TENNESSEE JUDICIAL SELECTION COMMISSION

APPLICATION FOR NOMINATION TO JUDICIAL OFFICE

TENNESSEE COURT OF APPEALS
(Middle Section)

Submitted by:
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Tennessee Judicial Nominating Commission

Application for Nomination to Judicial Office

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INTRODUCTION

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

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

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

I am employed as an attorney in private practice operating under the name "The Huskey Firm". Practicing with me in my office is my son, Jason, admitted to the Bar in 2006.

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

1970 – BPR # 3504

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 – 1970 – 3504 – License is currently 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).

(After law school graduation)

(a) June – Sept. 1970 – Henry McCord Forrester & Richardson, Tullahoma, TN

(b) Sept. 1970 – Apr. 1974 – United States Army – Judge Advocate General Corp

(c) Apr. 1974 – Dec. 1975 – Operated the Manchester Branch office of the Tullahoma law firm of Henry McCord Forrester & Richardson

(d) Jan. 1976 – Present – Private practice of law in Manchester in which I was the sole practitioner until October of 2006 when my son joined me in the practice.

(All other employments prior to law school)

(a) Prior to age 13 any employment I had was merely odd jobs in the neighborhood such as mowing yards and things of that nature.

(b) At age 13 I started working at York's Supermarket and worked there for 3 years part time while I was in Jr. High School. I worked as a sack boy, stock boy, clean up and generally whatever needed to be done. My main supervisor was Monroe York who owned the store and who just recently passed away in his mid 90s.

(c) 1960 – 1963 while attending High School I worked as a janitor at Hickerson Station Church of Christ just outside Tullahoma, TN. General duties were cleaning up the building for various services. I worked part time while attending school.

(d) 1963 – 1967 while attending college I worked summers and weekends at Lewis Insurance Agency in Tullahoma. I was a gopher, an office boy that did whatever needed to be done. My supervisors were Clifton Lewis and later Jim Swink, both of whom are now deceased.

(e) 1967 – May 1970 – I was a dorm advisor and then a dorm director for undergraduate student housing while attending Tulane School of Law. During the summers of 1967 – 1970 I worked at the Tullahoma Law Firm of Henry McCord Forrester & Richardson.

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

Not applicable

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

As indicated I have a general practice of law which has always throughout the years emphasized trial practice. Most of my work entails some type of litigation, including personal injury litigation, workers' compensation, domestic relations, criminal defense, real estate litigation, business litigation as well as estate practice. Currently I am County Attorney for Coffee County which works include advice and preparation of documents for various county entities as well as litigation on behalf of the County. I have also a year and a half ago took on the position as delinquent tax attorney for the County in addition to the services as County Attorney. They are 2 separate positions.

In the last 2 years my involvement with the County services has increased significantly. My office continues to do all the facets of practice that it has done in the past; however, my attention has focused more over the past year and would generate for my particular involvement the following approximate percentages:

Business Transactions/Commercial Law	1%
Civil Rights	1%
Commercial Practice – Business Litigation	3%
Construction Law	1%
Corporate – Business Formation/Alteration	1%
Criminal Law	5%
Disability/Social Security	2%
Employment	1%
Estates/Wills/Trust/Probate	5%
Family Law	10%
Government (County Attorney)	30%
Government (Tax Attorney)	10%
Healthcare	7%
Medical Malpractice – Plaintiff	1%
Personal Injury – Plaintiff	15%

Real Estate – Residential	1%
Workers' Compensation	6%

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

After admission to the Bar, my first primary legal service was serving as an officer in the Army Judge Advocate General's Corp between 1970 and 1974. I remained in the Reserves after leaving active duty and was called up for approximately 5 months during Desert Shield/Desert Storm and retired from the Reserves as a Lieutenant Colonel in 1995. During my active military service I had extensive practice in military Court-Martials, both in prosecution, defense, administration of criminal justice, foreign criminal jurisdiction and while stationed at Ft. Campbell prior to leaving military service I served as the Chief of Military Justice for the 101st Airborne Division. Also while on active duty I dealt with all matters that a military lawyer must deal with including administrative procedures, procurement law and extensive criminal trials. After release from active duty in 1974 I began practicing law in Manchester, Coffee County, Tennessee, first managing the branch office of the Tullahoma firm of Henry McCord Forrester & Richardson through the end of 1975 and then beginning in January of 1976 established my own practice which I still maintain to this day. I have 43 years of trial practice as a lawyer.

During my private practice in Manchester I was pleased also to have had the opportunity to serve as labor lawyer for various unions composing the Air Engineering Metal Trades Council at Arnold Engineering Development Center at Arnold Air Force Base for approximately 13 years. During that period I advised the Labor Unions and the Council on labor law matters and represented them in many arbitrations and at times in litigations in the courts and before the NLRB.

I am admitted to practice in the following courts:

(1) Tennessee Supreme Court and all subordinate courts of the State – 1970.

(2) United States Court of Military Appeals, Washington DC – 1970

(3) Federal District Courts of Tennessee – 1974

(4) Sixth Circuit Court of Appeals – 1981

(5) United States Supreme Court – 1981

In addition to the admission to practice in the above courts, I've also appears Pro Hoc Vice in the courts of Maryland, Mississippi, Georgia, Florida and Louisiana. In the course of my practice I have handled murder and fraud cases before military Courts-Martial, and in state trial courts as well as complex fraud cases against individuals and companies in Federal Court. In the civil arena I've handled from simple domestic matters to complex domestic matters to civil litigations taking years to complete; on administrative proceedings in state agencies and appeals thereof about anything you could think of of a trial nature. I have handled quite a number of real property litigations involving both boundary line issues and ejectment, including quite a number of litigations in Grundy County, Tennessee which is a location that during the years of my practice that has been ripe for boundary line and ejectment litigations. I used to have a little saying that a lawyer in Tennessee couldn't truly call himself a trial lawyer until he had handled a Grundy County boundary line lawsuit. There is a lot of merit in that comment. In the following questions, in response thereto, you will find examples of some cases, both in trial court and in appellate court that demonstrate the breadth and depth of my practice.

In addition to my extensive trial work, I have also maintained an active and extensive appellate practice. For example, in the Tennessee Supreme Court and Appellate Courts of this State, the record will reflect I have in excess of 70 appellate opinions to my name. It should be recalled that for a period of time during my practice there was no record maintained of the unreported decisions, so in actuality the number is greater than the figure would reflect. To reflect on that a little further, I might mention that one year when I was having a large number of appeals I was appearing in front of the Middle Section Court of Appeals, I commented to Judge Todd and the panel that I had enough cases in front of them at that time that I felt rather than standing in front of them and saying "I'm Bob Huskey from the Coffee County Bar", I needed to stand in front of my local courts and say "I'm Bob Huskey of the Court of Appeals Bar."

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

administrative bodies.

(a) *United States vs. Sgt. Joe D. Hensley, General Court Martial—United States Army (1973)—Probably the most intriguing case in which I was ever involved or ever well be involved was a case that I tried while in the military service. I was stationed in Thailand when the case arose and started my representation. Because of an untimely escape before the trial and the suspect's recapture, I completed my tour and was assigned to Fort Campbell. I was sent back, in essence, halfway around the world to defend the case. Sgt. Hensley was charged with involvement in a conspiracy that had gone on for several years in Thailand during the Vietnam War involving the diversion of petroleum products through the POL supply point in Bangkok. It involved much more, but he was actually charged with the diversion of $70,000 worth of petroleum products, conspiracy to divert those petroleum products, murder in the first degree, conspiracy to murder, aggravated assault on a military policeman with a motor vehicle, resisting arrest and, finally, escape from confinement due to his escape shortly before trial. As indicated, I returned to Thailand to defend the case. We had witnesses from 19 different countries, and a military judge was brought in from Japan. It was tried before a Court Martial Panel of Officers. He pled guilty to the escape from confinement for obvious reasons and I defended the other six charges. My client was convicted of diversion of petroleum products, conspiracy to divert them and resisting arrest. He was found not guilty of the murder, conspiracy to murder and aggravated assault. He ended up with a six-year sentence while we were facing about 3½ to 4 life sentences. We considered this a successful representation.*

(b) *Turnbow vs Social Security Administration. Administrative Law Proceeding (1974) I sought a disability determination for a lady who had previously been denied Social Security benefits in a proceeding represented by counsel. In order to establish compensability in this case, as sole counsel, I put together two disabilities. First a mental breakdown for a period of years followed by cancer and established disability back 14 years prior to the hearing. Several years later the assistant to the Administrative Law Judge advised me that was the most memorable case she had ever witnessed in her years at the administration and the arrearage of disability established was the longest of which she knew. A favorable decision came at a time when the Plaintiff was at advanced stages of cancer and had extremely high medical bills which were then satisfied by Social Security. It not only put money in the pockets of Plaintiff and her family, but saved her home because otherwise there would have been no money to pay her medical bills.*

(c) *Keeton vs Pizza Hut (1977). Circuit Court of Coffee County. As sole counsel for Plaintiff, I established and proved to a jury in the second trial that Pizza Hut was liable to the Plaintiff for an injury she sustained to her foot resulting from the design of the entrance to the Pizza Hut in the way two doors joined in that entrance area. As a result, she made a small recovery and Pizza Hut changed the design for their future structures.*

(d) *NLRB (Sverdrup Technology, Calspan and Pan Am) vs. AEMTC, (1981) (1982-9183)—As indicated above, for a number of years, I represented the Air Engineering Metal Trades Council and affiliated unions at the Arnold Engineering Development Center in arbitrations, litigations and related matters. In 1980, the contract was split into three companies where it previously had been with one. As a result, the union had to negotiate on three different fronts for collective bargaining agreements. The union was successful in effectuating a contract with two of the three companies but not with the third, and a strike ensured. The effectiveness of the union with the strike depends upon other workers honoring it. In an effort to thwart the effectiveness of the union, the Air Force designated specific gates for the other contractors and a separate specific gate for use by employees who were on strike, thereby eliminating their ability to picket where other employees would enter the work area and the entrance to the Air Force Base. I fought this action on behalf of the union in the Chancery Court of Coffee County where an injunction had been obtained and also before the NLRB and their appellate processes, because there was a complaint issued by the NLRB alleging wrongful picketing by the union.*

I ultimately prevailed on behalf of the union and the ultimate ruling of the NLRB was based on our proof of the interrelation of the functions of the companies. The ruling held that the union employees were entitled to picket all the gates used by any of the companies. This was an extended proceeding in somewhat of a strange area to me, but which greatly enhanced the rights and effectiveness of the union. Opposing me in the matter were corporate and private counsel for three major companies as well as the counsel for the NLRB.

(e) *State vs. Dr. Edorado L. Battallia (1982)—Coffee County Circuit Court—Dr. Battallia was a practicing physician in Tullahoma, TN, and he along with Richard Morris, the Administrator of Harton Hospital in Tullahoma, TN, was charged with conspiracy to illegally dispense drugs primarily for the usage of the hospital administrator, Richard Morris. Although the charge may not seem like a major one, it sent undercurrents in the community due to the position of these individuals and, needless to say if convicted, Dr. Battallia's practice would be destroyed. Hon. William Russell from Shelbyville represented Dick Morris who was not only charged with this offense, but some others as well. Mr. Morris entered into a plea bargain arrangement in regard to his case which included a prison term. The conspiracy charges against my client went to trial by jury and resulted in an acquittal in a highly publicized proceeding. This case as well as the Holland murder trial (State vs. LeMay which I address in another question) were two of the probably ten most prominent cases in this county during the past forth years.*

Dr. Battallia and District Attorney Buck Ramsey, who prosecuted him, appeared

together in my behalf before this Nomination Commission on a prior application I made. (Both are now deceased).

(f) *Heintz vs Heintz (1984). Post-trial custody proceeding in regard to a 6 year old boy. As sole counsel, I represented the father in an extended proceeding which resulted in the removal of the child from the mother and transferred custody to the father. The mother was unable to control the child and felt the child needed psychiatric help and that is what the child psychiatrist from Vanderbilt said. However, the Court found what the child needed was a firm hand and some consistency from the father and changed custody. Under custody of the father, the boy overcame the lack of control that he experienced with his mother and his problems with ADD. He later graduated from high school and entered the Marines for 4 years. Then while still in the Marines, went to college as a Marine, graduated from college and is continuing his service as a Marine officer. He is married and has two children. On the surface a simple domestic case, but what the case says is our activities and our work affect people's lives. This boy's life was changed as a result of that case, and it was a positive change for his development.*

(g) *Hannah, Hivley and Simmons vs Amburgery (1985), Circuit Court of Coffee County and the Court of Appeals, Middle Section of Tennessee, #84-161-II. As sole counsel, I represented three neighbors in an action to require the removal of a completed garage on property of the Defendant. The Defendant had a very large nice house in a nice neighborhood, but it was close to the street. He applied for and obtained a permit to build a carport attached to the residence, but instead built a large brick three car detached garage out close to the street in violation of the zoning set back requirements for the City of Manchester. The City directed him not to proceed, but he did anyway. Following the completion of the structure, the City refused to take any action, so the only relief available was for these three (3) neighbors themselves to pursue the matter. The Trial Court awarded monetary damages to the neighbors for violation of the restrictions and the Defendant appealed contending that there was no authority to award damages. The Plaintiffs whom I represented contended it was appropriate to award damages if and only if the injunctive relief that was sought was not granted, but that what the neighbors really wanted and were entitled to was a removal of the garage. The Court of Appeals ordered the removal of the garage and in doing so, Judge Cantrell, in writing the opinion for the Court, stated that this was the first case in the State of Tennessee where a completed structure was ordered removed by the Courts.*

(h) *US vs. C & H Commercial Contracts, Inc. (1994)—United States District Court for the Eastern District of Tennessee, Chattanooga Division—One of the major criminal cases I have tried in recent years. My client, C & H Commercial Contractors, Inc., was charged with 27 counts of fraud in regard to a construction project at the Arnold Engineering Development Center at Arnold Air Force Base.*

The case involved an extended period of time and untold volumes of paperwork for a trial of approximately three weeks. The case involved a number of fraud counts connected with the submission of a claim against the government as well as fraud based on utilization of inferior materials. Two of the principals in the corporation were also charged. Jerry Summers of Chattanooga and Bill Pope of Chattanooga were associated to represent two co-defendants who were principals in the corporation and the engineer from Biloxi, Mississippi who helped prepare the claim for C & H Commercial Contractors, Inc. was also charged as a co-conspirator on the claim related counts of the indictment, and he was represented by attorney Kyle Hendrick of Chattanooga. A Biloxi procurement attorney , who had prepared the claim for C & H, was labeled in the indictment as an un-named co-conspirator. After approximately three weeks of trial, the jury returned a verdict of not guilty on all 27 counts, and the monetary claim was then pursued by C & H against the government, which claim the government then settled.

(i) *DCS vs Fred and Bonnie Bradley. (2002) Juvenile Court of Coffee County. As Court appointed counsel for Bonnie Bradley, I defended her in an action in Juvenile Court of Coffee County in a seemingly never ending case and a termination proceeding to terminate her parental rights of her 7 children, the two youngest of which were removed from her custody at birth straight from the hospital. It was a good example of governmental abuse of authority. It just seemed once the Department of Children's Services made up its mind that it wanted to remove these children and to terminate parental rights, no matter how hard the parents tried and what they did, it would never be satisfactory; and DCS was going to use its power and influence to get it done. Despite the continued efforts, I along with the attorney for Fred Bradley were successful in obtaining a ruling denying termination of parental rights by that Juvenile Court. I was appointed as counsel when the two youngest children were just born. I anticipate I would die or my practice would be closed before this case would end. Incidentally, after the Juvenile Court refused to terminate the parental rights after extended, extended proceedings, after the appeal period elapsed, DCS tried a new approach with the Juvenile Judge to terminate rights; and he advised his decision would not change. Next DCS filed a termination case in Circuit Court. These poor people have no money and barely have enough to survive on particularly with 7 kids. If it were not for appointed counsel in these cases to look after their interest, they would have no chance at justice. Termination was denied by the Court on all kids. After years of litigation and a long period of time away from their parents a settlement was reached which returned the oldest of the children to the parents and the parents, for the best interest of the younger children who really did not know them because of the proceeding, they surrendered for adoption.*

(j) *United States vs. Phyllis Craighead: (2002), United States District Court for the Eastern District of Tennessee, Chattanooga Division. Phyllis Craighead was the founder and President of a business known as Kids and Nurses which ultimately*

had facilities in Nashville, Memphis, Knoxville, Chattanooga and three locations in Florida. The businesses provided day services and treatment for the most fragile and most seriously impaired children. These services were mandated to be provided by the State under Medicaid requirements and were supposedly supplied then through the TennCare program in Tennessee. A large portion of this TennCare obligation was then handled under contract from the State by BlueCross BlueShield which in essence then administered the Medicaid funds for the State. Kids and Nurses was a unique facility with only possibly one like it in one other location in Tennessee and that was in Memphis.

Because of the costs of the services involved, BlueCross wanted to relieve itself of the contract with Kids and Nurses. There were detailed provisions in the contract for working out disagreements in resolving contract issues; however, rather than following the contract procedures for disputes, BlueCross' employees and representatives, on issues which they had differences with Kids and Nurses, reported Kids and Nurses to TBI as submitting fraudulent claims. The ever looming federal investigation of Medicaid funds and the slow walking of payment for services by BlueCross, literally destroyed and necessitated the sale of the business.

After five years of investigation, a 36 count indictment for fraud was issued against Phyllis Craighead who I then represented in a two week trial of those charges in Federal District Court of Chattanooga in April, 2002. The jury at the completion of the trial returned a not guilty verdict on all 36 counts. Subsequent to the acquittal in Federal Court, I have now filed on behalf of Phyllis Craighead a suit against BlueCross BlueShield in the Circuit Court of Wilson County titled Craighead vs. BlueCross BlueShield, Case No.: 12,289 for BlueCross' Malicious Prosecution and other related misconduct After extensive discovery and six (6) years of battling in the Circuit Court of Wilson County and being successful on withstanding all Summary Judgment Motions by BlueCross, and just before beginning of trial, BlueCross with the aid of the State Attorney General were successful in getting an Extraordinary Appeal to the Court of Appeals.

In the Court of Appeals the State Attorney General appealing as Amicus Curia contended that Ms. Craighead or anyone else was entitled to sue an insurance company, who was providing TennCare coverage, for Malicious Prosecution, would open the floodgates of suits and would discourage insurance companies from providing information on TennCare and Medicaid Fraud. Under the facts of the case, the wrongful conduct of BlueCross, which prompted the prosecution occurred in 1996. An immunity statute was passed in 2001, some 6 years after the wrongful conduct, which statute was not retroactive; however, the Middle Section Court of Appeals that Ms. Craighead's action against BlueCross was barred by statute passed 5 years after that conduct. In question # 40 in this application the question was posed to the applicants about whether or not the applicant would follow the law even if they disagreed with the law. Despite my

high respect for the Middle Section Court of Appeals, I believe their ruling in this case is an example of a court was worried about the effects of a decision that was consistent with the law and so in turn it twisted the law to make it apply to the facts when it really didn't. That should not have occurred.

Regretfully I could not get the Supreme Court to review it.

(k) *Terry Pennington vs. American City Bank and First National Bank of Manchester, (2003) Circuit Court for the Fourteenth Judicial District of Coffee County, Jury Trial. This was a suit based primarily on fraud brought on behalf of the plaintiff, Terry Pennington, against two banks each of which had issued loans dealing only with Terry Pennington's wife and had notarized a forged signature placing a lien on his residence. The case was tried several days before a jury and settled by the parties just before closing argument.*

(l) *Travis v. Lakewood Park v. Coffee County, (2004) Coffee Chancery No. 04-238. This is suit filed in Chancery Court of Coffee County by residents of Lakewood Park (a private development) against Lakewood Park in 2004 which later was amended and both parties, the residents and Lakewood Park sued Coffee County for back assessments on lots the County had by statutory necessity acquired at a tax sale because there were no other bidders. The trial judge for this case was a retired judge who was designed to fill in during the illness of Judge Rollins. He did an outstanding job in his study and realization of the law that the statutes regarding the process of collection of taxes necessitated the sale of the Lakewood lots and where there were no bidders or bids sufficient to cover the amount required by statute, the County was duty bound to acquire the property under statute and so long as that county proceeded under that statute as expeditiously and advantageously as possible under the circumstance, they would be immune from obligation for lot fees and things of that nature, because they were carrying out the statutory mandated process. However, if they failed to proceed expeditiously by the statute they would be liable. On most of the transactions the trial judge held that the County was immune, but on some of them where he felt they hadn't proceeding advantageously and expeditiously as possible, he found liability. Lakewood Park appealed to the Court of Appeals and the case was heard by the Western Section Court setting for the Middle Section. The Court ignored the tax collection statute and said it was strictly a matter of contract when the County bought the property at the tax sale, it owed the lot fees regardless of why they acquired it or that they required it out of necessity under statute. At that point I made an application to the Supreme Court and tried unsuccessfully to get the County Associations to file Amicus Curia, because it would potentially affect other counties, not just Coffee County. The county association declined to do so, not wanting to offend developments in their counties. The Supreme Court declined to review the case and now that the Court of Appeals Opinion has become final, the county attorneys and delinquent tax attorneys from all over the State are regretting that their counties didn't join and*

now those entities are trying to get some legislation passed to correct this dilemma.

(m) *Nguyen v. Lemons, (2005) Coffee Chancery No. 05-323. This case was a convoluted construction dispute between the owner and the contractor over breach of the building quality and performance and failure to meet the requirements of the plans. It was heavily litigated in Coffee Chancery Court, I represented the Nguyen's and Mr. Ed North, a fine young lawyer who did an outstanding job for his client, represented Mr. Lemons the contractor. After extensive trial, post-trial Motions, and ruling, the Honorable Judge Rollins set aside his prior ruling and ordered a re-trial, after which the parties reached an agreement.*

The substance and significance really of this case to me, in my professional belief, the Nguyen's who were fine people who were born in Vietnam and who escaped from Vietnam and came to the United States had worked and done well in this country and were building themselves a nice, fine home but they were foreigners and they could not speak as clearly as one who was raised here and I believe the builder felt that he could do just what he wanted and ignore his obligations because they could not do anything about it. They stood up for what they believed was right, got help and I worked with them to try to protect their interest in the matter and that is the pertinence of that case. They were disadvantaged and I believe the builder sensed that and just sought to take advantage of them.

(n) *City of Tullahoma v. Coffee County, (2006) Coffee Circuit No. 35-206. This is approximately a six (6) million dollar suit by the City of Tullahoma against Coffee County for a reimbursement of a claim portion of local option sales tax recovered over a period of approximately 25 years. The claim is mainly based on the wording of the Statute that requires when the funds are used by the County for school purposes that they be apportioned to the other school systems while at the same time not requiring similar division of funds going to the cities within a County. Not only involved in this case is a phenomenal amount of money between two governmental entities, but it deals with the Constitutional issue of whether or not that statutory scheme or requirement violates the equal protection clause of the Tennessee Constitution as interpreted in the Small Schools I decision of the Tennessee Supreme Court in that it serves to enhance the financial ability of the city schools over the rural schools? This case was settled while Summary Judgments on both sides were pending.*

(o) *Jewell Vandagriff v. George Vandagriff, (2007) Coffee Circuit No. 10,462. This original case was a divorce back in the 1050's if I recall correctly, but the action in which I was involved, the follow-up filing in 2007 wherein I represented Ms. Vandagriff who is elderly, had no funds, but she had taken care of the parties disabled son until his death. The action sought unsuccessfully to obtain alimony*

from the former spouse, but was successful in obtaining reimbursement of a major portion of the cost for the burial of the disabled child which the mother had cared for until his death. It was one of those cases that needed handling. I actually handled it on an hourly rate, but asked for no money up front and told my client that I would not charge anything unless we were successful and made a recovery for her.

(p) *State vs. LeMay: In 1977, I defended as appointed counsel a man by the name of Alan Eugene LeMay who, along with two other individuals, was tried for first degree murder and armed robbery of John Holland. At the trial level, my client was convicted of second degree murder and armed robbery receiving a total sentence of 70 years, 40 for the second degree murder and 30 for the armed robbery. The female defendant was convicted of second degree murder and armed robbery and received a total of 80 years and the other male defendant was convicted of first degree murder and armed robbery and received a total sentence of 110 years. I might add, I considered the trial results successful in that my client who was a burly construction worker and who, on the surface would look like the leader and the one that would get the most time, was convicted of second degree murder rather than first degree murder and got the lesser sentence of the three (3) defendants. Then on appeal, I was successful in overturning the armed robbery sentence to effectively reduce his sentence to 40 years rather than 70 years. Also in the case, we established some new law in regard to trying of multiple defendants and the utilization of pretrial statements of the other defendants even though the statements are redacted. I pursued the appointment case on behalf of the defendant through the Tennessee Supreme Court and also submitted a petition for Certiorari to the United States Supreme Court.*

(q) *Windsor vs. Harden et al: In 1980, I represented an Assistant United States Attorney in a suit against a newspaper for libel and slander and other torts and the United States Attorney for the Middle District of Tennessee for damages as a result of wrongfully and inappropriately falsifying his employment records to force his resignation. This case when ultimately concluded filled two file cabinet drawers. It was heard in the Circuit Court of Coffee County, the Federal District Court in Nashville, the State Court of Appeals, the Tennessee Supreme Court and three times in the Sixth Circuit Court of Appeals in Cincinnati and involved two petitions for certiorari to the United States Supreme Court. The important and legal premise from the case that was established by the Sixth Circuit Court of Appeals was that as a new principle of law, if conduct of this nature ever occurred again, it would be actionable against a US Attorney. The Justice Department sought to overturn this aspect of the decision of the Sixth Circuit Court of Appeals and sought an en banc hearing, but was unsuccessful.*

(r) *Freeze vs Home Federal Savings and Loan Association of Manchester 623 S.W.2d 109 (Tenn. Ct. App. 1981). During a period of increasing interest rates, I represented the Plaintiff developer who built homes, established a loan on them,*

rented them a year or two and then sold them. I was sole counsel on the case and the ruling of the trial court and the Court of Appeals in the case recognized that the lending company could be estopped from exercising acceleration clauses based on practice in dealing with the developer.

(s) *Huskey vs. State: 688 S.W.2d 417 (1985) and 743 S.W.2d 609 (1988). In relation to the above LeMay case, the time involved in the trial and the appeal of that case when added together in hours constituted almost three months work time. I was a sole practitioner when I handled that case and was paid a total of $500.00 for trying the case and should have received another $500.00 for the appeal, but didn't. While by comparison, the Court Reporter at state approved rates was paid $4,700.00 for merely preparing the transcript of the trial that I tried. I felt the case well demonstrated the inequity in the situation existing in the appointment of legal counsel. I took no action until Mr. LeMay's case was completely concluded, but then thereafter, I filed an action against the state in the Chancery Court of Davidson County for violation of my state and federal constitutional rights for the taking of my property and under the state constitution my "particular services" without just compensation. My desire and intent in pursuing this case was to demonstrate the inequity of the appointment system and to either prompt by court action the necessity of establishing fair compensation for appointed counsel or in the alternative, to pressure the state to establish a public defender system. The Tennessee Supreme Court dismissed the case saying that it had to be brought out of the criminal court where the action arose rather than as a suit against the state. I disagreed because I was not a party to the criminal action itself, but was counsel. In any event, to pursue the matter, I refiled the case in the Circuit Court of Coffee County where the criminal case was tried. The case again went to the Supreme Court. The Supreme Court in the second hearing on the matter refused to grant relief, and in all candor, I don't feel it was that good of an opinion that was issued; however, I do respectfully believe that it got their attention and thereafter, the Court, as a body and as individual members, made several public statements about the inequity of the current system and of the necessity of change. Shortly thereafter, the legislature raised the appointed fee rates a little, but more importantly, adopted a public defender system. These two cases were heard by the Tennessee Supreme Court in 1985 and 1988 respectively.*

(t) *Henley vs Henley. 1987 WL 25152 (Tenn. Ct. App. 1987). I was sole counsel for Appellant establishing principle that source of property is an appropriate factor in establishing property division.*

(u) *England vs England 1989 WL 3161 (Tenn. Ct. App. 1989). I was sole counsel for domestic Appellant. The case established that division of assets between spouses should be equitable—not equal and property division adjusted accordingly.*

(v) *Childress vs Bennett. 1989 WL 92150 (Tenn. Ct. App. 1989). I was sole counsel for Plaintiff-Appellant in this medical malpractice case, which reversed the trial court and held that under appropriate circumstances, the trial court must consider allowing testimony of an expert who is not from Tennessee or a continguous state.*

(w) *Matthews vs St. Paul Property and Liability. 845 S.W.2d 737 (Tenn. 1992). I was sole counsel for Plaintiff-Appellant in a workers' comp case which was pulled from panel consideration and addressed by the full Supreme Court. It established and recognized circumstances where Tennessee would have jurisdiction on a workers' comp claim of a worker who was a resident of Tennessee, but neither employed in Tennessee nor entered his contract in Tennessee.*

(x) *Ponder vs Manchester Housing Authority. 870 S.W.2d 282 (Tenn. 1994). I served as sole counsel for the Plaintiff-Appellant in a workers' comp case on behalf of Plaintiff's deceased husband. Supreme Court selected the case for review by the Court rather than allowing it to be heard by the workers' comp panel. The Court recognized and confirmed new standards for payment of lump sum as opposed to periodic payment and reversed Trial Judge who considered old criteria in determining lump sum entitlement.*

(y) *Millsaps vs Robertson-Vaughn Construction. 970 S.W.2d 477 (Tenn. Ct. App. 1997). As sole counsel, I represented Plaintiff-Appellant in suit against a contractor. Appellate decision overturned the Trial Court and held that the Trial Court is required to enforce arbitration award and ruling even though it disagrees with that decision.*

(z) *Joel D. Curry, et ux v. City of Hohenwald, Lewis Circuit No. 3560 (Court of Appeals 2008) This case involved a governmental tort liability action for negligence of indifference over a period of time by the City of Hohenwald to correct a dangerous condition that had been reported to them by, in fact, the very individual who got injured by the condition. After a bench trial in Circuit Court the trial judge found negligence equal on both sides and ruled for the Defendant. Mr. Curry, through Counsel, appealed to the Court of Appeals and upon review, the Court of Appeals for the middle section reversed the trial judge and found that negligence was 75%, 25%. An application by the City to appeal to the Supreme Court was denied and the case was ultimately back before the Circuit Court of Lewis County and ultimately for an awarding of damages. Even after their award of a low damage, the Judge refused to grant interest. Plaintiff contended that we were entitled to interest on what the judgment should have been from the date the trial court rendered its verdict. The Defendant recognized the entitlement even though the judge did not and paid interest to avoid an appeal. A check was finally received in mid 2008.*

My good friend and client got to see his recovery and the positive results of his

determination and continuing to pursue what he thought was right prior to his death in November of 2008. The significance of the case was to keep trying, trial court denies you your rights, you carry it up to another Court until you are heard, when it gets sent back, if again you do not get what you are entitled to, be prepared to go ahead as Mr. Curry would have gone back up to the Court of Appeals if necessary to collect the interest on that judgment.

(aa) *In re: Estate of Troy G. Blackburn, Chancery Court of Coffee County (2002), P.W. 02-104. An appeal to Court of Appeals, Middle Section of Tennessee which ruling was entered November 14, 2007 (no. M2006-01427-COA-R3-CV). Application to Appeal denied by the Supreme Court in 2008. This is an extremely intriguing will contest case. It involves a handwritten will executed by the testator on his deathbed the night before his death early the next morning and witnessed by two (2) individuals. The will left his whole estate to one (1) of his three (3) children. During the course of first trial the handwritten will turned up missing but since we knew that we had an exact copy we were proceeding with the trial until it developed that one of the jurors informed the Court that they had seen the proponent of the will put the will in his pocket. A non-suit was declared. Ultimately three (3) different jurors indicated that they saw the proponent do something with the will, although a different version.*

Motion for Summary Judgment was made by the proponent because all the requirements of the will were met by the proof; however that was denied by the trial judge since it had been ruled upon earlier by a special Judge who had recused himself on a Motion of bias. When the case went to trial a second time before the regular Judge, the opponents of the will were allowed to put on the testimony of the three (3) jurors of the prior trial who believed they saw the proponent of the will do something with it. Needless to say this did not set well with the trying jury. Their ultimate determination was "it is not a will" which in fact, is an issue of law rather than an issue of fact. On appeal it was sustained by the Appellate Court and Supreme Court denied review. The bottom line is, for some reason or other if the jury or Court does not like a litigant or does not like the results that will occur they will try to find a basis to rule against him. This further enhances the well recognized principle that "hard facts make bad law."

(bb) *Francis Oscar Roy, M.D. v. Tennessee Board of Medical Examiners, (2007) Davidson Chancery, currently pending before the Middle Section Court of Appeals and Case No. M2008-01636-COA-R3-CV. This case is a judicial review of administrative proceedings by the Tennessee Board of Medical Examiners who terminated the medical license of Dr. Roy and imposed a substantial fine upon him. Basis of the review is constitutional deprivation of due process. The proof of the Board's case was a video deposition of a medical expert about Dr. Roy's records and violation of standards. That deposition was taken by notice by Counsel for the Board in accordance with the Rules of Civil Procedure, however Counsel overlooked the fact that additional days notice is required when the*

deposition is out of County under the Rules. In fact, in this particular case Dr. Roy who was representing himself did not literally receive the notice because he was in Manchester and did not receive it until the afternoon of the day on which the deposition was to be taken in the morning in Knoxville. So in other words, he got the notice several hours after the deposition was taken. So not only did he not have Counsel but he could not even appear and ask any questions or participate at all. Although Dr. Roy objected to the utilization of that deposition several times, the Board ruled that Counsel had done all that was necessary by mailing notice in accordance of the rules; but what Counsel overlooked and what the Board did as well, that Counsel was not in compliance with the Rules because she did not allow the additional time as required by the Rules when it is out of County. Further, there was another aspect of the Rules that was not met but the bottom line was that there was not timely.

In proceeding in Chancery Court, the Chancellor held that there was not adequate notice and that in fact the notice was invalid which normally would end the review, however she went further to find that Dr. Roy had waived the untimely notice because he did not immediately notify opposing Counsel and when he did object to opposing Counsel he sent the objection to the hearing officer with a copy to Counsel.

This matter was appealed to the Court of Appeals. The significance of this case is found in the fact that an Administrative Board has such ultimate power over the livelihood of a professional. We, as trial lawyers, recognize that there is very little that judicial review will consider in reversing administrative proceedings, at times it almost seems like it's a rubber stamp; however I respectfully suggest that this is somewhat of a test case. Because in this case, we clearly have a violation of due process which is devastating the livelihood of this doctor and if judicial review will not correct this violation of due process, then we might as well consider judicial review of an administrative proceeding to be a rubber stamp. I certainly hoped the Appellate Court would step forward and correct the error of the lower Court and the Board of Medical Examiners. Regretfully it did not.

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.

For a period of approximately a year in the late 1970s I served as City Judge for the City of Manchester.

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

I have served under court appointment in the Juvenile Courts of Coffee County as guardian for juveniles involved in the process on a few occasions, but most often because of my litigation experience under court appointments I was normally appointed as counsel for one of the parties and in essence as a litigator.

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

In the words of the late Justice Joe Henry, "I am a trial lawyer." During the past 43 years, I have handled litigation at every level of court from the City court to the United States Supreme Court. For the most part, my clients have been poor individuals who generally couldn't afford the cost of litigation. I have handled in civil litigations everything from minor financial disputes to major matters that had huge monetary impact. In the criminal area I have handled everything from simple speeding tickets to First Degree Murder and major fraud prosecutions. I have the litigation experience at the trial level and likewise the corresponding experience at the appellate level. Perhaps the reason I have as much appellate experience as I do is that just because my client's case may be unsuccessful at the trial level doesn't keep me from proceeding further with the matter for I believe it's my job as a litigator to represent the client all the way, if need be, to obtain justice for him or her. I might say that I think that the broad experience at the trial level is extremely important for an appellate judge. I recognize that many have served as appellate judges and served well having come from government agencies or other legal backgrounds; however, I respectfully believe that it is an additional strong asset for an appellate judge to have that background of dealing with the clients and understanding the effect of trial and appellate decisions upon the parties to litigation. People that don't have that trial level experience miss that objective.

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

In 1996, 1998 and 2003 I submitted applications to the Nominating Commission for an

Appellate position – one in the Court of Criminal Appeals and two in the Court of Appeals. I was not presented as one of the three nominees to the Governor in either of those. I felt I was fully qualified and perhaps in many cases more qualified than those nominated, but I realize from having reviewed it over the years that those in the larger cities and those often coming from government agencies have the edge and so I understood it was a fact of reality.

I also made application in 2009 to the nominating commission to fill a Circuit Judge position in Coffee County. I was neither nominated by the commission to go to the Governor nor was I selected by the Governor. The absence of the appointment by the Governor did not bother me, because I anticipated full well ahead absent strong backing from certain political sources, Governor Bredesen would nominate the Honorable Vanessa Jackson who got the appointment as the Judge unless someone with great influence intervened.

However, what I found very difficult to accept in that proceeding was that I was not one of the three nominees from the commission. The basis of that contention is that of all those applying I was the senior attorney, had the broadest level of experience, both in trial and appellate court, of all applicants. In the realm of experience there was roughly three tiers. Candidly, there was myself at the top tier, and that may sound a bit arrogant, but I don't mean it that way, it's factually correct from an experience and background viewpoint. The next level was composed of the three who were nominated, and then the lower level was composed of the other applicants.

Although I knew the odds were not good at getting the appointment by the Governor, I was totally shocked that of the group I was not nominated and candidly it makes me in my own mind question the process. I don't mean this to be offensive, but I think a Judge or a judicial candidate needs to be honest and straightforward and that is what I always try to do in my practice and the way I would do as a judge. Candidly, I went to probably the only member of that commission that I knew well enough to contact and asked the member simply, why was I not one of the three considering the fact that my trial experience and my practice experience was greater than any of the other candidates. The commission member was a little reluctant to say anything, but basically ended up telling me that someone, some official or somebody, brought a letter to the commission and circulated it; that the letter was not called to my attention nor was I given an opportunity to explain it or respond to it and nobody asked me a question about it in the interview. I was advised by that member that this member contended to the commission that that letter should not be considered without me being given an opportunity to view it and respond, but the commission considered it anyway and that member believed based on that letter, I was not included.

I candidly don't think that was right. If there was something in that proceeding that was brought to the attention of the commission which it was going to consider that was adverse to me, it would not be appropriate to consider it if I was not given the opportunity to respond or know about it. To discount me based on something I was never even apprised of I think was wrong. A judge shouldn't decide a case against a party based on facts that are deprived to that party nor should a Nominating Commission fail to nominate a party based on facts that are hidden from the applicant.

Therefore it's obvious I have applied to this commission or its predecessors four times and got shot down each time. Why apply again with those circumstances? The answer is simple. My approach on becoming a judge that I've always desired to do, even at my late age, is still there. I treat that just like I do my clients and my litigation. I don't give up because it gets hard. I keep going. That's the reason I had as many appeals as I did. It's about time this committee put me on the list.

EDUCATION

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

(1) Middle Tennessee State University – 1963-1967

Bachelor of Science Degree 1967

Major: Political Science

Minors: English and History

Recognitions: Who's Who in American Universities and Colleges, Distinguished Military Graduate, Association of the United States Army Award, ROTC Scholarship, Leadership Award, Sigma Honor Society, President and Vice President Pre-Law Club, Vice President Church of Christ Group, Associated Student Body House of Representatives, Chairman of the Election Committee, Associated Student Body, Socratics, The Buchanan Players, President's Scholastic Award (awarded my senior year).

(2) Tulane University School of Law – 1967-70

New Orleans, Louisiana

Juris Doctor Degree – 1970

Awarded and maintained a full academic scholarship for all three years of legal education

PERSONAL INFORMATION

15. State your age and date of birth.

Age – 68; DOB 04-13-1945

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

I have lived in Tennessee all my life with the exception of the 3 years from 1967-1970 when I was attending law school during which time I lived in New Orleans, Louisiana; and during the initial 4 years of active duty with the Army during which I lived in Charlottesville, Virginia; Baltimore, Maryland; and Satahip, Thailand.

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

After release from active duty in 1974 I came to Manchester, Coffee County, Tennessee and have resided here ever since.

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

Coffee 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.

During the 4 years at MTSU I took the Reserve Officer Training Corp program and was commissioned as an officer after basic training in 1967. I got a Distinguished Military Graduate deferment to attend law school and upon my completion of law school and taking the Bar, in September of 1970 I went on active duty in the United States Army as a Captain in the Judge Advocate General's Corp. Because I was a ROTC scholarship recipient in college I had a 4 year commitment for active duty.

I took military justice training at the Judge Advocate General's school at the University of Virginia at Charlottesville, Virginia. I was thereafter assigned to Ft. Holobird in the southeastern section of Baltimore, Maryland and served in that command from December of 1970 through December of 1971. In January of 1972 I was assigned to the Headquarters of Usarsupthai in Sattahip, Thailand. After completion of my tour in Thailand I was assigned to the 101st Airborne Division at Ft. Campbell, Kentucky for a period of approximately 16 months ending in April of 1974.

While in the military I dealt with all manner of military and administrative legal questions and all aspects of the Military Justice criminal system. I served as both prosecutor and defense counsel and at Ft. Campbell I served as Chief of Military Justice of the 101st Airborne Division. The most memorable experiences I had in my 4 years of active duty was serving as defense counsel for Sgt. Joe D. Hensley, the case of which is referenced in the list of summary of cases. By the time this case ultimately came to trial I was stationed at Ft. Campbell, Kentucky and the Army sent me half way around the world via Pam Am 747 jet from Ft. Campbell to Bangkok, Thailand to defend Sgt. Hensley in the murder and multiple other related charges case. I knew at the time that for as long as I might practice I would probably never have a client that would pay my cost to send me half way around the world to defend a case.

During my service I was awarded the NDSM, ARCOM, VSM, ARCAM, VCM, ARCOM (with oak leaf cluster), ASR, ARCOM (with two oak leaf clusters), LOM.

Following my release from active duty I remained in the Reserves, was called up for a few months during Desert Shield/Desert Storm in 1990-91 and ultimately retired as a Lieutenant Colonel in 1995. Technically with a retiring officer from the Reserves you don't actually receive a discharge, but rather at the end of my service I was transferred from the Active Reserve to the Retired Reserve.

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

No

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

No

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

No

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.

Yes, on one occasion. The circumstances are as follows: this occurred approximately 2 years

ago as best I recall. My taxes are generally filed by my accountant before the October deadline of each year. On a preceding year I had larger than usual income and as a result owed a very sizable tax bill over and above what had been paid in to the IRS. After filing the return, I contacted the IRS and told them that my income fluctuated and I would make payments in chunks as money was received rather than trying to do a scheduled payment plan. I proceeded as funds came in and paid off the extra amount that was owed.

At that time my wife was working for the Social Security Administration as an attorney advisor in Nashville. A couple of months after I had made the last payment, paying off any arrearages that were due, the IRS issued a garnishment on my wife's payroll check. You can just imagine the domestic problem that caused at home. My wife was mad at me and I was livid at the IRS. I called the IRS and spent a great period of time trying to talk to somebody that could address the matter, but the IRS representative who I ultimately got to speak with indicated that their record showed that there was still a remaining payment due of $4,500.00. I assured the IRS representative that the payment had been made and the check had cleared my bank account, but they contended they had no record of it.

I therefore obtained a copy of the front and back of that check from my bank and faxed it to the IRS representative. The IRS representative then on further checking of their records after viewing my check, which they didn't appear to have a record of, they advised me that they found where I had paid the remaining amount due, but they couldn't figure out what they had done with it and therefore I couldn't be credited with it, even though I had paid it, until they could figure out what they'd done with it; and that the levy would continue until it was paid again or they could figure out what they had done with it.

As you might imagine, I was pretty livid at that point. I advised them in substance that it's one thing if they thought I hadn't paid it to take action by a levy to collect it, but when I verified I had paid it and they had received it and they had found it on their records where they had received it, what does not knowing what they did with it have to do with it at all? It would be like me charging a client a fee and then looking back on my records and not being able to figure out where I'd spent the fee, so I bill the client again and tell the client that he or she will have to pay it unless I can figure out what I spent it on.

The IRS representative assured me they would proceed expeditiously to try to figure out the situation, but that they couldn't stop the levy until they had figured it out. As a result they ran another levy on my wife's next check, which likewise didn't go well at home and after the second levy they finally, I guess, figured out what they had done with the money and lifted the levy and refunded the money from the two levies they had run.

So yes, once in my life I have had a levy or garnishment run against me and having had that done provides me a perfect example why I don't like dealing with the IRS either for my personal matters or in a representative capacity.

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.

(1) *Huskey vs. Insurance Agent Small Claims Court, New Orleans (Louisiana). While a Senior at law school I had a contractual agreement with an insurance agent to make referrals for a certain referral fee. The agent made an initial payment and then breached the contract and never paid me the rest that was due. I filed suit representing myself for the breach of the contract and litigated against the Defendant who had Counsel representing him. I won the case and celebrated the victory with a party for my friends.*

(2) *Huskey vs. Jones—(1979) Coffee Circuit. My wife and I were involved in an automobile accident in 1978 and sued for damages we sustained. Suit was filed in the Circuit Court of Coffee County and resulted in a verdict in favor of my wife and me, although regrettably small. I don't recall the date of the trial, but I think it was about 1979.*

(3) *Huskey vs. State—See cases of special note above under question Number 9.*

(4) *Huskey vs. Huskey—Coffee County Chancery Court 95-202. Regrettably my wife of 24 years and I divorced. It was filed in 1995 and the final decree entered in January of 1996.*

(5) *Baker vs. Huskey—Coffee Circuit No.: 28,516. On behalf of Mr. and Mrs. Baker, I filed a pharmaceutical malpractice case against Kmart based upon the erroneous filling of a prescription. The case had limited value because although there was clearly a pharmaceutical malpractice, there were very limited damages. We would have settled the litigation at any stage in the proceeding for $7,500.00*

The Kmart defendant was successful in obtaining a summary judgment based upon the running of the statute of limitations. There was a legal issue about whether or not the case was filed timely in light of differing interpretations of the notice to the plaintiffs. As a result of the granting of the summary judgment based on statute of limitations, I contacted Mr. and Mrs. Baker and advised them that they needed to consult with another attorney because there would be an issue of professional negligence on my part. They then secured an attorney in

Murfreesboro and filed the subject litigation for malpractice.

Interestingly enough the initial litigation was a pharmaceutical malpractice which was defended on the basis of, in essence, a legal malpractice in the delay of filing. This case was resolved.

(6) *C & H Commercial Contractors vs. Robert L. Huskey—In 1996, I secured the services of C & H Commercial Contractors to add a second story on my office building for the purpose of a residence. After completion of the structure in 1997, in substance the contractor billed me about twice the agreed price for that work and failed to pay some of the subcontractors for the work performed. I paid any outstanding subs that had claims which brought the amount of money that I had paid at that time to several thousand dollars more than the maximum, or worst case scenario, of what the construction was supposed to cost. C & H filed suit against me in March of 1997. The action was brought in the Circuit Court of Coffee County case number 28,265. An Order was entered nunc pro tunc for July 30, 2001 voluntarily dismissing the lawsuit. On July 9, 2002, Plaintiff refiled the action under case number 32,161. No timely process was issued, and the case has since been dismissed.*

(7) *Huskey v. Avery – Coffee Circuit No. 37031 – 2009. This case stemmed from an automobile accident in 2008. Avery backed out from parking spot across into the opposite lane of traffic striking my vehicle in the side and causing a neck injury. The case was settled.*

(8) *Huskey v. Huskey – Coffee Chancery No. 2012-CV-269 – 2012. This was an Irreconcilable Differences divorce between myself and Bethany Huskey.*

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

(1) Forest Mill Church of Christ

(2) Middle Tennessee Christian Foundation (member of the Board of Directors for approximately 25 years.

27. Have you ever belonged to any organization, association, club or society which limits its

membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.

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

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

(1) I belonged to the Rotary Club for a period from the mid 70s until approximately 1991, probably a period between 15 and 17 years. I was on the Board of Directors for several years and I was president of the Manchester Rotary for the Rotary year 1988-89. I probably stopped attending Rotary about 1991 or '92. At the time I was a member of Rotary it was a men only organization; however, that has changed since that time.

(2) Probably not applicable, but to be technically complete, I would add that during the years 1963-1967 while I was in college at MTSU, I worked summers and weekends at Lewis Insurance Agency in Tullahoma. The lady office manager of that entity was Sammie Lang, and she was extremely active in the Business and Professional Women's Club (BPW). During those years they had a number of periodic hat parties and in conducting those parties, I helped them with the arrangements, set up, lifting, moving, and you name it. During that period, because of that involvement they designated me as an honorary member of the Tullahoma BPW, so I guess technically I was, in part, a member of an organization during that time that was limited to only one sex, but I was of the opposite sex.

ACHIEVEMENTS

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

Tennessee Trial Lawyers Association (Now Tennessee Association for Justice)

American Trial Lawyers Association (Now American Association for Justice) I have been a member of AAJ at different times during the past 10 years, but don't recall the exact dates.

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

In 1978 I received the award of Citizen of the Year presented by the Manchester Kiwanas Club, an organization of which I was not a member. The award was given to me in recognition of my service to the City of Manchester as an alderman during which I had, in essence, as pro bono service while an alderman, filed suit against the City itself for Declaratory Judgment to stop the City from expending taxpayer money for what amounted to under the law as private development. The litigation was successful and saved the City and the taxpayers considerable money.

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

I wrote an article published in the Tennessee Bar Journal, the March, 2003 edition entitled "Don't pick our charities for us." I often write letters to the Editor of the local newspapers as well as the Tennessean. On occasions when because of their length, they have been published as guest editorials.

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.

N/A

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.

(a) City Alderman – 1976-1979

(b) Ran for Mayor in approximately 1979

(c) Ran for District Attorney General in 1982 for Judicial District including Coffee, Warren, Dekalb and Van Buren Counties.

(d) I was a 1990 candidate for Circuit Judge for Part II of the 14th Judicial District (Coffee County)

(e) 1998 – Candidate for Circuit Judge, Part I, for 14th Judicial District (Coffee County)

(f) Was an applicant to the Judicial Nominating Commission as reflected above in response to question 13.

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

No

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

See attached writing samples, each of which is totally my personal effort.

ESSAYS/PERSONAL STATEMENTS

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

I decided I wanted to be an attorney when I was approximately 13 years of age. I have never wavered in that desire through any levels of my education. That is what I wanted to be. At some point in the course of my education, I believe it focuses around the time I was in college taking Constitutional Law under Dr. Norman Parks, I determined that in my career as a lawyer I wanted at some point in time to be a Judge, because the judgeship symbolized the image of the justice system. It is upon the judges and their integrity that rests the credibility of the system.

As a result of hard work and good fortune and thankfully a full scholarship to Tulane University School of Law I was able to obtain a quality education in law and fulfill my career dream as a lawyer and I have had success in my practice over the 43 years as a lawyer.

Despite repeated attempts, as reflected by this application, I have yet to accomplish the career goal of judgeship. Just like in my professional duty as a lawyer, I don't give up on a client or a case because of difficulties; I keep plugging away. I do the same with my professional goal of becoming a judge. Having failed in past attempts hasn't stopped me from continuing to try.

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

To me as a practicing attorney of now 43 years, my perspective of equal justice under the law is as follows: In the course of my practice, my clientele has run the gamut. In the military, I represented officers, but most often lower grade enlisted men. In private practice, I've represented doctors, lawyers, teachers, homemakers, welders, electricians, pipefitters, teamsters,

carpenters, private businessmen, garbage collectors, policemen, firemen, mechanics, the unemployed and those are but a sample. Regardless of the field of endeavor and at some point some time or other I've represented them. I have represented men, women, Caucasians, blacks, Mexican, Indians, Italians, Canadians, and possibly other nationalities that do not presently come to mind. But what has been true and constant in the representation of each one of these is that regardless of their race, sex, financial status or field of endeavor is that I did the very best that I could to represent them completely in their case.

In summary, you do the best you can for every client, regardless of his or financial status or his or her ability to pay.

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 Middle Section Court of Appeals will handle the appeal of essentially every type of civil litigation arising under the courts of Tennessee as well as administrative authorities of the State, with the exception of Workers' Compensation.

As you would know, the Middle Section Court of Appeals is composed of 4 judges who sit in panels of 3 to hear appeals from State trial level courts of record as well as appeals from State administrative agencies.

As you can tell from the other information provided in this application, I have extensive trial experience in essentially all areas of practice. I understand from having dealt with it firsthand the effect of case decisions on the parties and as a sole practitioner I have conducted my practice of law while having to operate as a business manager at the same time. That is a different experience than one has working for a government agency or being in a large firm. Although I don't know who the other applicants for the position will be, I'm well satisfied that my credentials, background and broad experience will be competitive with anybody whose name could be presented. I respectfully believe I would be outspoken, direct and a leader on the court.

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

My primary participation with an organization is with my church. Also, I oftentimes participate in and contribute to fundraising events to help those in need.

Candidly, I don't see that there would be any need for any change in regard to my community activities in any aspect as a result of the appointment to the position of Judge of the Middle Section Court of Appeals. Obviously I would not engage in anything that would bring any discredit upon the court in any activities and, on the other hand, participation in charitable functions with people realizing I was a judge would be a credit to the judiciary.

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

All my life I've been a worker and a hard worker. I started working at age 13 and have had regular employment for the past 55 years. When I ran for Circuit Judge I used the Huskie dog as a logo for the campaign. Statements to the public in forums was "A Huskey is a work dog, not a show dog." Admittedly there is a natural flare to be a show dog as well, but the work dog is always the stabilizing force. My involvement in the legal field is obviously quite broad because I have dealt with and handled almost any type legal case that could or would be presented to the Court of Appeals for review. While most of my life has been in Tennessee, in Coffee County, either being Tullahoma where I was raised or Manchester where I've practiced, I have also lived in other locations including New Orleans; Louisiana, Baltimore, Maryland; and Sattahip, Thailand. In my service in the military as well as with many aspects of my practice I've had relations and involvement with people of many different cultures. My experience is broad and my legal work has been extensive. I've always been dedicated in my work as a practicing attorney and always put my wholehearted energies in representation of my clients. Due to the fact that I've always desired to become a judge and have continued to pursue the attempt to become a judge despite obvious setbacks with prior attempts, reflects that I am dedicated in what I'm attempting to accomplish and if selected to be a judge I'll put my whole self into it and be a credit to the court and to the judiciary in general, because it is so important to me to reach that goal.

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

I want to answer this question, but add a caveat. There is no question I will uphold the law, even if I disagree with the substance of the law. It's got to be a given; you can't properly practice law without doing that and you certainly couldn't be a judge without doing that. On the other hand, let me be quick to say that if something is the law and I believe it's wrong or should not be the law, while I would recognize it while it existed, I would extend my best efforts, in whatever capacity I was in, to change the law either by encouraging legislative action if that was the way or by appellate review and court decision on appeal, if appropriate, to see that what should be the law is the law. A lawyer or a judge must always comply with the law, but likewise if something is the law that you firmly believe should not be the law, your duty would also extend to try and see that that law was changed.

To give an example of same in my practice as an attorney, will be in relation to a judgeship. In my practice as an attorney which qualifies me to be a judge, when I was running for a Circuit Judge position back in the '90s, there were restrictions on what judicial candidates could say what their beliefs were about certain punishments, particularly the death penalty, and matters of that nature. While I don't recall the exact specifics of what arose, there was the question posed at a gathering about what the candidate's position was on such a matter. Another candidate who

was present acknowledged that the rules prohibit a judicial candidate from making such pronouncements, but stated that he felt the public should know those opinions and so he stated his opinion. My opinion just happened to coincide with that candidate's. I wanted to be able to state my position on the matter; I thought it would have been helpful to my campaign to do so and I would have been in agreement with the other candidate's position on the matter, but I did not state a position on it and relayed that those involved with the legal process must comply with the law and while I didn't agree with the law, I was duty bound to comply with it. If a person seeking a judgeship wouldn't comply the law while pursing that election if they didn't agree with those rules, then how could you expect that individual if they were elected as judge to comply with the laws if they didn't agree with them. The law applies to everybody across the board and must be respected.

REFERENCES

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

A. Benny Benjamin, Director of Alliance for Community Outreach, Inc., 115 W. Main Street, Manchester, TN 37355, (931) 728-1219

B. Honorable Gary C. Shockley (Shareholder-Baker Donelson Law Firm), 211 Commerce Street, Suite 800, Nashville, TN 37201, (615) 726-5704

C. Honorable Bethany G. Huskey, Advisor for Social Security Administration, [redacted]

D. David Pennington, Mayor of Coffee County, Coffee County Administrative Plaza, 1329 McArthur Street, Suite 1, Manchester, TN 37355, (931) 723-5100, [redacted]

E. Judd Matheny, State Representative, 301 6th Ave. N., Legislative Plz Ste 15, Nashville, TN 37243, (615) 741-7448, [redacted]

AFFIRMATION CONCERNING APPLICATION

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

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the [Court] (Middle Section) Court of Appeals of Tennessee, and if appointed by the Governor, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended questionnaire with the Administrative

Office of the Courts for distribution to the Commission members.

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

Dated: June 10, 2013.

Signature

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

TENNESSEE JUDICIAL NOMINATING COMMISSION
511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

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

WAIVER OF CONFIDENTIALITY

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

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

Robert L. Huskey
Type or Printed Name

Signature

6-10-13
Date

3504
BPR #

In this Issue — Intellectual Property Litigation: Learning the Fundamentals Through Song, Stage and Screen, Part II: Trademark ■ Humor: Lawyer Barbie loses her appeal

Tennessee Bar Journal

MARCH 2003 VOL. 39, NO. 3

ADA AND THE WORKPLACE

Recent Supreme Court rulings may expand defense opportunities

Courts need to follow the rule for certified interpreters

I would like to add another wish to that expressed by Chief Justice Drowota. "Rule 6 is for all lawyers" (*Tennessee Bar Journal*, Jan. 2003). The Chief Justice wished aloud, "If we could just get every lawyer in the state to read the rule... ." My wish is that we get every lawyer and judge to read Supreme Court Rule 42, implemented by order dated April 25, 2002, which deals with the standards for court interpreters. Rule 42 requires all courts to use "State certified court interpreters" unless the court makes a finding in open court "that diligent, good faith efforts to obtain the certified or registered interpreter, as the case may be, have been made and none has been found to be reasonably available." Rule 42, Section 3(c). Since this rule was implemented and since the Administrative Office of the Courts has come out with a list of State Certified Interpreters who have passed both written and oral exams in the target language and criminal background checks, I have personally witnessed courts continue to use non-credentialed 'interpreters" (I use the term loosely) even after being reminded of the new rule. I have seen "interpreters" who were former border patrol agents who knew enough Spanish to say "manos arriba" and little else. Cooks from the local Mexican restaurant, college kids, individuals who supplemented their interpreter duties with duties as bailbondsman and labor broker. One court continues to use a bilingual individual who has never even taken the required English language legal terminology exam and who claims to be certified on his business card when in fact he is not and who routinely speaks with defendants outside of the courtroom in direct violation of the ethical standards for interpreters (Rule 41). All this with the full knowledge of presiding judges, defense attorneys and prosecutors. I have been confronted mostly with outright hostility when I remind courts of Rule 42 and the requirement for "certified" interpreters. This is uncalled for. If we truly aim to achieve Access to Justice for all, then we need to ensure that the Supreme Court mandate for competent, professional, and ethical interpreters is followed.

"I have seen 'interpreters' who were former border patrol agents who knew enough Spanish to say 'manos arriba' and little else."

— Jerry Gonzalez, Nashville

'Don't pick our charities for us'

The article published in the January 2003 edition of the *Tennessee Bar Journal* (vol. 39, no. 1), entitled "Rule 6 is for all lawyers" necessitates a

(Continued on page 31)

LETTERS TO THE EDITOR are welcomed and considered for publication on the basis of timeliness, taste, clarity and space. They should be typed and include the author's name, address and phone number (for verification purposes). Please send your comments to 221 Fourth Ave. N., Suite 400, Nashville, TN 37219-2198; FAX (615) 297-8058; E-MAIL: srobertson@tnbar.org

Reeves

Author, author!

In the February issue of the Tennessee Bar Journal, *Pamela L. Reeves' article, "Working It Out: Mediation Advice for Employment Law Disputes," was inadvertently run without Reeves' picture or biographical information. The* Journal *regrets the omission. Here's what should've been included:*

Pamela L. Reeves is with the firm of Anderson, Reeves & Cooper PA, in Knoxville, where she focuses her practice on mediations, arbitrations and employment matters. Other partners in the new firm are Bruce Anderson and Rick Cooper. The partners are all Rule 31 mediators. Reeves is a past president of the Tennessee Bar Association and a graduate of the University of Tennessee College of Law.

PRESIDENT'S PERSPECTIVE

(Continued from page 3)

managing partners of major law firms around the state. The chief justice and speakers urged law firms to assist their lawyers to meet their professional responsibilities to provide pro bono services by encouragement from management and by written firm policies making it possible for lawyer members (including young lawyers) to render legal services to persons of limited means.

The second role of lawyers, as explained by Mayor Purcell, is as law reformers. In this category is the lawyer, legislator, or lobbyist who shapes the law through the statutes. It is noteworthy that at the national level, two-thirds of the Tennessee delegation are lawyers. Our delegation has supported legal services and recently assisted in keeping Tennessee's legal services programs from losing a major portion of its funding. At the state level, we also have lawyer legislators leading many of the most important activities and areas of progress in our state.

The law is also shaped and reformed by case decision. The trial lawyer serves the public by helping to develop the law where changes in technology or in business or in society itself demand it. When I think of lawyers in this role, I remember the great lawyers and judges who guided the civil rights movement through the courts in the 1950s, '60s, and '70s; and those lawyers who made the constitutional rights of fair trial and legal representation a reality for those accused of crimes.

Third, Purcell noted, lawyers serve the public as teachers. Who better than members of the bar to explain the basic legal and constitutional values of our state and nation? Judges and lawyers throughout the state are engaged in formal and informal teaching through speaking, writing, and educational activities. Civic responsibility and rights, constitutional liberties, and the Rule of Law are concepts that lawyers can make easier to understand and appreciate.

Mayor Purcell praised the efforts of the bar and pointed out that as a result, the level of justice has been transformed in this state in our lifetimes. "The change has been incredible — not in the last 100 years, but in the last decade — *right here in Tennessee.*"

While not all lawyers can serve full-time, all can serve. And when they serve, lawyers dispel the bad lawyer jokes, snide comments, and slander that our profession endures in the media, by uninformed citizens, and by self serving politicians. We can all be lawyers in public service, and when we are, we demonstrate the best of our profession.

LETTERS

(Continued from page 5)

response. The article was basically an interview with Chief Justice Drowota addressing the obligations for pro bono service under the new rule.

A response is warranted for two reasons. One, as an attorney in private practice in Tennessee for the past 28 years, I have expended a world of time in free or partially paid free legal services, some intended and some just because clients didn't pay. And to some degree I am a bit tired of hearing extended harangue about the obligation of practicing attorneys to provide free services. The bottom line is, in private practice for one reason or the other, we regularly provide considerable free or reduced fee services. Many times it is because I think a person needs my help, and I chose to help. Other times it may be a case that is a weak case and would be handled on a percentage and is a long shot, but I think it's the right thing to do, and I may represent someone for an extended period of time knowing the likelihood of making a fee is limited. I think such action is not limited to me, but is fairly common among the trial bar and particularly plaintiff's practitioners. Yet we are regularly told we are not doing enough, and we are generally told that by people who are drawing a salary rather than depending on a fee from individual cases to pay for their overhead and provide a living for their families.

The second reason I felt compelled to respond is that the article cited a case wherein an attorney claimed before the Supreme Court that the fee provided on a criminal appointment case was unconstitutional, and that attorney is me. The case was incorrectly labeled as *State vs. Huskey*, while it was appropriately *Huskey vs. State*; however, that designation may be part correct because when I argued the case in front of the Supreme Court, I was made to feel as though it was *State vs. Huskey*.

Appointment system is unconstitutional

Chief Justice Drowota merely references the case and brings out the point

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that Justice Harbison, who wrote one of the two opinions in the *Huskey* case, stated in substance that it was simply a lawyer's obligation that comes with his license to practice. But there is a lot more to it, and I would suggest to you that the appointment system is in fact unconstitutional. At the time of that case, we did not have the statewide public defender system. Attorneys in private practice such as myself spent a significant amount of practice time handling appointed cases, the fee for which would not nearly cover our overhead while we were handling the cases. I filed the suit against the state to either force the state under the Tennessee Constitution to pay just compensation for the services of private attorneys whose services were taken by court order or in the alternative, force the state to establish a public defender system. The case was ideal for that purpose. It was a first-degree murder case and involved, under my appointment, hours which totaled basically three solid months of work. The trial itself was two weeks in length. For my total of three months of service, which is one-fourth of a year's practice time, I was approved a fee of $500 for the trial level work and $500 for appellate level, but the state only paid me the $500 for the trial level and never paid the $500 appellate level until after I sued them. It figured out to about $1.30 an hour as I recall; my overhead as you might anticipate as a sole-practitioner was considerably more than $1.30 an hour. The court records reflect that the state paid the court reporter at state-approved rates, $4,700 to type the transcript of the case for which the state paid me $500 to try.

'Particular services' doesn't apply to lawyers?

Suit was filed under the Fifth Amendment to the U.S. Constitution and also under the Tennessee Constitution. The U.S. Constitution prevents a taking of one's property without just compensation. The Tennessee Constitution is much more on point. Article 1, Section 21 of the Tennessee Constitution prohibits the state not only taking of property, but of a citizen's "particular services," without just compensation. The Tennessee Supreme Court had in an earlier decision defined "particular services" as those services that required special skill and training and could not be performed by members of the general public. That sounds to me like a lawyer's services are "particular services."

"The court records reflect that the state paid the court reporter at state-approved rates, $4,700 to type the transcript of the case for which the state paid me $500 to try."

I would respectfully suggest that the Supreme Court was in error in the *Huskey* case. It simply was not ready to bite the bullet on that issue and certainly not for the benefit of lawyers who are not the most popular group. To the Supreme Court's credit however, it did right after that decision, in its report to the legislature strongly imploring them to take some action to correct the problem because the court couldn't continue to demand the services from the practicing bar at the level of the current practice. And shortly thereafter the public defender system was established.

Those who began practice since the establishing of the public defender system probably cannot appreciate the dilemma the bar faced under the former system. While we have received relief by the public defender system, the problem is now again arising in the area of Juvenile Court, particularly in the area of termination of parental rights cases or removal of custody wherein the courts have determined the parties are entitled to legal counsel. Generally two parents and a guardian ad litem are involved and so there are generally two or three or sometimes more lawyers appointed and these cases go on forever, sometimes until the kids are grown. I fear that as this area of practice expands, appointments associated therewith will become a similar burden on the practicing bar as did formerly the criminal appointments.

I do not wish this letter to be interpreted as opposing public service, but I think there is a big difference between voluntary pro bono work versus mandatory services directed by the state through the courts. The former rules in effect at the time of the *Huskey* case did not justify such mandatory service and even the current Rule 6, although stronger in that area, talks about voluntary service and points out that the rule is not mandatory. But even if the rule was mandatory, can a court rule trump a provision of the Constitution? Like I told the Supreme Court in oral argument when Justice Harbison advised that it was just my obligation as an attorney to provide free services, that I would gladly compare my charitable contributions with any member of the court, but I reserve the right to pick my own charities and not have them pick for me.

The Supreme Court held in the *Huskey* case that a lawyer's services are not particular services as contemplated by the Constitution. That provision of the Constitution is still there and the services of a lawyer like the services of a doctor or dentist, etc., *are particular services* requiring particular skill or training and that Constitutional provision doesn't go away. The law is what the highest court says it is until another court recognizes the error of the prior decision and changes it, as has happened many times in our legal history.

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LETTERS

(Continued from page 5)

Eureka! A solution to the TennCare and budget crises

If however, the Honorable Supreme Court still contends that lawyers' services like that of other professionals are not particular services, then *eureka*, I have, through the interpretation of the Supreme Court, found a solution to the state's TennCare and budget crises dilemma. The medical, pharmaceutical and dental professions require special training and education to perform their services just like lawyers, but if our Supreme Court does not consider them to be particular services under the Constitution, then our TennCare and in turn, our budget crisis can be solved the same way that the courts would solve our need to provide legal services to the poor. Merely appoint the doctors. Determine the number of people who are qualified for TennCare and assign so many of them to each general practitioner or specialist, and the same with hospitals. Health care will be provided the same way as providing legal care, on the back of the private practitioners. I realize that we have programs in which doctors provide services at a reduced rate under agreements with TennCare, etc; but that is an agreement, a voluntary contract. This would be just like the court appointment for legal services, an appointment and a token fee would be provided. It would be, if you will, the medical profession's "pro bono" service in appreciation for their license to practice.

If in fact that should happen, I have a feeling the medical profession will be knocking on the door of the Supreme Court begging them to reconsider their opinion in the case of *Huskey v. State*.

In closing, and to some extent to cover my head, let me make it clear; I respect the Supreme Court and have the greatest respect for Chief Justice Drowota, but as a citizen and as a practicing attorney, I reserve the right to protect my constitutional rights as well as those of my clients. On behalf of myself and those members of the bar, how few they may be, who agree with me, we provide free services. We do it more often than you realize, but let us pick our own charities, don't you pick them for us.

— *Robert L. Huskey, Manchester*

Postscript to 'The Curious Meaning of Words'

Title attorneys are picky — that's their job.

Despite my best efforts to draft a perfect "inclusion clause" in a will to bring real property into a probate estate, I'm told that the clause is improved by adding four words. [See December 2002 *Tennessee Bar Journal*, "Vesting of Title in Probate Estate – The Curious Meaning of Words," by Dan Holbrook.] Specifically, instead of including in the probate estate "any interests in real property," the form should reference "*all real property and* any interests in real property" or, more abbreviated, "all real property and any interests therein."

As an estate attorney, I thought one couldn't merely own real property — one had to own an interest, such as fee simple. *Ipso jure*, the term "any interests" includes all real property. Well, yes, but since *Tenn. Code Ann.* §31-2-105 refers to "real property," and not to the interests therein, the "inclusion clause" is more accurate and complete in the eyes of title attorneys if it parrots the statute more closely. But retain the reference to "any interests" to ensure inclusion of all types of interests other than fee simple.

Curiouser and curiouser.

— *Dan Holbrook*

C'mon, send it in!

The *Tennessee Bar Journal* is always looking for good articles that would be of interest to Tennessee lawyers, so go ahead and submit that story you've been working on.

Here's how: Electronic submissions are preferred. Articles should be no longer than 20 pages, double-spaced (about 5,000 words), with notes at the end.

Send your submission to Suzanne Robertson, editor, *Tennessee Bar Journal*, 221 Fourth Ave., N., Nashville, TN 37219 or via email to srobertson@tnbar.org. Articles will then be reviewed by a five-member editorial board. *We look forward to hearing from you.*

Tennessee Bar Journal
The legal magazine for Tennessee attorneys

IN THE CHANCERY COURT FOR THE FOURTEENTH JUDICIAL DISTRICT AT MANCHESTER, COFFEE COUNTY, TENNESSEE

DOYLE FORD and wife, BARBARA FORD, Plaintiffs, vs. WILLIAM R. (BILL) THOMA, Defendant. and ANNETTE RENE' POWERS, Plaintiff/Intervenor, vs. DOYLE FORD and wife, BARBARA FORD, and WILLIAM R. (BILL) THOMA, Defendants of Intervening Petition.	)	Civil Action No.: 10-256

PLAINTIFFS' POST-TRIAL WRITTEN ARGUMENT

COMES NOW the plaintiffs, by and through counsel, and pursuant to the procedures directed by the Court, do hereby submit their initial post-trial argument in the subject case.

At the conclusion of the proceedings the Court announced to the parties his initial inclinations about the law on the matter along with the concerns he had about the appropriate

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application of same to the facts. The primary focus thereof were types of easements and how they are created.

With all due respect to the Court, I believe perchance as a result of the pre-trial brief filed by counsel for Mr. Thoma and the shotgun approach that plaintiffs' counsel utilized in bringing in alternate theories may have misdirected the focus of the primary basis of the litigation and the equities that apply in this case. Alternate backup theories of means to create an easement are applicable as such, particularly easement by estoppel; however, the real basis and equity of the lawsuit that may be getting lost in the legal technicalities is that proof shows that it was the intention of Mr. Jack Thoma that the road that he had laid out and so depicted by his chosen surveyor, Richard Raper, was intended all along by him to service all of the properties developed off of the Thoma farm. In its truest form, this suit is one to reform the ultimate instrument, the deed itself, to coincide with the agreement and intention of the parties and the overall transaction which included the road which is manifest by the requirement of the lady closing the transaction to get a signature on the plat which depicted the piece of property sold and the road adjacent that serviced it.

The thing I have always appreciated about the Court is that although the Court may state what it understands the situation to be under the law applicable, the Court recognizes that our job as lawyers and advocates is to point out why the initial thinking of the Court may not be correct as to a particular issue; and I respectfully believe that's a situation with which we are faced with from my review of the Court's comments following the hearing of the matter. Of course that may be a misinterpretation on my part, but it seems as though the Court was saying we can't just by equity and fairness create an easement if we don't have legal technicalities in place. In part, as a general principle, I agree with the Court, as far as creating a certain type of specific

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easements, but for the purpose of obtaining for Mr. and Mrs. Ford what they believed they were getting and what the proof showed Mr. Jack Thoma intended them to have, I believe those specific technical requirements are misplaced. It is an equitable issue. The reformation of a deed, trust or other instrument is specifically recognized in our law and is an equitable relief historically available through the Chancery Court and not available under the law in the technical sense of the law.

I realize that down through the years many of the so-called leaders of the law have fought to eliminate the Chancery Court as a separate and distinct Court as it was established under the Constitution adopted from the English Court of Equity. Before England had a Court of Chancery or a Court of Equity, it had a law Court, but it was the recognition that sometimes the technicality of the law is not sufficient to do justice that prompted the establishment of an Equity or Chancery Court which carried over into this country and into the law of the State of Tennessee.

Senior Chancellor Stewart, and by that of course I'm referring to Chancellor L. F. Stewart, who is now deceased, said to me many times that the most effective means of undermining the Chancery Court and ultimately eliminating it was the adoption in some districts of a combination of the Courts whereby a Judge, generally a Circuit Judge, served as both Circuit Judge and Chancellor or sometimes referred to as law and equity judges. When Chancellor Stewart made those comments to me, Coffee County still had the true division of the Courts—Judge Gerald L. Ewell, Sr. was Circuit Judge and he was a true Circuit Judge and L. F. Stewart was a Chancellor, and he was a true Chancellor. As Chancellor Stewart indicated it's unfair when a law calls for the two (2) courts that have distinct purposes to put both hats on one judicial officer and ask him or her to in one case be a Judge and in the other case be a Chancellor. The

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resulting loss to our system by such an arrangement is that the objective of the Chancery Court is undermined by the technicality of the law court.

Regrettably in our district, Coffee County, when we lost by redistricting the services of Chancellor Stewart in 1990 and we needed another judicial officer when primarily for the purpose of avoiding judge shopping, a decision was made by someone, I guess the legislature ultimately, to make the new position, now designated as Part II, also a Circuit Judge and have two (2) Circuit Judges serve both as Circuit Judge and Chancellor. That is certainly not the Court's fault, because that mistake was made before you started practicing and it's an unfair burden to place upon Your Honor and Judge Jackson to be two (2) entities. But we still have separate Chancery and Circuit cases—cases of different nature filed in different courts of different subject matter jurisdiction, and thus that burden is placed upon the two (2) of you.

A year or so back, Judge Lee when he was filling in for Your Honor and Judge Rollins during Judge Rollins illness and your absence for military service, commented in Chambers about the distinction saying that he was a law Judge and that where on the other hand he considered Judge Rollins more of an equity judge. In addressing the distinction between the courts and his serving during that period in handling the cases in both Chancery and Circuit, he advised that a lot of times he would be reviewing a case and he'd have to back up and look at the heading and check to see whether he was trying a law case or an equity case to determine which hat he must wear in evaluating the matter. I respectfully request the Court to take off your hat of Circuit Judge and put on solely the hat of Chancellor for this is a case filed in Chancery of a subject that is inherently and traditionally of Chancery jurisdiction.

With the foregoing being said, I would now like to focus upon the law and purpose of same relating to reformation of instruments and in this case, reformation of a deed.

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(REFORMATION OF INSTRUMENTS)

Reformation is an equitable process by which the Court corrects a mistake in writing so that it fully and accurately reflects the agreement of the parties. Engineering Handling Systems v. Republic Buildings Corp., 579 F. Supp. 1267 (W.D. Tenn. 1984) Reformation contemplates the rewriting of the contract to reflect the actual intent of both parties at the time of contracting. Rolane Sportswear, Inc. v. U.S. Fid. & Guar. Co., 407 F.2d 1091 (6th Cir. 1969). When an instrument is drawn and executed, which professes or is intended to carry into execution an agreement, whether in writing or by parol, previously entered into, but which by mistake of the draftsman, either as to fact or law, does not fulfill or which violates the manifest intention of the parties to the agreement, equity will correct the mistake so as to produce a conformity of the instrument to the agreement. Reformation of an instrument will accomplish what was intended by the parties without putting either party at an unfair advantage. Vakil v. Idnani, 748 S.W. 2d 196 (Tenn. Ct. App. 1987) There must have been an antecedent agreement that was not incorporated in the written instrument to be reformed and that a mistake or deletion was made in the integration of the formal contract, which results in an inconsistency between the final document and the intent of the parties.

In determining whether a mutual mistake exists, the Court will take into consideration the surrounding circumstances and any factors which tend to shed a light on the parties intentions. City of Memphis Ex. Rel., State v. Moore, 818 S.W. 2d 13 (Tenn. Ct. App. 1991)

Although some cases may be cited denying the right to reform an instrument to include land omitted by a mutual mistake because of the Statute of Frauds, it is almost a universal rule that a deed, mortgage or contract for sale of land may be reformed to include land omitted by the mutual mistake of the parties. First National Bank v. Ashby, 2 Tenn. App. 666 (1925). There is

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really no distinction between reforming a deed to include an easement or right-of-way that was omitted than there is in reforming a deed to include an additional description of land that was omitted. If, by mistake, a writing contains less of more, or something different from the intention of the parties, and this is made to appear by clear and satisfactory proof, a Court of Equity will reform the writing so as to make it conform to what the parties intended. Wright v. Market Bank, 60 S.W. 623 (Tenn. Ch. App. 1900) In a case where the vender by mistake conveys to the purchaser a lot of a different number from the one actually sold to him, the jurisdiction of a Court of Equity to reform the deed so as to make it embrace the lot actually sold, is clear and undisputed. Nor does the Statute of Frauds in such a case, intervene to bar the relief sought. Johnson v. Johnson, 67 Tenn. (8 Baxt.) 261 (1874)

Moreover, where the grantors furnish the description to be incorporated in the deed, but the deed did not include all the property which the grantors intended to convey and the grantee intended to acquire, and neither party discovered the error until some time after the sale had been completed, the grantee was entitled to a reformation of the deed on the ground of mutual mistake. McMinnville v. Rhea, 44 Tenn. App. 612, 316 S.W. 2d 46 (1958)

(REFORMATION EVEN WHERE LANGUAGE IS DELIBERATE)

Reformation of a deed may be granted, although the parties deliberately and knowingly used the words subsequently found inadequate to express their intention, if it transpires that the parties were honestly mistaken as to the legal effect of the instrument, by way of exception to the general rule denying relief from a mistake of law. Sands v. Hickman, 3 Tenn. Civ. App. (Higgins) 280 (1912). Further, reformation of a deed may be granted although the parties deliberately and intentionally used the words therein contained where the language is that of the

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draftsman and does not express the intention of the parties because of the draftsman's mistake as to its legal effect, by way of exception to the general rule denying relief from a mistake of law. Sands v. Hickman, 3 Tenn. Civ. App. (Higgins) 280 (1912). Moreover, where an instrument does not express the intention of the parties, due to a mistake of the draftsman as to the legal effect of the instrument as written, and the complainant (now plaintiff) was mislead because of his confidence in the draftsman, the instrument may be reformed because of the misplaced confidence by way of exception to the general rule denying relief from ignorance or mistake of law. Sands v. Hickman, 3 Tenn. Civ. App. (Higgins) 280 (1912).

(COURTS OF EQUITY AND REFORMATION)

A Court of Equity has the power to reform a deed. Christian v. John, 111 Tenn. 1992, 76 S.W. 906 (1903). Where the language of the deed was insufficient to express the real contract, it would be reformed. New River Lumber Company v. Blue Ridge Lumber Company, 146 Tenn. 181, 240 S.W. 763 (1921). Courts of Equity have jurisdiction to correct mistakes in deeds, or other instruments, or to reform them when they do not carry out the intention of the parties. McLain v. State, 59 Tenn. App. 529, 442 S.W. 2d 637 (1968). Moreover, in the reformation of deeds or other instruments for fraud, accident, mistake, or other valid cause, the jurisdiction of the Chancery Court founded upon the administration of what is called a "Protective or Preventative Justice," is unembarrassed, and its remedies complete. Parrott v. Parrot, 48 Tenn. (1 Heisk.) 681 (1870).

A Court of law cannot, upon an averment of fraud or mistake by him who sets up a deed and seeks to give it effect, correct the deed or give it effect as corrected. To achieve such a purpose, he must resort to a Court of Chancery. Wood v. Goodrich, 17 Tenn. (9 Yer.) 266

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(1836). The lack of a remedy at law to reform an instrument for a mutual mistake gives equity jurisdiction. Tennessee Hoop Company v. Templeton, 151 Tenn. 375, 270 S.W. 73 (1925). There is no reformation where the action is at law. Dallas Glass of Hendersonville, Inc. v. Bituminous Fire and Marine Company, 544 S.W. 2d 351 (Tenn. 1976).

The right to bring a suit for reformation of an instrument does unquestionably accrue when the instrument fails to embody the agreement and intention of the parties, just as the right to recovery damages for Breach of Contract accrues just as soon as the contract is broken. First National Bank v. Ashby, 2 Tenn. App. 666 (1925). An action for reformation of an instrument is controlled as to the Statute of Limitations by T.C.A. § 28-3-110 and is a 10-year Statute of Limitation. Barnes v. Barnes, 157 Tenn. 332, 8 S.W. 2d 481 (1928).

(EVIDENCE FOR REFORMATION)

A Court of Equity will reform a written contract of any grade or dignity, whether sealed or unsealed, upon parol evidence, when fraud or mistake or accident has intervened to defeat the intention of the parties. Mayberry v. Nichol, 39 S.W. 881 (Tenn. Ch. App. 1896).

It is a general principle alike applicable at law and in equity, that a deed must be held to contain the true and full contract of the parties and parol cannot be heard to change or reform it; but the general rule does not apply in cases of fraud or mistake in the execution of the deed. It is not easy to reconcile this doctrine to common-law rule, which excludes all parol evidence to vary or control written contracts, and that it is liable to abuse is obvious. However, where the terms and stipulations are inserted, or omitted, by fraud or mistake, greater frauds and injustice would be perpetrated by closing the door against any relief than the rule is designed to prevent. Cromwell v. Winchester, 39 Tenn. (2 Head) 289 (1859).

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Parol evidence is admissible in trying the issue of reformation. Prudential Insurance Company v. Strickland, 187 F. 2nd 67 (6th Circuit 1951). If the complainant is entitled to have the deed or contract of sale reformed by a decree of the Court of Equity, the decree of reformation may properly be granted on oral evidence. Marron v. Scarbrough, 44 Tenn. App. 414, 314 S.W. 2d 165 (1958). The rule is, to authorize reformation of written contracts, the evidence must be clear, exact and satisfactory that it does not express the intention of the parties, and also as to what they intended to express. Greer v. Fargason Grocer Company, 168 Tenn. 242, 77 S.W. 2d 443 (1935). The mistakes alleged must be made manifest by proof, and established beyond reasonable controversy. The presumption is always in favor of the writing and must be effectually rebutted by the evidence of an accident or mistake. Mayberry v.Nichol, 39 S.W. 81 (Tenn. Ch. App. 1896).

(THOMA – FORD TRANSACTION)

To evaluate the matter and determine whether or not the ultimate instrument that was executed being the Form warranty deed prepared by Richard A. Northcutt of Metropolitan Escrow actually embodies the intention and agreement of the parties, we need to look at the various documents and instruments utilized in securing the agreement to establish and confirm the intentions of the parties, particularly that of Mr. Jack Thoma. If Mr. Thoma were alive, we could just ask him. If Mr. Thoma were alive we wouldn't be up here, but since he is no longer living we can look and glean what his intent was by what he did and what he said and what documents he utilized in securing the transaction in addition to the deed itself (Exhibit 7), which was actually drawn by somebody who worked for the closing company that handled the closing, but wasn't the one handling the closing.

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Some of the exhibits that were utilized will help depict what the intent of the parties were and some of them will not be of any benefit at all. Exhibit 1 in this case is the ad from First Choice Realty. Although relevant in the sequence of events, it really doesn't in and of itself offer any information other than the fact that it was the desire of Mr. Thoma to sell a tract of land which ultimately was enlarged and sold to Mr. and Mrs. Ford.

Exhibit 2, however, is very enlightening. If the Court will note Exhibit 2 was prepared by Mr. Thoma's surveyor in April of 2002 which was two (2) years before a tract containing a little bit more land or 10.02 acres was sold to the Fords. Exhibit 2 reflects the land to be sold before the addition of enough land to make it over ten (10) acres. Exhibit 2 reflects some significant aspects about his intention. Basically, by Exhibit 2, prepared solely at the behest of Mr. Thoma, we have his farmland divided into three (3) tracts, all of which abutted on either the side or the end of a roadway which he had his surveyor depict and lay out on the plat.

Although what I referenced is three (3) individual tracts of land depicted in that plat, there is actually a fourth segment or section of land which is laid out as being a separate tract that apparently doesn't belong to any of the three (3) tracts. We have the 9.19 acres which was ultimately purchased by Mr. and Mrs. Ford after it was enlarged a little; we have the 25.06 acres of land which ultimately ended in the ownership of Rene' Powers; and we have the remaining Thoma property, which the amount of acreage is not reflected thereon, it's just the remaining property and then the fourth depicted portion is a tract of land labeled as a roadway, and I note the usage of the word "roadway" as opposed to easement, right-of-way, license area, passage way or anything of that nature or as being a portion of his remaining land. But rather a specific amount, 2.53 acres, is set out as a roadway and it connects the other three (3) depicted properties – the remaining Thoma land, the 9.19 acre tract and 25.06 acre tract.

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Not only does the plat define specifically how much land is in that roadway, but it depicts the end of that roadway as being within the northern boundary of the remaining Thoma property. It in essence ends at the beginning of the "remaining Thoma property". If that area that is depicted as roadway and depicted as containing 2.53 acres was intended merely to be a portion of and remain with the "remaining Thoma property" then two (2) things should have been different on the plat—first there would have been no reason to define the amount of acreage in a strip of land that's only part of a tract that's not intended to be divided from it. Or in other words, the acreage inside the roadway would be totally irrelevant because it would just be part of another tract, which tract would have a total acreage amount.

Secondly, if it was intended to remain part of the "remaining Thoma property" it would not have an end or termination in the northern boundary of the "remaining Thoma property" and it would not have a line between it and the "remaining Thoma property". In other words, there would be a roughly 50.63 feet gap in that line that runs across the northern boundary of the remaining Thoma property. In other words, there would be no dividing line between what's marked as roadway and the remaining Thoma tract; it would be an open gap with no line. The most logical interpretation of this plat as drawn by Mr. Thoma's surveyor is that the property was being divided into three (3) tracts, all serviced by the roadway that divides the two (2) northernmost tracts and ends at the beginning of the third tract labeled "remaining Thoma property".

Exhibit 3 although not as enlightening as Exhibit 2 on the pertinent issue, is consistent therewith and as the Court will recall is an instrument that was provided to the Fords about the same time they were given Exhibit 2. Exhibit 3 reflects the deed restrictions that were placed in the Fords' deed when they purchased the property and got a deed and also confirms the intention

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of Mr. Thoma, like as does Exhibit 2, that he intended to divide his farm into three (3) tracts, selling the two (2) northernmost tracts and keeping the back tract or "remaining Thoma property" at least for a period of time.

Exhibit 4 is a form contract used by real estate people who put together an agreement. Exhibit 5 goes with it and if you'll compare the numbers it's the responsive information to the contract proposal and is signed by the three (3) parties to the transaction.

Next we get to Exhibit 6 and here again is a document that is like Exhibit 2 very helpful, indicative of the grantor's intent and consistent with the implications of Exhibit 2. The difference between Exhibit 2 and Exhibit 6 and the need for Exhibit 6 is that the Fords needed more than 9.19 acres, they needed at least ten (10) acres; and so upon that information, Mr. Thoma had an additional platting made to increase the size of the tract to be sold to the Fords from 9.19 acres to 10.02 acres by extending the property southward consistent with the lines already established into an area an additional 154.43 feet beyond the roadway on Exhibit 6.

It would appear that the surveyor and in turn Mr. Thoma deleted the division between the 25.06 acre tract and the remaining Thoma property and merely depicted what was necessary for the transaction being had, that being the sale of a 10.02-acre tract to Mr. and Mrs. Ford and thus providing a plat of the tract and the roadway which serviced it. Here again, as in Exhibit 2, the roadway was depicted as a roadway containing 2.53 acres. As the Court will note, on the southern end of the roadway it is divided off from any adjacent property with a surveyed line, a call and a length. Here again, if this platted, depicted roadway was not intended to be a road and not intended to service the Ford property, then there would have been no more need to include the roadway on this plat than there was to include the breakdown of the remaining Thoma property from the 25.06 acre tract which ultimately became the property of Rene' Powers.

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In essence, all that would have been needed would have been the platted description of the 10.02 acres that was the land that was to be sold to Mr. and Mrs. Ford. One would wonder why that detailed roadway was included, yet the lines dividing the 25.06 acres from the remaining Thoma property were deleted. The logical interpretation would be that that breakdown between the remaining Thoma property and the 25.06 acre tract ultimately sold to Rene' Powers were not needed. What was included on this plat, Exhibit 6, was what was needed for the transaction; that being the property actually being conveyed to the Fords containing 10.02 acres and the depiction of the roadway which was going to service the Ford property. Here again, in the depiction of the plat prepared at the behest of Mr. Thoma reflects the roadway which has a beginning, has an end and is divided off from all other property of the Thoma farm and it contains 2.53 acres. Here again, just like in Exhibit 2, it does not open into the remaining property, but is divided off as an entity in and of itself; in essence, a roadway.

As we know by Exhibit 33, which is the stipulation of expected testimony, that this plat depicting the 10.02 acres and the roadway of 2.53 acres was part of the closing of the sale transaction and a copy was provided to the Fords at the sale according to the stipulated testimony of Rose Mines who handled the closing. She really didn't remember much about the transaction other than she remembered specifically that plat and that she in handling the closing transaction delivered a copy of Mr. Ford and Ms. Flippen and required one of them to sign confirming the receipt of same. Hence the survey depicting the roadway was as much a part of the closing as the deed itself.

This seems to be a good point in the depiction of the case to indicate that if the description of the property set out in Exhibit 7, or in essence the Warranty Deed, was inconsistent with the 10.02 acres depicted in the plat, Exhibit 6, I would respectfully suggest to

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the Court that the case law cited above and law of Tennessee would authorize a Court of Equity to Reform that deed to be consistent with the plat. By the same token, the failure of the drafter of the deed to include the utilization of that roadway in the deed when it was intended by the parties that Mr. and Mrs. Ford have use of that roadway, then that too is subject to reformation just as if part of the acreage had been left out. Exhibit 8 is a closing document merely dealing with the figures and adds no light on the intent of the parties other than to complete a sale and purchase transaction. That pretty well covers discussion of the Exhibits that were prepared or utilized up through the closing, which would be the ones that would have bearing upon Mr. Thoma's intent.

(DISCUSSION ABOUT ROAD)

I don't have a transcript of the trial testimony itself, but I remember it being consistent with what was testified to in Mr. Ford's discovery deposition taken by Mr. Nichols on August 1, 2011 and Mr. Nichols cited from that deposition in his pre-trial brief. I'll refer to the same area of discussion that is beginning on page 17, line 9, and Mr. Ford was responding to an ongoing question to describe basically the process by which he came to own the property and beginning on page 17 is when the road is discussed by Mr. Ford and it is as follows:

> And my reason for that was, I didn't have any equipment to tell me exactly where the – I knew the road had fenceposts where – every turn there was a fencepost telling you where the road was located, so – and he told me that the road had been – he said, it's dedicated as a road, and if you build it to county specs, the county will take it over and maintain it. And I told him, I said, Mr. Thoma, I can't build a road a half mile long with county specs, because it's just too expensive. I said, I couldn't do that.
>
> And he said, okay, I don't care if you even build a road or not, but that's all that piece of property can be used for is a road. So you can't plant nothing on it. You can't build nothing on it, but, he said, if you want to run on it as dirt, you can. And I said, no, I was raised on a dirt road, so I'm going to go a step up and I'm going to make it gravel. He said, that's fine, that's not a problem. He said,

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and you're going to have to maintain it. And I said, well, that's not a problem either.

So we bought the property and I did not know that it was a private road. When he said he had dedicated that as a road, I just assumed that he had dedicated it to the county, because I knew it would be a county road if it ever became a pubic road.

But when – I did not know that it was a private road until Rene' Powers come out there and she built a house that's – it's a big house, and I think it's somewhere between 10 and 11,000 square feet, and it's over a million dollar home, piece of property. Of course, mine is somewhere in the neighborhood of $300,000 to $350,000, so there is a whole lot of difference in our houses.

But I stopped by there one day and she – before she ever bought the property, she came down there and asked me if she could use my road to get to her property. And I said, well, Rene', that's not my road. She said, well, whose road is it? And I said, well, I don't know. I said, Mr. Thoma just told me it was dedicated as a road. You couldn't use it for nothing else.

And so I said, I don't know if the county owns it or – I don't know who owns it. But a little while later I was by there and she flagged us down, and she said, I found out who owns the road. And I said, really? She said, yeah, Bill Thoma owns it. It's 2.53 acres of roadway and he pays property taxes on it. (Copy of pages 17, 18 & 19 attached as Attachment 1)

As indicated above, I don't have a transcript of the actual testimony as yet, but I recall the substance of the testimony. In the post-trial comments, the court indicated that he understood the facts to be that Mr. Thoma reserved the property as his own, but then allowing the other property owners to use it. I don't have the actual wording in front of me that Mr. Ford testified, but my recollection was his testimony was consistent with the facts he'd given me earlier and with the testimony he gave in his deposition. It is my recollection that he testified that Mr. Thoma dedicated the land known as Thoma Lane as a road for the use of the people who bought property on it and for his use as well which is different from keeping it for himself, owning it himself and authorizing others merely to use it. On pages 25 and 26 of the deposition of Mr. Ford taken by the Honorable Walter Nichols on the 1st day of August, 2011, Mr. Nichols

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addressed that very issue with Mr. Ford and beginning at page 25, line 15, through page 26, line 9, the following question by Mr. Nichols and response by Mr. Ford were elucidated:

> Q Now, what was said at the closing about the use of this drive? Mr. Huskey was asking Ms. Thoma about that.
>
> A Mr. Thoma and I sat side by side.
>
> Q At the closing?
>
> A At the closing, yes. And the subject of the road came up. And I don't know if anybody else was involved in the conversation or not, but he told me, he said, I dedicated that road for the use of the people that buy the property and for my own purpose, because when I sell that 25 acres, I've got to have a way to get back to my property. And he said, whether you build a road on it or whether you drive on it in the mud is up to you. I don't care. But I'm not going to build a road. And I said, yes, sir, I understand that.
>
> And he said, well – I said, then I'm not going to build a road either. I mean, I'll build the road, but I'm going to gravel it instead of – so we did build the road. (Copies of pages 25 and 26 filed herewith as Attachment 2)

The defendant in the case wants to say that the ultimate transaction is the deed and anything not spelled out in detail in the deed is not part of the transaction. It appears though without dispute that there were other facets of the agreement other than just the form deed with a conveyance, a description and a sale price.

In the same transaction where the deed was executed and the money was paid, Exhibit 6, a plat of the specific property and the roadway adjacent to it was provided to Mr. and Mrs. Ford as part of the transaction and they were required to sign confirming a receipt of that document, (Exhibit 33 stipulated testimony of the closing agent, Rose Mines). Further in that same transaction there was Exhibit 5 which was agreed upon and signed by the Fords and Mr. Thom confirming other aspects of the sale transaction and there is absolutely no proof countering the contention of the plaintiffs in regard to the transaction nor for the stated purposes of the road.

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Mr. Ford testified about it and it was confirmed by his brother-in-law who was present and heard part of the conversation.

The bottom line is Mr. Thoma in his advertising and prep to sell the property, going back two (2) years prior to his transaction with the Fords, reflected that what is now known as Thoma Lane was set up by him to be a roadway to service the properties of the Thoma farmland. (Exhibit 2) The individual plat prepared at the behest of Mr. Thoma by his surveyor depicts the beginning and ending of the roadway and the total amount of land in the roadway and depicts it as separate and apart from the "remaining Thoma land". Since every document that would give an indication of the purpose of what is now known as Thoma Lane is that it was dedicated by Mr. Thoma as a roadway to service not just his property, but all property adjacent to it—Mr. and Mrs. Ford and Ms. Powers just as much as for himself. Mr. Thoma never expressed it that he was keeping the land and just allowing others to use it, but to the contrary he emphasized I've dedicated it as a road for everybody and you can't do nothing on it but use it as a road. You can build whatever kind of roadway you want, but you can't use it for anything but a road because a road is what it is and it not only services you, it services me also because I still own some land there.

The Court in its comments following the trial referenced being an assumption by Mr. Ford. That assumption was that it was dedicated as a road. Whether or not the formal technicalities of an offer to the county was made or not, it was obviously designed to qualify as a road because of the width provided for it to meet county standards reflected in Mr. Thoma's comments at the closing. If it was not in fact dedicated as a roadway but the Fords were told it was, that's a mistake and not necessarily a unilateral mistake, because if it was a mistake and Mr. Thoma told them it was a dedicated road then you'd either have a misrepresentation by Mr.

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Thoma which would allow a reformation based on the reliance thereon by Mr. Ford or you have a misunderstanding of both Ford and Thoma as to what it took to constitute a dedication. It's got to be one or the other. Since no one involved in the transaction believed Mr. Thoma would have intentionally tried to deceive anyone, the proof would suggest that the mutual misunderstanding is the most likely situation, particularly in light of the plats he had prepared. I respectfully contend that the expression made by Mr. Thoma in the transaction combined with the plats (Exhibits 2 & 6) constitute a dedication. The fact that there has not been an acceptance of that dedication by any governmental entity doesn't prevent it from being a dedication, and the applicable laws for such dedication then apply.

Therefore it is respectfully suggested that based on the law of reformation of an instrument and considering, particularly, the document evidence which defines a road as beginning and ending, not just as a part of retained property, but separate and apart from retained property confirms the testimony of Mr. Ford and the plaintiffs proof that this was a dedication of the roadway for the benefit of the ultimate owners of property adjacent to the roadway giving those owners not a license, but easement or a right-of-way in that whole fifty (50) feet.

Further you have under the law of reformation, where parties have relied upon a draftsman or professional to prepare instruments appropriately if they believe they are appropriately covered and provided for, relying on the drafter, then if that draftsman fails to include what is necessary to carry out the intent of the parties, that instrument then will be reformed. In this case, it appears the draftsman had a surveyor's description. He was not present at the closing and there was no showing of him having knowledge of the dedication of the surveyed Thoma Lane as a roadway other than the fact that the legal description depicted the property as running beside a roadway. It would appear that either the draftsman lacked

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knowledge or lacked full information and in such a situation a reformation of a deed or instrument, particularly where a part of that closing transaction included the providing of a plat of the property and a roadway servicing it and a requirement of the purchaser to sign it as part of the transaction. I oftentimes when I have a survey or plat attach it to the deed itself and that would have been a good thing to have happened in this case, but in any event, it was part of the closing transaction and obviously just like installing the fenceposts was part of the transaction and part of the agreement and intention of the parties. Based on the law of reformation of instruments on the clearly shown intent of Mr. Thoma, both by the testimonies offered as to what he stated, but also with the survey plats that he had prepared that confirm same, the deed should be reformed to show that Mr. and Mrs. Ford have a right-of-way on Thoma Lane for unimpaired usage thereof which attaches to and runs with their land.

(NON RELEVANT SIDE ISSUES)

The proof clearly showed that Mr. and Mrs. Ford with the aid of their in-laws built what is known as Thoma Lane. They constructed it within the 50-foot width provided by the plat received from Mr. Thoma. When Ms. Powers intervened in the litigation, she contended that since she had been there it was not the Fords that had built and maintained the roadway, but that she had spent a great amount of money in constructing the road and relocating it back in the platted area contending that it was actually built by the Fords outside the platted roadway area. Such contentions have no relevance of the issue of the right of way involved, and on top of that their inaccuracy is clearly seen by the Exhibits and by the testimony of Ms. Powers herself. She contended in her pleading that the roadway that the Fords had built was only just partly in the depicted area and was actually built on her property. Exhibit 25 is a copy of a survey which she

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secured from Northcutt Surveying which confirms that the road built by the Fords is in fact the area depicted for the roadway on the plat and of only a short distance into the roadway at a curve that some gravel had been pushed out of the roadway over onto her property; however, an examination of that plat which she secured by a separate surveyor disputes her contention that they had build the road over on her property.

It should be remembered that Bill Thoma had told the Fords that he didn't care where within the fifty (50) feet the road was built as long as it was built within the fifty (50) feet. On cross-examination by plaintiffs' counsel Ms. Powers in regard to her testimony that she had actually had to rebuild the road to get it off of her property, when shown pictures offered by I believe it was Mr. Thoma depicting that the road built by the Fords had curves in it as opposed to being just a straight road and that that roadway, except for that one little spot in the front, where gravel had gotten out of the roadway, was within the fifty (50) feet, but that she didn't like it being curved, she wanted it straight and wanted it right in the middle of the fifty (50) feet, so she had someone make the road straight and down the center, just as her preference and not as a need; and that the money she spent in regard to the roadway was to cover two (2) things—(1) to patch holes and problems that were created by the construction trucks that were in when building her house and (2) to lay out the road straight rather than with curves. This is best probably depicted by Exhibits 36, 37, 38 and 39. Further that pictures 30 a-d taken just before court reflect the current appearance of Thoma Lane between the Powers' house and the Ford house and provide a comparison between that portion of Thoma Lane and the portion serving the Powers house. Exhibit 31 which contains pictures a-e and depict Thoma Lane in its condition from the Powers' house to Pea Ridge Road and well depict that Thoma Lane is in better

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condition where it's past the Powers' house as opposed to between her house and Pea Ridge Road.

As indicated, the foregoing is really irrelevant to the entitlement of the Fords to an easement, but since that information was thrown into the middle of the mix, I think it's important for the Court to recognize that it was fully refuted by the evidence.

(EFFECT OF DEDICATION NOT ACCEPTED BY PUBLIC ENTITY)

As an alternate theory, there is an old Supreme Court case in Tennessee, being the case of State Ex Rel. Beckham v. Taylor, 64 Southwestern 766 (1901). This case deals with the effect of a road which is dedicated, accepted by governmental entity and then abandoned. The case law indicates that the same law applies for property that's dedicated but never accepted. In the Taylor case, General G. W. Gibbs, owner of land, in 1855 layed off and platted a town which he referred to as "Union City". He sold lots according to his plan on both sides of the numerous streets and then twelve (12) years later in 1867 a town was so established and incorporated under that name. The streets were accepted. Most cases talk about a plat being recorded and most of the cases on the issues of roadways of this nature deal with recorded plats; however, in the Taylor case, there is no reference at any point to the referenced plan or plat of Mr. Gibbs ever being recorded, but merely that he laid it out and sold property adjoining its streets and it ultimately became a city twelve (12) years later. The city decided to do a swap of some land which would reduce the width of one of the streets, Washington Avenue. The city determined that they didn't need that full width, and they vacated a portion of the street and then conveyed it to an entity that wanted to use it. The Supreme Court held that the transfer by the city was a nullity and the basis for that holding is what is pertinent to the Ford v. Thoma case. This

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decision is attached as Attachment 3. It reflects the basis of the decision, on page 768, "that the platting of the territory and the sale of lots by the original owner in the manner heretofore recited vested the streets as such, not otherwise, in the municipality, and at the same time passed to the respective lot purchasers the ultimate fee in the soil to the center of the streets on which they severally abutted". "And through that abandonment the strip of ground in question ceased to be part of the public street and by operation of law, it reverted to the owner of the ultimate fee." There are subsequent case decisions relying upon the Taylor decision dealing with properties both where the land had been accepted by a governmental entity and later abandoned or where it had never been accepted by the governmental entity, but the same law prevailed, that being that the adjacent property owners would own to the center of the street, but have full usage to the full extent of the road or right-of-way.

In Keen v. Shoneys, the Court of Appeals Western Section, page 3 (Copy attached as Attachment 4) stated on page 4 of that decision, there was no doubt that where there is a public acceptance and use and then an abandonment in the case that the fee in the property reverts to the adjacent landowners and that the Court could perceive of no reason why the rule should be otherwise if there was no public acceptance of the roads or that there is only private use or no public use. In the Keen case they were dealing with a recorded plat, but its citation is not for that purpose, but to show that the case law holds that the same law that applies for roads, that have been accepted and then abandoned applies as for roadways that have been dedicated, but have not been accepted by a governmental entity.

Further in the Keen case, the ruling provides that where a subdivider dedicates the roadway he loses his interest in the road that he previously held and on pages 4 and 5, the court points out that the abutting property owners actually will own the property to the middle of the

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street or own the fee or soil under the property under the road to the middle of the street and on page 7 that although adjoining property owners own the fee to the middle of the road, every property in the subdivision is entitled to an easement for road purposes over the entire roadway, not just to the half. Applying the law of the Taylor case as amplified by more recent decisions, with the dedication of the road the property owners abutting the Thoma Lane have a right to use the full fifty (50) feet of Thoma Lane for road purposes.

(EASEMENT BY ESTOPPEL)

As the final theory, plaintiff would suggest an easement by estoppel. Clearly Mr. Thoma depicted what is now known as Thoma Lane as a road, not part of his property, or not a part of his remaining Thoma land, but a separately described roadway with acreage calculated on the plat. He told purchasers it was a dedicated road. It's a dedicated road and Mr. Thoma tells the purchasers they can use the road along with the other property owners adjoining the road. Based thereupon and the reliance thereon, the Fords built a roadway to service their property, and under the theory of estoppel the original seller, Jack Thoma, and his heirs and representatives would be estopped to deny it being a roadway and in essence a right-of-way for use by the Fords who built the roadway in reliance thereon. The bases for describing an easement by estoppel are found in LaRue v. Greene County Bank. In that case, the Tennessee Supreme Court noted the Courts have long since abandoned technical rules of construction of conveyances, and looked to the intention of the instrument as the proper guide. The language of the instrument will be read in the light of the surrounded circumstances. LaRue v. Greene County Bank, 106 S.W. 2d 1044 at p. 1048.

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The Court went on to say "We think there is no principle more firmly embedded in equity than that, where an owner stands by and sees another erect valuable structures upon his property in the belief that he is on his own land (or he is entitled to do so for his use), the owner is estopped from asserting any claim resulting from or arising out of the transaction". LaRue, supra at p. 1050. Although we are dealing with a roadway rather than a building, the principle is the same. Bill Thoma as the inherited owner of the remaining Thoma property and since no deed or instrument has been recorded conveying the part labeled as a roadway from his name, by knowingly watching the Fords build a road pursuant to their agreement with his father, that was to service their property, he would now by the same principle cited above would be estopped from denying their use of that road and their easement to it.

(SUMMARY)

Considering all the proof as to the facts and the documents confirming those facts, it is quite clear that it was the intent of Mr. Jack Thoma to generate a right-of-way or easement for the benefit of adjacent property owners in what is now known as Thoma Lane for he not only platted it, set it out in detailed description as to its location, and labeled it as a roadway with the exact content of acreage calculated by survey contained therein, and he told the purchasers that he had dedicated it as a road. The combination of the platting of that roadway and so defining it in at least two (2) survey plats that were offered into evidence clearly shows his intent to dedicate it as road and the oral description of his comments made to the Fords merely confirm what he had done with the plats. There are really two (2) evaluations that the Court can make in interpreting Mr. Thoma's statements about the road. He either in fact believed he had done what was necessary to dedicate the road and believed that it was appropriately dedicated by the plats

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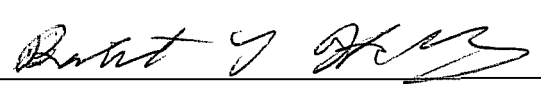
or he mislead the Fords to their detriment. Those are the only two (2) interpretations that could be made because the undisputed proof is he told them as well as their in-laws that this was a road and that he had dedicated it for the use of the adjoining properties and his plats confirmed it. There is no dispute as to those factors. So he either told them wrong and mislead them or he believed what he told them and it was his understanding and intention that he had done so. I would respectfully suggest that although either one would entitle the plaintiffs to a reformation, there is simply no evidence or indications of any sort that Mr. Jack Thoma would have intentionally mislead anybody. So the logical and normal interpretation would be that he in fact believed he had appropriately dedicated what is now Thoma Lane as a road. That being the case, that's an expression of his intent and that intent was not appropriately carried out by he ultimate deed that someone drew who worked for the closing company. Both parties then relied on the knowledge of the draftsman who failed to accurately depict the intent of the parties by the instrument that he drew. Such a situation warrants a determination by this Court that the instrument should be reformed to recognize the intent of the parties and embody the intent of the parties and thereby reform the deed. Whatever means or theory the Court seeks to apply, justice can be done only by carrying out what was the clear intent of the parties, i.e. the very purpose of establishing an equity court to start with.

RESPECTFULLY SUBMITTED:

THE HUSKEY FIRM



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Certificate of Service

I, Robert L. Huskey, certify that I have served a copy of the foregoing pleading upon opposing counsel, the Honorable Walter F. Nichols, at his law firm of Parsons & Nichols, 101 West Main Street, Manchester, TN 37355 and to the Honorable J. Stanley Rogers at his law firm of Rogers, Duncan & North, 100 North Spring Street, Manchester, TN both by hand delivery, this the 6th day of December, 2011.

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