is clear that, in order to

terminate parental rights, the abandonment must occur in the four months preceding the filing of the petition." ***In re Alex B.T.***, No. W2011-00511-COA-R3-PT, 2011 WL 5549757, at *6 (Tenn. Ct. App. Nov. 15, 2011).

TENN. CODE ANN. § 36-1-102(1)(B) defines "token support" as "support [that], under the circumstances of the individual case, is insignificant given the parent's means." TENN. CODE ANN. § 36-1-102(1)(B). "In the context of token support, the word 'means' connotes both income and available resources for the payment of debt." ***In re Adoption of Angela E.***, 402 S.W.3d, 636, 641 (Tenn. 2013) (citations omitted); *See* ***In the Matter of A.J.H.***, No. M2002-01568-COA-R3-JV, 2003 WL 1129817, at *3 (Tenn. Ct. App. Mar. 14, 2003) ("In the present case, even if we were to find that [father] made a genuine attempt to visit A.J.H., the evidence clearly shows that he made absolutely no effort to offer any kind of support to the infant, not even in the form of a token gift, such as a toy, an article of clothing, or a package of disposable diapers."); ***In re Adoption of T.A.M.***, No. M2003-02247-COA-R3-PT, 2004 WL 1085228, at *1 (Tenn. Ct. App. May 12, 2004) (affirming termination on willful failure to support where father made no attempt to support child while he lived rent-free with his parents, was provided food and $10 per week and at some point earned $7 per hour); ***In re Marr***, 194 S.W.3d 490, 493 (Tenn. Ct. App. 2005) (finding willful failure to support by incarcerated father who over five years sent mother a total of $125 while he earned $40 per month in prison job and

saved $300 for himself to use upon release); ***In re DMD***, No. W2003-00987-COA-R3-PT, at *5 (finding mother willfully failed to support her children when she provided no support while earning $2,843 during the year) *cf.* ***Menard v. Meeks***, 29 S.W.3d 870 (Tenn. Ct. App. 2000) (finding inference from note that father had offered support but support had been refused; noting check paid by father's father was never cashed).

In this case, the purchases made by Mother during the Relevant Period constituted mere "token support" when viewed objectively. Mother was earning sufficient income to pay for items such as a car note, auto insurance and cell phone service for herself. While arguments might rage as to whether such items are essential or nonessential in today's world, there is clear and convincing evidence in the record that Mother foisted on Petitioners her own duty to support the Children. A reasonable person in Mother's circumstances would have concluded that she had a duty to support the Children, which she failed to uphold during the Relevant Period. While Mother lacked the means to fully provide for the Children during the Relevant Period, the "support" that she provided was merely "token" in nature.

Mother proffered the testimony of Ray Glasgow, Esq., a respected and accomplished member of the Memphis Bar, who practices largely in the area of child welfare law, dependency and neglect, post-dependency and neglect, termination of parental rights and appointment of attorneys for parents. TT 169-71. Mr. Glasgow

testified that after a dependency and neglect hearing, the result of which is the placement of a child in DCS custody, i.e., State Custody, DCS has certain obligations, such as formulating a permanency plan. TT 175-76. By contrast, Mr. Glasgow testified, agency adoptions do not involve permanency plans. TT 177. Mr. Glasgow observed that once a child is no longer in the dependency and neglect stage, the child is no longer in foster care with the State of Tennessee and the child is placed with an adoption agency, the parent does not have a right to a free appointed attorney. TT 177. Mr. Glasgow reasoned that when the child is placed with an adoption agency, the parent's rights are affected adversely as a result. TT 179. From the foregoing, Mr. Glasgow offered the opinion that, in this case, appointing Mother an attorney after the Petition was filed did not cure purported procedural defects that had occurred pre-Petition. TT 179-83.

"Questions regarding the qualifications, admissibility, relevancy, and competency of expert testimony are matters left within the broad discretion of the trial court." ***State v. Stevens***, 78 S.W.3d 817, 832 (Tenn. 2002) (citing ***McDaniel v. CSX Transp., Inc.***, 955 S.W.2d 257, 263–64 (Tenn. 1997); ***State v. Ballard***, 855 S.W.2d 557, 562 (Tenn. 1993)). "The admission of expert proof is governed by Tennessee Rules of Evidence 702 and 703." ***State v. Copeland***, 226 S.W.3d 287, 301 (Tenn. 2007) (citing ***Brown v. Crown Equip. Corp.***, 181 S.W.3d 268, 273 (Tenn. 2005)). TENN. R. EVID. 702 provides: "If scientific, technical, or other specialized

knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise."

TENN. R. EVID. 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.... The court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate a lack of trustworthiness.

TENN. R. EVID. 704 provides

> Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

TENN. R. EVID. 704 allows the opinion of an expert to reach an ultimate fact, if it establishes: (1) conclusions that may be reached upon what causes a particular fact to exist, or (2) the existence of a fact, which may be the ultimate fact sought to be proven. *See* ***Coffey v. City of Knoxville***, 866 S.W.2d 516, 518-19 (Tenn. (Special Workers' Comp. App. Panel) 1993). However, this does not permit the expert witness to express an opinion as to the applicable legal conclusion to be drawn from the ultimate fact proven. *See, e.g.,* ***Askanase v. Fatjo***, 130 F.3d 657, 672-73 (5th Cir. 1997) (lawyer barred from testifying whether defendants breached their fiduciary duty); *see also* Cohen, Paine & Sheppard, ***Tennessee Law of Evidence***, 6th ed., pp. 364–366

(2011). The legal conclusions to be drawn from facts is a judicial function and only the court may reach legal conclusions.

The Tennessee Supreme Court has further defined the role of the trial court in assessing the reliability of expert testimony:

> Trial courts act as gatekeepers when it comes to the admissibility of expert testimony. Their role is to ensure that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice as an expert in the relevant field. A court must assure itself that the [expert's] opinions are based on relevant scientific methods, processes, and data, and not upon an expert's mere speculation. The court's reliability analysis has four general inter-related components: (1) qualifications assessment, (2) analytical cohesion, (3) methodological reliability, and (4) foundational reliability.

State v. Scott, 275 S.W.3d 395, 401–02 (Tenn. 2009) (internal citations and quotation marks omitted).

In its discretion, the court excludes the proffered testimony of Mr. Glasgow as to all three asserted grounds for termination. The court perceives the proffer of Mr. Glasgow's testimony to constitute an implicit, if not overt, attack on the current statutory or regulatory scheme, insofar as Mother was not provided the assistance of a free appointed attorney between the conclusion of the dependency and neglect proceedings and the filing of the Petition. No constitutional challenge to the statutory or regulatory scheme has been mounted by Mother, nor has notice been given to the Office of the Tennessee Attorney General and Reporter of such challenge pursuant to TENN. R. CIV. P. 24.04. It is not for this court to legislate or to overturn the statutory

or regulatory scheme on non-constitutional bases, and the court declines the suggestion that it do so. Additionally, the Tennessee Court of Appeals in ***In the Matter of S.Y.***, 121 S.W.3d at 369, held that any violation of a parent's due process rights that preceded the termination proceeding "was fully remedied by the procedural protections provided [parent] at the termination hearing."

Because "[i]ntent is seldom capable of direct proof, and triers-of-fact lack the ability to peer into a person's mind to assess intentions[,] ... triers-of-fact must infer intent from the circumstantial evidence, including a person's actions or conduct." ***State Dep't of Children's Servs. v. Culbertson***, 152 S.W.3d 513, 524 (Tenn. Ct. App. 2004). In accordance with the established public policy of Tennessee, "a parent has a duty to support a child, regardless of whether there is a prior court order requiring such." ***In re Shandajha A.G.***, No. E2012–02579–COA–R3–PT, 2013 WL 3787594, at *8 (Tenn. Ct. App. July 17, 2013); TENN. CODE ANN. § 36–1–102(1)(H)). Similarly, a child has a right to receive support just as a parent has an obligation to pay it. ***In re Jacobe M.J.***, 434 S.W.3d 565, 572 (Tenn. Ct. App. 2013). Every parent over the age of eighteen is presumed to have knowledge of the obligation to support his or her child. ***Id.***, 434 S.W.3d at 572.

Here, Mother was over the age of eighteen during the Relevant Period in question and, therefore, was presumed to know of her obligation to support her

children regardless of a court order. TENN. CODE ANN. § 36–1–102(1)(H); ***In re Shandajha A.G.***, 2013 WL 3787594, at *8.

Applying the clear and convincing evidence standard, the court must assess whether Mother's failure to provide more than token support to the Children was willful. When asked how much support she had provided to the Children during the Relevant Period and other times in which the Children had lived with Petitioner, Mother responded "Not much, but I didn't know I had to. … I thought I had to be ordered [to pay] child support." TT 130, 132. Mother testified that she was informed by a friend, but not a legal advisor, that she needed to start giving what child support she could. TT 133-34.

The court concludes that Petitioners have failed to prove by clear and convincing evidence that Mother's failure to provide support to the Children during the Relevant Period was willful. While Mother is presumed to have had knowledge of her obligation to support the Children, Petitioners did not establish that Mother had a conscious awareness that she should provide financial support to the Children at the same time that Petitioners had obtained legal custody of the Children and had assumed the responsibility of support. Without that awareness, which might have been provided by independent legal advice or by other means, there is a lack of clear and convincing evidence by which the court could conclude that Mother willfully failed to provide support for the Children during the Relevant Period. The record

does not reflect the presence of clear and convincing proof of statutorily defined abandonment due to failure to support the Children on the part of Mother during the Relevant Period. Mother's TENN. R. CIV. P. 41.02 motion for involuntary dismissal on the grounds of abandonment due to willful failure to support during the Relevant Period made at the close of Petitioners' proof is **GRANTED.**

C. Persistence of Conditions.

It was proven by clear and convincing evidence that the Children were removed from the home of Mother and the deceased biological father by order of the SCJC no later than March 28, 2012 due to Mother's drug use and related conditions and have not returned to the custody of Mother. *See* TE 7; TENN. CODE ANN. § 36–1–113(g)(3). The court concludes that it was proven at trial by clear and convincing evidence that drug use by the Mother is unabated. This conclusion is supported by Mother's positive test for amphetamines and methamphetamines as ordered by the court in April 2015. This condition has persisted for over three years following the removal of the Children, which period has seen failed attempts at rehabilitation by Mother. *See* TENN. CODE ANN. § 36–1–113(g)(3)(A).

The court concludes that clear and convincing evidence in the record establishes that there is little likelihood that these conditions will be remedied at an early date so that the Children can be safely returned to the Mother in the near future. *See* TENN. CODE ANN. § 36–1–113(g)(3)(B). The court concludes that clear and

convincing evidence in the record establishes that the continuation of the parent—child relationship between Mother and the Children would greatly diminish the Children's chances of early integration into a safe, stable and permanent home. *See* TENN. CODE ANN. § 36–1–113(g)(3)(C).

It is not required that Mother's continued inability to provide fundamental care to the Children be willful in order to constitute a condition which prevents the safe return of the Children to Mother's care. *See* ***In re A.R.***, *supra,* at *20. Further, Mother's failure to remedy the conditions which led to the removal need not be willful. *See* ***In the Matter of T.S.***, *supra,* 2000 WL 964775, at *6. Efforts to provide help to improve the Mother's parenting ability, offered over a long period of time, have proved ineffective. The court concludes that there is little likelihood of such improvement as would allow the safe return of the Children to Mother in the near future to be justified." *See* ***id.*** The court is cognizant that the purpose behind the "persistence of conditions" ground for terminating parental rights is "to prevent the child's lingering in the uncertain status of foster child if a parent cannot within a reasonable time demonstrate an ability to provide a safe and caring environment for the child." *See* ***In re A.R.***, *supra,* at *20.

In cases involving this ground, it is not necessary to prove that a parent-child relationship cannot be salvaged, nor is it necessary to show that a parent is currently harmful to a child's safety or future emotional stability. *See* ***In re Saliace P.***, 2016 WL

304543, at *8. The statutes governing termination of parental rights recognize a child's need for a permanent, stable environment. ***Id.*** Accordingly, the question is the likelihood that the child can be safely returned to the custody of the parent, not whether the child can safely remain in foster care with periodic visits with the parent. ***Id.*** In finding that the ground of persistence of conditions has been proven by clear and convincing evidence, the court has focused on the results of the Mother's efforts at improvement rather than the mere fact that he or she had made them. *See* ***In re Audrey S.***, 182 S.W.3d at 874. Mother's TENN. R. CIV. P. 41.02 motion for involuntary dismissal on the grounds of persistence of conditions made at the close of Petitioners' proof is **DENIED.** Mother's parental rights to the Children are terminated pursuant to TENN. CODE ANN. § 36–1–113(g)(3). The establishment of a single ground for termination by clear and convincing evidence supports the termination of a parent's rights. ***In re Valentine***, 79 S.W.3d 539, 546 (Tenn. 2002).

V. BEST INTEREST DETERMINATION

When, as here, at least one ground for termination of parental rights has been established, the petitioner must then prove by clear and convincing evidence that termination of the parent's rights is in the child's best interest. ***White v. Moody***, 171 S.W.3d 187, 192 (Tenn. Ct. App. 1994). When a parent has been found to be unfit (upon establishment of ground(s) for termination of parental rights), the interests of

parent and child diverge. ***In re Audrey S.,*** 182 S.W.3d at 877. The focus shifts to the child's best interest. ***Id.*** at 877. Because not all parental conduct is irredeemable, Tennessee's termination of parental rights statutes recognize the possibility that terminating an unfit parent's parental rights is not always in the child's best interest. ***Id.*** However, when the interests of the parent and the child conflict, courts are to resolve the conflict in favor of the rights and best interest of the child. TENN. CODE ANN. § 36–1–101(d). Further, "[t]he child's best interest must be viewed from the child's, rather than the parent's, perspective." ***Moody***, 171 S.W.3d at 194.

The Tennessee Legislature has codified certain factors that courts should consider in ascertaining the best interest of the child in a termination of parental rights case. These factors include, but are not limited to, the following:

> (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
>
> (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
>
> (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
>
> (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
>
> (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;

(6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;

(7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;

(8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or

(9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36–5–101.

TENN. CODE ANN. § 36–1–113(i). The Court has noted that "this list [of factors] is not exhaustive, and the statute does not require a trial court to find the existence of each enumerated factor before it may conclude that terminating a parent's rights is in the best interest of a child." ***In re M.A.R.***, 183 S.W.3d 652, 667 (Tenn. Ct. App. 2005). Depending on the circumstances of an individual case, the consideration of a single factor or other facts outside the enumerated, statutory factors may dictate the outcome of the best interest analysis. ***In re Audrey S.***, 182 S.W.3d at 877. As explained by the Court of Appeals:

> Ascertaining a child's best interests does not call for a rote examination of each of TENN. CODE ANN. § 36–1–113(i)'s nine factors and then a determination of whether the sum of the factors tips in favor of or

> against the parent. The relevancy and weight to be given each factor depends on the unique facts of each case. Thus, depending upon the circumstances of a particular child and a particular parent, the consideration of one factor may very well dictate the outcome of the analysis.

White v. Moody, 171 S.W.3d at 194 (Tenn. Ct. App. 2004).

VI. FINDINGS AND CONCLUSIONS RE: THE CHILDREN'S BEST INTERESTS

Applying the statutory framework as interpreted by our courts, the court makes the following findings and conclusions regarding the Children's best interests:

> (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;

Having observed the demeanor and credibility of the witnesses at trial, the court concludes that Mother has failed to make such an adjustment of circumstances, conduct or conditions as to make it safe and in the Children's best interest to be in the home of the Mother. At the time that the Children were removed from Mother's home in March 2012, the Children, then almost 3 years and 16 months of age, were left in a play pin as a "baby-sitter" while Mother and the biological father were "cooking meth" in the same home. The Children were exposed to toxic fumes and other dangers and were neglected. Hours after the parents' misconduct was reported and DCS removed the Children, the biological father overdosed on heroin and died. Despite this tragic "wake-up call," and at least two efforts to help the Mother through professional rehabilitation programs, one at Lakeside Hospital and the other at

Moriah House with the support of P.A., Mother's behavior has been epitomized by regression and failure, rather than progress. Mother was "kicked out" of Moriah House for alcohol use, which did not register with Mother as prohibited conduct. In the hope that Mother might rehabilitate herself, the Children were placed in temporary foster homes through the Bethany Safe Families Program. After almost two years in that program, it was clear in January 2014 that Mother was still unable to care for the Children due to her drug addiction and unstable life.

In February 2014, Mother penned what the court must regretfully characterize as a confessional with overtones of suicide. Mother confirmed most emotionally from the witness stand at trial that she had "thought of killing myself" due to the possible termination of her parental rights. Mother earnestly desires not to lose the Children but lacks the strength at present that is needed to overcome her addiction. The court is hopeful that Mother will someday be redeemed from her drug dependency.

During the Relevant Period, Mother, through the persistence of Petitioners, had frequent enough visits that the court cannot conclude that those visits were merely token in frequency. However, during those visits Mother was clearly distracted and unable to use the visits to build a parental bond with the Children, due in retrospect to her continued addiction to amphetamines and methamphetamines. Since April 2015, when she tested positive for amphetamine and methamphetamine use, Mother has had no further visits with the Children and offered no child support of

any kind, despite the fact that she has been represented by court-appointed counsel. Mother does not have a residence of her own, nor is she living with relatives. Instead, she goes from "couch to couch." Petitioners showed by clear and convincing proof that Mother is not living somewhere that would be safe or appropriate for the Children. Mother admitted as much. Her admitted drug usage within six months prior to the trial included methamphetamines, marijuana and Xanax. Mother is not employed and presented herself at trial as one with a demeanor that was incompatible with exercising the role of parent to two children under seven years of age. The court strongly weighs this factor in concluding that termination of Mother's parental rights is in the best interest of the Children, by clear and convincing evidence.

> (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;

For the reasons articulated in factor (1), the court concludes that clear and convincing evidence in the record establishes that Mother has failed to effect a lasting adjustment after reasonable efforts by Bethany and Moriah House for such duration of time that lasting adjustment does not reasonably appear possible. On the one hand, Bethany "went the extra mile" in extending its temporary Safe Families Program beyond its usual period to give Mother more time to achieve rehabilitation through the program at Moriah House. On the other, Moriah House continued to accommodate Mother until her alcohol use disqualified her from the program. The

court does not strongly weigh this factor in concluding that termination of Mother's parental rights is in the best interest of the Children, by clear and convincing evidence.

(3) Whether the parent or guardian has maintained regular visitation or other contact with the child;

Mother has failed to maintain regular visitation or other contact with the Children since the close of the Relevant Period through the date of the trial. The court finds credible Petitioner C.W.'s testimony that Petitioners have not discouraged such visitation or contacts – Mother has failed to play a proper role in the Children's lives. Petitioners have successfully maintained contact between the Children and other members of Mother's extended family, and wish to continue those relationships in the event Mother's parental rights are terminated, thereby demonstrating Petitioners' good faith. The court finds this factor to be consistent with its conclusions regarding factor (1) above and that it supports its conclusion that termination of Mother's parental rights is in the best interest of the Children, by clear and convincing evidence.

(4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;

The court concludes that Mother has otherwise failed to establish a meaningful relationship with the Children. The court does not strongly weigh this factor in concluding that termination of Mother's parental rights is in the best interest of the Children, by clear and convincing evidence.

(5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;

The most direct proof in the record on this factor are Ms. Brower's statement that Mother "represents uncertainty and change to the [Children], so it can be hard for [M.R.P.] when she interacts with [Mother]. She observed that Children "yearn for stability and have that now" with Petitioners. Although Ms. Brower did not testify live, her statements were made at or about the time of her observations and do not appear to have been made for the purpose of litigation. Moreover, Ms. Brower's observations are supported by the testimony of live witnesses at trial.

Prior to coming to live with Petitioners, the Children had lived with three families in the Safe Families program. Although they were quite young, the Children appeared to Petitioners to be apprehensive that they might have to move again. While Children formerly referred to Mother as Mama J[ ], during their most recent visits, the Children merely used Mother's first name. The Children refer to Petitioners as "Mom" and "Daddy," and to Petitioners' adoptive daughter as "Sister." The Children are performing very well for their ages in school. Petitioners have sought to maintain a relationship between the Children and their maternal grandmother and the Mother's brother and sister and their families. In a word, the court discerns that it has been established by clear and convincing evidence that a change of caregivers, that is, returning to live with Mother, would have a catastrophic effect on the Children's

emotional, psychological and medical condition in relation to their present circumstances. The court very strongly weighs this factor in concluding that termination of Mother's parental rights is in the best interest of the Children, by clear and convincing evidence.

> (6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;

The neglect of Mother toward the Children for which she was adjudged to have neglected the Children is documented by clear and convincing evidence. TE 7. The court finds this to be a factor, but not a very strong one, as the actions of Mother revealed therein are some four years removed from the present.

> (7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;

Having observed the demeanor and credibility of the witnesses at trial, the court concludes that Mother, sadly, has no place of abode worthy of being referred to as a "home." That being the case, the court cannot conclude that life with Mother would be healthy and safe or free from the influence of criminal behavior or activity. The proof is clear and convincing that Mother's drug use has continued for years without significant abatement. There is nothing in the record from which the court could conclude that Mother is consistently able to care for the Children in a safe and

stable manner. The court quite strongly weighs this factor in concluding that termination of Mother's parental rights is in the best interest of the Children, by clear and convincing evidence.

> (8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or

Having observed the demeanor and credibility of Mother at trial, the court concludes that Mother's mental and emotional status is compromised through long-term drug usage such as to be detrimental to the Children. Just as likely, the same conditions would be prevent Mother from effectively providing safe and stable care and supervision for the Children. The court strongly weighs this factor in concluding that termination of Mother's parental rights is in the best interest of the Children, by clear and convincing evidence.

> (9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36–5–101.

Petitioners did not seek to prove at trial what level of support Mother should have paid consistent with the child support guidelines during the period that she worked, or whether an earning capacity should be imputed to Mother now that she is unemployed. The court does not consider this to be a factor in its conclusion that termination of Mother's parental rights is in the best interest of the Children, by clear and convincing evidence.

For the foregoing reasons, the court finds that it is in the best interest of the Children that the parental rights of Mother be terminated.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that:

1. All of the parental rights of Respondent Mother J.R.A. regarding the minor children, M.M.P. and M.R.P., be and the same are hereby forever terminated, and all of the rights, responsibilities and obligations of Respondent Mother J.R.A. to said children, and said children to Respondent Mother J.R.A., are forever severed;

2. M.M.P. and M.R.P. are placed in the complete custody, control and guardianship of Petitioners C.W. and M.W. pending the finalization of their adoption in this matter.

3. Respondent Mother J.R.A. shall have no further notice of proceedings for the adoption of the minor children and shall have no right to object to the adoption or otherwise participate in the proceedings, or thereafter, at any time, to have any relationship, legal or otherwise, with the minor children, M.M.P. and M.R.P.

4. In accordance with TENN. R. CIV. P. 58, this is a final order as to Respondent Mother J.R.A., and any appeal from this order must be made to the Court of Appeals within thirty (30) days of the entry of this order pursuant to TENN. R. APP. P. 8A.

5. The fees of the Guardian Ad Litem, which total fifteen hundred dollars ($1,500.00) shall be paid by Petitioners, and the Guardian Ad Litem is relieved from further responsibility in this matter once the time to appeal has expired.

6. Andrew Wener, the court-appointed attorney for Respondent Mother J.R.A., be awarded a reasonable fee for his duties by the state and be relieved from further responsibility in this matter once the time to appeal has expired.

7. The administrative fees for the appointment of the Guardian Ad Litem and counsel for Respondent are waived.

8. The costs of this cause are taxed to Petitioners.

IT IS SO ORDERED.

This the 16th day of February, 2016.

JAMES R. NEWSOM III
CHANCELLOR

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed, United States Mail, First Class Postage Prepaid to:

Laura D. Rogers
Rebecca Bobo
Attorneys for Petitioners
5050 Poplar Avenue, Suite 1616
Memphis, TN 38157

Stacey Graham
Guardian ad Litem
6520 Stage Road, Suite 133
Bartlett, TN 38134

Andrew Wener, Esq.
Attorney for Respondent
44 North Second Street
Suite 1000
Memphis, TN 38103

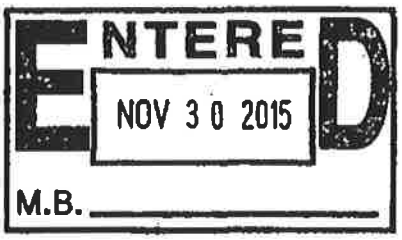
this 16th day of February, 2016.

Deputy Clerk

IN THE CHANCERY COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

IN RE: INVESTIGATIVE FILE TENNESSEE BUREAU OF INVESTIGATION, INVESTIGATIVE FILE: ME-76C-000007	]]]]]	No. CH-15-1472-3 Part III

STATE OF TENNESSEE ex rel. AMY P. WEIRICH, District Attorney General for the Thirtieth Judicial District and MARK GWYN, Director of the Tennessee Bureau of Investigation,	]]]]]]
Plaintiff,	]]
v.	]]
CONNOR SCHILLING,	]]
Defendant.	]



MEMORANDUM OPINION AND ORDER RE: STANDING AND INTERVENTION

I. STATEMENT OF THE CASE

A. The State's Petition.

The State of Tennessee by and through Amy P. Weirich, District Attorney General for the Thirtieth Judicial District (the "District Attorney") and Mark Gwyn, Director of the Tennessee Bureau of Investigation ("TBI") (together the "State") filed

the Petition to Release Tennessee Bureau of Investigation Investigative File (the "Petition") in this court on November 3, 2015. The State's Petition prayed for an order of this court permitting the release to the public of TBI Investigative File ME-76C-000007 (the "TBI File") on the authority of TENN. CODE ANN. § 10-7-504(a)(2)(A).

The TBI File is the TBI's investigative file regarding the July 17, 2015 incident which resulted in the death of Mr. Darrius Stewart, who was shot and killed by Memphis Police Officer Connor Schilling ("Mr. Schilling"). Petition at ¶ 1. The District Attorney exercised her authority pursuant to TENN. CODE ANN. § 38-6-102 to request that the TBI conduct the investigation into the death of Mr. Darrius Stewart.[1] Petition at ¶ 2. The District Attorney later requested that the Grand Jury indict Mr. Schilling for the criminal offenses of Voluntary Manslaughter and Employing a Firearm During the Commission of a Dangerous Felony. Petition at ¶ 3. On November 3, 2015, a TBI agent presented the case to the Shelby County Grand Jury. Petition at ¶ 3. Pursuant to the Grand Jury's statutory authority, the Grand Jury

[1] TENN. CODE ANN. § 38-6-102 permits the Director of the TBI, upon the request of the district attorney general of any judicial district, to assign TBI criminal investigators to aid that district attorney general in the investigation of any crime committed in the district attorney general's judicial district, but only when the district attorney general requests such aid. When detailed by the Director to aid the district attorney general, the criminal investigators have full power to issue subpoenas for witnesses, to serve the subpoenas, to administer oaths to witnesses as they may summon, to take written statements from them and, to have the same powers with reference to the execution of criminal process, making arrests, and the like, as does the sheriff of the county in which the investigators are at work.

returned a no true bill. Petition at ¶ 4. The Petition asserts that there can now be no prosecution of Mr. Schilling. Petition at ¶ 4.

The State asserts that it is in the best interest of the public that the TBI File be made available to the public immediately. Petition at ¶ 7. The State seeks court permission to make the TBI File, less identifying and personal information (to be redacted prior to publication), available to the public through the District Attorney's website. Petition at ¶¶ 6-8.

B. The Motions to Intervene

Pursuant to the court's authority under TENN. R. CIV. P. 16.01(1), the court entered an Initial Scheduling Order on November 5, 2015, ruling that it was appropriate, in the circumstances of this case, to set November 10, 2015 as the deadline for any person or entity to seek intervention herein pursuant to TENN. R. CIV. P. 24.

On November 5, Mary Stewart and Henry Williams, the parents of Mr. Darrius Stewart (the "Parents") filed a Motion to Intervene and Postpone the Release of the Tennessee Bureau of Investigation's Investigative File. The Parents' motion sought the postponement of the release of the TBI File to the public "in order to prevent the unwarranted dissemination of extremely private and sensitive information … in regard to the manner and details" of the death of Mr. Darrius Stewart. *Id.* at 1-2. The Parents asserted that they would "suffer irreparable emotional harm if the Investigative File is released without [their] opportunity to review the file prior to its

availability for public consumption." *Id.* at 2. The Parents sought permissive intervention pursuant to TENN. R. CIV. P. 24.02, contending that otherwise their interests and that of Mr. Darrius Stewart's Estate would be impaired. *Id.* at 2-3.

On November 10, Mr. Schilling filed a TENN. R. CIV. P. 24 Motion to Intervene. Mr. Schilling asserted that he claims an interest in the subject matter of this action, that he is so situated that the disposition of this action may impair his ability to protect his interests and that none of the existing parties will adequately protect his interests. *Id.* at 1. Mr. Schilling asserted that counsel for the Parents and others publicly had requested that the United States Department of Justice (the "USDOJ") look into the circumstances of Mr. Darrius Stewart's death "with the idea of prosecuting" Mr. Schilling. *Id.* at 1-2. Mr. Schilling contended that the release of the TBI File would create publicity "which would impair Schilling's ability to have a fair trial [by an impartial jury] in the United States District Court, in the unlikely event that the federal government should decide to prosecute the matter" in derogation of his Sixth Amendment rights. *Id.* at 2.

Mr. Schilling's Motion to Intervene was accompanied by "a pleading setting forth the claim or defense for which intervention is sought" in conformity to TENN. R. CIV. P. 24.03. In his proposed response, Mr. Schilling states that he has no objection to the release of the TBI File, but asks that the court impose certain terms and conditions of said release: (1) that the TBI File not be released until the USDOJ has reached a decision as to whether it will pursue an indictment; (2) that because he

is entitled to have the public records of the matter expunged, "that these records be made available to the public for a certain period of time to be determined by the Court to satisfy the 'public interest', but that, thereafter, all public records be expunged;" and (3) "that if this court determines that the investigative file should be released to the public, that it set fair and equitable conditions of what, if any, material will be redacted from the investigative file." *Id.* at 1-2. Among other affirmative defenses which relate to his right to a potential trial before an impartial federal jury (*id.* at 4-5), Mr. Schilling seeks to assert that the State lacked standing to present the Petition. *Id.* at 2.

The court set a hearing for November 13, 2015 to hear argument on the Motions to Intervene. Shortly before the hearing, the Parents filed "Plaintiff's Withdrawal of Motion to Postpone the Release of the Tennessee Bureau of Investigation's Investigative File," stating that they withdraw their previous motion to intervene, having elected to have the TBI File published. *Id.* at 2. The Parents expressed their "full confidence that the public's interest [in disclosure] is paramount to their own and do not wish to effectuate further delay." *Id.* at 2.

At the hearing, the court queried the State whether there was a precedent for the TBI making a direct request to a Tennessee court of record to disclose the contents of a TBI investigative file, and was advised that this is the first such instance. The District Attorney advised the court that the TBI File remains in her possession – it has not been filed with the Clerk and Master of the Chancery Court. Also, because

the Shelby County Grand Jury did not return a true bill against Mr. Schilling, there is no criminal proceeding in the Criminal Court of Shelby County to which the TBI File relates. Further, the District Attorney informed the court that, in the "unlikely" event that the USDOJ determined that a criminal investigation of Mr. Schilling was in order, the USDOJ would not rely upon the TBI File. The USDOJ would instead instruct the Federal Bureau of Investigation to pursue an independent investigation of the matter. Finally, the court advised counsel of two recent Tennessee appellate opinions of potential relevance, ***State of Tennessee ex rel. Johnson v. Gwyn*** ("***Johnson***"), No. M2013–02640–COA–R3–CV, 2015 WL 7061327 (Tenn. Ct. App. Nov. 10, 2015) and ***State of Tennessee v. Cobbins*** ("***Cobbins***"), No. E2013-02726-CCA-WR-CO (Tenn. Crim. App. Feb. 4, 2015) and directed the State and Mr. Schilling to brief two issues on an expedited basis: (1) standing and (2) intervention. The court received a set of legal memoranda from the State and Mr. Schilling on November 18 and a second set of rebuttal briefs on November 23.

II. STANDING

a. Applicable Principles of Standing Under Tennessee Law

Given the circumstances of this action, the court must first consider threshold questions pertaining to justiciability. *See* ***City of Memphis v. Hargett*** ("***Hargett***"), 414 S.W.3d 88, 96 (Tenn. 2013) (justiciability is a threshold inquiry). Tennessee courts have long recognized that " 'the province of a court is to decide, not advise, and to settle rights, not to give abstract opinions,' " ***Norma Faye Pyles Lynch Family***

Purpose LLC v. Putnam Cnty., 301 S.W.3d 196, 203 (Tenn. 2009) (quoting ***State v. Wilson***, 70 Tenn. 204, 210 (1879)). Thus, Tennessee courts decide only " 'legal controversies,' " ***id.*** (quoting ***White v. Kelton***, 144 Tenn. 327, 232 S.W. 668, 670 (1921)), and a legal controversy exists "when the disputed issue is real and existing, and not theoretical or abstract, and when the dispute is between parties with real and adverse interests." ***id.*** (citations omitted).

As our Supreme Court recently recognized in ***West v. Schofield***, 468 S.W.3d 482, 490 (Tenn. 2015) ("***West II***"), to determine whether a particular case involves a legal controversy, Tennessee courts use justiciability doctrines that "mirror the justiciability doctrines employed by the United States Supreme Court and the federal courts." ***Id.*** (citations omitted). Without justiciability doctrines, " 'the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.' " ***Am. Civil Liberties Union of Tenn. v. Darnell***, 195 S.W.3d 612, 620 (Tenn. 2006) (quoting ***Warth v. Seldin***, 422 U.S. 490, 500 (1975)).

The Court has reaffirmed the necessity and importance of justicability doctrines in ***West v. Schofield***, 460 S.W.3d 113, 129-30 (Tenn. 2015) ("***West I***"), stating:

> *[A] declaratory judgment action cannot be used by a court to decide a theoretical question*, render an advisory opinion which may help a party in another transaction, *or allay fears as to what may occur in the future* [.] Thus, in order to maintain an action for a declaratory judgment[,] a justiciable controversy must exist. For a controversy to be justiciable, *a real question rather than a*

> *theoretical one must be presented and a legally protectable interest must be at stake. If the controversy depends upon a future or contingent event, or involves a theoretical or hypothetical state of facts, the controversy is not justiciable.* If the rule were otherwise, the courts might well be projected into the limitless field of advisory opinions.

Id., 460 S.W.3d at 129-30 (emphasis by the Court) (citations omitted) (quoting ***State v. Brown & Williamson Tobacco Corp.*** ("***Brown & Williamson***") 18 S.W.3d 186, 193 (Tenn. 2000)) (internal quotation marks omitted).

Justiciability doctrines "include: (1) the prohibition against advisory opinions, (2) standing, (3) ripeness, (4) mootness, (5) the political question doctrine, and (6) exhaustion of administrative remedies." ***West II***, 468 S.W.3d at 490. Standing is the justiciability doctrine at issue in this matter. In ***Hargett***, our Supreme Court considered the doctrine of standing in depth:

> Courts use the doctrine of standing to determine whether a litigant is entitled to pursue judicial relief as to a particular issue or cause of action. ***ACLU of Tenn. v. Darnell***, 195 S.W.3d 612, 619 (Tenn. 2006); ***Knierim v. Leatherwood***, 542 S.W.2d 806, 808 (Tenn. 1976). The proper focus of a determination of standing is a party's right to bring a cause of action, and the likelihood of success on the merits does not factor into such an inquiry. ***Darnell***, 195 S.W.3d at 620; ***Petty v. Daimler/Chrysler Corp.***, 91 S.W.3d 765, 767–68 (Tenn. Ct. App. 2002). Every standing inquiry requires a "careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." ***Allen v. Wright***, 468 U.S. 737, 752 (1984).
>
> Our jurisprudence recognizes two categories of standing that govern who may bring a civil cause of action: non-constitutional standing and constitutional standing. Non-constitutional standing focuses on considerations of judicial restraint, such as whether a complaint raises generalized questions more properly addressed by another branch of the government, and questions of statutory interpretation, such as whether a

> statute designates who may bring a cause of action or creates a limited zone of interests. *See* ***In re Estate of Smallman***, 398 S.W.3d 134, 148-49 (Tenn. 2013); ***State v. Harrison***, 270 S.W.3d 21, 28 (Tenn. 2008); *see also* ***Ditto v. Del. Sav. Bank***, No. E2006-01439-COA-R3-CV, 2007 WL 471146, at *3 (Tenn. Ct. App. Feb. 14, 2007) (discussing prudential considerations relevant to non-constitutional standing). Constitutional standing, the issue in this case, is one of the "irreducible ... minimum" requirements that a party must meet in order to present a justiciable controversy. ***Lujan v. Defenders of Wildlife***, 504 U.S. 555, 560 (1992); *see also* ***City of Chattanooga v. Davis***, 54 S.W.3d 248, 280 (Tenn. 2001); ***Norma Faye Pyles Lynch Family Purpose LLC*** [***v. Putnam Cnty.***], 301 S.W.3d at 202–03 (noting that Tennessee courts' adoption of the various justiciability doctrines, including standing, has a basis in the separation of powers required under article II, sections 1 and 2 of the Tennessee Constitution).
>
> To establish constitutional standing, a plaintiff must satisfy "three 'indispensable' elements." ***Darnell***, 195 S.W.3d at 620 (quoting ***Petty***, 91 S.W.3d at 767). First, a party must show an injury that is "distinct and palpable"; injuries that are conjectural, hypothetical, or predicated upon an interest that a litigant shares in common with the general citizenry are insufficient in this regard. ***Id.*** Second, a party must demonstrate a causal connection between the alleged injury and the challenged conduct. ***Id.*** (citing ***Mayhew v. Wilder***, 46 S.W.3d 760, 767 (Tenn. Ct. App. 2001)). While the causation element is not onerous, it does require a showing that the injury to a plaintiff is "fairly traceable" to the conduct of the adverse party. ***Id.*** (quoting ***DaimlerChrysler Corp. v. Cuno***, 547 U.S. 332, 342 (2006)). The third and final element is that the injury must be capable of being redressed by a favorable decision of the court. ***Id.***; see also ***Davis***, 54 S.W.3d at 280 (noting that the third standing element requires an injury that "is apt to be redressed by a remedy that the court is prepared to give" (quoting ***Metro. Air Research Testing Auth., Inc. v. Metro. Gov't of Nashville & Davidson Cnty.***, 842 S.W.2d 611, 615 (Tenn. Ct. App. 1992))).

Hargett, *supra*, 414 S.W.3d at 97-98 (footnote omitted).

Mr. Schilling urges the court to find that the State lacks standing, and for that threshold reason, the Petition must be dismissed. He makes a three-pronged

argument: (1) the State lacks standing to request a release of the TBI File; (2) the court lacks jurisdiction over the TBI File; and (3) the public interest argument has already been rejected by the Tennessee courts.[2] The court will address these issues below.

b. Standing of the State

Mr. Schilling points out that the TBI and the District Attorney already have a copy of the TBI File, and for that reason they lack standing, having suffered no injury. Citing ***Hargett***, 414 S.W.3d at 98, Mr. Schilling argues that the State (the TBI and the District Attorney) has not suffered an injury, even if the state officials purport to be acting on behalf of the public.

As to standing, the State observes that the Tennessee Public Records Act (the "TPRA"), as codified at TENN. CODE ANN. §§ 10-7-101, *et seq.*, grants full access of all governmental records to the public "unless otherwise provided by state law." TENN. CODE ANN. § 10-7-503(a). It notes that TENN. CODE ANN. § 10-7-504 enumerates a list of exemptions to the general standard of disclosure, which records are to remain confidential under Tennessee law, including all investigative records of the TBI, which are to be treated as confidential and shall not be open to inspection by members of the public. TENN. CODE ANN. § 10-7-504(a)(2)(A). The State points out that the confidential nature of TBI investigative files is not absolute in that the legislative

[2] While denominated by Mr. Schilling as "standing" arguments, the latter two arguments address whether the State has stated a claim on which relief may be granted and whether the State is entitled to the relief requested. For sake of organization, the court will address the latter arguments in the order addressed by Mr. Schilling.

languages states: "The information contained in such records shall be disclosed to the public only in compliance with a subpoena or an order of a court of record...." *Id.*

The State poses two alternative arguments in support of the release of the TBI File by which the State seeks to establish standing. In the first, the State argues that the TPRA provides for one, but not the only, proper procedure for obtaining access to TBI investigative files via TENN. CODE ANN. § 10-7-505(a). That section states:

> (a) Any citizen of Tennessee who shall request the right of personal inspection of any state, county or municipal record as provided in § 10-7-503, and whose request has been in whole or in part denied by the official and/or designee of the official or through any act or regulation of any official or designee of any official, shall be entitled to petition for access to any such record and to obtain judicial review of the actions taken to deny the access.

Asserting that the District Attorney and the Director of the TBI are themselves "citizens of Tennessee," they, under the "unique circumstances" of this case are entitled to seek disclosure of the records to the public pursuant to TENN. CODE ANN. § 10-7-505(a).[3]

In the second alternative argument, the State acknowledges that in this circumstance no one has denied a "citizen" access to a file as contemplated by the language of TENN. CODE ANN. § 10-7-505(a). Instead, the State argues that the language of TENN. CODE ANN. § 10-7-504(a)(2)(A) by its own operation entitles the

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[3] In summarizing this argument, the State concludes "Following the procedures set forth in section 10-7-505, a citizen is to file a petition in the chancery court or circuit court for the county in which the county or municipal records sought are situated. Again, the District Attorney and TBI Director, as citizens of Tennessee, have rightfully and lawfully petitioned this Honorable Court to do just that. The Act confers standing on each as citizens of the state of Tennessee." State's Memorandum at 4.

TBI and the District Attorney to seek public disclosure to members of the public who ordinarily cannot inspect a TBI investigative file because of its confidential nature. Thus, that section provides a "path for release" of the TBI File through a subpoena or an order of a court of record. State's Supplemental Memorandum at 2.

Elaborating on their roles in petitioning for public disclosure, the State argues that the District Attorney requests the release of the TBI File pursuant to her "prosecutorial function attendant to the Grand Jury's decision" conferring standing on her office to seek the release of the TBI File to the public. *Id.* at 2. As to the TBI, the State asserts that as the entity which can claim confidentiality pursuant to TENN. CODE ANN. § 10-7-504(a)(2)(A), its consent to disclosure is necessary for disclosure to occur. *See id.*

The court concludes that the State has standing to request the public disclosure of the TBI File. The court reaches this conclusion with a measure of judicial humility, finding itself in uncharted legal waters. This matter requires a decision which is neither easy nor self-evident, but is in accordance with the guiding principles pronounced by our appellate courts as set forth above.

The court reasons that the Petition is not brought to seek advice from the court or to obtain an abstract opinion, but in order to settle a legal controversy in which the disputed issues are real and existing, involving parties with real and adverse interests. *See* ***Norma Faye Pyles Lynch Family Purpose LLC v. Putnam Cnty.***, 301 S.W.3d at 203.

On a foundational level, the court recognizes that in our system of state government there is a separation of powers among the co-ordinate branches of state government. As our Supreme Court explained in ***State v. McCoy***, 459 S.W.3d 1, 9 (Tenn. 2014):

> The Tennessee Constitution includes two explicit provisions establishing the separation of powers among the three branches of government. Article II, section 1 provides, "The powers of the Government shall be divided into three distinct departments: the Legislative, Executive, and Judicial." Article II, section 2 elaborates, "No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted." While there are no precise lines of demarcation in the respective roles of our three branches of government, the traditional rule is that "the legislative [branch has] the authority to make, order, and repeal [the laws], the executive ... to administer and enforce, and the judicial ... to interpret and apply." ***Underwood v. State***, 529 S.W.2d 45, 47 (Tenn. 1975) (quoting ***Richardson v. Young***, 122 Tenn. 471, 125 S.W. 664, 668 (1910)).

In this instance, our Legislature, setting policy, has provided in TENN. CODE ANN. § 10-7-504(a)(2)(A) that it is the norm that TBI investigative files and the certain files of five other departments or agencies of state government identified by name therein[4] "shall be treated as confidential and shall not be open to inspection by members of the public." *Id.* The plain language of TENN. CODE ANN. § 10-7-504(a)(2)(A) adds, however, that "The information contained in such records shall be disclosed to the public only in compliance with a subpoena or an order of a court of record." The

[4] Those being the Office of Inspector General, the Department of Agriculture, the Department of Environment and Conservation, the Department of Safety and the Alcoholic Beverage Commission. *See* TENN. CODE ANN. § 10-7-504(a)(2)(A).

General Assembly has determined as a matter of policy that our "courts of record" are uniquely suited to be those "governmental institutions ... [that are] competent to address" the question of whether such public disclosure of TBI investigative files should be made, and if so, in what circumstances, under what conditions, and under what constraints. ***See Darnell***, *supra,* 195 S.W.3d at 620.

In contrast to a declaratory judgment action which cannot be used to decide a theoretical question or allay fears as to what may occur in the future, the State's Petition presents real questions and legally protectable interests are at stake. *Cf. West I,* 460 S.W.3d at 129-30. While Mr. Schilling has expressed concerns as to what may occur in the future if the contents of the TBI File were to be disclosed to the public, *i.e.,* in the "unlikely" event of his federal prosecution, the contingent nature of these events should not obscure the State's present assertion that "It is in the best interest of the public that [the TBI File] be made available immediately ... to the public" over Mr. Schilling's opposition. *See* Petition at 2, ¶¶ 7, 8.

The fact that the TBI, the Office of Inspector General, the Department of Agriculture, the Department of Environment and Conservation, the Department of Safety and the Alcoholic Beverage Commission have not previously sought court approval for the public disclosure of records made confidential pursuant to TENN. CODE ANN. § 10-7-504(a)(2)(A) does not demonstrate that they are precluded from doing so via the exception from nondisclosure provided by the General Assembly. The proper focus of a determination of standing is a party's right to bring a cause of

action, and the likelihood of success on the merits does not factor into such an inquiry. *See* ***Hargett***, *supra,* 414 S.W.3d at 97. The court determines based on a careful judicial examination that the State is entitled to an adjudication of the particular claims asserted in the Petition. *See* ***id.***

As to principles of non-constitutional standing, considerations of judicial restraint would counsel that if the Petition had raised generalized questions more properly addressed by a branch of the government other than the judiciary – such prudential concerns would cause the court to go no further. As discussed above, the General Assembly has directed such questions as presented by the Petition to the courts for resolution. Judicial restraint in this circumstance would be tantamount to an abdication of judicial responsibility in the face of Legislative assignment of duty. The court concludes that "non-constitutional standing" is present.

Concerning principles of constitutional standing, as discussed above, the executive department of the State is charged with administering and enforcing the laws. Public officials in Tennessee are presumed to discharge their duties in good faith and in accordance with the law. ***West II,*** *supra,* 468 S.W.3d at 493. The State's Petition asserts that in the absence of public disclosure of the TBI File an injury would occur in derogation of "the best interest of the public." *See* Petition at 2, ¶ 7. While reasonable minds might differ as to how the public interest would best be served, the court presumes that the State and its executive officials on whose relation the Petition is filed, the District Attorney and the Director of the TBI, have a good faith basis for

their assertion that in the absence of public disclosure, injuries that are "distinct and palpable" would occur, injuries that they, due to their positions, experience and due to information available to them, are well-placed to perceive and address. *See* ***Hargett,*** *supra,* 414 S.W.3d at 98. Second, again based on the State's assertions, the challenged conduct, in this instance, non-disclosure, would have a causal connection that is fairly traceable to the alleged injury. *See* ***id.*** Finally, the asserted injury that would result from non-disclosure is clearly capable of being redressed by a favorable decision of the court. *See* ***id.*** The court concludes that "constitutional standing" is present. For these reasons, the court finds that the State has standing to bring the Petition.

c. Jurisdiction of the Court

Mr. Schilling, like the State, has infused his "standing" argument with additional arguments. Those arguments go to whether the State has stated a claim on which relief can be granted or whether the State should be granted the requested relief. He contends that "for the court to even consider permitting disclosure – for the court to have jurisdiction over the TBI file – the TBI File must have been filed with the court in a case and be part of the judicial record." Schilling Memorandum at 4. Otherwise, he asserts, there is no case that has reached the court. *Id.* The State does not address this argument in the memoranda submitted to the court.

The court observes that the State could rectify this alleged deficiency by tendering the TBI File for filing in this court. However, there is nothing in the TPRA, or more specifically in TENN. CODE ANN. § 10-7-504(a)(2)(A) that requires that a TBI

investigative file must be filed of record with the court as a prerequisite for public disclosure. The trial court in ***Johnson***, 2015 WL 7061327 at *2, ruled that it lacked jurisdiction under the doctrine of *in custodia legis*. In ***Johnson*** the Knox County Criminal Court already had jurisdiction over the TBI investigative file at issue therein. That ruling, which was not addressed by the Court of Appeals in ***Johnson***, does not control herein. In any event, this case is distinguishable from ***Johnson*** in that the Shelby County Criminal Court *does not* have jurisdiction over the TBI File because the Grand Jury did not return a true bill, and there was no criminal case thereafter. Thus the fact that the TBI File is not resident in the Chancery Court Clerk's Office does not deprive this court of jurisdiction.

Considerations of judicial economy suggest that the best course of action is for the District Attorney to retain possession of the TBI File at this juncture. Should the court order disclosure of the TBI File, yet require the State to make further redactions in addition to those already made to ensure the non-disclosure of extraneous confidential information, that process would likely be impeded, rather than advanced, by returning the TBI File from the court clerk to the office of the District Attorney for such processing. However, the court retains the discretion to examine the TBI File if it later finds such examination necessary to adjudicate this lawsuit.

d. The Public Interest

Mr. Schilling finally argues that the public policy of the State requires the confidentiality of the TBI File. In the cited cases, ***Cobbins, Abernathy v. Whitley,***

838 S.W.2d 211 (Tenn. Ct. App. 1992) ("***Abernathy***") and ***Higgins v. Gwyn***, No. M2011-00553-COA-R3-CV, 2012 WL 214829 (Tenn. Ct. App. Jan. 23, 2012) ("***Higgins***"), the TBI resisted the disclosure of the TBI investigative files at issue. Those cases do not establish that disclosure of a TBI investigative file may not be ordered by a court of record if disclosure would serve the public interest.

Having concluded that the court has standing over this lawsuit, the court next considers whether Mr. Schilling should be allowed to intervene, and if so, under what conditions.

III. INTERVENTION

Mr. Schilling moves to intervene pursuant to TENN. R. CIV. P. 24.01 and 24.02. The State opposes Mr. Schilling's intervention. Rule 24.01 provides:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties; or (3) by stipulation of all the parties.

Mr. Schilling does not contend that there is a statute which confers an unconditional right to intervene. The State has not stipulated that Mr. Schilling may intervene. Thus the court must determine if Mr. Schilling "claims an interest relating to the property or transaction which is the subject of the action and ... is so situated that the disposition of the action may as a practical matter impair or impede the [his] ability to

protect that interest, unless [his] interest is adequately represented by existing parties." TENN. R. CIV. P. 24.01(2).

A party seeking to intervene as of right under Rule 24.01 must establish that (1) the application for intervention was timely; (2) the proposed intervenor has a substantial legal interest in the subject matter of the pending litigation; (3) the proposed intervenor's ability to protect that interest is impaired; and (4) the parties to the underlying suit cannot adequately represent the intervenor's interests. The prospective intervenor has the burden of establishing all four of these elements or else the motion to intervene as of right will be denied. ***Brown & Williamson***, *supra,* 18 S.W.3d at 190-91. While the precise nature of the interest required to intervene as of right has eluded exact definition, it is clear that the right does not include a mere contingent, remote, or conjectural possibility of being affected as a result of the suit, but must involve a direct claim on the subject matter of the suit such that the intervenor will either gain or lose by direct operation of the judgment." ***Id.*** at 192. The court considers whether Mr. Schilling has met his burden of establishing the elements identified above.

Mr. Schilling's Motion to Intervene was filed within the time set by the court, that is, within seven days of the filing of the Petition. The State does not contend that the motion was untimely. The remaining elements are interconnected. The court must consider whether Mr. Schilling has a substantial legal interest in the subject matter of the pending litigation, that being the State's Petition to this court for an order

permitting the immediate disclosure of the TBI File to the public; whether in his absence from the lawsuit, Mr. Schilling's ability to protect that interest is impaired; and whether the State alone, the only original party to the lawsuit, cannot adequately represent Mr. Schilling's interests.

Mr. Schilling claims a substantial legal interest in the subject matter of this litigation. His proposed response to the State's Petition (the "Proposed Response") states that he has no objection to the release of the TBI File, but urges the court to rule that conditions be placed by the court upon the timing, duration and contents of that release in order to protect his interests.

The State's Petition observes that, as a result of the Grand Jury's no true bill, there can be no prosecution of Mr. Schilling. Certainly this is true as to a criminal prosecution by the State. Mr. Schilling counters that he remains subject to a potential federal investigation and prosecution in connection with the death of Mr. Darrius Stewart. Mr. Schilling's Proposed Response asserts that he has reason to believe that counsel for the Parents and a United States Congressman have made separate requests to the USDOJ to initiate an investigation into Mr. Schilling's actions on the night of July 17. Mr. Schilling expresses concern that the public release of the TBI File would compromise his right to a prospective federal trial on criminal charges before an impartial jury and that certain contents of the TBI File would not be admissible in a court proceeding. The State argues that, if a federal investigation did result, the

Federal Bureau of Investigation would be expected to conduct its own investigation without reference to the TBI File.

The court concludes that the matter which is the subject of this action is whether the TBI File should be released to the public. Apart from the potential that Mr. Schilling may be the target of a federal investigation and prosecution, the court reasons that Mr. Schilling at least has a substantial interest in the timing, duration and contents of that release. The disposition of this lawsuit "may as a practical matter impair or impede [his] ability to protect [his] interest" – which interest is not adequately represented by the State. For example, Mr. Schilling argues (without elaboration) in his Proposed Response that he is entitled to have the public records of the matter expunged (presumably at some point in time by the Criminal Court). Proposed Response at 2. In view of that interest he asks "that these records be made available to the public for a certain period of time to be determined by the Court to satisfy the 'public interest', but that, thereafter, all public records be expunged." *Id.* The State has not responded to this contention on the part of Mr. Schilling.

It is not necessary for this court to engage in conjecture as to what may happen in the event that the TBI File is disclosed to determine whether, in its discretion, Mr. Schilling should be permitted to intervene pursuant to TENN. R. CIV. P. 24.01(2). Mr. Schilling has demonstrated a substantial legal interest in the subject matter of the pending litigation. Moreover, Mr. Schilling is so situated that, in his absence, his ability to protect that interest is impaired. Finally, as the State is the only party to the

Petition, Mr. Schilling's interests would not be adequately represented if his application to intervene is denied. The court finds that Mr. Schilling's Motion to Intervene pursuant to TENN. R. CIV. P. 24.01 should be and therefore is **GRANTED**, and that he be aligned as a party defendant.[5] Mr. Schilling is granted leave to file his Proposed Response within five (5) days of the entry of this Memorandum Opinion and Order.

This finding does not end the court's inquiry. It is unquestioned that "virtually any condition" may be attached by a trial court to a grant of permissive intervention pursuant to TENN. R. CIV. P. 24.02. ***Manufacturers Consolidation Serv., Inc. v. Rodell***, 42 S.W.3d 846, 863 (Tenn. Ct. App. 2000) (relying on federal authorities applying FED. R. CIV. P. 24(b)). For the reasons that follow, the court rules that it may impose conditions on the intervention of Mr. Schilling pursuant to TENN. R. CIV. P. 24.01.

In pertinent part, TENN. R. CIV. P. 24.01 and FED. R. CIV. P. 24(a) are identical. Tennessee courts have found that decisions of federal courts construing rules that are substantially similar to our own are "highly persuasive." ***McGinnis v. Cox***, 465 S.W.3d 157, 164 (Tenn. Ct. App. 2014). Federal authorites hold that once a court grants intervention, whether of right or by permission, the intervenor is treated as if

[5] In the alternative, for the reasons stated above, the court would also have granted Mr. Schilling's motion for permissive intervention pursuant to TENN. R. CIV. P. 24.02, as the Petition and the defenses raised in his Proposed Response have "question[s] of law or fact in common." *See* TENN. R. CIV. P. 24.02(2).

he was an original party and has equal standing with the original parties. ***In re Bayshore Ford Truck Sales, Inc.*** (***Westgate Class v. Ford Motor Co.***), 471 F.3d 1233, 1246 (11th Cir. 2006). Toward that end, FED. R. CIV. P. 24(a) requires the prospective intervenor to anchor his request in the matter giving rise to the pending lawsuit, as Mr. Schilling has done.

However, "an intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues or compel an alteration of the nature of the proceeding." ***Vinson v. Washington Gas Light Co.***, 321 U.S. 489, 498 (1944). In this regard, "conditions can be imposed even when a party intervenes as a matter of right under [FED. R. CIV. P.] 24(a)(2)." ***Southern v. Plumb Tools***, 696 F.2d 1321, 1322 (11th Cir. 1983).

Like TENN. R. CIV. P. 24.01, Rule 24(a) itself does not mention conditions or restrictions. The Advisory Committee Note to the 1966 Amendment of Rule 24(a), however, provides: "An intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings." There apparently were no decided cases which provided explicit authority for this assertion on the part of the Advisory Committee. Even so, several federal courts have followed the lead of the Advisory Committee and have imposed restrictions on an intervenor of right. *See, e.g.,* ***Southern***, 696 F.2d at 1322 (citing 7A **C. Wright & A. Miller, *Federal Practice and Procedure*,** § 1922 at 624-25 (1972)).

The Tennessee Rules of Civil Procedure were adopted in 1972. *See* ***Sneed v. City of Red Bank,*** 459 S.W.3d 17, 31 (Tenn. 2014). The Advisory Committee Note to the 1966 Amendment of Rule 24(a) was available to the drafters of the Tennessee Rules, which incorporated the pertinent language into TENN. R. CIV. P. 24.01 without modification. The court reasons that it may impose conditions on the intervention of Mr. Schilling due to the requirements of the efficient conduct of the instant proceeding. *See also* TENN. R. CIV. P. 1 ("These rules shall be construed to secure the just, speedy, and inexpensive determination of every action.")

In granting Mr. Schilling's application to intervene pursuant to TENN. R. CIV. P. 24.01, the court does not lose sight of the State's contention that the best interest of the public is served by the public disclosure of the contents of the TBI File. Mr. Schilling does not take issue with the State's primary contention in this regard. He disputes secondary issues regarding the timing, duration and contents of that release. These jurisprudential considerations guide the court in establishing the conditions on Mr. Schilling's intervention that follow:

1. Mr. Schilling may not assert new or additional claims, cross-claims, counterclaims, and third-party claims in this case.

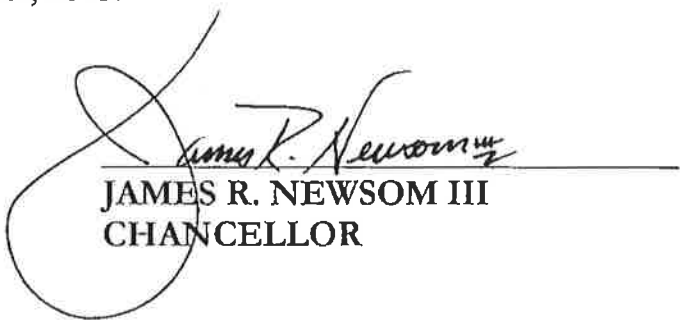
2. Mr. Schilling may not, without leave of court file any motion not expressly allowed by this order, with the exception of motions requesting leave to file a motion. This shall not restrict Mr. Schilling from seeking any relief available under the Tennessee Rules of Appellate Procedure.

3. If an issue arises about the scope of Mr. Schilling's intervention and the parties are unable to resolve the issue, the parties may seek clarification from the court.

4. The court reserves discretion to impose additional conditions on Mr. Schilling's intervention.

IT IS SO ORDERED.

This 30th day of November, 2015.



JAMES R. NEWSOM III
CHANCELLOR

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of November, 2015, a true and correct copy of the foregoing Order has been mailed, United States Mail, First Class Postage prepaid to:

Amy P. Weirich
District Attorney General
30th Judicial District
201 Poplar Avenue, 3rd Floor
Memphis, TN 38103

Arthur E. Quinn
62 North Main Street
Suite 401
Memphis, TN 38103

Deputy Clerk

IN THE CHANCERY COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

IN RE: INVESTIGATIVE FILE TENNESSEE BUREAU OF INVESTIGATION, INVESTIGATIVE FILE: ME-76C-000007	]]]]]	No. CH-15-1472-3 Part III

STATE OF TENNESSEE ex rel. AMY P. WEIRICH, District Attorney General for the Thirtieth Judicial District and MARK GWYN, Director of the Tennessee Bureau of Investigation, Plaintiff, v. CONNOR SCHILLING, Defendant.	]]]]]]]]]]]]]]	ENTERED DEC 8 - 2015 M.B.

ORDER DIRECTING DISCLOSURE OF TBI INVESTIGATIVE FILE PURSUANT TO TENN. CODE ANN. § 10-7-504(a)(2)(A)

The court finds that, under the particular circumstances of this case, disclosure of the TBI File at issue is authorized and should be ordered pursuant to the statutory authority set forth at TENN. CODE ANN. § 10-7-504(a)(2)(A).

CASE STATUS

As recounted in the court's November 30, 2015 Memorandum Opinion and Order Re: Standing and Intervention, the State of Tennessee by and through Amy P. Weirich, District Attorney General for the Thirtieth Judicial District (the "District Attorney") and Mark Gwyn, Director of the Tennessee Bureau of Investigation ("TBI") (together the "State") filed a Petition to Release Tennessee Bureau of Investigation Investigative File (the "Petition") in this court on November 3, 2015. The State's Petition prayed for an order of this court permitting the release to the public of TBI Investigative File ME-76C-000007 (the "TBI File") on the authority of TENN. CODE ANN. § 10-7-504(a)(2)(A).

The TBI File is the TBI's investigative file regarding the July 17, 2015 incident which resulted in the death of Mr. Darrius Stewart, who was shot and killed by Memphis Police Officer Connor Schilling ("Mr. Schilling"). Petition at ¶ 1. The District Attorney exercised her authority pursuant to TENN. CODE ANN. § 38-6-102 to request that the TBI conduct the investigation into the death of Mr. Darrius Stewart.[1] Petition at ¶ 2. The District Attorney later requested that the Grand Jury

[1] TENN. CODE ANN. § 38-6-102 permits the Director of the TBI, upon the request of the district attorney general of any judicial district, to assign TBI criminal investigators to aid that district attorney general in the investigation of any crime committed in the district attorney general's judicial district, but only when the district attorney general requests such aid. When detailed by the Director to aid the district attorney general, the criminal investigators have full power to issue subpoenas for witnesses, to serve the subpoenas, to administer oaths to witnesses as they may summon, to take written statements from them and, to have the same powers with reference to the execution of criminal process, making arrests, and the like, as does the sheriff of the county in which the investigators are at work.

indict Mr. Schilling for the criminal offenses of Voluntary Manslaughter and Employing a Firearm During the Commission of a Dangerous Felony. Petition at ¶ 3. On November 3, 2015, a TBI agent presented the case to the Shelby County Grand Jury. Petition at ¶ 3. Pursuant to the Grand Jury's statutory authority, the Grand Jury returned a no true bill. Petition at ¶ 4. The Petition states that there can now be no prosecution of Mr. Schilling. Petition at ¶ 4.

The State asserts that it is in the best interest of the public that the TBI File be made available to the public immediately. Petition at ¶ 7. The State seeks court permission to make the TBI File, less identifying and personal information (to be redacted prior to publication), available to the public through the District Attorney's website. Petition at ¶¶ 6-8. Mr. Stewart's parents and next of kin, Mary Stewart and Henry Williams (the "Parents"), have withdrawn their motion to intervene, expressing their "full confidence that the public's interest [in disclosure] is paramount to their own and do not wish to effectuate further delay." Plaintiff's Withdrawal of Motion to Postpone the Release of the Tennessee Bureau of Investigation's Investigative File ("Parents' Withdrawal") at 2.

On November 30, 2015 the court ruled that this lawsuit is a justiciable controversy in that the State has constitutional and non-constitutional standing to litigate this case. This threshold determination is a necessary prerequisite for the court to consider the merits of the State's claim. Also, the court determined that Mr. Schilling should be allowed to intervene in this lawsuit as a matter of right pursuant to

TENN. R. CIV. P. 24.01(2) as he claims an interest in the subject matter of this lawsuit and is so situated that the disposition of the lawsuit may, as a practical matter, impair or impede his ability to protect that interest. Mr. Schilling has filed his Response to the Petition as directed by the court. With that predicate, and in the interests of justice, the court reaches the merits.

THE TENNESSEE PUBLIC RECORDS ACT

The State has advised the court that there is no precedent for the TBI making a direct request to a Tennessee court of record to disclose the contents of a TBI investigative file. This being an issue of first impression, the court seeks to discern and follow the legislative intent.

The Tennessee Public Records Act (the "TPRA") as codified at TENN. CODE ANN. §§ 10-7-101, *et seq.*, provides citizens of Tennessee with broad access to records of Tennessee governmental agencies. ***Gautreaux v. Internal Med. Educ. Found.***, 336 S.W.3d 526, 529 (Tenn. 2011). The purpose of the TPRA is to facilitate "access to governmental records [which] promotes public awareness and knowledge of governmental actions and encourages public officials and agencies to remain accountable to the citizens of Tennessee. ***Schneider v. City of Jackson***, 226 S.W.3d 332, 339 (Tenn. 2007). The TPRA is a statutory codification of the common law public access doctrine that established the "public's right to examine governmental records." ***Id.*** Because the statute has supplanted the common law right, the

provisions of the Public Records Act are the sole basis for public access to government records in Tennessee. *See* ***id.*** The Act requires disclosure of public records not specifically exempted from disclosure. TENN. CODE ANN. § 10-7-503(a)(2)(B).

The TPRA defines "public records" or "state record or records" as:

> all documents, papers, letters, maps, books, photographs, microfilms, electronic data processing files and output, films, sound recordings, or other material, regardless of physical form or characteristics made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency[.]

TENN. CODE ANN. § 10-7-301(6). The TPRA defines a "confidential public record" as:

> any public record which has been designated confidential by statute and includes information or matters or records considered to be privileged and any aspect of which access by the general public has been generally denied[.]

TENN. CODE ANN. § 10-7-301(2).

The TPRA also provides:

> All state, county and municipal records shall, at all times during business hours, which for public hospitals shall be during the business hours of their administrative offices, be open for personal inspection by any citizen of this state, and those in charge of the records shall not refuse such right of inspection to any citizen, ***unless otherwise provided by state law***.

TENN. CODE ANN. § 10-7-503(a)(2)(A) (emphasis added).

The Tennessee Supreme Court has characterized the TPRA as "an all encompassing legislative attempt to cover all printed matter created or received by

government in its official capacity." ***Griffin v. City of Knoxville***, 821 S.W.2d 921, 923 (Tenn. 1991). It has opined that the TPRA's broad legislative mandate "require[s] disclosure of government records even when there are significant countervailing considerations." ***Gautreaux***, 336 S.W.3d at 529. The TPRA requires the courts to construe the statute broadly "so as to give the fullest possible public access to public records." TENN. CODE ANN. § 10-7-505(d). Accordingly, there is a "presumption of openness" under the TPRA, "favoring disclosure of governmental records." ***Schneider***, 226 S.W.3d at 340.

Notwithstanding the presumption of openness, in the interest of public policy the General Assembly has provided specific exemptions from disclosure contained in the TPRA itself. It has also "acknowledged and validated both explicit and implicit exceptions from disclosure found elsewhere in state law." ***Swift v. Campbell***, 159 S.W.3d 565, 571 (Tenn. Ct. App. 2004). The TPRA's general requirement of disclosure is not intended to trump the specific confidential designation by the General Assembly regarding investigative files of the TBI. "As a matter of statutory construction, a specific statutory provision will control over a more general statutory provision." ***State v. Cauthern***, 967 S.W.2d 726, 735 (Tenn. 1998).

The State filed the Petition in reliance on TENN. CODE ANN. § 10-7-504(a)(2)(A). The prohibition of disclosure of TBI investigative files is not absolute. *See* State's Memorandum of Law in Support of Petition to Release Tennessee Bureau

of Investigation Investigative File ("State's Initial Memo.") at 2. The statutory language establishes one such exception to the disclosure mandate of the TPRA:

> ***All investigative records of the Tennessee bureau of investigation***, the office of inspector general, all criminal investigative files of the department of agriculture and the department of environment and conservation, all criminal investigative files of the motor vehicle enforcement division of the department of safety relating to stolen vehicles or parts, all criminal investigative files and records of the Tennessee alcoholic beverage commission and all files of the handgun carry permit and driver license issuance divisions of the department of safety relating to bogus handgun carry permits and bogus driver licenses issued to undercover law enforcement agents ***shall be treated as confidential and shall not be open to inspection by members of the public. The information contained in such records shall be disclosed to the public only in compliance with a subpoena or an order of a court of record***; provided, however, that such investigative records of the Tennessee bureau of investigation shall be open to inspection by elected members of the general assembly if such inspection is directed by a duly adopted resolution of either house or of a standing or joint committee of either house. Records shall not be available to any member of the executive branch except to the governor and to those directly involved in the investigation in the specified agencies.

(emphasis added). The section contemplates that disclosure of TBI investigative files "to the public" may occur "only in compliance with a subpoena or an order of a court of record."

The State poses two alternative arguments in support of the release of the TBI File based on the TPRA. In the first, the State argues that the TPRA provides for a procedural method for obtaining access to TBI investigative files via TENN. CODE ANN. § 10-7-505(a). State's Initial Memo. at 2. That section states:

> (a) Any citizen of Tennessee who shall request the right of personal inspection of any state, county or municipal record as provided in § 10-7-503, and whose request has been in whole or in part denied by the official and/or designee of the official or through any act or regulation of any official or designee of any official, shall be entitled to petition for access to any such record and to obtain judicial review of the actions taken to deny the access.

Emphasizing the phrase "any citizen," the District Attorney and the Director of the TBI posit that they are themselves "citizens of Tennessee," who, under the "unique circumstances" of this case, are entitled to seek disclosure of the records to the public pursuant to TENN. CODE ANN. § 10-7-505(a).[2] State's Initial Memo. at 2-3.

As pointed out by Mr. Schilling, the State's first argument for disclosure must fail. *See generally* Rebuttal Memorandum of Connor Schilling to the State's Memorandum of Law ("Schilling Rebuttal Memo."). While the court does not adopt Mr. Schilling's argument in its entirety, the court agrees that the statute confers no right on the District Attorney and the Director of the TBI superior to that of any other citizen of the State to utilize the procedure set forth in TENN. CODE ANN. § 10-7-505 to obtain disclosure of TBI investigative records.

As noted above, TENN. CODE ANN. § 10-7-505(a)(2)(A) provides that:

> All state, county and municipal records shall, at all times during business hours, which for public hospitals shall be during the business hours of their administrative offices, be open for personal inspection by any

[2] In summarizing this argument, the State concludes "Following the procedures set forth in section 10-7-505, a citizen is to file a petition in the chancery court or circuit court for the county in which the county or municipal records sought are situated. Again, the District Attorney and TBI Director, as citizens of Tennessee, have rightfully and lawfully petitioned this Honorable Court to do just that. The Act confers standing on each as citizens of the state of Tennessee." State's Initial Memo. at 4.

> citizen of this state, and those in charge of the records shall not refuse such right of inspection to any citizen, ***unless otherwise provided by state law.***

(emphasis added). TENN. CODE ANN. § 10-7-504(a)(2)(A) provides that TBI investigative files are one exception to the general posture of the TPRA of openness.

Further, the State's first argument would effectively seek to have the court so read TENN. CODE ANN. § 10-7-505(a) as to ***add*** the language appearing in bold and brackets below:

> (a) Any citizen of Tennessee who shall request the right of personal inspection of any state, county or municipal record as provided in § 10-7-503 [**and § 10-7-504(a)(2)(A)**], and whose request has been in whole or in part denied by the official and/or designee of the official or through any act or regulation of any official or designee of any official, shall be entitled to petition for access to any such record and to obtain judicial review of the actions taken to deny the access.

"When the statutory language is clear and unambiguous, [Tennessee courts] must apply its plain meaning in its normal and accepted use, without a forced interpretation that would limit or expand the statute's application." ***Eastman Chem. Co. v. Johnson***, 151 S.W.3d 503, 507 (Tenn. 2004). If the statutory language is clear and unambiguous, the court's "obligation is to enforce the written language without reference to the broader statutory intent, the history of the legislation, or other sources." ***Chattanooga–Hamilton Cnty. Hosp. Auth. v. Bradley Cnty.***, 249 S.W.3d 361, 366 (Tenn. 2008). The court cannot, in keeping with basic tenants of statutory construction, read the statutory language of TENN. CODE ANN. § 10-7-505(a) in the manner that the State suggests. The court finds that the statutory

procedure set forth in TENN. CODE ANN. § 10-7-505 is not an available method by which public disclosure of a TBI investigative file may be obtained, whether by a member of the public or by the State. The State's first alternative argument fails.

In its second alternative argument, the State argues that the language of TENN. CODE ANN. § 10-7-504(a)(2)(A), by its own operation, entitles the TBI and the District Attorney to seek public disclosure to members of the public who ordinarily cannot inspect a TBI investigative file because of its confidential nature. The State contends that section provides a "path for release" of the TBI File through a subpoena or an order of a court of record. State's Supplemental Memorandum in Support of Petition to Release TBI Investigative File ("State's Supp. Memo.") at 2.

Elaborating on their roles in petitioning for public disclosure, the State argues that the District Attorney requests the release of the TBI File pursuant to her "prosecutorial function attendant to the Grand Jury's decision" conferring standing on her office to seek the release of the TBI File to the public. *Id.* at 2. It is clear, under the circumstances of this case, that the District Attorney's "prosecutional function" has come to an end as to Mr. Schilling. The grand jury's historic role is one of a "protective bulwark" on behalf of the ordinaty citizen. *See, e.g.,* ***United States v. Dionisio***, 410 U.S. 1, 17 (1973). As the Grand Jury returned a "no true bill" as to Mr. Schilling, he is protected from further prosecution by the District Attorney, a fact acknowledged in the State's Petition. *See* Petition at ¶ 4. However, having first requested the aid of the TBI in the investigation pursuant to Tenn. Code Ann. § 38-6-

102, the District Attorney retains custody of the TBI File and requests disclosure in that capacity. *See* Petition at ¶ 2. As to the TBI, the State asserts that as the entity which can claim confidentiality pursuant to TENN. CODE ANN. § 10-7-504(a)(2)(A), the TBI's consent to disclosure is necessary for disclosure to occur. *See* State's Supp. Memo. at 2.

As discussed in the court's previous Memorandum Opinion and Order, on a foundational level, there is a separation of powers among the co-ordinate branches of state government. As our Supreme Court explained in ***State v. McCoy***, 459 S.W.3d 1, 9 (Tenn. 2014):

> The Tennessee Constitution includes two explicit provisions establishing the separation of powers among the three branches of government. Article II, section 1 provides, "The powers of the Government shall be divided into three distinct departments: the Legislative, Executive, and Judicial." Article II, section 2 elaborates, "No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted." While there are no precise lines of demarcation in the respective roles of our three branches of government, the traditional rule is that "the legislative [branch has] the authority to make, order, and repeal [the laws], the executive ... to administer and enforce, and the judicial ... to interpret and apply." ***Underwood v. State***, 529 S.W.2d 45, 47 (Tenn. 1975) (quoting ***Richardson v. Young***, 122 Tenn. 471, 125 S.W. 664, 668 (1910)).

In this instance, our Legislature, setting policy, has provided in TENN. CODE ANN. § 10-7-504(a)(2)(A) that TBI investigative files and the certain files of five other

departments or agencies of state government identified by name therein[3] "shall be treated as confidential and shall not be open to inspection by members of the public." *Id.* The plain language of TENN. CODE ANN. § 10-7-504(a)(2)(A) adds, however, that "The information contained in such records shall be disclosed to the public only in compliance with a subpoena or an order of a court of record." The General Assembly has determined as a matter of policy that our "courts of record" are uniquely suited to be those "governmental institutions ... competent to address" the question of whether such public disclosure of TBI investigative files should be made, and if so, in what circumstances, under what conditions, and under what constraints. ***See Am. Civil Liberties Union of Tenn. v. Darnell***, 195 S.W.3d 612, 620 (Tenn. 2006) (quoting ***Warth v. Seldin***, 422 U.S. 490, 500 (1975)).

The court's research discloses that the earliest public records act in Tennessee was enacted by the General Assembly in 1957. Tenn. Public Acts of 1957, Pub. Ch. No. 285. That legislation provided in part that medical records of patients in State hospitals and medical facilities were confidential and not open for inspection by members of the public except in compliance "with a subpoena or an order of the court." *Id.* In 1976, the General Assembly replaced the quoted language as follows "with a subpoena or an order of a court of record." Tenn. Public Acts of 1976, Pub. Ch. No. 777. The above phraseology has been a portion of portion of the legislative

[3] Those being the Office of Inspector General, the Department of Agriculture, the Department of Environment and Conservation, the Department of Safety and the Alcoholic Beverage Commission. *See* TENN. CODE ANN. § 10-7-504(a)(2)(A).

language has remained intact in subsequent revisions of what is now enacted as TENN. CODE ANN. § 10-7-504(a)(2)(A) since that time. The records of the TBI were made explicitly exempt from public disclosure in 1999. Tenn. Pub. Acts of 1999, Pub. Ch. 199.

The fact that the TBI has not previously sought court approval for the public disclosure of records made confidential pursuant to TENN. CODE ANN. § 10-7-504(a)(2)(A) does not demonstrate that it is precluded from doing so via the exception from nondisclosure provided by the statute. The General Assembly has directed such questions as presented by the Petition to the courts for resolution. As the court earlier recognized, the executive department of the State is charged with administering and enforcing the laws. Public officials in Tennessee are presumed to discharge their duties in good faith and in accordance with the law. ***West v. Schofield***, 468 S.W.3d 482, 493 (Tenn. 2015) ("***West II***"). The State's Petition asserts that in the absence of public disclosure of the TBI File, an injury would occur in derogation of "the best interest of the public." *See* Petition at 2, ¶ 7. While reasonable minds might differ as to how the public interest would best be served, the court presumes that the State and its executive officials on whose relation the Petition is filed, the District Attorney and the Director of the TBI, have a good faith basis for their assertion that in the absence of public disclosure, injuries that are "distinct and palpable" would occur, injuries that they, due to their positions, experience and due to information available to them, are well-placed to perceive and address.

The bare language of TENN. CODE ANN. § 10-7-504(a)(2)(A), which sets forth that: "The information contained in such records shall be disclosed to the public only in compliance with a subpoena or an order of a court of record ...." does not provide guidance to the court as to the factors to be considered in permitting such public disclosure of TBI investigative files. The court in this instance finds aid in the TBI's own administrative rules, which articulate its policy regarding production of documents and testimony. While not bound by administrative rules as authoritative, "[c]ourts may take judicial notice of the rules and regulations of state administrative agencies which have been promulgated by authority of law, have statewide application and are easily ascertainable." ***Acuff v. Comm'r of Tenn. Dept. of Labor***, 554 S.W.2d 627, 631 (Tenn. 1977).

TBI Administrative Rule 1395-1-6-.02(1) (the "TBI Administrative Rule") states in part that:

> Due to the inherently intrusive nature of criminal investigations and the sensitive nature of material contained in bureau records, access by the public to records of the bureau is extremely limited and subject to several considerations.

Here, the court notes, the District Attorney and the Director of the TBI, that is, the State, have asserted in good faith that disclosure of the TBI File is in the public interest. The Parents have expressed their "full confidence that the public's interest [in disclosure] is paramount to their own and do not wish to effectuate further delay." Parents' Withdrawal at 2. Mr. Schilling states that he has no objection to the public

disclosure of the TBI File, but asks the court to place conditions on the timing, duration and contents of that release. Response of Connor Schilling to Petition to Release Tennessee Bureau of Investigation Investigative File at 1-2.

Mr. Schilling, commenting on TENN. CODE ANN. § 10-7-504(a)(2)(A), points out that the "confidentiality of the TBI File is absolute, ***unless a court orders otherwise***." Memorandum of Connor Schilling in Support of Motion to Intervene ("Schilling Initial Memo.") at 4 (emphasis added). Mr. Schilling relies on ***State v. Cobbins***, No. E2013-02726-CCA-WR-CO, slip op. at 13 (Tenn. Crim. App. Feb. 4, 2015) to argue that the statutory language does not permit a balancing test to take into account an asserted public interest in disclosure.

In ***Cobbins,*** the parents of the victims in the underlying criminal proceedings filed a petition seeking to intervene in the criminal cases to seek access to the portions of a TBI file that had been filed in the criminal court under seal during the hearing on motions for a new trial. The criminal court released for public view all information in the TBI file on which it relied in adjudicating the criminal defendants' motions for new trial. The TBI filed a response opposing the petition to intervene and the petitioners' right to access the TBI file. The criminal court granted intervention but denied the petitioners' request that the TBI file be unsealed. On appeal, the Court of Criminal Appeals affirmed, concluding that the petitioners had no statutory or constitutional right to intervene in the criminal proceeding, preserving the redacted and sealed portions of the TBI file at issue. *See also* ***State of Tennessee ex rel.***

Johnson v. Gwyn, No. M2013-02640-COA-R3-CV, 2015 WL 7061327 (Tenn. Ct. App. Nov. 10, 2015) (holding that *res judicata* served to bar the claims of the same petitioners in a collateral civil action).

This action presents the converse of the circumstance in ***Cobbins***. In ***Cobbins*** the private citizen petitioners sought to overcome the statutory exemption from disclosure granted to TBI investigative files. In such an instance, as ***Cobbins*** teaches, there can be no balancing between the interests of the private petitioners in public disclosure, and that of the State in continued confidentiality. Herein, however, the State, in a case of first impression, seeks, pursuant to TENN. CODE ANN. § 10-7-504(a)(2)(A), to obtain "an order of a court of record" to release the TBI File. While the language of the statute previously may not have been used by the TBI to seek disclosure, the statute has been previously held to be clear and unambiguous: "the only disclosure of TBI investigative records permitted ... is pursuant to a subpoena or court order." ***Higgins v. Gwyn,*** No. M2011-00553-COA-R3-CV, 2012 WL 214829 (Tenn. Ct. App. Jan. 23, 2012).

In certain circumstances, a trial court might find that the TBI and the District Attorney lacked justification for public disclosure of an investigative file following the refusal of a grand jury to return a true bill. Here, however, the State asserts that disclosure of the TBI File is in the best interest of the public, with identifying and personal information to be redacted by the District Attorney General's office. The Parents do not object to the public disclosure of the TBI File. Mr. Schilling, however,

while not objecting to the public disclosure in principle, asks the court to place conditions on the timing, duration and contents of that release. Response of Connor Schilling to Petition to Release Tennessee Bureau of Investigation Investigative File at 1-2. In the unique circumstances of this case, for the reasons stated herein, the court finds that the State has shown good cause for the disclosure of the TBI File pursuant to TENN. CODE ANN. § 10-7-504(a)(2)(A), and imposes, by way of the Protective Order that follows, conditions on the timing, duration and contents of that release.

PROTECTIVE ORDER

Having found aid in the TBI Administrative Rule quoted above, the court considers whether a protective order should be entered regarding the public disclosure of the TBI File. TBI Administrative Rule 1395-1-6-.02(2), states in part as follows:

> Pursuant to the Tennessee Public Records Act, Tenn. Code Ann. § 10-7-504(a)(2), investigative records of the bureau "shall be treated as confidential and shall not be open to inspection by members of the public." Access to investigative records may be gained only in compliance with process from a court of record, including either a subpoena or a court order. ... Accordingly, the director ...
>
> (b) opposes any access to investigative records in the absence of a protective order limiting the use of those records, even if records are released pursuant to a court of record's subpoena or order....

The court accepts the Director's counsel and considers, as requested by Mr. Schilling, whether the public disclosure of the TBI File should be (a) postponed until after the United States Department of Justice has reached a decision as to whether it will pursue an indictment against Mr. Schilling; (b) made available to the public for a

limited time, but thereafter expunged; and (c) redacted based on guidelines established by the court.

While Mr. Schilling has expressed concerns as to what may occur in the future if the contents of the TBI File were to be disclosed to the public, *i.e.,* in the "unlikely" event of his federal prosecution, the court repeats its observation that the contingent nature of these events should not obscure the State's present assertion that "It is in the best interest of the public that [the TBI File] be made available ***immediately*** … to the public" over Mr. Schilling's opposition. *See* Petition at 2, ¶¶ 7, 8 (emphasis added). Therefore, the court finds that the requested public disclosure of the TBI File should occur immediately, and should be disseminated to the public through the District Attorney's internet site, www.scdag.com, as prayed for in the Petition. Petition at ¶ 8.

Next, the court considers whether the TBI File should be made available to the public for a limited time. The court notes that while the public interest that has been identified by the State in the public disclosure of the TBI File is keen at the present time, that interest is likely to abate following the initial disclosure. The court instructs the State to monitor the activity on the District Attorney's website and sets a status conference on February 8, 2016 at 2:00 p.m. to determine whether continued public access to the TBI File through the District Attorney's internet site would continue to serve the public interest after that time.

The court now considers whether the TBI File should be redacted, and if so, to what extent. The court first notes that, in its disclosure, the State shall adhere to the General Assembly's requirements set forth in TENN. CODE ANN. § 10-7-504(f)(1) which provide that the following records or information of any municipal employee or former employee "shall be treated as confidential and shall not be open for inspection by members of the public" and must therefore be redacted from the TBI File before disclosure. In addition such records or information relating to members of the public who may have cooperated with the TBI's investigation should be similarly redacted. The information to be redacted includes: (A) Home telephone and personal cell phone numbers; (B) Bank account and individual health savings account, retirement account and pension account information; (C) Social security number; (D)Residential information, including the street address, city, state and zip code; (E) Driver license information (and photographs); (F) Emergency contact information; (G) Personal, nongovernment issued, email addresses; and (H) like information of immediate family members, whether or not the immediate family member resides with the person involved.

Again, the court also finds the TBI Administrative Rule provides guidance as to additional matters which must be redacted prior to public disclosure. As set forth in TBI Administrative Rule 1395-1-6-.02(3), TBI records are subject to specific restrictions on their release as "otherwise provided by state [and Federal] law." In this regard, the Director must redact material that is specifically confidential and

privileged. For example, the State is to redact (a) Social Security Numbers, pursuant to 5 U.S.C. § 552a Note, Disclosure of Social Security Numbers; (b) information protected by the holding in ***Kallstrom v. City of Columbus***, 136 F.3d 1055, 1066 (6th Cir. 1998); (c) medical information protected by the holding in ***Stenson v. City of Knoxville***, E.D. Tenn. No. 3:98-cv-142 (Memorandum and Order, R. 27, August 26, 1998); (d) information protected by the informer's privilege; and (e) information protected by the attorney work product doctrine. TENN. R. CRIM. P. 16. The materials produced shall be attested to by the custodian of records.

The court observes that this is not a final order for purposes of TENN. R. APP. P. 3(a) from which an appeal as of right might be taken. TENN. R. APP. P. 9(b) permits a party to seek an interlocutory appeal by filing and serving a motion requesting such relief within 30 days after the date of entry of the order from which interlocutory review is sought. In view of the foregoing, the operation of this order is stayed until December 15, 2015, within which time the adversely affected party should advise the court of his intention to request a further stay pending application for permission to appeal.

IT IS SO ORDERED.

This 8th day of December, 2015.

James R. Newsom III

JAMES R. NEWSOM III
CHANCELLOR

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of December, 2015, a true and correct copy of the foregoing Order has been mailed, United States Mail, First Class Postage prepaid and delivered by electronic mail to:

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Deputy Clerk