Tennessee Judicial Nominating Commission

Application for Nomination to Judicial Office

Rev. 26 November 2012

Name: Arnold B. Goldin

Office Address: Shelby County Courthouse, 140 Adams Ave., Room 303, Memphis, Shelby County, Tennessee 38103

Office Phone: 901-222-3906 Facsimile: 901-222-3909

Email Address: arnold.goldin@shelbycountytn.gov

Home Address: (including county) [redacted]

Home Phone: [redacted]

INTRODUCTION

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

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

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Chancellor, Part II, Shelby County Chancery Court, State of Tennessee 30th Judicial District

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

1974

BPR #8488

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, BPR #8488

Date of Licensure: October 5, 1974

License 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).

Private practice of law from October 5, 1974 – September 30, 2002.

Chancellor, Shelby County Chancery Court, October 1, 2002 – Present.

I was licensed as a home building contractor from 1988 until approximately 2000. No business was conducted after approximately 1989.

From approximately 1997–April 2010, I was a joint owner with my wife of Fashion Salons, LLC, which at one time owned three *Fantastic Sams* franchised family hair salons located in Lakeland, Cordova, and Bartlett, Tennessee. My wife operated the business as her regular occupation. The salons were sold between 2007 and 2010, and the business is no longer in operation.

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.

Not applicable.

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.

My 28 years in private practice was exclusively a trial practice in both state and federal courts.

The Courts in which I practiced were as follows including dates of admission:

All Courts of Tennessee, October 5, 1974

United States District Court, W.D. TN, April 2, 1975

United States District Court, N.D. MS, March 4, 1977

United States Court of Appeals For the Sixth Circuit, April 13, 1978

United States Court of Appeals For the Fifth Circuit, August 26, 1996

I was also admitted several times *Pro Hac Vice* in additional United States District Courts, as follows:

United States District Court, S.D. FL, 1991

United States District Court, E.D. AR, Several Times

United States District Court, E.D. LA, Several Times

I represented a wide variety of clients. These included major corporations as well as average working people; a maritime insurance carrier defending against an unjustified claim for fire damage to a tow boat or a business in a commercial dispute with another company. While I was in private practice I also represented and/or counseled judges and my fellow lawyers in personal and professional matters. I believe representing these varied clients has given me a diverse perspective that I have been able to carry over to my judicial career.

Since becoming Chancellor in October 2002, I have handled thousands of cases ranging from determining the constitutionality of the Shelby County Home Rule Charter to termination of parental rights cases. The Shelby County Chancery Court hears the greatest variety of civil cases of all the civil courts. Of all the cases that I have heard over the past 10+ years, only three have been tried to a jury.

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

I successfully defended a client for plagiarism of her Ph.D thesis before an academic jury at Auburn University.

I brought suit in federal court on behalf of a property owner against a local municipal

government for the unconstitutional use of the right of eminent domain causing the local government to immediately reverse its unlawful taking of my client's property.

I represented my father before the Foreign Claims Commission of the United States, United States Department of Justice *In the Matter of the Claim of DAVID GOLDIN Against the Government of the Federal Republic of Germany, Claim No. HS-575, Decision No. Hs-634.* My father was a private in the U.S. Army during World War II and was captured by the Nazis during the Battle of the Bulge. Because he was Jewish, he and 350 other *undesirables* were transported by cattle car to Berga, a sub camp of the Buchenwald Concentraion Camp to perform slave labor for the Germans. Over 50 years after the war, the Holocaust Survivors Claims Program was established to compensate American soldiers who were subjected to slave labor and concentration camp conditions by the Nazis. It was a unique and special honor to represent my father and to help him bring closure, after 52 years, to this horrific period in his life. My father passed away in August 2002, at age 91, approximately 1 month before my appointment as Chancellor.

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.

Appointed by the Governor in September 2002, as Chancellor of Part II of the Shelby County Chancery Court.

Elected in the August 2004 Countywide General Election to fill unexpired term as Chancellor.

Reelected in the August 2006 Countywide General Election for a full 8 year term as Chancellor.

As an example of the variety of cases that I have decided as Chancellor are the following:

1) *Janice Brooks and Cedrick Wilson v. Rivertown On The Island Condominium Owners Association, Inc.*, Shelby County Chancery Court, Case No. CH-10-1088-2, December 9, 2010. (Affirmed, Tennessee Court of Appeals, No. W2011-00326-COA-R3-CV, December 6, 2011). Copy of Findings of Fact and Conclusions of Law and Final Judgment attached as Ex. 1.

This case involved a non-judicial foreclosure sale by a homeowner's association (HOA) against a homeowner for non-payment of association fees and assessments. The Plaintiff had purchased the property for over $300,000.00 in a cash sale. The HOA foreclosed on the property and bought the property for the $12,000.00 which it alleged was owed to it. The Court found following trial that the Defendant's accounting on the date of foreclosure was inaccurate and that the amount owed was approximately $6,400.00 rather than $12,000.00. This error was not corrected until the day before trial. The Court further found that the amount of the purchase "shocked the conscience of the Court" and set aside the foreclosure. The case confirmed the

Supreme Court's opinion in *Holt v. Citizens Central Bank*, 688 S.W.2d 414 (Tenn. 1984), which held that although a foreclosure sale could not be set aside "solely on the conscience shocking inadequacy of price." However, that fact coupled with other factors such as bookkeeping, accounting, and notice irregularities would permit the setting aside of the foreclosure sale.

2) *Walter Bailey, et al. v. Shelby County, Tennessee and The County Commission of Shelby County*, Shelby County Chancery Court, Case No. CH-12-0005-2, January 13, 2012. (Appeal filed but withdrawn by Shelby County). Copy of Order Granting Summary Judgment attached as Ex. 2.

This case involved the redistricting of the Shelby County Commission legislative districts. State law requires that the legislative bodies of Tennessee counties redistrict county districts at least every 10 years so that members represent substantially equal populations. The Shelby County Commission took the position that under the county charter a 2/3 vote super majority (9 votes) was required to redistrict the county. The County Commission had voted on a constitutional plan of redistricting that had passed three readings with at least a simple majority (7 votes). The Court gave great deference to the legislative prerogative of the commission and gave it several months to resolve the impasse. When it became clear that a resolution to the impasse was not imminent, the Court ruled that the County Charter provision was in conflict with both the Tennessee Constitution and the state statute that requires only a simple majority of the commissioners to redistrict county legislative districts. The Court found that the Tennessee Constitution and state statutory provisions pertaining to redistricting of county legislative districts preempt the Shelby County Charter and approved the redistricting plan that had been passed on three readings by a simple majority. This decision resolved the impasse.

3) *Regina Morrison Newman, et al. v. Shelby County Election Commission, et al*, Shelby County Chancery Court, Case No. ChH-10-1538-2, January 14, 2011. (Affirmed, Tennessee Court of Appeals, No. W2011-00550-COA-R3-CV, 2012 WL 432853, February 13, 2012).

This case involved an election contest involving the August 5, 2010 Shelby County General Election. The case was brought by eight unsuccessful candidates for county elected office and two candidates for state judicial office. The Plaintiffs' Complaint alleged that fraud or illegality so permeated the election as to render it incurably uncertain. Plaintiffs sought to void the entire general election. The Court tried the case on an expedited basis, and on the third day of trial, the Court granted an involuntary dismissal, finding that the Plaintiffs failed to meet their burden of proof. This was a highly charged and emotional case for the community. It is the Court's duty to base its decisions on the law and the facts proven at trial.

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.

Not applicable.

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

1) One of the great joys that I discovered upon becoming a Chancellor is that all adoptions in Shelby County are approved in Chancery Court. It has been a wonderful experience participating in the birth of these new families. We always take pictures with the families and try to make it a special day. Since taking the bench in 2002, Part II of Chancery Court has participated in National Adoption Day on the Saturday before Thanksgiving. We open the Courthouse on this Saturday so that the family and friends of the newly adopted children can celebrate together. We typically have over 200 people in attendance. We celebrated our 10th year of participation in National Adoption Day this past year and approved approximately 15 adoptions. We take pictures with the families and provide Certificates of New Families and stuffed animals to the adoptees. Refreshments are also provided, and it is very festive.

2) I participated as lead counsel in the following reported cases:

Owens v. Conticarriers, 591 F. Supp. 777 (W.D. Tenn. 1984).

Harnesk v. Carnival Cruise Lines, 1992 AMC 1472 (U.S.D.C., S.D. FL) (1992) (American Maritime Cases).

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.

February 25, 2000, one of three candidates for appointment submitted to the Governor by the Tennessee Judicial Selection Commission for the then existing vacancy in Division IV of the Shelby County Circuit Court.

September 2002, one of three candidates for appointment submitted to the Governor by the Tennessee Judicial Selection Commission for the then existing vacancy in Part II of the Shelby County Chancery Court.

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.

BA, University of Virginia, 1967-1971

JD, Memphis State University, 1971-1974

PERSONAL INFORMATION

15. State your age and date of birth.

63 y.o.

July 28, 1949

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

42 years.

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

42 years.

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

Shelby.

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

Not applicable.

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

No.

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

No.

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

Not applicable.

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

No.

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

No.

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

Yes. 1985. Tennessee Supreme Court, *In Re Goldin*, 689 S.W.2d 869 (1985). The decision clarified the disclaimer requirements for attorneys.

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.

Temple Israel, Memphis, Tennessee, Member, 1974-Present, Board of Directors, 2005-2009.

Downtown Kiwanis Club, 2002-2012.

The Economic Club of Memphis, 2006-Present

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

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

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

No.

ACHIEVEMENTS

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

Tennessee Judicial Conference, 2002-Present

American Inns of Court, Leo Bearman Sr. Chapter, 2003-2009

Fellow, Memphis Bar Foundation, 2004-Present

Tennessee Trial Lawyers Association, 1974-2002 (President, 1986-1987).

The Association of Trial Lawyers of America, 1974-2002 (Chair, Admiralty Law Section, 1991-1992; Tennessee State Delegate, 1995-1997).

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.

Chancellor Charles A. Rond **"Judge of the Year Award"** – Presented by the Young Lawyers Division of the Memphis Bar Association (2004).

Naifeh and Smith, **The Best Lawyers In America**, 1995- Judicial Appointment.

Martindale-Hubbell Law Directory, Rating AV, 1986-Present

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

Author: "Don't Miss The Boat," *The Tennessee Trial Lawyer*, Spring 1983.

Co-Author: "Seaman Status Under The Jones Act-Navigating Through Murky Waters," *Tennessee Bar Journal*, September-October 1987;

"Jones Act Liability For Off-Vessel Injuries", *The Tennessee Trial Lawyer*, Summer 1989.

Author: "Let's Adopt The Notice Provision of the Federal Rules of Civil Procedure for Issuing TRO's In Tennessee", *Memphis Lawyer*, March/April 2008.

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

I participate each year in a "Bridge The Gap" seminar for new bar admittees and have done numerous seminars for the Memphis Bar Association since becoming Chancellor.

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.

Appointed by the Governor in September 2002 as Chancellor of Part II of the Shelby County Chancery Court.

Elected in the August 2004 Countywide General Election to fill unexpired term as Chancellor.

Reelected in the August 2006 Countywide General Election for a full 8 year term as Chancellor.

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.

I am attaching two more recent orders which I personally drafted. Exhibits 1-2. (See: Question 10). I am also attaching three appellate opinions which I personally drafted as a result of serving on the Tennessee Supreme Court Special Workers' Compensation Appeals Panel. Exhibits 3-5.

ESSAYS/PERSONAL STATEMENTS

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

I have been honored to serve these past 10+ years as Chancellor of Part II of the Shelby County Chancery Court and I continue to appreciate the opportunity to serve. I seek this position to continue my service to the Judiciary and citizens of Tennessee. I believe that depth of experience is important for any judicial position but particularly for an appellate judge. My 28 years of trial practice handling a wide variety of legal matters ranging from the rudimentary to the complex coupled with my 10+ years as Chancellor will give me a unique perspective on the appellate court. I would like the opportunity to use my experience to continue the outstanding work of the Western Section Court of Appeals.

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)***

As a charter member of the IOLTA Grant Review Committee, I worked with the other members to develop the structure that is currently in place for providing the primary grant funding for area legal service organizations across the state.

As a member of the Supreme Court Commission on Dispute Resolution, I worked with the other members, including lawyers, judges, and professors, to develop a statewide, court sanctioned system of alternative dispute resolution. Our report to the Supreme Court formed the basis for Supreme Court Rule 31.

As Chairperson of the Civil Justice Reform Act Advisory Group for the U.S. District Court for the Western District of Tennessee, I worked with the members of the committee to develop a

court annexed mediation system for the Western District Court. Our report and recommendations to the District Court judges formed the basis for the current Federal mediation program in the U.S. District Court for the Western District.

More recently I served as a member of the Tennessee Supreme Court Rule 40A Workgroup which recommended the redrafting of the rule which governs the appointment of a guardian ad litem in custody proceedings. The workgroup which included lawyers and judges from across the state who conferenced together regularly, often weekly, culminating with recommended major reforms to the existing Supreme Court Rule that were adopted by the court.

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

I am seeking the position of Judge of the Tennessee Court of Appeals, Western Section. The Court of Appeals is divided into Western, Middle and Eastern Sections to correspond to the three grand divisions of the state. The western grand division is generally considered that area west of the Tennessee River. The Western Section has four judges. Although the Western Section primarily hears civil appeals arising in the Western Section, it also sits in the other Grand Divisions to assist with the case load.

I believe that my 28 years of trial practice and 10+ years as a trial judge will be invaluable experience for the position of Appellate Judge. My years of trial practice experience served me well in my service as a trial judge, and I am confident that my combined trial practice and trial judge experience will likewise prepare me for the appellate 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)***

Member, Governor's Commission on Tort Reform, 1986-1987.

Charter Member, Tennessee Bar Foundation IOLTA Grant Review Committee, 1987-1989.

Member, Tennessee Supreme Court Commission On Dispute Resolution, 1992-1995.

Chair, Civil Justice Reform Act Advisory Group, United States District Court, W.D.TN, 1995-1999.

Member, Tennessee Supreme Court Rule 40A Workgroup, 2010-2011.

I intend to continue participating on Judicial and Bar related activities including speaking, teaching and assisting the judicial system when asked to serve.

I have purposely decided to decline invitations to serve on various boards in an effort to avoid potential conflicts of interest. I have found that the other persons serving on boards on which I

would like to serve either appear before the court as lawyers or are employed by companies that may have matters before the court. I found the best course is to avoid the conflict.

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)***

Our courts are a microcosm of our society. The myriad of problems that are dealt with daily by our courts require an individual who has experienced and dealt with issues of diversity and inequality and has a keen sense of right and wrong.

I believe that my background and life experiences, including 28 years as a trial lawyer and over 10 years as a trial judge, have had a significant impact in shaping my character and my values. I was born and grew up in Richmond, Virginia. My father and grandfather owned and operated a small grocery store in a racially mixed neighborhood. I lived in a small house next to the store with my parents, grandparents and older brother. My next door neighbors were African-American as was the majority of the neighborhood. My brother was the first member of my family to attend college. From as far back as I can remember I wanted to be a lawyer.

I started elementary school in 1954. Those early years were difficult in that the public school system was segregated. The state and city governments were determined to resist the Supreme Court's mandate in the *Brown* decision. Rather than integrate the schools, the Richmond Board of Education began closing schools and consolidating white students. From the first to the sixth grade I was bused for the purpose of segregating the public schools, and I was forced to attend five different elementary schools as a result of the school closings.

I attended and graduated from the first integrated middle and high school in the City of Richmond.

I understand the impact of bias and prejudice upon society and the individual. From elementary through high school, I was the only Jewish student in the school. I learned firsthand the pain and sting of discrimination. Because of my personal experience, I have always had enormous respect and admiration for the African-American students who were the first to integrate the schools.

I believe that I was fortunate to have learned at an early age the importance of treating all people with respect.

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

Yes. As a trial judge it has always been my duty to interpret and follow the law as passed by the legislature and as interpreted by the appellate courts. If the law is to changed it is to be done in

the first instance by the legislature or by the interpretation of the appellate courts. Until changed the court has a duty uphold the law even if it disagrees with it.

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. Leo Bearman, Jr., Attorney, 165 Madison Ave., Memphis, Tennessee 38103

901-577-2220

B. Kevin W. Weaver, Attorney, 51 Germantown Ct., Suite 112, Cordova, Tennessee 38018

901-757-1700

C. Leslie Gattas Coleman, Attorney, 1770 Kirby Pkwy., Suite 105, Memphis, Tennessee 38138

901-752-1250

D. David Jordan, Executive Director, AGAPE Child & Family Services, 111 Racine St., Memphis, Tennessee 38111 901-323-3600 Ext. 18

E. William H. Watkins, Jr., CPA, 1661 Aaron Brenner Dr., Memphis, Tennessee 38120

901-761-2720

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 Tennessee 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 17, 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.

_Arnold B. Goldin_____
Type or Printed Name

Signature

June 17, 2013
Date

BPR # 8488

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

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

JANICE BROOKS and CEDRICK WILSON,

Plaintiffs,

vs.

Case No. CH-10-1088-2

RIVERTOWN ON THE ISLAND CONDOMINIUM OWNERS ASSOCIATION, INC.,

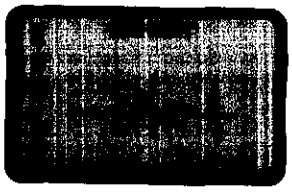
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on to be heard on the 29th day of September, 2010, adjourned to the 30th day of September, 2010, and adjourned again to the 13th day of October, 2010, upon the Complaint For A Temporary Injunction or Restraining Order filed by the Plaintiffs, Janice Brooks ("Ms. Brooks") and Cedrick Wilson ("Mr. Wilson") (collectively, the "Plaintiffs"); the Answer filed by the Defendant, Rivertown on the Island Condominium Owners Association, Inc. (the "Association"); the testimony of the Plaintiffs; the testimony of witnesses for the Plaintiffs and for the Association; financial records and other exhibits. Based on the testimony before the Court and the entire record as a whole, the Court finds as follows:

FINDINGS OF FACT

1. Mr. Wilson is an adult resident of Shelby County, Tennessee.
2. Ms. Brooks is Mr. Wilson's mother and also an adult resident of Shelby County, Tennessee.
3. The Association is a Tennessee non-profit corporation, the members of which are all of



the owners of units in the condominium development known as Rivertown on the Island. (Ex. 2.)

4. The Association is managed by Keith S. Collins Company, LLC, a limited liability company organized and operating under the laws of Tennessee.

5. On or about May 1, 2008, Mr. Wilson purchased the condominium unit located at 380 North Island Drive, Building 3, Unit 312, Memphis, Shelby County, Tennessee 38103 (the "Unit"). (Ex. 18.)

6. Mr. Wilson purchased the condominium for $321,740.00 in an all cash sale. (Ex. 11).

7. The Unit is subject to that certain Master Deed Establishing Rivertown on the Island and submitting Rivertown on the Island to the Horizontal Property Act of the State of Tennessee, of record in the Register's Office of Shelby County, Tennessee, under Instrument Number 07109223, as amended by instruments of record under Instrument Numbers 07152054, 08125810, 08126925 and 09114856 (the "Master Deed"). (Ex. 22 & Ex. 26.)

8. The Master Deed requires the payment of monthly assessments[1] to the Rivertown on the Island Condominium Association. At the time of the purchase monthly assessments were $199.00 per month.

9. Mr. Wilson paid his first monthly assessment at the time of closing the purchase of the Unit. (Ex. 20.)

10. On November 18, 2008, the Association, through its attorneys, sent Mr. Wilson a letter demanding payment of his delinquent assessments, plus attorneys' fees, expenses and

[1] While Section 8.01 (a) of the Master Deed provides for the payment of "assessments" by Unit

costs of collection. (Ex. 1.)

11. The November 18, 2008, letter stated that Mr. Wilson owed $1,544.00 including monthly assessments totaling $908.85 and attorneys' fees and expenses totaling $301.62. (Ex. 1.) Mr. Wilson did not respond.

12. On December 12, 2008, the Association, through its attorneys, sent Mr. Wilson another letter notifying him that the Association had filed a notice of lien on the Unit. (Ex. 2.) Mr. Wilson did not respond.

13. On February 5, 2009, Mr. Wilson made a payment of $1,910.40 to the Association. (Ex. 4.)

14. On April 29, 2009, the Association, through its attorneys, sent Mr. Wilson a letter acknowledging his February payment and informing Mr. Wilson he still owed $904.85 in assessments and $301.62 in attorneys' fees. (Ex. 3.)

15. On August 12, 2009, Mr. Wilson made a $2000 payment to the Association. (Ex. 4.)

16. On September 16, 2009, the Association obtained a judgment in the General Sessions Court of Shelby County, Tennessee against Mr. Wilson for unpaid assessments, attorneys' fees and costs of collection in the amount of $2,233.07. (Ex. 12.)

17. In 2009, the Association filed a lawsuit against Mr. Wilson for an injunction and damages caused by dogs that Mr. Wilson was keeping at the Unit. Mr. Wilson did not respond.

18. On September 11, 2009, this Court entered a default judgment against Mr. Wilson in the dog nuisance lawsuit. (Ex. 9.)

---

owners, the term "dues" is used interchangeably in the exhibits with the term "assessments".

19. On October 26, 2009, this Court entered a judgment against Mr. Wilson for $4,993.75 in attorneys' fees and expenses incurred in bringing the dog nuisance lawsuit. (Ex. 10.)

20. The $4,993.75 in attorneys' fees and expenses was charged to Mr. Wilson's account with the Association. (Ex. 10.)

21. Also charged to Mr. Wilson's account pursuant to the Master Deed were $827.90 for damages to the common area carpet caused by Mr. Wilson's dogs, $100.00 in fines and $300.00 for witness fees related to the matter. (Ex. 14.)

22. On September 17, 2009, the Association held a special meeting of its members to discuss amending the Master Deed to provide for a right of non-judicial foreclosure. (Ex. 23.)

23. Notice of the meeting was sent to members of the Association.

24. A quorum was present, and an amendment, allowing non-judicial foreclosure, with a thirty-day notice provision was passed by the members. (Ex. 27.)

25. The amendment was recorded in the Register's Office of Shelby County, Tennessee under Instrument Number 09114856 (the "Fourth Amendment"). (Ex. 26.)

26. On December 15, 2009, Mr. Wilson made a payment of $2,523.12 to the Association. (Ex. 4.) This payment was not actually credited to Mr. Wilson's account until April 5, 2010. (Ex. 14.)

27. In late 2009, the Association, through its attorneys, began the non-judicial foreclosure process on the Wilson Unit for nonpayment of assessments.

28. On or about January 11, 2010, Mr. Wilson quitclaimed the Unit to Ms. Brooks, Wilson's mother. (Ex. 5.)

29. The quitclaim deed by which Ms. Brooks took title to the Unit is recorded in the

Register's Office of Shelby County under Instrument Number 10003013 (the "Quitclaim Deed"). (Ex. 5.)

30. Ms. Brooks did not pay any assessments to the Association while she owned the Unit.

31. The Quitclaim Deed listed the owner's address as "380 N. Island Drive, Bldg 3 Unit 312, Memphis, TN 38103," the same address as the Unit. (Ex. 5.)

32. On January 19, 2010, the Association, through its attorneys, sent Mr. Wilson a letter informing Mr. Wilson that he owed $9,706.57 "exclusive of attorney's fees related to this non-judicial foreclosure sale." The letter required the recipient to call the law firm handling the matter to receive an accurate accounting of all fees owed. (Ex. 13.)

33. On January 26, 2010, Mr. Wilson made a payment of $1,076.88. (Ex. 8.)

34. As of January 28, 2010, the Association's occupant ledger for Ms. Brooks' unit stated Mr. Wilson owed $9,506.57. (Ex. 15.)

35. On February 22, 2010, the Association, through its attorneys, sent Ms. Brooks a letter stating she owed $8,928.14 "exclusive of attorney's fees and the expenses of this foreclosure." The letter required the recipient to call the law firm handling the matter to receive an accurate accounting of all fees owed. (Ex. 6 & Ex. 28.)

36. On February 23, 2010, Mr. Wilson made a payment of $240.00. (Ex. 8.)

37. On February 25, 2010, the Association sent Ms. Brooks notice of its intent to foreclose by certified and regular U.S. mail to the Unit. (Ex. 28.)

38. On March 30, 2010, Mr. Wilson made a $225.00 payment to the Association. (Ex. 8.)

39. On April 7, 2010, the Association, through its attorneys, sent Ms. Brooks a letter stating she owed $8,529.49 "exclusive of attorney's fees and the expenses of this foreclosure

sale." The letter required the recipient to call the law firm handling the matter to receive an accurate accounting of all fees owed. (Ex. 6 & 29.)

40. Notice of the foreclosure sale was published in *The Daily News*, a newspaper of general circulation in Shelby County, Tennessee, on April 12, April 19, and April 26, 2010. (Ex. 30.) Notice of the publication was sent to Ms. Brooks via certified and regular U.S. mail on April 7, 2010. (Ex. 29.) Mr. Wilson was also sent such notice on April 7, 2010. (Ex. 32.)

41. On May 14, 2010, M. Wayne Mink, Jr. ("Mr. Mink"), attorney and trustee for the Association, publicly called the non-judicial foreclosure sale.

42. The Association purchased the Unit for the amount of its alleged lien on the Unit, plus attorneys' fees and expenses of foreclosure, totaling $12,828.46. (Ex. 31.)

43. From February 5, 2009 to March 30, 2010, Mr. Wilson sent six checks totaling $8,174.40 to Keith S. Collins Company, LLC. ("Collins") The checks were also made payable to Collins (Ex. 4 & 8.)

44. Collins forwarded Wilson's checks to the Association's attorneys for processing. According to the agreement between the Association and its attorneys, the attorneys deducted their fees first and then forwarded the remaining amount to the Association. Therefore, once payments were forwarded to the attorneys, Wilson's payments were reduced by the attorney's fees deducted by the Association's attorneys.

45. The attorneys retained $1,910.30 for fees and expenses incurred in collection and disbursed $6,424.10 back to the Association for credit to Mr. Wilson's or Ms. Brooks' account. (Ex. 16.) Wilson was never notified that his payments were being reduced by

the Association's attorney's fees or the amount of the fees.

46. The amounts listed in most of the notices sent to Mr. Wilson and Ms. Brooks did not include the charges for attorneys' fees associated with collection[2]. Even if Mr. Wilson or Ms. Brooks had paid the full amount listed in the notices, because of the arrangement between the Association and its attorneys, Mr. Wilson or Ms. Brooks would still have a balance remaining on the account.

47. The total charges assessed to the Unit owned by Mr. Wilson and/or Ms. Brooks, which included monthly assessments and late fees from May 2008 to May 2010, attorneys' fees, expenses, fines and damages from the dog nuisance matter, were $14,639.12. (Ex. 17.)

48. The total credits to the account for the Unit, which included credit for payments made by Mr. Wilson and billing adjustments, were $8,233.60. (Ex. 17.)

49. The balance after subtracting total credits from total charges was $6,405.52. (Ex. 17.) This is the amount, plus attorneys' fees and expenses of foreclosure, that Ms. Brooks owed the Association as of the date of foreclosure.

50. The amount of $1740.65 was not properly credited to the account until September 28, 2010, after the foreclosure. (Ex. 14.)

51. At the time of the foreclosure, the amount charged to Ms. Brooks account was inaccurate. At foreclosure, $6,405.52 was owed whereas the Association claimed at that time that the balance on the account totaled $8,738.44. (Ex. 14.)

52. The amount owed was not adjusted to reflect the correct amount owed until September

[2] This was unlike the letters of November 18, 2008 and April 29, 2009, from the Association's attorneys which did advise Mr. Wilson the amount of the assessments and the amount of the attorney's fees.

28, 2010, the day before the trial commenced (Ex. 14.) This was almost five months after the foreclosure sale.

CONCLUSIONS OF LAW

I. Standing

"Standing is a judge-made doctrine used to determine whether a party is entitled to judicial relief." Metro. Air Research Testing Auth., Inc. v. Metro. Gov't of Nashville & Davidson County, 842 S.W.2d 611, 615 (Tenn. Ct. App. 1992). "To establish standing, a party must demonstrate (1) that it sustained a distinct and palpable injury, (2) that the injury was caused by the challenged conduct, and (3) that the injury is apt to be redressed by a remedy that the court is prepared to give." Id. Mr. Wilson, therefore, lacked standing to challenge the foreclosure sale because he had quit-claimed the property to Ms. Brooks. Ms. Brooks, however, did have standing. She, as the owner of the foreclosed property, was the proper plaintiff in this suit to set aside the foreclosure.

II. Tennessee Consumer Protection Act Claims

The issue of whether the TCPA applies to condominium associations is an issue of first impression. The Tennessee Consumer Protection Act ("TCPA") provides in pertinent part, "'trade,' 'commerce,' or 'consumer transaction' means the advertising, offering for sale, lease or rental, or distribution of any goods, services, or property, tangible or intangible, real, personal, or mixed, and other articles, commodities, or things of value wherever situated." Tenn. Code Ann. § 47-18-103(11).

One local court has specifically addressed the issue holding that a condominium association is not subject to the TCPA. In Welshans v. Oaks at Schilling Farms Condominium Association, Inc., Division V of the Circuit Court of Shelby County found that the defendant

condominium association did not engage in "trade" and dismissed the plaintiffs' TCPA claims. The Circuit Court's Judgment with Findings of Fact and Conclusions of Law specifically states as follows:

> The Court finds that The Condominium Association does not engage in any activity that could be considered "trade" as that term is defined by T.C.A. § 47-18-103. Therefore, the Court finds that that Plaintiffs' claim is not cognizable under the Tennessee Consumer Protection Act (TCPA). Therefore, Plaintiff's claim under the TCPA is dismissed.

CT-000222-09 (Div. V Shelby County Cir. Ct. Aug. 9, 2010.

The Welshans court's ruling coupled with the apparent absence of Tennessee case law to the contrary, strongly suggests that a condominium owners association does not engage in "trade" or "commerce," and therefore is not subject to the TCPA.

In the Connecticut case of Pasquariello v. Castle Rock Owners Association, Inc., the court addressed this same issue. 2010 WL 3447827 (Conn. Super. Aug. 5, 2010). In Pasquariello, the court was examining the Connecticut Unfair Trade and Practices Act which uses the same definition of trade and commerce as the TCPA. Id. at * 3. The court held that the condominium owner in that case had failed to allege facts to support that the condominium owner's association engaged in trade or commerce under the Connecticut Act. Id. at *5. The court reasoned that the relationship between a condominium owner and a condominium association is not the same as the relationship between a business engaged in trade or commerce and a consumer. Id at *4. The condominium owner and association are in a relationship "akin to the relationship between shareholders of a corporation and the corporation's officers and directors." Id. Furthermore, the court explained that requiring engagement in trade or commerce under the Act was meant to significantly limit the reach of the Act. Id. at *3.

This Court finds the reasoning in Welshans and Pasquariello persuasive and adopts the reasoning that a condominium association is not engaged in an activity that would place it under the purview of the Tennessee Consumer Protection Act.

In this case the Defendant is seeking attorney's fees, pursuant to T.C.A. §47-18-109(e)(2), on the basis that the Plaintiffs' TCPA action was frivolous, without legal or factual merit or brought for the purpose of harassment. Although the Court is not persuaded that the Defendant is engaged in an activity to which the TCPA is applicable, it does find that a good faith argument could be made that the Association should be subject to the TCPA. In fact, such an argument was apparently made in the two lower court cases cited. Specifically, the Court finds that the TCPA claim was not frivolous nor was it brought for the purpose of harassing the Defendant. Accordingly, the Defendant is not entitled to an award of attorney's fees and costs and its claim is denied.

III. Rescission of Foreclosure Sale

In Holt v. Citizen's Central Bank, the Tennessee Supreme Court stated the standard to set aside a foreclosure sale. 688 S.W.2d 414 (Tenn. 1984). The Court stated "[i]f a foreclosure sale is legally held, conducted and consummated, there must be some evidence of irregularity, misconduct, fraud or unfairness on the part of the trustee or mortgagee that caused or contributed to an inadequate price, for a court of equity to set aside the sale." Id. at 416.

In the present case, inadequacy of price is apparent and in fact does shock the conscience of this Court. Mr. Wilson paid $321,740.00 in cash to purchase the condominium at issue, whereas, the Association foreclosed for only $12,828.46. However, as explained by the Holt court, inadequacy of price must be coupled with something additional to warrant the setting aside

of a foreclosure sale. Id. In this case the inadequacy of price was not the only factor. The payment scheme established by the Association and its attorneys lead to irregularities and unfairness to the Plaintiff, Ms. Brooks.

The Association and its attorneys had an arrangement where delinquent assessment payments, although paid directly to the Association's management company Collins, were processed by the attorneys first and then forwarded to the Association to credit the owner's account. While notices were sent to Mr. Wilson and Ms. Brooks, the majority of these letters never indicated an accurate balance on the account. In fact, according to the testimony of the Association's representative and its attorney, attorneys' fees assessed on accounts were changing daily. Therefore, even if an owner had paid the full amount stated in one of the letters, the debt would not have been satisfied.

In addition to the issue of receiving an accurate notice of fees owed, evidence showed that there were irregularities involving the application of payments and charges assessed. On December 15, 2009, Mr. Wilson made a payment of $2,523.12. (Ex. 4.) According to the occupant ledger, a $1750.07 credit, which appears to be the December $2,523.12 less attorneys' fees, did not appear until April 5, 2010. (Ex. 14.) This amount was not credited until after the attorneys' had begun foreclosure. (Ex. 28.) On September 28, 2010, five months after the foreclosure took place and one day prior to trial; Ms. Brooks' account was credited $1740.65 (Ex. 14). At the time of foreclosure, the Association ledgers indicated Plaintiffs owed $8,738.44 when in fact the accurate amount was $6,405.52 (Ex. 14.) It is still not clear to the Court what amount it would have taken to give the Plaintiff a zero ($0) balance and to avoid the foreclosure. This is not acceptable.

RULING

Mr. Wilson lacks standing to pursue the action to rescind the foreclosure sale of Ms. Brooks' Unit. Mr. Wilson's claims are therefore dismissed from the lawsuit.

The Court finds that the condominium association does not engage in trade or commerce and therefore, the Tennessee Consumer Protection claim is dismissed.

The Court finds that the irregularities regarding the handling of Wilson's payments to the Association coupled with the inadequate price at foreclosure warrant the setting aside of the foreclosure sale.

IT IS THERFORE ORDERED, ADJUDGED AND DECREED as follows:

1. Mr. Wilson's claims are hereby dismissed with prejudice;

2. Ms. Brooks' claim under the Tennessee Consumer Protection Act is hereby dismissed with prejudice;

3. The Association's claim for attorney fees and costs under the Tennessee Consumer Protection Act are denied;

4. The foreclosure sale of 380 North Island Drive, Unit 312, Memphis, Tennessee is hereby set aside and held for naught and the Association's interest in the property shall be divested out of it and revested into Ms.Brooks and no fees or charges of any kind related to the foreclosure shall be assessed against the real property or the owner;

5. Court costs are to be assessed against the Defendant for which execution shall issue, if necessary.

CHANCELLOR ARNOLD GOLDIN

Date: December 9, 2010

Certificate of Service

I, the undersigned, hereby certify that a true and correct copy of the foregoing was served on Attorney for Plaintiff, Paul J. Springer, 301 Washington Avenue, Suite 302, Memphis, TN 38013 and Attorney for Defendant, James O. Evans and Robin Rasmussen 1669 Kirby Parkway, Suite 106, Memphis, TN 38120, via U.S. mail this 1st day of December, 2010.

Deputy Clerk & Master

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

WALTER BAILEY, MIKE RITZ,
and TERRY ROLAND, as Citizens of
Shelby County, Tennessee,

Plaintiffs,

v.

No. CH 12-0005-2

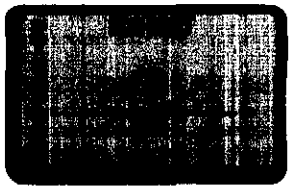
SHELBY COUNTY, TENNESSEE and
THE COUNTY COMMISSION OF
SHELBY COUNTY,

Defendants.

ORDER GRANTING SUMMARY JUDGMENT

This case involves the redistricting of the Shelby County Commission districts. Pursuant to Tenn. Code Ann. § 5-1-111[1], at least every ten (10) years, the legislative bodies of the counties in Tennessee are required to meet to change the boundaries of county districts or redistrict a county entirely so that the members represent substantially equal populations. After

[1] (a) Prior to January 1, 1982, and at least every ten (10) years thereafter, county legislative bodies of the different counties shall meet and, a majority of the members being present and concurring, shall change the boundaries of districts or redistrict a county entirely if necessary to apportion the county legislative body so that the members represent substantially equal populations.
(b) The county legislative body may increase or decrease the number of districts when the reapportionments are made.
(c) A county legislative body may reapportion at any time if the county legislative body deems such action necessary to maintain substantially equal representation based on population.
(d) The county legislative body must use the latest federal census data whenever a reapportionment is made.
(e) Districts shall be reasonably compact and contiguous and shall not overlap.
(f)(1) Except as provided in subdivision (f)(2), in the establishment of boundaries for districts, no precinct shall be split.
(2) Upon written certification by the coordinator of elections, a county election commission may establish a precinct that encompasses two (2) or more districts in any county that has twenty (20) or more county legislative body districts. In making this determination the coordinator of elections shall consider, among other things, the type of voting equipment used in the county, as well as the racial makeup of the districts and the cost savings to the county.
(g) Upon application of any citizen of the county affected, the chancery court of such county shall have original jurisdiction to review the county legislative body's apportionment, and shall have jurisdiction to make such orders and decrees amending the apportionment to comply with this section, or if the county legislative body fails to make apportionment, shall make a decree ordering an apportionment. Tenn. Code Ann. § 5-1-111.



reviewing the results of the 2010 Federal Census, members of the Shelby County Board of Commissioners ("Commissioners") submitted proposals containing various plans for reapportionment. The Commissioners were required to pass a redistricting plan by December 31, 2011. Multiple plans have been proposed.

The plan now at issue is Plan 2-J. On February 6, 2012, the Commission adopted Plan 2-J on first reading by a 7-6 vote. Later, on February 20, 2012, Plan 2-J passed on second reading by a 9-4 vote. On March 12, 2012, Plan 2-J received a 7-5 vote. Although Plan 2-J received a majority vote of the Commissioners after three consecutive readings, the Commission's Chairman declared that Plan 2-J did not pass because it did not receive a two-thirds vote on third reading as required under Shelby County Charter § 2.06(C)(3)(f).[2]

Meanwhile, on January 3, 2012, Commissioners Walter Bailey, Mike Ritz, and Terry Roland filed their Complaint in this Court, alleging that the current Shelby County Commission districts are mal-apportioned. Plaintiffs alleged that the current redistricting plan for the Shelby County Commission violates the United States Constitution, the Tennessee Constitution, and the Shelby County Charter.

Plaintiffs Mike Ritz and Terry Roland subsequently withdrew as parties to this lawsuit on March 30, 2012. On April 13, 2012, Plaintiff, Walter Bailey, filed a Motion for Summary Judgment. In response, Defendant, Shelby County, filed its Memorandum in Opposition to Summary Judgment on May 11, 2012.

Although the Shelby County Charter § 2.06(C)(3)(f) requires a two-thirds majority vote

---

[2] All ordinances shall be adopted upon receiving a majority vote of the membership of the board of county commissioners, except for ordinances dealing with the following subjects, which shall be adopted on receiving a two-thirds vote of the membership of the board of county commissioners…
(f) Any proposal which changes the number of county commissioners or their district lines.

Shelby County Charter 2.06(C)(3)(f).

in county redistricting matters, Tenn. Code Ann. § 5-1-111(a) explicitly states that only a majority vote is needed.[3] The Court finds that there are three issues before the Court in this case: (1) whether Shelby County Charter § 2.06(C)(3)(f) is preempted by the requirements of Tenn. Code Ann. § 5-1-111(a); (2) whether Shelby County Charter § 2.06(C)(3)(f) is in conflict with the Tennessee Constitution; and (3) whether Plaintiff Bailey is collaterally estopped from bringing this lawsuit.

Based upon the memoranda submitted by the parties[4] in conjunction with the pleadings and exhibits, the Court finds that the following material facts are not in dispute:

1. Tenn. Code Ann. § 5-1-111 mandates that prior to January 1, 1982, and at least every ten (10) years thereafter, county legislative bodies shall change the boundaries of districts or redistrict a county entirely if necessary to apportion the county legislative body so that the members represent substantially equal populations.
2. Tenn. Code Ann. § 5-1-111 requires that the county legislative body use the latest federal census data whenever redistricting a county.
3. Tenn. Code Ann. § 5-1-111 requires a majority of members of the county legislative body to agree to a redistricting plan.
4. Shelby County is a charter form of government, which includes a procedural framework to effectuate reapportionment under Shelby County Charter § 2.06(C)(3)(f).
5. Shelby County Charter § 2.06(C)(3)(f) requires a two-thirds vote of the commissioners to redistrict the county.

[3] This court's ruling concerning the legality of a provision of the Shelby County Charter requiring a two-thirds vote is limited to § 2.06(C)(3)(f) only. No other provision of the charter is before the court nor is the validity of any other provision of the charter being challenged or interpreted.

[4] The Court is deciding this motion pursuant to Local Rule 10(j) of the Shelby County Chancery Court which permits the hearing of motions on the parties' submissions.

6. The two-thirds vote requirement for redistricting under the Shelby County Charter is greater than the majority requirement set out in Tenn. Code Ann. § 5-1-111.
7. The Commission conducted committee hearings and commission meetings for several months. During these discussions, the Commission debated and reviewed multiple proposed plans to reapportion the thirteen members of the Commission consistent with the United State Constitution reapportionment requirements.
8. One proposed Ordinance included a map known as Plan 2-J.
9. Plan 2-J satisfied all of the equal protection requirements of the United States Constitution.
10. On February 6, 2012, on its first reading, Plan 2-J received a majority vote of 7-6.
11. On February 20, 2012, on its second reading, Plan 2-J received a majority vote of 9-4.
12. On March 12, 2012, on its third reading, Plan 2-J received a majority vote of 7-5.
13. After the March 12, 2012 vote on third reading, the Commission's Chairman declared that although Plan 2-J received a majority of seven votes, it did not pass as a duly enacted Ordinance because it did not receive a two-thirds vote on third reading as required under Shelby County Charter § 2.06(C)(3)(f).
14. No other redistricting plan has received a majority vote by the Commission on three readings.

A. Summary Judgment Standard

Summary judgment is appropriate when the moving party can show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1, 5 (Tenn. 2008).

Cases filed after July 1, 2011 must follow the newly enacted summary judgment standard set out in Tenn. Code Ann. § 20-16-101. The General Assembly enacted this statute to overrule the judicially created *Hannan* summary judgment standard and to replace it with the federal summary judgment standard. *See* 2011 Tenn. Pub. Acts c. 498, §1. Pursuant to the new standard, the moving party, who does not have the burden of proof at trial, shall prevail on a motion for summary judgment if it (1) submits affirmative evidence that negates an essential element of the nonmoving party's claim or (2) demonstrates to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. Tenn. Code Ann. § 20-16-101.

If the moving party cannot meet its burden of production, the summary judgment will be denied. However, if the moving party can meet the burden of production, the burden shifts to the nonmoving party. *See generally Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

In this case there is no dispute as to any material fact and the issues are purely of constitutional, statutory and legal interpretation.

B. Conflicting Local Law and State Statutes

Although local governments have discretion to act within the scope of their delegated power, local governments cannot "effectively nullify state law on the same subject by enacting ordinances that ignore applicable state laws." *421 Corp. v. Metro. Gov't of Nashville & Davidson County*, 36 S.W.3d 469, 475 (Tenn. Ct. App. 2000).

Here, the Shelby County Charter, effective September 1, 1986, contains a provision for voting requirements in redistricting matters. However, the General Assembly has enacted legislation that specifically directs the counties on county reapportionment. Moreover, the delegates of the Constitutional Convention of 1977 amended the state constitution to include

language that directed counties to reapportion themselves as prescribed by the laws set out by the General Assembly. The later enacted charter conflicts directly with the current state law and state constitution. An examination of the legislative history of Tenn. Code Ann. § 5-1-111 and Tennessee Constitution Article 7, § 1 reveals that the intent of the legislature was to require only a majority vote in county redistricting matters.

C. Statutory Construction

In construing statutes, courts must presume that the General Assembly selected these words deliberately and that the use of the words conveys some intent and carries meaning and purpose. When the language of a statute is clear and unambiguous, courts must apply the plain meaning of the statute "without a forced interpretation that would limit or expand the statute's application." *Eastman Chem. Co. v. Johnson*, 151 S.W.3d 503, 507 (Tenn. 2004). "When the language is ambiguous and does not yield a clear interpretation, courts may consult the legislative history for additional guidance." *Lawrence County Educ. Ass'n v. Lawrence County Bd. of Educ.*, 244 S.W.3d 302, 309 (Tenn. 2007); *Storey v. Bradford Furniture Co.*, 910 S.W.2d 857, 859 (Tenn. 1995); *Carr v. Ford,* 833 S.W.2d 68, 69 (Tenn. 1992). In all, the golden rule of statutory construction is "to effectuate legislative intent, with all rules of construction being aides to that end." *Lawrence County Educ. Ass'n*, 244 S.W.3d at 309.

The legislative history of Tenn. Code Ann. § 5-1-111 establishes that the General Assembly intended to limit the number of votes necessary for county redistricting matters. When the current statute was enacted in 1968, Tenn. Code Ann. § 5-1-111 (a) stated "a majority of the acting justices of the peace being present and concurring." In 1978, the legislature modified the statute from "acting justices of the peace" to "members."

Prior to 1968, the statute (then Tenn. Code Ann. 5-111) required two-thirds of the county

legislative body to vote for redistricting. Tenn. Code Ann. 5-111 read as:

> 5-111. Change of Districts.—The county court of any county, *two-thirds (2/3) of the acting justices of the peace being present and concurring*, may change the boundary of any civil district and make new districts or redistrict a county entirely, when necessary, by means of commissioners to be appointed by such court, or otherwise. (Emphasis added).

However, this language was deliberately changed by the legislature. The 1967 Tennessee House of Representatives floor discussion of the proposed change from two-thirds to a simple majority is instructive of the Tennessee General Assembly's intent to require fewer votes in redistricting matters. During the floor debate on amending Tenn. Code Ann. § 5-111, Representative Samuel Lewis described the reason for the change in county reapportionment voting:

> Section 11 of this act repeals Section 5-111 and 5-112. These are simply now by the two-thirds vote of the court the districts can be changed. My understanding is that this has never happened, in this state, but if it has I don't know where, but it will not be necessary now, because this bill calls for a majority of the court to be able to do it.
>
> House debate on H.B. 437 (tape H-258, Apr. 27, 1967) (statement of Rep. Lewis).

The Tennessee General Assembly voted on this change knowing that the two-thirds requirement was too burdensome on counties to redistrict. The voting requirement language in the statute has remained unchanged since 1968. Thus, the Tennessee General Assembly mandates that counties require no more than a majority vote in redistricting matters. The Shelby County Charter's requirement of a two-thirds voting requirement is, therefore, preempted by this mandatory state law.

Furthermore, Tenn. Code Ann. § 5-1-210(1) limits ordinances in a county charter to those powers "authorized or required... under the Constitution and general laws of the State of Tennessee." Reading this section of Chapter 1 in the Counties Title of the Tennessee Code Annotated in conjunction with Tenn. Code Ann. § 5-1-111 further supports that the General Assembly's prescription of a majority vote in county redistricting preempts the two-thirds

requirement found in the Shelby County Charter § 2.06(C)(3)(f).

D. Constitutional Construction

Not only does the provision found in Shelby County Charter § 2.06(C)(3)(f) violate the state statute concerning county redistricting, it also violates the Tennessee Constitution.

When construing a constitutional provision, courts must look to the intent of the people who adopted a constitutional provision. *Gaskin v. Collins,* 661 S.W.2d 865, 867 (Tenn. 1983). Courts must interpret constitutional provisions in a way that assigns plain and ordinary meaning to their words as well as take into account the history, structure, and underlying values of the entire document. *Estate of Bell v. Shelby County Health Corp.*, 318 S.W.3d 823, 835 (Tenn. 2010) (citing *Barrett v. Tenn. Occupational Safety and Health Review Comm'n,* 284 S.W.3d 784, 787 (Tenn. 2009); *Cleveland Surgery Ctr., L.P. v. Bradley County Mem'l Hosp.,* 30 S.W.3d 278, 282 (Tenn. 2000); *Gaskin v. Collins*, 661 S.W.2d at 867).

Article VII, Section 1 of the Tennessee Constitution states: "The legislative body shall be composed of representatives from districts in the county as drawn by the county legislative body *pursuant to statutes enacted by the General Assembly.*" (Emphasis added). This paragraph was added to the Tennessee Constitution in 1978. The language instructs counties to reapportion themselves in accordance with the laws enacted by the state legislature. Here, this includes Tenn. Code Ann. § 5-1-111.

Looking at the debate at the Tennessee Constitutional Convention of 1977, the inclusion of paragraph 2 to Article 7 of the Tennessee Constitution was intentionally added to order counties to follow the laws of the General Assembly in county redistricting. Delegate Ramsey stated during the discussion:

> I think our intent all along was that the local governing bodies would reapportion themselves as prescribed by the general laws and as set out by the General Assembly.

1977 J. DEB. LIMITED CONSTITUTIONAL CONVENTION 1977, STATE OF TENN. 1319 (statement by Del. Ramsey on November 30, 1977).

Constitutionally, Shelby County must redistrict the Commissioners in accordance with the laws of the state. The state law was amended to reduce the number of votes necessary to redistrict a county. Therefore, only a majority vote of the Commissioners is needed to approve a redistricting plan.

E. Collateral Estoppel

The County did not address the legislative and constitutional issues argued by Plaintiff Bailey, but rather defends on the basis that Bailey's lawsuit is collaterally estopped by a prior decision of the Shelby County Circuit Court rendered in 1993.[5]

Collateral estoppel is a judicially created issue preclusion doctrine. *Mullins v. State*, 294 S.W.3d 529, 534 (Tenn. 2009). The party claiming collateral estoppel has the burden of proof. *State v. Scarbrough,* 181 S.W.3d 650, 655 (Tenn. 2005). To prevail on a claim of collateral estoppel, the party invoking it must show (1) that the issue being precluded is identical to an issue decided in an earlier proceeding, (2) that the issue being precluded was actually raised, litigated, and decided on the merits in the earlier proceeding, (3) that the judgment in the earlier proceeding is final, (4) that the party against whom collateral estoppel is asserted was a party or is in privity with a party to the earlier proceeding, and (5) that the party against whom collateral estoppel is asserted had a full and fair opportunity in the earlier proceeding to contest the issue now sought to be precluded. *Mullins*, 294 S.W.3d at 535.

---

[5] In 1992, Bailey filed a Complaint in Federal District Court for the Western District of Tennessee and filed a Complaint and Amended Complaint the Circuit Court of Shelby County, Tennessee. Bailey sought a determination of the validity of the redistricting plan, which the County Commission approved by a majority vote, but not a two-thirds vote required by the Shelby County Charter. At that time, Bailey argued that the two-thirds vote provision of the Shelby County Charter § 2.06(C)(3)(f) should be given full force and effect.

On November 16, 1993, the Circuit Court of Shelby County, Tennessee entered an Order granting the relief sought by Bailey. Shelby County appealed the Circuit Court Order to the Tennessee Supreme Court, however the appeal was dismissed.

Shelby County has clearly not met its burden regarding its defense of collateral estoppel. The issues in this suit involve issues of constitutional law and preemption. The 1993 Order did not address either of these issues. As a result, collateral estoppel does not preclude this Court from ruling on the issues raised in this case.

Bailey's motion for summary judgment is, therefore, GRANTED and the Court finds, as a matter of law, as follows:

1) Based on the Tennessee Constitutional and statutory provisions pertaining to the redistricting of county legislative districts, Shelby County Charter § 2.06(C)(3)(f) is preempted by Tenn. Code Ann. § 5-1-111(a).

2) The redistricting requirement of a simple majority vote of the county legislative body as set out in Tenn. Code. Ann. § 5-1-111(a) applies in redistricting the county legislative districts.

3) Plan 2-J, having satisfied all of the equal protection requirements of the United States Constitution, and having received a majority vote on three separate readings by the members of the Shelby County Commission, is approved as the plan of redistricting for Shelby County.

4) Court costs are assessed against the Defendant, Shelby County, Tennessee.

IT IS SO ORDERED.

CHANCELLOR

DATE: June 13, 2012

"I hereby certify that a copy of the above ORDER / JUDGMENT has been served on all other parties or counsel."

By: Natasha Jones
Deputy Clerk & Master

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
JUNE 2003 Session

DARRELL DWAIN BINKLEY v. TENNESSEE DIECASTING-HARVARD INDUSTRIES, ET AL.

Direct Appeal from the Chancery Court for Lauderdale County
No. 10,950 Martha Brasfield, Chancellor

No. W2002 -02188-WC-R3-CV - Mailed August 28, 2003

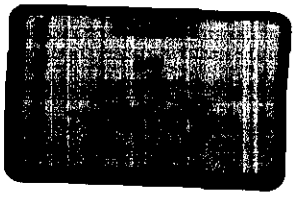
This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with the Tenn. Code Ann. Section §50-6-225 (e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The Appellant, employer, argues that the trial court erred in finding that the employee sustained a herniated disc as a result of his on the job injury; in awarding temporary total and permanent partial disability benefits and in not applying the "Last Injurious Injury Rule" to dismiss the employee's claim against Appellant. The Appellee, employee, argues that the trial court erred in limiting employees permanent award to 2.5 times the anatomical rating pursuant to T.C.A. §50-6-241(a)(1) because employee's return to work was not "meaningful". For the reasons discussed below, the panel has concluded that the judgment of the trial court should be affirmed in all respects.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Chancery Court Affirmed

ARNOLD B. GOLDIN, Sp. J., delivered the opinion of the court, in which HOLDER, J. and LOSER, Sp. J. joined.

Byron K. Lindberg and Peggy Tolson, Tolson and Associates, Brentwood, Tennessee, for the appellant, Tennessee Diecasting-Harvard Industries and ITT Hartford Insurance Group

D. Michael Dunavant, Ripley, Tennessee, for the appellee, Darrell Dwain Binkley



MEMORANDUM OPINION

STANDARD OF REVIEW

The review of the findings of the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. T.C.A. § 50-6-225(e)(2). Stone v. City of McMinnville, 896 S.W. 2d 548,550 (Tenn. 1995). This court is not bound by the trial court's findings, but instead conducts its own independent examination of the record to determine where the preponderance lies. Galloway v. Memphis Drum Service, 822 S.W.2d 584, 586 (Tenn. 1981).

FACTUAL BACKGROUND

The employee, Darrell Dwain Binkley, filed his complaint for workers' compensation benefits alleging that he sustained an injury to his lower back on September 29, 1997, when he lifted a five gallon bucket of oil, weighing approximately 75 pounds, while at work for his employer, Tennessee Diecasting. His complaint alleged that his injury was permanent and that he was entitled to benefits for both temporary total and permanent partial disability, in addition to current and future medical care. Appellant denied the employee's claim in its entirety and further alleged that if the employee sustained an on the job injury that the court should dismiss the claim against it based on the "Last Injurious Injury Rule".

Following a trial on May 21, 2002, the court found that the employee sustained a compensable injury to his low back and awarded him five (5%) per cent permanent partial disability to the body as a whole. The court further found that the employee was entitled to benefits for a period of temporary total disability and that the "Last Injurious Injury Rule" did not apply to the facts of this case. The employer has appealed from the entire award.

The employee was 42 years old at the time of trial. He had a varied work history. He had been in the military, albeit briefly; had performed seasonal work at two different cotton gins over several years; had worked as a laborer at factories and warehouses and had been a maintenance man for two adult family homes in the State of Washington, one of which was owned by his former wife. He had also worked as a laborer and maintenance man for a diesel company. While working for this employer in 1988, he slipped and sustained a herniated disc at the L5-S1 level for which he underwent surgery. He received a workers' compensation settlement as a result of this injury.

LEGAL AND MEDICAL CAUSATION

The employee went to work for the Appellant in 1997. His duties were to operate a machine and to dispense parts. His job required constant lifting, bending and stooping. Part of his job required him to keep the machines well oiled and lubricated. The oil for the machines was carried in the plant in large open buckets. The oil would splash out of the buckets onto the floor causing a slipping hazard. On the day of his injury, he was preparing to carry oil to his machine in a 5 gallon bucket,

weighing approximately 75 pounds. As he lifted the bucket, he felt a "pop" in his back causing a shock to run into his knees and toes and numbness, tingling and pain in his left leg and foot.

He advised his plant supervisor that he had been injured and was told to go to the emergency room at the local hospital where he was treated and released. He did not improve. The employer then authorized treatment by Dr. William Tucker, a family practice physician in Ripley. Again, he did not improve and was referred by Dr. Tucker to Dr. D.J. Canale, a Memphis neurosurgeon. Dr. Canale ordered an MRI performed. Dr. Canale read the MRI as showing a mild bulging disc, especially at the L5 level. Dr. Canale testified that he found no evidence of a recurrent disc rupture and returned the employee to work full duty without restrictions and with no permanent physical impairment.

The employee was not satisfied with his treatment from Dr. Canale. He felt that his pain was similar to the pain he had experienced from his earlier 1988 disc injury. He told his employer he was going to seek treatment at the V.A. Hospital. In the meantime, the employer's workers compensation carrier referred him to Dr. John Brophy, another Memphis neurosurgeon. Though Dr. Brophy sent him to a work hardening/physical therapy program the employee did not participate in it because it was going to require him to sign a form that stated he would not seek treatment from anyone other than Dr. Brophy. Since he was also being treated at the V.A., he refused to sign the form. Dr. Brophy then released him and returned him to work at full duty without restrictions and with no permanent physical impairment.

He was offered light duty work by his employer in October, 1997, which he performed for a very brief period of time. He left the job voluntarily and never returned to full duty as per the instructions of Drs. Canale and Brophy.

The employee was treated at the V.A. Hospital in Memphis between 1997-1999. He then moved back to Washington State in 1999, and began treatment at the V.A. Hospital there in July, 1999, undergoing back surgery on December 30, 1999. The operative notes reflect that the surgeon found scar tissue, fatty tissue, and *a large disc fragment at the L5-S1 level.*

Following his surgery, the employee continued to seek treatment for his back problem from the V.A. Hospital rather than from physicians authorized by his employer. Dr. Samuel Pieper, a psychiatrist with the V.A. Hospital in Murfreesboro, who never examined or treated him, reviewed the records of his treatment at the V.A. Hospitals. Dr. Pieper testified that the employee sustained a permanent impairment from his on the job injury of September, 1997, based primarily on the fact that a disc fragment was found at the L5-S1 level during surgery. Dr. Pieper opined that the employee had sustained a 10% permanent physical impairment from his 1988 back surgery and that, in accordance with the AMA Guidelines, he should receive an additional 2% for his second surgery at the same level in1999.

Appellant contends that the trial court should have denied compensability of this claim because two highly respected neurosurgeons, Drs. Canale and Brophy, testified that Mr. Binkley did

not sustain a permanent impairment from his injury of September, 1997. They also argue that the credibility of the V.A. records and its surgeons is somewhat "jaundiced" and that a patient, if he looks long and hard enough, can always find a surgeon who will perform surgery.

This is an interesting argument which may be valid in some cases. In this case, however, not only did the employee consistently complain of back and leg pain from the date of his injury in September, 1997 until his surgery on December 30, 1999, but when surgery was ultimately performed at the V.A. Hospital, *a large disc fragment was found and removed from his back.* Dr. Pieper opined that the disc fragment was the abnormality that showed up on the MRI, myleogram and CAT scan and that these diagnostic test results had been incorrectly interpreted by Drs. Canale and Brophy. It was his opinion that the disc fragment that was found as a result of the December, 1999, surgery had caused the employee's pain since September 29, 1997.

The trial court found that the preponderance of the evidence supported the employee's claim that he sustained a ruptured disc when he lifted the oil bucket on September 29, 1997 and we are not persuaded otherwise.

TEMPORARY TOTAL DISABILITY

The employee was injured on September 27, 1997. He was off work until November 7, 1997, when he was returned to work by Dr. Canale. The employer provided him with light duty work at full pay and stopped paying him temporary total disability benefits. His return to work lasted approximately three (3) hours after which he voluntarily terminated his employment. It was on this same date that he began seeking medical treatment at the V.A. Hospital in Memphis.

He continued to seek treatment at the V.A. for his work injury both in Memphis and Washington State culminating with his back surgery on December 30, 1999.[1]

The post operative notes from the V.A. indicated that he was doing well following his surgery until January 10, 2000, when he "picked up a bag of sugar, and his problems began anew".

The trial court found that the employee had been unable to work from the time he voluntarily left his light duty employment with his employer and continued with his treatment at the V.A., including his surgery. The court found he reached maximum medical improvement on January 10, 2000, the date he picked up the bag of sugar.

Appellant argues that because the employee voluntarily left his employment while assigned to light duty, that he should not be entitled to reinstatement of additional temporary total disability.

---

[1]He had also been released by Dr. John Brophy on December 15, 1999 to return to work at full duty *without restrictions*.

As the Supreme Court stated in Cleek v. Wal-Mart Stores, Inc., 19 S.W.3d 770, 776 (Tenn.2000):

"T.C.A. §50-6-207(3)(A)(i) specifically provides that the injured employee shall receive compensation 'for the period of time during which [the employee] suffers temporary total disability on account of the injury' and thus the purpose served by such benefits is to allow for 'the healing period during which the employee is totally prevented from working' Gluck Bros., Inc.v. Coffey, 222 Tenn. 6, 13-14, 431 S.W. 2d 756, 759 (1968)."

Appellant relies upon the employees return to work by Drs. Canale and Brophy. Based on the employee's findings at surgery and the opinion of Dr. Pieper, the trial court obviously found that both Drs. Canale and Brophy had been incorrect in their diagnosis at the time they returned the employee to work.

Moreover, as the court stated in Cleek, "the fact that benefits were terminated by a nominal return to work does not necessarily mean that temporary total disability benefits can never be revived under any set of circumstances". 19 S.W. 3d at 776.

The trial court found that the employee is entitled to an additional period of temporary total disability benefits for the period November 7, 1997, when he began seeking treatment at the V.A. Hospital until January 10, 2000. We agree with the trial court.

PERMANENT IMPAIRMENT

Once the causation and permanency of an injury have been established by expert testimony, the trial court may consider many pertinent factors, including age, job skills, education, training, duration of disability, and job opportunities for the disabled, in addition to anatomic impairment, for the purpose of evaluating the extent of a claimant's permanent disability. McCaleb v. Saturn Corp., 910 S.W.2d 412, 416 (Tenn. 1995).

T.C.A. § 50-6-241(a)(1) states that if the employer returns the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of the injury, the maximum permanent partial disability award that the employee may receive is 2.5 times the medical impairment rating determined pursuant to the provisions of the AMA Guides to the Evaluation of Permanent Impairment. The case law has interpreted this section to mean that the return to work must be a "meaningful" return to work. Nelson v. Wal-Mart Stores, Inc., 8 S.W.3d 625,630 (Tenn. 1999).

The Appellant argues that it returned the employee to work at light duty at his full pre-injury wage, and that he voluntary left their employment, not because he was unable to perform the light duty work assigned to him, but because "he did not like going to work and being unable to perform his share of the workload". In light of this, Appellant urges that if the employee is entitled to an award of permanent physical impairment at all, which it argues he is not, that it should be limited

to 2.5 times his anatomical impairment rating.

The employee, on the other hand, argues that T.C.A. § 50-6-241(b) should apply to the facts of this case. This section provides that if the employer does not return the employee to employment at a wage equal or greater than the wage the employee was receiving at the time of the injury or by analogy, the return to work is not "meaningful", the maximum permanent partial disability award that the employee may receive is six (6) times the anatomical impairment rating.

The employee argues that he was only returned to light duty work. His job was to walk, stand and watch the other employees work. He was not required to perform the heavy labor of working on one of the machines. The employee testified that he did not like going to work and being unable to perform his share of the workload, and that he went home after about three (3) hours. He argues that this was, in essence, "make work" and not meaningful. Implicit in the employee's argument is that he was returned to work before reaching maximum medical improvement and before he was capable of attempting a meaningful return to work.

This issue has now been resolved by the Supreme Court in Lay v. Scott County Sheriff's Department, E2002-01731-SC-R3-CV (Filed: June 19, 2003).

Lay was injured in an automobile accident while working as a deputy sheriff for the Scott County Sheriff's Department in October, 2000. He was diagnosed as having a bulging disc with nerve impingement at the L4-5 disc space. He continued to work for the Sheriff's Department for five months after the accident, in the same position and at the same pay as before the accident. In March, 2001, before having surgery and before reaching maximum medical improvement, he voluntarily resigned from the Sheriff's Department for a better paying private sector job. Subsequently, he had surgery, and as a result of his post-surgery medical restrictions, the private sector employer refused to take him back. The Sheriff's Department did rehire him but at the bottom of the pay scale.

Lay argued that the determination of whether there was a meaningful return to work must occur only after an employee reaches maximum medical improvement while the county argued that Lay's first return to work after the accident was "meaningful" under Nelson.

The court stated in Lay that "in determining whether there has been a meaningful return to work, the focus is upon 'the reasonableness of the employer in attempting to return the employee to work and the reasonableness of the employee in failing to return to work' not the date on which maximum medical improvement was attained." Slip Op., p.4.

As in this case, the court in Lay found that his voluntary resignation "was 'unreasonable' behavior, ... as it was not related to his injury." Slip.Op., p. 5.

The court went on to state, as follows:

> "Finding that a court, when assessing meaningful return to work, is limited to only those events occurring after an employee attains maximum medical improvement, regardless of the employee's own actions, would be contrary to the holdings of other cases and to the purposes of Section 50-6-241.
>
> ...
>
> ...an employee cannot avoid the statutory caps and thereby augment his award through his unilateral acts when those acts are unrelated to the injury." Slip Op., p.6.

The trial court found that the Appellant fully complied with the statute in providing the employee with a job, albeit light duty, at his full pre-injury wage but that the employee chose not to perform it, even though he was fully capable of doing so. Based on these facts, the trial court found that the caps of 2.5 times the anatomical impairment rating applied. We agree.

The Appellant then urges that the employee should not be awarded any permanent physical impairment. It argues that Drs. Canale and Brophy gave the employee 0% impairment and that Dr. Pieper's rating of 2% was not given until after the employee's "third" back injury in January, 2000 when he lifted a bag of sugar.

Dr. Pieper testified, however, that his impairment rating was based on the employee's second disc surgery in1999. He testified that the employee had a 10% anatomical rating for his 1988 surgery and that the AMA Guide provides an additional 2% for his 1999 surgery at the same L5-S1 level.

The trial court applied the 2.5 caps and found that the employee sustained a 5% permanent physical impairment to the body as a whole based on his anatomical impairment of 2%. We find that the evidence does not preponderate against the trial court's award.

THE LAST INJURIOUS INJURY RULE

Finally, Appellant argues that the trial court erred in not applying the "Last Injurious Injury Rule" to the facts of this case. [2]

The substance of the Appellant's argument is that the employee sustained a "third injury" in January, 2000, when he picked up a bag of sugar and that this injury should serve to shift the entire responsibility for his impairment to the *person or entity* responsible for his last or most recent injury in a series of successive injuries. Appellant relies on the Supreme Court's decision in Riley v.INA/Aetna Ins. Co., 825 S.W. 2d 80 (Tenn. 1992). We believe the Appellant's reliance on Riley and on the application of the rule to the facts of this case is misplaced.

---

[2] The Chancellor's ruling stated that the court had issued an earlier order setting out the facts and the law that the court relied upon in denying the applicability of the "Last Injurious Injury Rule" to the facts of this case. Unfortunately, the earlier order was not included in the record on appeal.

Under the Last Injurious Injury Rule, an employer takes the employee as he finds him and if an employee, having previously sustained an injury while working for a different employer, is injured on his new job and the new injury is causally connected to his employment, the new employer is liable for the effects of the entire injury even though the resulting disability is far greater than if the second injury were evaluated on its own. Baxter v. Smith, 364 S.W.2d 936, 943 (Tenn. 1962).

In Riley, the employee, a 44 year old truck driver with an existing 40% disability to the body as a whole, sustained a work-related back injury. Following back surgery and before reaching maximum medical improvement, the employee began work for another employer. He sustained another back injury while working for the new employer. The employee brought separate suits against both employers for the injuries sustained while working for them. The court sustained the trial court's finding that the Last Injurious Injury Rule was inapplicable because "there was an assessment of [employee's] first-injury permanent disability before the occurrence of the second injury." In fact, the employee's physician did not actually assign the employee a permanent physical impairment rating prior to his subsequent back injury at the new employer. The physician testified that "if asked" prior to the new injury he would have assigned a 5% rating attributable to the earlier injury. Based on this testimony, the court held that this "assessment" of the employee's permanent disability was "sufficient to forestall application of the last injurious injury rule". 825 S.W. 2d 80, 82, 83 (Tenn. 1992).

In the present case, the rule is inapplicable for two reasons: 1) There is no proof in this record that the employee was employed by a new or successive employer when he sustained his "third injury" on January 10, 2000. Without a successive employer, the rule is inapplicable.[3] Baxter at 943. 2) An "assessment" was made by Dr. Pieper that the employee should have an additional 2% permanent physical impairment that was attributable to his injury of September 29, 1997. As in Riley, the assessment was made after the subsequent injury, but was specifically attributed to the earlier injury.

CONCLUSION

For the reasons stated above, the judgment of the trial court is affirmed in its entirety. The cost of this appeal is taxed to the Appellants.

ARNOLD B. GOLDIN, SPECIAL JUDGE

[3] The determination of a successive employer is the threshold inquiry. Because in this case there was no proof of a successive employer, it is not necessary to determine the causal connection between the employment and the resulting injury or whether the successive injury created a greater disability than would have otherwise been the case. Of course, in a case where the rule is applicable, all of the criteria must be met.

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
JUNE 2003 Session

EDWARD CARL CAKSAKKAR. v. GOODYEAR TIRE & RUBBER CO., and JAMES FARMER, DIRECTOR, DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT, WORKERS' COMPENSATION DIVISION, SECOND INJURY FUND

Direct Appeal from the Chancery Court for Obion County
No. 21,127 William B. Acree, Circuit Judge (By Interchange)

No. W2002-02368-WC-R3-CV - Mailed September 25, 2003

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with the Tenn.Code Ann. §50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The trial court found that the plaintiff was permanently and totally disabled. The parties do not contest this finding. The appellant, Second Injury Fund, argues, however, that the trial court erred in its apportionment of liability between the Fund and the employer when it held that only 25% permanent vocational impairment should be apportioned to the employer and 75% apportioned to the Fund as a result of the plaintiff's last back injury. For the reasons discussed below, the Panel has concluded that the judgment of the trial court should be modified so that 75% permanent vocational impairment is apportioned to the employer and 25% apportioned to the Fund.

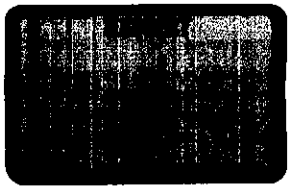
Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Chancery Court Affirmed as Modified

ARNOLD B. GOLDIN, Sp.J. delivered the opinion of the court, in which HOLDER, J. AND LOSER, SP.J., joined.

Paul G. Summers, Attorney General and Reporter and E. Blaine Sprouse, Asst. Attorney General, Nashville, Tennessee for the appellant, Second Injury Fund.

Jeffrey A. Garrety, Jackson, Tennessee, for the plaintiff/appellee, Edward Carl Caksackkar.

Randy N. Chism, Elam, Union City, Tennessee, the defendant/appellee, Goodyear Tire & Rubber Co.



MEMORANDUM OPINION

STANDARD OF REVIEW

The review of the findings of the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. T.C.A. § 50-6-225(e)(2). Stone v. City of McMinnville, 896 S.W. 2d 548,550 (Tenn. 1995). This court is not bound by the trial court's findings, but instead conducts its own independent examination of the record to determine where the preponderance lies. Galloway v. Memphis Drum Service, 822 S.W.2d 584, 586 (Tenn. 1981). The standard governing appellate review of findings of fact by a trial court requires the Special Workers' Compensation Appeals Panel to examine in depth the trial court's factual findings and conclusions. GAF Bldg. Materials v. George, 47 S.W. 3d 430, 432 (Tenn. 2001). When all of the expert medical testimony offered in a workers' compensation case is by deposition, the reviewing court may exercise it's own judgment as to the weight and credibility to be given the testimony in making an independent assessment as to where the preponderance of the evidence lies. Overman v. Williams Sonoma, Inc., 803 S.W. 2d 672, 676 (Tenn. 1991).

FACTUAL BACKGROUND

The employee, Edward Earl Caksakkar, filed a complaint for workers' compensation benefits alleging that he sustained a twisting injury to his lower back on December 29, 1997. This injury was followed by an additional low back injury on January 2, 1998, when he was thrown from a buggy at work into some skids stacked nearby, thereby exacerbating his earlier low back injury. His complaint alleged that his injury was permanent and that he was entitled to benefits for both temporary total and permanent or permanent partial disability, in addition to current and future medical care. Additionally, the employee brought his complaint against the "Second Injury Fund" pursuant to T.C.A. §50-6-208(b) because of a prior back injury which he sustained on November 5, 1981, while working for the same employer. As a result of his 1981 work injury, the employee entered into a workers compensation settlement based on 25% permanent partial disability to his body as a whole.

Following a trial on August 7, 2002, the court found that the employee sustained compensable injuries to his low back on December 29, 1997, and January 2, 1998, and that as a result of these injuries he was permanently and totally disabled. The trial court further found that the liability for the permanent and total disability benefits should be apportioned among the defendants pursuant to T.C.A. §50-6-208(a) and that pursuant to said statute the employee's current injury accounted for 25% of this total disability. The court then found that the employer, Goodyear, was, therefore, liable for 25% of the permanent and total benefits due to the employee, and the Second Injury Fund was liable for the remaining 75% of the benefits due. Neither the employer nor the Second Injury Fund contest the trial court's finding of permanent and total disability. The Second Injury Fund has, however, appealed from the trial court's apportionment of liability between the Fund and the employer.

The employee went to work for the appellant in 1977. He previously had injured his low back in 1981 while working for the appellant. He underwent surgery for this injury and received a settlement in 1983 based on a vocational disability of 25% to the body as a whole. Following his recovery from the surgery he returned to full-duty employment for the appellant with no restrictions. He worked continuously performing heavy labor for the appellant without incident until his injuries forming the basis of his complaint. According to the evidence at trial, the employee had not even been back to see his doctor about his 1981 back injury.

The employee was initially treated conservatively following his 1997-98 injuries. His initial treating doctor, Dr. Anthony Segal, did not believe he was a good candidate for surgery and returned him to work at light duty with no impairment.

He was later seen by Dr. David McCord. Dr. McCord performed diagnostic studies which he opined demonstrated diminished disc space at L4-L5 and degenerative changes in the employee's spine. As a result, Dr. McCord performed back fusion surgery on the employee at his L4-L5 and L5-S1 vertebrae. The first fusion surgery of October 15, 1999, failed. A second fusion surgery was performed by Dr. McCord on September 1, 2000, and it too failed. A third fusion surgery was performed at the same site on March 12, 2001, during which some vertebrae were removed.

In his deposition, Dr.McCord testified that this was a very severe injury to employee, that he should avoid prolonged sitting, heavy lifting, or overhead labor and he assigned him a permanent physical impairment rating of 26% to the body as a whole. On the employer's "Impairment Evaluation" form, that was introduced as an exhibit at trial, Dr. McCord stated that the employee "Remains 100 % occupationally disabled." He further marked that place on the form that stated: "Not Able to perform any sustained activity."[1]

In addition to Dr. McCord, the employee was referred by his counsel to Dr. Joseph C. Boals, III for an independent medical evaluation on October 23, 2001. Dr. Boals testified by deposition that the employee's injuries and subsequent surgeries caused him to have significantly limited range of body motion. Additionally, he concurred that his finding of an absence of an ankle jerk bilaterally was evidence of significant injury and of neurological loss over and above anything that might be related to the aggravation of any pre-existing condition. Based on his examination, he opined that the employee had a 39% permanent physical impairment to the body as a whole.

In his cross examination of Dr. Boals, counsel for the employer raised the issue of the significance of the employee having been diagnosed in 1978 with Reiter's Syndrome, a syndrome of conjunctivitis, arthritis and urethritis. Dr. Boals described it as a very rare syndrome and he testified that the arthritic component can cause some very advanced changes over time in the joints of the body, much like rheumatoid arthritis.

---

[1]This form, entitled "THE GOODYEAR TIRE & RUBBER COMPANY IMPAIRMENT EVALUATION FOR DISABILITY PENSION", was introduced as an exhibit at trial.

As a followup, the employer's counsel asked Dr. Boals, based on his knowledge of employee's 1981 back surgery and the existence of the Reiter's Syndrome in addition to his current injuries, which problems were more than likely the cause of the employee's severe condition. He testified that there was no doubt there was previous impairment from the earlier disc surgery and that the Reiter's Syndrome would contribute to some impairment though "we really don't know whether or not that syndrome had been flared up by this recent surgery".

On further cross examination by counsel for the Second Injury Fund, the following questions and answers were elicited:

Q. Doctor ... Your thirty-nine percent impairment that you gave this gentleman, that is based on the current work related injuries that he suffered at Goodyear starting in December of 1997?

A. That's correct.

Q. And in your opinion the reason this gentleman can't work now is as a result of these injuries?

A. Yes.

Q. When I say these injuries, I mean these most recent injuries starting in December, 1997?

A. Yes. I would have to sort of qualify that by saying we have to consider his total inability to work with the Reiter's syndrome and the previous back surgery as being some component of it, *the major component being this recent surgery.*[2] (Emphasis added.)

Dr. Boals did testify, however, that he would not have expected injuries such as that suffered by the employee to require such "exotic" surgery in the absence of some underlying chronic disease "like" Reiter's Syndrome.

---

[2] Of significance is the employee's own testimony at trial. He testified that he had worked continuously for the employer performing heavy manual labor without restrictions since returning from his 1981 back surgery. He further testified that he didn't know there was anything wrong with him until he got hurt in 1997-98. As he stated: "It wasn't nothing wrong with me before I got hurt. I done anything I wanted to."

LEGAL ANALYSIS

The parties do not dispute that the employee in this case is totally and permanently disabled. The only issue on appeal is the apportionment of the award by the trial court between the employer and the Second Injury Fund.

The learned trial judge determined that the award should be apportioned pursuant to T.C.A. § 50-6-208(a) and that the employee's current injury accounted for 25% of his total disability. The court then found the employer liable for 25% of the total award and the Second Injury Fund liable for the remaining 75%.

With the medical proof being that the employee had permanent physical impairment ratings of 26% to the body as a whole from his treating doctor and 39% from his evaluating doctor, the trial court was apparently persuaded by the employer of the significance of the employee's pre-injury (1978) diagnosis of Reiter's Syndrome and its impact on this injury in making an apportionment of liability for the injuries forming the basis of this claim for benefits.

In Sweat v. Superior Indus., Inc., 966 S.W.2d 31, 34 (Tenn. 1998), the employee had a pre-existing debilitating condition known as psoriatic arthritis. He alleged that he was asymptomatic prior to his employment but that his job "triggered his symptoms and worsened the underlying disease." The defendant denied that the employment caused a progression or worsening of the underlying disease. The court in Sweat found that "it is well-settled that an employer takes an employee as he finds him, that is with his pre-existing defects and diseases." Rogers v. Shaw, 813 S.W. 2d 397 (Tenn. 1991). It then went on to find that the employee was asymptomatic prior to working for the employer, notwithstanding being very active, and that his employment triggered his symptoms. The court stated that "there being no way by which the Court can quantify how much worse his condition was made by his work, it results that the employer must bear the burden of uncertainty."

In this case, as in Sweat, the employee had apparently been diagnosed years earlier with a potentially debilitating arthritic condition which was asymptomatic. The employee performed heavy manual labor for the employer for almost 20 years after being diagnosed with Reiter's Syndrome in addition to having had prior disc surgery in 1981. As the employee testified, there wasn't anything wrong with him that he was aware of before he was injured in January, 1998.[3]

In the present case, the Panel agrees with the trial judge that the liability for the permanent and total disability award to the employee should be apportioned among the defendants pursuant to

---

[3]The employee testified that since his January, 1998, injury he had constant pain in his back and legs, muscle spasms, sleepless nights, and he has been "just miserable". Before his injury of January, 1998, he was an avid deer hunter, fisherman, duck hunter and camper, but he can no longer perform any of these activities.

T.C.A.§50-6-208(a).[4] However, we find that the disability resulting from the employee's last compensable injury accounted for 75% of his total disability rather than the 25% as found by the trial court.

As a result, the employer is liable for 75% of the permanent and total disability benefits due to the employee and the Second Injury Fund is liable for the remaining 25% of the benefits due to the employee.

CONCLUSION

For the reasons stated above, the judgment of the trial court is modified in accordance with this opinion. The cost of this appeal is taxed to the appellee, Goodyear Tire & Rubber Co.

ARNOLD B. GOLDIN, SPECIAL JUDGE

[4]Both subsection (a) and subsection (b) of T.C.A. §50-6-208 are applicable in this case. As the court stated in Perry v. Sentry Ins. Co., 938 S.W. 2d 404, 407 (Tenn. 1996), "section (a) and section (b) are not mutually exclusive and an employee may meet the criteria for recovery under both sections." Moreover, according to Bomley v. Mid-America Corp., 970 S.W. 2d 929 (Tenn. 1998), in such a case courts must apply the subsection that produces a result more favorable to the employer. Here, the same result is reached under both subsections.

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
June 28, 2005 Session

MICHAEL RAY WOLFORD v. ACE TRUCKING, INC., ET AL.

Direct Appeal from the Circuit Court for Decatur County
No. 2568 C. Creed McGinley, Judge

No. W2004-02905-WC-R3-CV - Mailed October 7, 2005

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tennessee Code Annotated Section § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The appellant, employee, argues that the trial court erred as a matter of law in finding that the employee was 100% permanently partially disabled and seeks an award of permanent total disability benefits. The appellees, the employer and the Second Injury Fund, argue that the trial court was correct in finding that the employee was not permanently and totally disabled. For the reasons stated below, the panel has concluded that the judgment of the trial court should be affirmed as modified.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right;
Judgment of the Circuit Court Affirmed As Modified

ARNOLD B. GOLDIN, SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and ROBERT CORLEW, III, SP. J., joined.

Paul G. Summers, Attorney General and Reporter and Juan G. Villasenor, Asst. Attorney General, Nashville, Tennessee for the appellee, Second Injury Fund.

Art D. Wells, Jackson , Tennessee, for the appellant, Michael Ray Wolford.

Michael Mansfield, and John D. Stevens, Rainey, Kizer, Reviere & Bell, Jackson, Tennessee, for the appellee, Ace Trucking, Inc.

MEMORANDUM OPINION

STANDARD OF REVIEW

The review of the findings of the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the

evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2); Stone v. City of McMinnville, 896 S.W.2d 548, 550 (Tenn. 1995). This court is not bound by the trial court's findings, but instead conducts its own independent examination of the record to determine where the preponderance lies. Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn.1991).

HISTORY OF THE CASE

The employee, Michael Ray Wolford, filed his complaint for workers' compensation benefits alleging that he sustained an injury to his back on July 14, 2000, while in the course and scope of his employment with his employer, Ace Trucking, Inc. He later amended his complaint to add the Second Injury Fund. The issue presented at trial was the extent of the employee's permanent disability.

Following a trial on October 20, 2003, the court found the employee to be 100% permanently partially disabled. The court found that the employee had prior court approved workers' compensation awards totaling 42% to the body as a whole and assigned 58% of the award to the employer, and the remaining 42% to the Second Injury Fund. The order awarding 100% permanent partial disability to Wolford was entered on November 6, 2003. On November 20, 2004, the employee filed a notice of appeal.

On the initial appeal of this case, the Appeals Panel noted in its opinion that the trial court awarded benefits based on 100% permanent partial disability but that the workers' compensation statutes of this state contain no such classification. Vinson v. United Parcel Serv., 92 S.W.3d 380, 384–85 (Tenn. 2002). The Appeals Panel then remanded the case back to the trial court, mandating that the trial court clarify "whether it found the claimant to be permanently and totally disabled or permanently and partially disabled and entitled to receive the *maximum allowable award* for permanent partial disability."[1]

In the Order on Remand entered on September 23, 2004, the trial court found that the employee was entitled to an award of the maximum permanent partial disability allowable under the Tennessee Workers' Compensation Act, which the trial court found was 400 weeks of benefits at the employee's statutory workers' compensation benefit rate. On October 8, 2004, the employee filed his notice of appeal. It is the second appeal of this case which we now consider.

PERMANENT AND TOTAL DISABILITY

The employee was thirty-eight years old at the time of trial. He is a high school graduate with additional vocational training received while serving in the military and through a truck drivers training course. He spent the majority of his work history driving trucks of various types but has

[1] The opinion of the initial Appeals Panel, delivered by Joe C. Loser, Sp. J. and joined in by Janice M. Holder, J. and James F. Butler, Sp. J., was filed on September 1, 2004.

some other general experience as a laborer and welder. The employee had two prior workers' compensation claims for injuries which required three back surgeries. As a result of the two prior claims, the employee received previous court approved workers' compensation awards totaling 42% permanent partial disability to the body as a whole.

When the employee went to work for Ace, he informed his supervisor about his previous back injuries. The employee worked for the employer for about one and a half years, beginning in February of 1999, before he injured his back for the fourth time on July 14, 2000. He testified that he was pulling on a pin to slide tandems onto a trailer when he felt pain in his back radiating down his right leg. As a result of this injury his doctor, Dr. Eugene Gulish, an orthopaedic surgeon associated with Henry County Orthopaedic Surgery and Sports Medicine, Inc., performed another back surgery on March 1, 2001.

On November 7, 2002, Mr. Wolford was seen at the Semmes-Murphy Clinic by Dr. Maurice Smith for a neurosurgical evaluation. Dr. Smith did not recommend further surgery. In a transcribed note of December 13, 2002, Dr. Smith stated that Mr. Wolford was at maximum medical improvement and assigned him an anatomical impairment of 13% to the whole person.[2]

Dr. Gulish concurred in Dr. Smith's anatomical impairment rating of 13% to the body as a whole and released Mr. Wolford from his care on February 4, 2003.

Mr. Wolford was seen by numerous other physicians during the course of his treatment. On February 18, 2003, on referral by his attorney, he was seen by Dr. Joseph C. Boals, III, for an independent impairment evaluation. Dr. Boals found that Mr. Wolford had an overall anatomical impairment of 39% to the body as a whole.

As in his earlier appeal, the employee contends that he is permanently and totally disabled.

At the trial of this case, the trial court found the employee to be 100% permanently partially disabled and awarded him 400 weeks of benefits. The court specifically found that he was not permanently and totally disabled.[3]

Because the employee had previous workers' compensation awards totaling 42% to the body as a whole, the trial court found the employer responsible for 58% of the award and the Second Injury Fund for the balance. The employee appealed from the trial court's award.

---

[2] The parties have stipulated in their "Pre-Trial Memorandum for Workers' Compensation Cases" that the date of maximum medical improvement is December 13, 2002.

[3] In the transcript of the trial proceedings of October 20, 2003, the court stated: ". . . I think the record is deficient as far as someone stating he's absolutely not capable of any type of gainful employment. . . . I feel it's a four-hundred-week award, rather than the permanent."

On appeal, the employee argued that the trial court erred in not finding the employee to be permanently and totally disabled. In reviewing the case on appeal, the Appeals Panel cited Vinson v. United Parcel Service, 92 S.W.3d 380, 384–85 (Tenn. 2002) and noted that

> the trial court awarded benefits based on *100 percent* permanent *partial* disablity. The workers' compensation statutes of this state contain no such classification as 100 percent permanent partial disability to the body as a whole. The facts are essentially undisputed and make it clear that Mr. Wolford is severely disabled from his work-related injury.

Apparently, because of some confusion about the trial court's intentions in light of the current statutory scheme, the Appeals Panel remanded the case for the trial court to "clarify whether it found the claimant to be permanently and totally disabled or permanently and partially disabled and entitled to the maximum allowable award for permanent partial disability."

On remand the trial court again found that the employee was "entitled to an award of the maximum permanent partial disability allowable under the Tennessee Workers' Compensation Act, which the Court finds is 400 weeks of benefits at his statutory workers' compensation benefit rate," rather than an award of permanent and total disability.[4]

Based upon our independent examination of the record, we concur with the trial court's findings that the evidence in this case does not support a finding of permanent and total disability.

To what permanent benefit then is the employee entitled?

MAXIMUM TOTAL BENEFIT

Under current workers' compensation law in Tennessee, there are four categories of compensable disability: (1) temporary total disability; (2) temporary partial disability; (3) permanent partial disability; and (4) permanent total disability. Tenn. Code Ann. § 50-6-207; Cleek v. Wal-Mart Stores, 19 S.W.3d 770, 776 (Tenn. 2000).

The employee argues that because there is no classification in our workers' compensation statutes of 100% permanent partial disability we are bound by the Supreme Court's decision in Vinson. In Vinson the Court stated

> [I]t appears impossible to find that an injured employee is 100% permanently partially disabled without simultaneously finding that the employee is 100%

[4] In the transcript of the hearing on remand, the trial court stated as follows: "I find that the record in this case did not support that particular statute saying 'permanent and totally disabled from any gainful employment whatsoever'. So that is what I said then, that is what I am saying now."

> permanently and totally disabled. . . . Thus, an award of 400 weeks appears to be a statutory impossibility because such a finding would necessarily entail a finding of 100% permanent and total disability.

92 S.W.3d at 385, n.2.

The court's logic in Vinson is indisputable on its facts. In this case, however, the trial court on remand did not award 100% permanent partial disability. Rather it found that the employee was entitled to an award of the *maximum permanent partial disability* allowable under the Tennessee Workers' Compensation Act. At the hearing on remand from the initial appeal to the Appeals Panel, the trial court stated as follows:

> The Court makes this finding in this case that it was not the Court's intention, nor presently would it be the Court's intention, to find the plaintiff permanently and totally disabled but it was the Court's intent that he receive the maximum allowable award which would be four hundred weeks.

In Wausau Insurance Co. v. Dorsett, ___ S.W.3d ___ (Tenn. 2005), the Supreme Court, in a case involving the limits on temporary total disability benefits, did an analysis of the statutory term "maximum total benefit". The Court stated as follows:

> Employees are entitled to compensation for each class of disability resulting from a single compensable injury for which they qualify. Redmond [v. McMinn County], 354 S.W.2d at 437. However, unless an employee *is adjudged to be entitled* to permanent total disability benefits, the disability benefits that an employee may receive for a single injury may not exceed the "maximum total benefit." See Tenn. Code Ann. § 50-6-205(b)(1) (1999 & 2004 Supp.) ("The total amount of compensation payable under this part shall not exceed the maximum total benefit . . . .); Vinson v. United Parcel Serv., 92 S.W.3d 380, 384 (Tenn. 2002) (Emphasis added) . . . .
>
> . . . The statutory definition of maximum total benefit is clear. The only category of disability benefits exempted from this 400-week limitation is permanent total disability benefits.

Wausau Ins. Co., ___ S.W.3d at ___ (Tenn. 2005) (footnote omitted).

In the present case the trial judge found in two separate hearings that the employee is *not* entitled to an award of permanent and total disability. Rather, he found the employee to be entitled "to an award of the maximum permanent partial disability allowable under the Tennessee Workers' Compensation Act, which the Court finds is 400 weeks of benefits at his statutory workers' compensation benefit rate." Unlike the factual situation in Vinson, the statutory scheme does

provide for a *maximum total benefit* of 400 weeks.

The employee in this case received temporary total disability benefits from the date of his injury on July 14, 2000, until he reached maximum medical improvement on December 13, 2002. Based on the trial court's ruling, the employee is entitled to permanent partial disability benefits for the balance of the *maximum total benefit* of 400 weeks that he has not already received in either temporary total or permanent partial disability benefits. The only exception would be if we were to find that the trial court erred in not finding the employee to be permanently and totally disabled. This we decline to do.

The Second Injury Fund will be responsible for any permanent partial disability benefits that exceed 232 weeks or 58% of 400 weeks.

CONCLUSION

For the reasons stated above, the judgment of the trial court is modified in accordance with this opinion. The cost of this appeal is taxed to the appellant and its sureties, for which execution may issue if necessary.

ARNOLD B. GOLDIN, SPECIAL JUDGE