APPLICATION OF HUBERT BAILEY JONES

COURT OF APPEALS POSITION

WEST TENNESSEE SECTION

Tennessee Judicial Nominating Commission

Application for Nomination to Judicial Office

Rev. 26 November 2012

Name: Hubert Bailey Jones

Office Address: (including county) 202 South Main Avenue, P.O. Box 763,
Dyersburg, Dyer County, TN 38025-0763

Office Phone: 731-286-5323 Facsimile: 731-285-1503

Email Address: hjones@dyerlaw.net

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.

I am engaged in the private practice of law.

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

I was licensed to practice law in Tennessee in 1977 and my Board of Professional Responsibility No. is 5281.

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

I am only licensed to practice law in the State of Tennessee. My license number is 2085. My BPR number is 5281. My license was issued on April 16, 1977. The license is currently active.

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

No.

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

I have been continuously engaged in the private practice of law with the same firm or its predecessor firms in Dyersburg, Tennessee, since completing my legal education and becoming licensed in 1977.

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.

The nature of my present practice consists of representing physicians, hospitals and other health care providers in health care liability litigation. This represents approximately 70% of my practice. The other 30% of my practice is a general civil practice including wills, trusts, estates, transactional work and the other areas of a general civil practice which are referred to in my answer to Question No. 8.

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.

Over my legal career, I have litigated most types of civil lawsuits in the courts of most counties in West Tennessee as well as various types of civil litigation in the United States District Court for the Western District Eastern Division (Jackson) and Western Division (Memphis). During the period of my practice from 1977 to 1995, I handled a wide variety of civil litigation including motor vehicle accident cases; insurance coverage disputes (including auto policies, homeowners policies, commercial policies, health policies, disability policies, uninsured/underinsured motorist policies and life insurance policies); worker's compensation cases; premises liability cases; real estate litigation including boundary line disputes and fraudulent conveyances; medical malpractices cases; Tennessee Governmental Tort Liability Act cases; products liability cases; domestic/family litigation including divorce, child custody, conservatorships, guardianships and adoption; sales and use tax litigation; claims before the State Claims Commission; construction litigation; commercial litigation; and architectural/engineering

malpractice litigation. Also, during this period, I handled quite a few criminal cases generally by appointment until Dyer County got a public defender. During this same timeframe, I also handled many other types of general, non-litigation civil matters such as wills, trusts and estates, durable powers of attorney for health care, general durable powers of attorney, deeds, title opinions, organization/formation as well as dissolution of partnerships, corporations, limited liability companies, professional limited liability companies as well as various other commercial, business and transactional type work.

After my partner, Ralph Farmer, retired at the end of 1994, my practice, of necessity became more focused to medical malpractice/health care liability litigation involving the representation of physicians, physicians' assistants, nurse practitioners, hospitals, surgery centers, clinics and other health care providers in medical malpractice/health care liability actions. As discussed in the response to question no. 7, this now comprises approximately 70% of my practice. The remaining 30%, still involves many of the same general civil matters mentioned above as well as some new areas of interest including specifically issues relating to elder care and counseling various health care providers concerning health care compliance issues and in particular privacy issues related to HIPAA and other emerging issues in the health care field.

During my legal career, I have been involved in a variety of state appellate court cases before the Tennessee Court of Appeals and the Tennessee Supreme Court. My cases in the Tennessee appellate courts have dealt with cases under the Tennessee Governmental Tort Liability Act, Worker's Compensation Act, motor vehicle accident cases and medical malpractice/health care liability cases. These appellate cases have dealt with a multitude of issues including the interplay between the statute of limitations under the Tennessee Governmental Tort Liability Act and actions for indemnity/contribution (*Security Fire Protection, Co. Inc., v. City of Ripley*, 608 S.W.2d 684 (Tenn. App. 1990), whether a plaintiff can be excluded from the courtroom in a civil case during trial (*Burks by Burks v. Harris*, 1992 WL 322375 (Tenn. Ct. App. 1992), whether the duty of a physician in prescribing medication to his patients extends to non-patients. *Burroughs v. Magee*, 118 S.W.3d 323 (Tenn. 2003).

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

There are two cases I have had the privilege to be involved in that have involved matters of first impression before our state appellate courts, namely *Burks by Burks v. Harris*, 1992 WL 322375 (Tenn. Ct. App. 1992) and *Burroughs v. Magee*, 118 S.W.3d 323 (Tenn. 2003).

(2) In *Burks by Burks v. Harris, 1992 WL 322 375,* my clients were defendants, Robert and Roger Harris. Defendant, Robert Harris, was driving his father's pick-up truck pulling a loaded cotton trailer in the eastbound lane of State Highway 88 near the City Limits of Halls, Lauderdale County, Tennessee. Visibility at the time of the accident was in dispute with testimony that the sun had gone down and it was "dusky dark" as well as testimony that visibility was at least the distance of a football field. The rear of the cotton trailer was unlit other than a slow moving vehicle identification emblem located in the lower left corner. About 7:00 o'clock p.m. as Robert Harris was approaching the city limits of Halls, there was a substantial impact to the rear of the cotton trailer. Upon stopping and getting out of the truck, Robert Harris found a

black Chevrolet Beretta driven by John Burks, the minor child of C.L. Burks, wedged underneath the cotton trailer. As a result of his injuries, John Burks never recovered and was in a permanent vegetative state at the time of trial. A lawsuit was filed by John G. Burks through his father, C.L. Burks. The case was tried for approximately one week to a Lauderdale County jury which returned a verdict finding in favor of the defendants. An appeal ensued.

One of the principal issues on appeal was whether the trial court erred in granting the defendant's motion to exclude the minor plaintiff, John Burks, from the courtroom during trial. After an extensive pre-trial hearing on the motion to exclude, the trial court found the injured plaintiff, John Burks, could in no way contribute to or assist his counsel in the case and should under the circumstances be excluded from the courtroom during trial because his presence would unduly prejudice the defendants. The trial court did allow into evidence "A Day in the Life" video of John Burks. On appeal, the Tennessee Court of Appeals considered several issues, one of which was whether the trial court's exclusion of the injured plaintiff from the courtroom at trial violated his right to a trial by jury as guaranteed by Article 1 Section 6 of the Tennessee Constitution. The Court of Appeals noted this to be a matter of first impression in the State of Tennessee and after analyzing cases from other jurisdictions adopted a two prong test to determine when exclusion was warranted and whether the trial court's decision to exclude the injured plaintiff from the courtroom in this particular case was warranted. The Court of Appeals upheld the trial court's decision and affirmed the judgment. The Supreme Court denied permission to appeal the case concurring in the results only. Although the Supreme Court's denial of permission to appeal but concurring in the results only means the case has little, if any, precedential value, it was a challenging case to try and involved a novel issue on appeal.

(2) *Judy C. Burroughs, Individually and as a Surviving Spouse and Personal Representative of the Estate of Harold L. Burroughs, Deceased v. Robert W. Magee, M.D.*, 118 S.W.3d 323 (Tenn. 2003). This was a hybrid medical malpractice/motor vehicle accident case. I represented Dr. Robert Magee and Houston Gordon, Esq. and Lyle Reid, Esq., represented the plaintiff, Judy Burroughs, Individually and as Surviving Spouse of the Estate of Harold Burroughs. It was an action for damages for personal injury and wrongful death resulting from an automobile accident in which the plaintiff, Ms. Burroughs, was injured and her husband was killed. Dr. Magee was the physician of the driver of the other vehicle, Roger Hostetler. Plaintiff's theory against Dr. Magee was that on the day before the accident, Dr. Magee negligently prescribed two (2) medications to Mr. Hostetler that impaired his ability to drive and failed to warn him of the risk of driving while under the influence of the two (2) drugs. The trial court granted the defendant's Motion for Summary Judgment on grounds the physician owed no duty of care to the plaintiff and her husband. The Court of Appeals affirmed in part and reversed in part finding the physician owed a duty to the plaintiff and her husband to warn his patient (Hostetler) of the risk of driving while under the influence of the prescribed medications but held he owed no duty to the plaintiff or her husband in deciding whether to prescribe the medications to the plaintiff. The Tennessee Supreme Court granted permission to appeal and heard argument in Dyersburg as part of its S.C.A.L.E.S. Project. The issue in the case addressed by the Supreme Court was whether and to what extent a physician owed a duty of care to a nonpatient third-party. The Tennessee Supreme Court held under the facts of the case, Dr. Magee owed a duty of care to his patient, Mr. Hostetler, and to the Burroughes to warn Mr. Hostetler of the possible adverse effects of the two (2) prescribed medications on his ability to safely operate a motor vehicle. However, the Supreme Court refused to extend the duty beyond that and refused to hold that Dr. Magee owed a

legal duty to the Burroughes in deciding whether to prescribe the two (2) medications to Mr. Hostetler. After the Supreme Court's ruling, the case went to trial in Lauderdale Circuit Court and after approximately a week trial, the jury returned a verdict in favor of the defendant, Dr. Magee. No appeal was taken on the jury verdict. This issue of whether a physician owed a duty to third parties in prescribing medication to a patient was a matter of first impression in Tennessee. I also feel the case to be noteworthy because there was much concern in the medical community at that time as to whether the Supreme Court might find a physician owed a broader duty in treating his or her patient that extended to non-patients. There was such a concern that the Tennessee Medical Association filed an Amicus Brief.

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

I have been a Rule 31 Listed General Civil Mediator since 2001. However, serving as a mediator has not been a significant component of my legal practice in several years.

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

I have served as a court appointed guardian a*d litem* for minors over the years in Juvenile Court. Most of these matters related to decisions concerning placement of custody of the minor because of parental abuse/neglect type issues. I have fulfilled my role in representing the minors' interest by meeting with them, visiting the physical location of the homes where the minor might be placed, interviewing parents and other potential custodians of the minor, securing the minor's medical records and taking all other action I felt necessary to render an opinion to the Court as to what I felt to be in the minor's best interest.

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

Not applicable.

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.

None.

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.

University of Tennessee at Martin, attended 1970 to 1974, BS degree in Business Administration with high honors, 1974. My major was economics.

University of Tennessee College of Law, 1974 – 1976, obtained Doctor of Jurisprudence Degree in December 1976. While in law school, I was selected to the Phi Kappa Phi Honor Society, was a member of the Tennessee Law Review and published a case note in Volume 43 (Fall 1975) entitled "Civil Procedure – Discovery – Imposition of Sanctions for Failure to Disclose Names of Witnesses. I was also the Recipient of American Jurisprudence Awards in Future Interests and Criminal Process.

PERSONAL INFORMATION

15. State your age and date of birth.

My age is 60 and date of birth is August 22, 1952.

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

I have lived continuously in the State of Tennessee for 60 years.

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

I am presently living in Dyer County and have lived continuously in Dyer County since the summer of 1977.

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

I am registered to vote in Dyer County, Tennessee.

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.

Nothing other than perhaps traffic citations. Most if not all of these charges have been dismissed upon payment of costs, and I have no recollection of pleading guilty or being convicted of any such citations.

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.

I have never been disciplined or cited for breach of ethics or unprofessional conduct by any court, administrative agency, bar association, disciplinary committee or other professional group.

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.

Terry L. Scott, a minor, vs. the Rotary Club of Dyersburg, et al, Dyer County Circuit Court Civil Action No. 6974. This case involved personal injuries sustained by a minor, Terry Scott, on or about October 5, 1982, when he got into a fire pit in Okeena Park in Dyersburg. I was sued in my capacity as a member of the Dyersburg Rotary Club. The Dyersburg Rotary Club has a fundraiser in which its members barbeque and sell chicken halves. 1982 was the first year we had the fundraiser. Unfortunately, the fire on which the chickens were cooked was not totally put out and Terry Scott sustained burn injuries when he got into the area of the firepit. The Dyersburg Rotary Club did not have a liability policy that would cover this occurrence and Terry Scott through his parent(s) sued all the Rotary Club members individually. The Rotary Club members' homeowner's insurance policies including mine contributed toward an aggregate settlement which was court approved and the case was dismissed as to all defendants.

In RE: Adoption of Jason Derek Stallings, Law and Equity Court for Dyer County, Tennessee, Civil Action No. 29062. This was a proceeding in which I adopted my stepson, Jason. The disposition was by order of adoption entered July 26, 1983.

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.

Member, First United Methodist Church Dyersburg, Tennessee. I presently serve as a member of the Evangelism Committee and Pastor- Parish-Staff Relations Committee. I have in the past served as the Chairperson of the Administrative Board now known as the Church Council as well as on several other committees including Finance, the Board of Trustees and Family Ministries.

Dyersburg City School Board (2001 – Present), TSBA Level V (Master School Board Member), All Tennessee School Board in 2009.

Dyersburg-Dyer County Union Mission, Board of Directors, (1988 – Present); Chairperson of Board of Directors, (2006 to Present); President (2001 – 2006).

Director, Wesley-Asbury, Inc., a non-profit 501(c)(3) corporation which owns Canterbury Place Assisted Living Facility in Dyersburg, 1992 to present; President 2010 to present; Secretary 1992 to 2010.

Dyersburg Noon Rotary Club (1978 to Present), President 1997.

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.

Not to my knowledge.

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.

I have been a member of the following bar associations and professional societies within the past ten years.

Fellow, Tennessee Bar Foundation (2003 – present)

Member American Bar Association (1977 – present).

Member – Tennessee Bar Association (1977 – present)

Member – Dyer County Bar Association (1977 – present)

I have not held any offices or titles in those organizations. The Committee Membership which I consider significant was my tenure as a Hearing Committee Member of the Board of Professional Responsibility from 1989 to 1995.

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.

I have had an AV Preeminent Peer Rating from Martindale Hubble since the early 1990's.

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

The only legal article I have published was the above referenced article in Volume 43 of the Tennessee Law Review (Fall, 1975) entitled "Civil Procedure – Discovery – Imposition of

Sanctions for Failure to Disclose Names of Witnesses".

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

I have taught at two (2) CLE seminars within the past five (5) years. On July 20, 2012, I participated in the "Medical Records Law" seminar sponsored by Lorman Education Services in Memphis, Tennessee. The specific topic which I taught was "Release of Records/Confidentiality of Patient Medical Records of Physicians and Hospitals".

On May 3, 2013, I participated in the "2013 Medical Malpractice Conference for Tennessee Attorneys" presented by Tenn. Attorneys Memo at the Nashville School of Law. My topic at this seminar was "Ethical Considerations When Dealing with Medical Records." I am presently scheduled to also be a presenter at another Lorman Seminar scheduled for July 31, 2013. This seminar is very similar to the one put on in 2012 and is entitled "Medical Records Law in Tennessee." My specific topic is the same as it was in 2012 with pertinent information being updated.

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.

I have been a member of the Dyersburg City School Board from 2001 to the present. I was initially appointed to the Board to fill the unexpired term of a member who resigned. Since that time, I have been elected on three (3) occasions to fill four (4) year terms.

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 have attached the "Brief of Appellee, David A. West, D.O." filed in the Tennessee Court of Appeals, Western Section at Jackson in the case styled *Dixie A. Willis and Bernard Willis, Plaintiffs-Appellants vs. David A. West, D.O., Defendant-Appellee* and a legal writing entitled "Ethical Considerations When Dealing with Medical Records" published as part of the "2013 Medical Malpractice Conference for Tennessee Attorneys" in Nashville, May 3, 2013. These examples reflect 100% my own personal effort.

ESSAYS/PERSONAL STATEMENTS

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

When the prospective vacancy on the Court of Appeals, Western Section became known, one of my colleagues suggested that I should consider applying for the vacancy because he felt it played to my strengths as a lawyer. After reflecting on this, I believe a Court of Appeals judgeship would play to my strengths as a lawyer. I believe my greatest strengths as a lawyer are a good understanding, knowledge and appreciation of Tennessee law, the ability to analyze the law and apply it to a particular factual situation and my writing ability. I am applying for this position because I feel that if I am fortunate enough to be selected on the panel of potential candidates by the Nominating Commission and appointed by Governor, I will make a good appellate judge that will have a positive impact on the Tennessee judicial system.

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)***

The activities which I have undertaken which are most responsive to this question involve activities which I have undertaken on behalf of two 501(c)(3) non-profit corporations. First is the Dyersburg-Dyer County Union Mission. I have provided legal counsel and advice to the Mission since becoming a Director over leases, other legal documents and have been readily available to discuss with the Executive Director and/or administrative staff a variety of legal issues. The second non-profit entity to which I have provided pro bono legal services would be Wesley-Asbury, Inc., the non-profit corporation that owns Canterbury Place Assisted Living Facility in Dyersburg, Tennessee. Over the years, I assisted in the drafting of various legal documents and have provided legal advice and counsel concerning various legal issues. I believe my pro bono legal services have helped the Mission carry out its purpose of assisting the economically disadvantaged and have assisted Wesley-Asbury in caring for the aged.

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

The judgeship which I seek is the Court of Appeals position which will become vacant as a result of Judge Alan E. Highers decision not to seek reelection in August 2014. The Court of Appeals consists of twelve (12) Judges of which four are selected from each of the State's Grand Divisions. This is an extremely important position because Court of Appeal decisions are the final decisions in the overwhelming number of civil cases that are appealed. I feel I can have a positive impact because of my strengths as a lawyer as well as the diversity of my civil practice over my career.

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

My participation in community services and organizations includes my participation in the Dyersburg City School Board, the Dyersburg-Dyer County Union Mission, Wesley-Asbury, Inc. and the Dyersburg Noon Rotary Club. As relates to my participation in the Dyersburg City School Board, I have worked to help ensure the city schools fulfill their Mission Statement of providing a safe, positive environment where all children can reach their full potential. I have attended every school board meeting over twelve years except one or two when I had a conflict, and in order to learn "best practices" both statewide and nationally attended every Tennessee School Board Association (TSBA) annual convention in Nashville, have participated in every TSBA Leadership Conference and have attended the National School Board Association (NSBA) annual conventions in 2004, 2005, 2006, 2007 and 2009.

From 1988 to the present, I have served as a Director of the Dyersburg-Dyer County Union Mission I served as President from 2001 to 2006 and as Chairman of the Board of Directors from 2006 to the present. The Mission provides various forms of assistance for economically disadvantaged persons in the community and has a comprehensive program for at risk youth in the Dyer and Lauderdale County areas. Each year the Mission conducts a summer camp known as "New Life Youth Camp" at facilities in Northwest Lauderdale County that features a variety of activities such as boating, canoeing, fishing, horseback riding, crafts and other physical activities as well as Bible study. The camp presently runs for approximately six (6) weeks with children each week coming from different age groups from first grade to high school. During the times the camp is not in session, there is an active youth club for at risk youth at the Mission Youth Center which has a gymnasium and other facilities. Finally, my community service includes work with the Dyersburg Noon Rotary Club, a service organization. Our biggest fund raiser is the annual chicken barbeque every June. We have just completed our 31st year with this fundraiser. Money from the Rotary Club is distributed each year to many worthwhile enterprises. If appointed Judge of the Court of Appeals I will resign from the City School Board but I would like, if possible, to stay active in the Dyersburg Noon Rotary Club, the Dyersburg-Dyer County Union Mission and Wesley-Asbury, Inc.

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)***

I do not have a lot to add to what I have previously stated. I would, however, like the Commission to consider the following in evaluating and understanding my candidacy:

(1) I have a good work ethic. When I was first hired in private practice in 1977, I was told the hours were from "can to can't." If selected and ultimately appointed, I will be diligent and timely in my judicial work.

(2) I am a lifelong learner. My mother was a career fifth grade teacher and nurtured my natural curiosity. It still gives me a thrill to learn something new. As fast as changes are taking place this day and time, lawyers and judges have to be inquisitive, willing to learn many new

ideas and concepts and be open to new and different ways of doing things.

(3) I love literature and love reading all types of books with the possible exception of science fiction. I feel that my love of literature and poetry has enhanced my ability to practice law including helping my "wordsmithing ability". Often the practice of law is not so much about what you say but how you say it.

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. I have handled many court appointed criminal cases prior to Dyer County obtaining a public defender. These cases ranged from serious felonies such as armed robbery and aggravated sexual battery to lesser offences such as petit larceny. Occasionally, the facts of a case would be particularly abhorrent. Yet, in those instances, I was able to compartmentalize my personal feelings toward the client and comply with my duty to be his or her advocate and represent them the best I could within the bounds of ethics. It is all about realizing your role in the judicial system. As a judge, my role would not be to legislate or abandon *stare decisis* but to understand the law, analyze the facts of the particular case and to apply established law to it even if I do not like the established law.

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. Honorable R. Lee Moore, Jr., Judge of the Circuit Court for the 29th Judicial District, 100 Main Avenue, North, Suite 2, P.O. Box 1471, Dyersburg, TN 38025-1471, telephone no. 731-288-8011

B. James L. Kirby, Attorney, Harris, Shelton, Hanover, Walsh, PLLC, One Commerce Square, Suite 2700, Memphis, TN 38103-2555, Telephone No.: 901-525-1455; email address: jkirby@harrishelton.com

C. John Lannom, Attorney, Lannom Coronado, PLLC, 422 McGaughey Street, P.O. Box 1729, Dyersburg, TN 38025-1729, Telephone No.: 731-285-0374; Email: jlannom@lannomcoronado.com

D. Randall P. Prince, DDS, Dentist, 427 Troy Avenue, Dyersburg, TN 38024; Telephone No.

731-286-1583
E. Larry S. White, Owner of insurance agency, 220 N. Main Street, Suite G101, P.O. Box 1129, Dyersburg, TN 38025; Telephone No.: 731-286-1583

AFFIRMATION CONCERNING APPLICATION

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

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

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

Dated: June 18, 2013.

Signature

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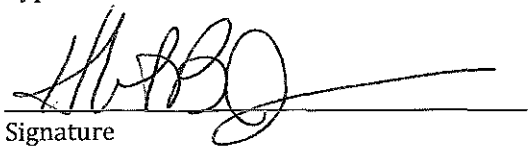
Signature

June 18, 2013
Date

005281
BPR #

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IN THE COURT OF APPEALS OF TENNESSEE

WESTERN SECTION AT JACKSON

DIXIE A. WILLIS and BERNARD WILLIS,	)	
PLAINTIFFS/APPELLANTS,	)	
VS.	)	CASE NO.: W2011-01856-COA-R3-CV
DAVID A. WEST, D.O.,	)	
DEFENDANT/APPELLEE.	)	

Rule 3 Appeal from "Order Denying Plaintiffs' Motion for Rule 60.02 Relief" of the Twenty-Ninth Judicial District at Dyersburg Trial Court Case No. 05-129 (the Honorable R. Lee Moore, Jr., Presiding)

BRIEF OF APPELLEE, DAVID A. WEST, D.O.

Hubert B. Jones
B.P.R. No.: 005281
Attorney for the Defendant/Appellee,
David A. West, D.O.

JONES, HAMILTON & LAY, P.L.C.
Attorneys at Law
202 South Main Avenue
P.O. Box 763
Dyersburg, TN 38025-0763
Telephone: (731) 286-5323
Telecopier: (731) 285-1503
E-Mail: hjones@dyerlaw.net

ORAL ARGUMENT REQUESTED

STATEMENT OF THE CASE/FACTS

As relates to the issues presented for review in this case, the course of proceedings and disposition of this case at the trial court level is so interwoven with the facts relevant to the issues presented for review that the defendant/appellee, David A. West, D.O., merges his statement of the case and his statement of the facts for this reason.

This is a medical malpractice lawsuit concerning Dr. West's care and treatment of plaintiff, Dixie Willis, for a post operative infection following surgery performed by Dr. West on her right shoulder on June 17, 2003. (R. Vol. 1 at 1).[1] The plaintiffs, Dixie Willis and husband, Bernard Willis, originally filed a "Complaint" against Dr. West in Civil Action No. 04-19 in the Dyer County Circuit Court on February 18, 2004, and took a voluntary non-suit by "Order of Voluntary Dismissal" entered on November 5, 2004. (R. Vol. 1 at 110; Brief of Appellants, at viii.) The plaintiffs were represented by Attorney Ralph Lawson in that case. (R. Vol. 4 at 19). Not quite one (1) year later, the plaintiffs on October 20, 2005, refiled their action against Dr. West in the present case. (R. Vol. 1 at 1). Attorney Barry E. Weathers represented the plaintiffs at that time. (R. Vol. 1 at 3). Dr. West answered denying any liability and asserting, among other things, that all of his care and treatment of Ms. Willis complied with the recognized standard of acceptable professional practice required of him as an orthopaedic surgeon. (R. Vol. 1 at 7-10).

On June 8, 2007, this case was included on the trial court's "Notice of Dormant Cases" list. (R. Vol. 1 at 53-55). This notice provided in pertinent part:

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[1] References to the record on appeal shall be designated as "R. Vol. _____ at _____".

> Notice is hereby given that the following cases appear to be dormant. Notice is further given that these cases will be dismissed without prejudice unless brought to a final conclusion by August 10, 2007. In the event that there is good cause why these actions cannot be concluded by that date, a motion asking for an extension must be filed and heard **PRIOR TO AUGUST 10, 2007**. (R. Vol. 1 at 53).

Upon plaintiffs' Motion, this case was removed from the dormant list and an extension to prosecute the case given by "Order Removing Case From Dormant Docket". (R. Vol. 1 at 56-58.) The "Order Removing Case From Dormant Docket" provided that "in the event the case returns to the dormant docket, the matter will be dismissed". (R. Vol. 1 at 58). Thereafter, the case was again included on a second "Notice of Dormant Case List" filed by the trial court, and upon motion of plaintiffs, the case was again removed from the dormant list by "Order Removing Case From Dormant List" entered February 26, 2008. (R. Vol. 1 at 62-63, 76). Because of an extraordinary situation involving Mr. Barry Weathers, plaintiffs' counsel at that time, the trial court allowed the case to be removed from the dormant list on the second occasion but warned the plaintiffs to conclude the case before it went back on the dormant list because the trial court would not extend it again. (R. Vol. 6 at 26; R. Vol. 7 at 26-27).

On January 8, 2009, a "Consent Order Substituting Counsel for Defendant, David A. West, D.O." was entered in which Steven B. Crain withdrew as counsel for Dr. West and Hubert B. Jones and James A. Hamilton III with Jones, Hamilton & Lay, PLC, were substituted as counsel for Dr. West. (R. Vol. 1 at 82).[2] Thereafter, on April 13, 2009, a "Notice of Substitution of Counsel" was filed by the law firm of Skouteris and Magee,

[2] Mr. Crain served as Dr. West's counsel throughout the first lawsuit and until January 8, 2009, in the second lawsuit.

PLLC, stating that Michael C. Skouteris and Milton E. Magee, Jr., would be counsel of record for plaintiffs in place of Attorney Barry Weathers. (R. Vol. 1 at 85).[3]

On September 11, 2009, an "Order Amending Certain Deadlines in Scheduling Order" was entered providing, among other things, that the plaintiffs must produce and make available to defendants, Dr. David Clymer, their Rule 26 expert, for a discovery deposition by October 30, 2009, and the defendant must produce and make available to plaintiffs, Dr. Michael Cobb, his Rule 26 trial expert, for a discovery deposition by December 31, 2009. (R. Vol. 1 at 91-92). The deadline for completing discovery depositions for persons other than experts was set at February 26, 2010, as was the deadline for evidentiary depositions. (R. Vol. 1 at 91-92).

Counsel agreed to a date for Dr. Clymer's discovery deposition of October 12, 2009, beginning at 4:30 p.m. at Dr. Clymer's office in Overland Park, Kansas and on September 16, 2009, defendant served and filed his "Notice to Take Video Deposition of David Clymer, M.D." (R. Vol. 1 at 93). On September 28, 2009, counsel for defendant received a fax from counsel for the plaintiffs of an invoice of Dr. David J. Clymer confirming a deposition date of October 12, 2009, at 4:30 p.m. and advising that a prepayment fee of $900.00 had to be made in advance of the deposition. (R. Vol. 1 at 111, 117-118). This fax further advised that the fee would be forfeited if the physician was not notified at least three (3) days prior to the cancellation of the deposition and it further provided that the prepayment must be received no later than one (1) week prior to the deposition date. (R. Vol. 1 at 117-118). On October 1, 2009, defense counsel overnighted a check for $900.00 to Dr. Clymer so as to keep the deposition date of

[3] An order on this "Notice of Substitution of Counsel" was entered on August 7, 2009. (R. Vol. 1 at 91).

October 12, 2009, intact and allow the defendant to take Dr. Clymer's discovery deposition by the October 30, 2009, deadline. (R. Vol. 1 at 111).

On Thursday, October 8, 2009, plaintiffs' counsel's office advised counsel for defendant's offices that Dr. Clymer was refusing to give a deposition on the scheduled date because he could not locate the medical records and be prepared for his deposition. (R. Vol. 1 at 111-112). Thereafter, by agreement, the discovery deposition of Dr. Clymer was rescheduled for Monday, October 26, 2009, beginning at 4:30 o'clock p.m., at Dr. Clymer's offices in Overland Park, Kansas and on October 9, 2009, an "Amended Notice to Take Videotaped Deposition of David Clymer, M.D." was served and filed in this case. (R. Vol. 1 at 112).[4] Counsel for the defendant again made travel arrangements to Overland Park, Kansas for the rescheduled deposition and engaged a court reporter and videographer for same. (R. Vol. 1 at 112). Likewise, Dr. West made travel arrangements to attend the rescheduled deposition on Monday, October 26, 2009, in Overland Park, Kansas. (R. Vol. 1 at 112). However, on Friday, October 23, 2009, at 3:02 p.m., counsel for defendant received a facsimile transmission from Ms. Bethany Horton, secretary to counsel for plaintiffs, serving a copy of the "Notice of Voluntary Non-Suit" and stating:

> "Please find enclosed a copy of the notice of non-suit in the Dixie Willis v. David West case that was filed today." (R. Vol. 1 at 123).

After receipt of the "Notice of Voluntary Non-Suit", counsel for Dr. West went to the Circuit Court Clerk's Office to confirm that the "Notice of Voluntary Non-Suit" had been filed as stated and to get the copy served on him stamp filed. (R. Vol. 1 at 112

[4] The trial court clerk did not include the "Amended Notice to Take Videotaped Deposition of David Clymer, M.D." in the record. Counsel for defendant has verified it is in the trial court record; however, this omission does not seem to be material since it is conceded by all concerned that the deposition was scheduled for Monday, October 26, 2009, in Overland Park, Kansas and notice given.

130-131). Counsel for defendant asked Ms. Kimberly Hill, the Deputy Circuit Court Clerk, if the Circuit Court Clerk had received a facsimile filing of a "Notice of Voluntary Non-Suit" in this case. (R. Vol. 1 at 130). Ms. Hill checked and confirmed they had just received a facsimile transmission of a "Notice of Voluntary Non-Suit" for filing from Skouteris and Magee, PLLC, with a coversheet from such law firm. (R. Vol. 1 at 130-131; R. Vol. 5 at 24). Counsel for the defendant then asked her to stamp the "Notice of Voluntary Non-Suit" which she had received filed and to stamp the copy of the "Notice of Voluntary Non-Suit" which had been served on him by Skouteris and Magee filed. (R. Vol. 1 at 130-131; R. Vol. 5 at 23-27). The "Notice of Voluntary Non-Suit" was stamped filed by the Circuit Court Clerk on October 23, 2009, at 3:55 p.m. (R. Vol. 1 at 96-97, 130-131).[5]

Upon his return to the office, counsel for the defendant spoke with counsel for the plaintiffs' secretary, Ms. Bethany Horton, who advised him she would contact Dr. Clymer to cancel his deposition and request a refund of the $900.00 predeposition fee in light of the dismissal of the case necessitating the cancellation of Dr. Clymer's deposition. (R. Vol. 1 at 129). This was confirmed by letter sent via telecopier and U.S. Mail to counsel for the plaintiff on October 23, 2009. (R. Vol. 1 at 129). Counsel for defendant also requested that an order of dismissal be submitted to Judge Moore on the non-suit. (R. Vol. 1 at 129).

[5] Counsel for defendant had no knowledge of any purported "second thoughts" counsel for plaintiff had about the "Notice of Voluntary Non-Suit" and there is nothing in the record to suggest he did. (Vol. 1 at 1 – Vol. 7 at 33). In the "Brief of Appellant" plaintiffs refer to a conversation between Mr. Jones (defense counsel) and Ms. Jennie Pate Hollingsworth "that Friday afternoon", the inference being it was the Friday afternoon the notice of non-suit was filed. (Brief of Appellant, p. 4). That is totally incorrect. In fact, the reference in the Brief of Appellant to the record (R. Vol. 5 at 14-15) makes no reference to the day or date Ms. Hollingsworth was interviewed by Ms. Chaney and Mr. Jones. (R. Vol. 5 at 14-15). The conversation was in fact an interview by Mr. Jones and his legal assistant, Ms. Chaney, after the notice of non-suit was entered and prior to and in preparation for the February 12, 2010, hearing. The statement that this conversation was on "that Friday afternoon" is without any factual basis and is totally incorrect.

What transpired on Monday, October 26, 2009, is the subject of some dispute between the Deputy Circuit Court Clerk, Ms. Christy Wright, and plaintiffs' counsel, Mr. Milton Magee. Ms. Wright testified that on Monday, October 26, 2009, plaintiffs' counsel, Mr. Magee, came into the Circuit Court Clerk's office and found the "Notice of Voluntary Non-Suit" which had been submitted by facsimile transmission on Friday, October 23, 2009, and she told Mr. Magee it was filed. (R. Vol. 5 at 5). Mr. Magee commented he did not mean for it to get filed and Ms. Wright responded "if you didn't mean for it to get filed then we'll discard it." (R. Vol. 5 at 5-6). Ms. Wright was unequivocal in her testimony that Mr. Magee knew it was filed and did not object when she simply threw the documents away. (R. Vol. 5 at 6).

On the other hand, Mr. Magee testified that Ms. Christy Wright, the Deputy Circuit Court Clerk, told him that the "Notice of Voluntary Non-Suit" which was sent for facsimile filing on October 23, 2009, had not been filed and that he asked Ms. Wright to throw it away. (R. Vol. 4 at 19-22). Mr. Magee also testified that the facsimile cover sheet which accompanied the "Notice of Voluntary Non-Suit" was also thrown away by Ms. Wright at his request. (R. Vol. 4 at 22). Specifically, Mr. Magee testified:

> Q. And you threw away, with that document (the Notice of Voluntary Non-Suit), this cover sheet from Skouteris and Magee where that document was sent.
>
> A. Actually, I never touched it. The clerk pulled it, and I – she said, "What do you want to do?" I said, "If it hasn't been filed, if it hasn't been logged, if it hasn't been put in the jacket, throw it away. I'm going to have to file something else." (R. Vol. 4 at 22).

It is undisputed that the "Notice of Voluntary Non-Suit" which Deputy Circuit Court Clerk Kimberly Hill had filed October 23, 2009, and the facsimile coversheet which accompanied the "Notice of Voluntary Non-Suit" were discarded and thrown away

on Monday, October 26, 2009, either at the behest of counsel for the plaintiff or without any objection by counsel for the plaintiff.[6]

When plaintiffs' counsel did not submit an order of voluntary dismissal as required by Tenn. R. Civ. P. 41.01(3), defendant filed a "Motion for Entry of Order of Voluntary Dismissal as Required by Tenn. R. Civ. P. 41.01(3)." (R. Vol. 1 at 101-102). On December 14, 2009, a "Memorandum in Support of Motion for Entry of Order of Dismissal Pursuant to Tenn. R. Civ. P. 41.01(3)" was filed with the "Affidavit of Kimberly Hill" as well as various exhibits. (R. Vol. 1 at 110-135). This Motion was set for hearing on December 21, 2009, (R. Vol. 1 at 108-109). On December 21, 2009, plaintiffs filed a "Motion to Withdraw Notice of Voluntary Non-Suit", a "Response to Motion for Entry of Voluntary Dismissal", the "Affidavit of Jeannie Pate Hollingsworth" and a second "Affidavit of Kimberly Hill". (R. Vol. 1 at 138-147). Notwithstanding the throwing away of the facsimile cover sheet that accompanied the "Notice of Voluntary Non-Suit" faxed to the Circuit Court Clerk and its resulting unavailability, plaintiffs' ground for relief and argument was that the "Notice of Voluntary Non-Suit" was not properly filed because it was not accompanied by a cover sheet as required by Tenn. R. Civ. P. 5A.02(2). (R. Vol. 1 at 140-142). There was no argument by plaintiffs of mistake or excusable neglect as a ground for relief at that time. (R. Vol. 1 at 140-142).

Defendant filed "Defendant's Response to Motion to Withdraw Notice of Voluntary Non-Suit", and both the defendant's "Motion for Entry of Order of Voluntary Dismissal as Required by Tenn. R. Civ. P. 41.01(3)" and plaintiffs' "Motion to Withdraw Notice of Voluntary Non-Suit" were heard before the Honorable R. Lee Moore, Jr., on

[6] Unfortunately, despite the trial court's efforts, plaintiffs' counsel did not locate and provide a copy of the cover sheet which was thrown away on October 26, 2009. (R. Vol. 2 at 236-240 242, 244-246). Fortunately, counsel for defendant did have his copy of the "Notice of Voluntary Non-Suit" which was stamp filed with the exact same time and date as the original facsimile "Notice of Voluntary Non-Suit" sent to the Circuit Court Clerk and which was available to include in the record. (R. Vol. 1 at 96-97).

December 21, 2009. (R. Vol. 4 at 1-26). Plaintiffs' counsel, Mr. Milton Magee, testified at the hearing. (R. Vol. 4 at 18-22). The hearing was adjourned because the Deputy Clerk, Ms. Christy Wright, was unavailable to testify. (R. Vol. 4, at 22-25). "Defendant's Supplemental Memorandum in Support of Motion for Entry of Order of Voluntary Dismissal Pursuant to Tenn. R. Civ. P. 41.01(3)" was filed on February 8, 2010. (R. Vol. 2 at 150-157).

The hearing which had been adjourned on December 21, 2009, was reconvened before Judge Moore on February 12, 2010. (R. Vol. 5 at 1-33). At this hearing, Ms. Christy Wright, Ms. Jeannie Pate Hollingsworth and Ms. Kimberly Hill testified and after argument of counsel, the Court took the matter under advisement. (R. Vol. 5, 1-33).

On February 26, 2010, the trial court filed its "Memorandum Opinion and Order". (R. Vol. 2 at 236-241). Consistent with the testimony of the witnesses, the trial court found that the facsimile cover sheet was thrown away by the Deputy Clerk on Monday, October 26, 2009, when plaintiffs' counsel came to the clerk's office and discovered a prior non-suit had been taken. (R. Vol. 2 at 240). After setting forth its findings of fact and conclusions of law, the trial court in its "Memorandum Opinion and Order" stated as follows:

> The uniform cover sheet under Rule 5A.02(2) is not at the present in the custody of the clerk's office, but it is apparent that this document or similar document was thrown away when plaintiff counsel appeared at the clerk's office. The Deputy Clerk took the position that if plaintiff counsel did not want to file a document that they would remove the document from the record. The Deputy Clerk was in error and has no such right. Since the wording of the statutes regarding Notice of Non-Suit appear to be mandatory, the Court needs to review the cover sheet that accompanied the facsimile Notice of Non-Suit. The Clerk by mistake threw this document away. Counsel for plaintiff is, therefore, directed to file an exact copy of his file copy of said cover sheet. The Court will

> rule on this matter after reviewing a copy of the cover sheet. (R. Vol. at 240).

On March 23, 2010, counsel for plaintiffs filed a document stating that they could not find in their office file a copy of the cover sheet faxed to the Dyer County Circuit Court Clerk with the "Notice of Voluntary Non-Suit. (R. Vol. 2 at 242). Thereafter, on April 8, 2010, this Court entered its "Order Dismissing Case" (R. Vol. 2 at 244-246). In so holding, the trial court concluded that a cover sheet or cover letter was sent with the facsimile transmission of the "Notice of Voluntary Non-Suit" with instructions to file the document and the information required by Rule 5A of the Tennessee Rules of Civil Procedure, that the Notice of Voluntary Non-Suit was properly filed and Rule 41.01(3) requires an order of dismissal be entered. (R. Vol. 2 at 239, 244-246). Accordingly, the trial court denied plaintiffs' Motion to Withdraw Notice of Voluntary Non-Suit and dismissed the case. (R. Vol. at 246).

On May 7, 2010, "Plaintiff's Motion to Alter or Amend Order of Dismissal" pursuant to Tenn. R. Civ. P. 59.04 was filed. (R. Vol. 2 at 247-248). This motion stated no grounds for the relief. (R. Vol. 2 at 247-248). The body of the Motion in its entirety is as follows:

> COMES NOW, the Plaintiff, by and through undersigned counsel, and pursuant to Tenn.R.Civ.P. 59.04, submits this Motion to Alter or amend the Court's Order of Dismissal dated April 7, 2010. (R. Vol. 2 at 247-248).

On May 24, 2010, "Defendant's Response to Plaintiffs' Motion to Alter or Amend Order of Dismissal" was filed as was "Defendant's Motion to Strike Plaintiffs' Motion to Alter or Amend Order of Dismissal" on grounds the Rule 59.04 Motion was insufficient

under Tenn. R. Civ. P. 7.02 in that it failed to "state with particularity the grounds therefor". (R. Vol. 2 at 249-250; R. Vol. 3 at 1-5).

On June 1, 2010, fifty-four (54) days after entry of the "Order Dismissing Case", "Plaintiffs' Amended Motion to Alter or Amend Order of Dismissal" pursuant to Rule 59 was filed. (R. Vol. 3 at 6-7). On June 9, 2010, plaintiffs filed their "Memorandum of Law in Support of Motion to Alter or Amend Judgment" specifically seeking relief from the "Order Dismissing Case" entered April 8, 2010, on grounds of mistake, inadvertence or excusable neglect. (R. Vol. 3 at 8-17). "Defendant's Response to Plaintiffs' Amended Motion to Alter or Amend Order of Dismissal and Memorandum in Support Thereof" was filed July 23, 2010. (R. Vol. 3 at 18-54).

On July 27, 2010, "Plaintiffs' Motion to Alter or Amend Order of Dismissal" filed May 7, 2010, "Defendant's Motion to Strike Plaintiffs' Motion to Alter or Amend Order of Dismissal" filed May 24, 2010, "Plaintiffs' Amended Motion to Alter or Amend Order of Dismissal" filed June 1, 2010, with supporting memoranda and responses were heard by the trial court. (R. Vol. 3 at 55-58; R. Vol. 6 at 1-28). At the conclusion of the hearing, the trial court made specific findings and rulings that were later incorporated into its "Order on Post-Judgment Motions." (R. Vol. 6 at 24-27). The trial court on August 10, 2010, entered its "Order on Post-Judgment Motions" in which it made the following findings and rulings:

> (1) The "Defendant's Motion to Strike Plaintiffs' 'Motion to Alter or Amend Order of Dismissal'" filed May 24, 2010, is well taken and should be granted, this Court specifically finding "Plaintiff's Motion to Alter or Amend Order of Dismissal" filed May 7, 2010, is legally insufficient and does not comply with Tenn. R. Civ. P. 7.02 in that it states no grounds whatsoever for such motion as required by Tenn. R. Civ. P. 7.02 nor does it set forth the relief or order sought as required by Tenn. R. Civ. P. 7.02. Accordingly, this Court finds

"Plaintiff's Motion to Alter or Amend Order of Dismissal" should be and the same is hereby stricken.

(2) The "Plaintiff's Motion to Alter or Amend Order of Dismissal" filed May 7, 2010, having been stricken, "Plaintiff's Amended Motion to Alter or Amend Order of Dismissal" filed June 1, 2010, is not a timely Rule 59 Motion and is therefore denied.

(3) Should the Court's findings and rulings as set forth in (1) and (2) above, be found incorrect on appeal, the Court makes the following alternative finding and ruling. The Court finds after consideration of the entire record and after careful consideration and weighing of relevant factors and circumstances to be considered in determining whether relief should be afforded on grounds of mistake, inadvertence, surprise or excusable neglect, that the plaintiffs are entitled to no relief on such grounds. Accordingly, this Court rules in the alternative that "Plaintiffs' Amended Motion to Alter or Amend Order of Dismissal" when considered on the merits is not well taken and should be denied. (R. Vol. 3 at 55-57).

Neither the "Order Dismissing Case" entered April 8, 2010, nor the "Order on Post-Judgment Motions" entered August 10, 2010, were appealed.

On April 6, 2011, the plaintiffs filed their "Motion for Rule 60.02 Relief" and "Memorandum in Support of Motion for Rule 60.02 Relief" in which the plaintiffs asked the Court to set aside the April 8, 2010, "Order Dismissing Case" on exactly the same grounds namely, mistake and excusable neglect as "Plaintiffs' Amended Motion to Alter or Amend Order of Dismissal" which the Court had previously ruled on in its "Order on Post-Judgment Motions" entered August 10, 2010. (R. Vol. 3 at 59-71).

The "Defendant's Response to Plaintiffs' Motion for Rule 60.02 Relief and Memorandum in Support Thereof" was filed on May 5, 2011. (R. Vol. 3 at 72-91). Plaintiffs' "Motion for Rule 60.02 Relief" was heard by the trial court on July 18, 2011. (R. Vol. 3 at 105-108; R. Vol. 7 at 1-33). At the conclusion of the hearing, the trial court denied plaintiffs' "Motion for Rule 60.02 Relief", making specific findings and rulings

which were later incorporated into its "Order Denying Plaintiffs' Motion for Rule 60.02 Relief." (R. Vol. 7 at 26-33). On August 2, 2011, the trial court entered its "Order Denying Plaintiffs' Motion for Rule 60.02 Relief" in which it made the following findings and rulings:

> (1) Plaintiffs' "Motion for Rule 60.02 Relief" raises exactly the same grounds and issues as "Plaintiffs' Amended Motion to Alter or Amend Order of Dismissal" filed June 1, 2010, and the "Memorandum of Law in Support of Motion to Alter or Amend Judgment" filed by plaintiffs on June 9, 2010. As reflected in this Court's, "Order on Post-Judgment Motions" filed August 10, 2010, this Court in its alternative finding and ruling considered the merits of "Plaintiffs' Amended Motion to Alter or Amend Order of Dismissal" which sought relief on grounds of mistake and excusable neglect and found as follows:
>
> > Should the Court's findings and rulings as set forth in (1) and (2) above, be found incorrect on appeal, the Court makes the following alternative finding and ruling. The Court finds after consideration of the entire record and after careful consideration and weighing of relevant factors and circumstances to be considered in determining whether relief should be afforded on grounds of mistake, inadvertence, surprise or excusable neglect, that the plaintiffs are entitled to no relief on such grounds. Accordingly, this Court rules in the alternative that "Plaintiffs' Amended Motion to Alter or Amend Order of Dismissal" when considered on the merits is not well taken and should be denied.
>
> Rule 59.01 of the Tennessee Rules of Civil Procedure does not authorize motions to reconsider motions made under Rule 59.04 to alter or amend. This Court finds plaintiffs' "Motion for Rule 60.02 Relief" which raises the exact same grounds and issue as was previously addressed and ruled on by this Court in its "Order on Post-Judgment Motions" is nothing more than a motion to reconsider the Court's ruling on "Plaintiffs Amended Motion to Alter or Amend Order of Dismissal" and as such is not an authorized motion under the Tennessee Rules of Civil Procedure and is a nullity. Thus, plaintiffs' "Motion for Rule 60.02 Relief" is denied on that ground.
>
> (2) Should the Court's finding and ruling as set forth in (1) above be found incorrect on appeal, the Court makes the following alternative

finding and ruling. The Court finds as a fact that plaintiffs' "Motion for Rule 60.02 Relief" should be denied because it was not filed within a reasonable time from the orders from which relief was sought as required by Tenn. R. Civ. P. 60.02. The Court finds as a fact that the plaintiffs did not act reasonably and should have fairly and reasonably been expected to have filed their "Motion for Rule 60.02 Relief" much more promptly than they did rather than waiting until a date that was two (2) days before the anniversary date of the "Order Dismissing Case" filed April 8, 2010 and almost eight (8) months after entry of the "Order on Post-Judgment Motions" entered August 10, 2010.

(3) Should the Court's findings and rulings as set forth in (1) and (2) above be found incorrect on appeal, the Court makes the following alternative finding and ruling. The Court after again considering the entire record and after again carefully considering and weighing of relevant factors and circumstances to be considered in determining whether relief should be afforded on grounds of mistake, inadvertence, surprise or excusable neglect finds after such reconsideration of the issue that the plaintiffs are entitled to no relief under Rule 60.02 on such grounds. Accordingly, this Court rules in the alternative that plaintiff's "Motion for Rule 60.02 Relief" when considered on the merits is not well taken and should be denied. (R. Vol. 3 at 105-107).

On August 30, 2011, plaintiffs filed their "Notice of Appeal" of the trial court's "Order Denying Plaintiffs' Motion for Rule 60.02 Relief" granted (sic) in favor of defendant on August 2, 2011. (R. Vol. 3 at 112-113).

ARGUMENT

Plaintiffs suggest to this Court that there are issues dealing with whether the "Notice of Voluntary Non-Suit" was properly filed (Brief of Appellants, at iv, Issue (1) and Issue (2)). However, as discussed *supra*, these issues were ruled upon by the trial court in its "Order Dismissing Case" entered April 8, 2010, which was not appealed. Therefore, despite plaintiffs' contention to the contrary, the issues dealing with the propriety of the filing of the "Notice of Voluntary Non-Suit" and the entry of the "Order Dismissing Case" pursuant to Tenn. R. Civ. P. 41.01(3) are not properly on appeal.

Plaintiffs' only appeal is from the trial court's "Order Denying Plaintiff's Motion for Rule 60.02 Relief" on grounds of mistake and excusable neglect. (R. Vol. 3 at 112).

I.

STANDARD OF REVIEW

The standard of review for the trial court's decision to grant or deny a Rule 60.02 Motion is abuse of discretion. *Banks v. Dement Construction Co.*, 817 S.W.2d 16, 18 (Tenn. 1991). The abuse of discretion standard envisions a less rigorous review of the lower court's decision and a decreased likelihood that the decision will be reversed on appeal. *Lee Medical, Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010). There is no abuse of discretion when the trial court applies the correct legal standard and properly considers the factors customarily used to guide the particular discretionary decision. *Id.* In reviewing a lower court's discretionary decision, the appellate court should consider (1) whether the factual basis for the decision is properly supported by evidence in the record, (2) whether the lower court properly identified the most appropriate legal principles applicable to the decision and (3) whether the lower court's decision was

within the range of acceptable alternative dispositions. *Id.* at 524. "[T]he abuse of discretion standard does not permit an appellate court to substitute its judgment for that of the trial court". *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998).

When called upon to review a lower court's discretionary decision, the reviewing court should review the underlying factual findings *de novo* upon the record of the trial court with a presumption of correctness unless the preponderance of evidence is otherwise. Tenn. R. App. P. 13(d); *Lee Medical, Inc., v. Beecher*, 312 S.W. 3d 515, 525 (Tenn. 2010). The reviewing court should review the lower court's legal determinations *de novo* without any presumption of correctness. *Lee Medical, Inc.,* 312 S.W.3d at 525.

II.

THE TRIAL COURT CORRECTLY HELD PLAINTIFFS' "MOTION FOR RULE 60.02 RELIEF" WAS A MOTION TO RECONSIDER THE TRIAL COURT'S RULING ON A PREVIOUSLY FILED RULE 59 MOTION AND WAS NOT AN AUTHORIZED MOTION UNDER THE TENNESSEE RULES OF CIVIL PROCEDURE

As the first ground for denying plaintiffs' "Motion for Rule 60.02 Relief", the trial court held:

> Plaintiffs' "Motion for Rule 60.02 Relief" raises exactly the same grounds and issues as "Plaintiffs' Amended Motion to Alter or Amend Order of Dismissal" filed June 1, 2010, and the "Memorandum of Law in Support of Motion to Alter or Amend Judgment filed" by plaintiffs on June 8, 2010. As reflected in this Court's, "Order on Post-Judgment Motions" filed August 10, 2010, this Court in its alternative finding and ruling considered the merits of "Plaintiffs' Amended Motion to Alter or Amend Order of Dismissal" which sought relief on grounds of mistake and excusable neglect and found as follows:
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> > Should the Court's findings and rulings as set forth in (1) and (2) above, be found incorrect on appeal, the Court makes

> the following alternative finding and ruling. The Court finds after consideration of the entire record and after careful consideration and weighing of relevant factors and circumstances to be considered in determining whether relief should be afforded on grounds of mistake, inadvertence, surprise or excusable neglect, that the plaintiffs are entitled to no relief on such grounds. Accordingly, this Court rules in the alternative that "Plaintiffs' Amended Motion to Alter or Amend Order of Dismissal" when considered on the merits is not well taken and should be denied.
>
> Rule 59.01 of the Tennessee Rules of Civil Procedure does not authorize motions to reconsider motions made under Rule 59.04 to alter or amend. This Court finds plaintiffs' "Motion for Rule 60.02 Relief" which raises the exact same grounds and issue as was previously addressed and ruled on by this Court in its "Order on Post-Judgment Motions" is nothing more than a motion to reconsider the Court's ruling on "Plaintiffs Amended Motion to Alter or Amend Order of Dismissal" and as such is not an authorized motion under the Tennessee Rules of Civil Procedure and is a nullity. Thus, plaintiffs' "Motion for Rule 60.02 Relief" is denied on that ground. (R. Vol. 3 at 105-109).

Tenn. R. Civ. P. 59.01 specifically provides:

> Motions to which this rule is applicable are: (1) under Rule 50.02 for judgment in accordance with a motion for a directed verdict; (2) under Rule 52.02 to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under Rule 59.07 for a new trial; **or (4) under Rule 59.04 to alter or amend the judgment.** These motions are the only motions contemplated in these rules for extending the time for taking steps in the regular appellate process. **Motions to reconsider any of these motions are not authorized and will not operate to extend the time for appellate proceedings.** (Emphasis Added).

In *Daugherty v. Lumbermen's Underwriting Alliance*, 798 S.W.2d 754, 757-758 (Tenn. 1990), a Rule 60.02 motion for relief from judgment raised exactly the same issue as a previously filed Rule 59 motion. The Tennessee Supreme Court held this motion was nothing more than a motion to reconsider the trial court's ruling on the

earlier Rule 59 motion and as such was prohibited under Tenn. R. Civ. P. 59.01 and a nullity. *Id.* In so holding, the Supreme Court stated:

> The purpose of the rule is to bring finality to proceedings in the trial court when the trial judge has ruled upon any of the listed motions. Thus, plaintiff's second motion was prohibited under Rule 59.01 and was a nullity. *Id.* at 758.

In *Tennessee Farmers Mut. Ins. Co. v. Farmer*, 970 S.W.2d 453, 445, FN1, the Supreme Court reiterated this rule, citing *Daugherty* with approval and stating:

> We emphasize that the "Motion to Reconsider" at issue in this appeal was *not* a motion to reconsider a previously decided motion under Rule 59.01, Tenn. R. Civ. P. Indeed, that rule specifically provides that motions to reconsider previously decided post-trial motions are "not authorized and will not operate to extend the time for appellate proceedings." Rule 59.01, Tenn. R. Civ. P, *see also, Daugherty v. Lumbermen's Underwriting Alliance*, 789 S.W.2d 754, 755 (Tenn. 1990)

. . . .

In the present case, the trial court correctly found the plaintiffs' "Motion for Rule 60.02 Relief" raised exactly the same issue as they did in their previously filed Rule 59 motion and supporting memorandum which the trial court had already ruled upon and in filing their "Motion for Rule 60.02 Relief", the plaintiffs were simply asking for "another bite of the apple." (R. Vol. 7 at 28). Plaintiffs conceded as much this in their "Memorandum in Support of Motion for Rule 60.02 Relief".[7] (R. Vol. 3 at 63). The plaintiffs' "Memorandum in Support of Motion for Rule 60.02 Relief" made the same arguments and cited the same cases as the plaintiffs' "Memorandum of Law in Support of Motion to Alter or Amend". (R. Vol. 3 at 8-17, 59-69).

[7] "As part of the Rule 59 motion, plaintiff (sic) argued that the order was entered as a consequence of mistake, inadvertence or excusable neglect." (Plaintiffs' "Memorandum in Support of Motion for Rule 60.02, "Procedural History", Paragraph 21, p. 5) (R. Vol. 3 at 63).

Plaintiffs' "Memorandum in Support of Motion for Rule 60.02 Relief" is substantially identical to the plaintiffs' "Memorandum in Support of Motion to Alter or Amend Judgment". (R. Vol. 3 at 8-17, 59-69). A substantial part, if not most, of the Rule 60.02 memorandum is taken verbatim, word for word from the Rule 59 memorandum. (R. Vol. 3 at 8-17, 59-69). Nothing new was raised. In short, like *Daugherty*, the plaintiffs' purported Rule 60.02 motion is nothing more than a motion to reconsider the Court's ruling on their Rule 59 Motion. As such, it is prohibited under Tenn. R. Civ. P. 59.01 and is a nullity under *Daugherty.*

The plaintiffs in the present case made a choice not to appeal the trial court's "Order on Post-Judgment Motions" entered August 10, 2010, which addressed the issue of whether relief should be afforded on grounds of mistake, inadvertence, surprise or excusable neglect on the merits. They should not be relieved of their choice not to appeal that decision under the guise of a Rule 60 motion. *Day v. Day*, 931 S.W.2d 936, 939-940 (Tenn. Ct. App. 1996) (Rule 60.02 is not to be used to relieve a party from "a free, calculated and deliberate choice" made not to appeal from a final order).

Based upon the foregoing, the trial court correctly ruled plaintiffs' "Motion for Rule 60.02 Relief" was nothing more than a motion to reconsider the trial court's ruling on plaintiffs' Rule 59 motion, that it was not an authorized motion under the Tennessee Rules of Civil Procedure and should be denied on that ground.

III.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN RULING PLAINTIFFS' "MOTION FOR RULE 60.02 RELIEF" WAS NOT TIMELY FILED

As its second ground for denying plaintiffs' "Motion for Rule 60.02 Relief", the trial court held:

> The Court finds as a fact that plaintiffs' Motion for Rule 60.02 Relief should be denied because it was not filed within a reasonable time from the order from which relief was sought as required by Tenn. R. Civ. P. 60.02. The Court finds as a fact that the plaintiffs did not act reasonably and should have fairly and reasonably been expected to have filed their "Motion for Rule 60.02 Relief" much more promptly than they did rather than waiting until a date that was two (2) days before the anniversary date of the "Order Dismissing Case" filed April 8, 2010 and almost eight (8) months after entry of the "Order on Post Judgment Motions" entered August 10, 2010. (R. Vol. 3 at 105-109).

Tenn. R. Civ. P. 60.02 requires that a motion filed under the rule that seeks relief on grounds of mistake, inadvertence, surprise or excusable neglect "shall be made within a reasonable time, and . . . not more than one year after the judgment, order or proceeding was entered or taken". A Rule 60.02 Motion filed on the grounds of mistake, inadvertence, surprise or excusable neglect may be considered untimely "if the trial court finds, as a matter of fact, that the movant has not acted reasonably and that he could have fairly and reasonably been expected to file the motion much more promptly". *Wooley v. Gould, Inc.,* 654 S.W.2d 669, 670 (Tenn. 1983), rev'd on other grounds *Betts v. Tom Wade Gin,* 810 S.W.2d 140 (Tenn. 1991); *See also, Walker v. Nissan North America, Inc.,* 2009 WL 2589089 (Tenn. Ct. App. 2009) (copy of case attached in Appendix).

In *Wooley*, the Tennessee Supreme Court held that a Rule 60.02 Motion seeking relief on grounds of mistake or excusable neglect that was filed on the anniversary date of the order sought to be set aside was not filed within a "reasonable time" as required by Rule 60.02 and was denied. In so holding, the Tennessee Supreme Court held as follows:

> The motion was filed on the anniversary date of the order sought to be set aside, and therefore, was filed within the very maximum time permitted. This, however, does not make it timely if the trial court finds, as a matter of fact, that the movant has not acted reasonably and that he could have fairly and reasonably been expected to file the motion much more promptly. *Id.* at 670.

In affirming the trial court's denial of the plaintiff's Rule 60.02 motion, the Tennessee Supreme Court further noted:

> A trier of fact could reasonably conclude that the delay in this case, far greater than that in any other reported case, was too great to meet the requirements of Rule 60.02 *Id.* at 673.

In *Rogers v. Estate of Russell*, 50 S.W.3d 441 (Tenn. App. 2001), the Court of Appeals held that an eleven (11) month delay in filing a Rule 60.02(1) motion after entry of the order denying the movant's claim was unreasonable because there was no explanation for the movant's failure not to take earlier action in the probate court or to appeal the case. Accordingly, the Court in *Rogers* denied the Rule 60.02(1) motion as untimely.

In the present case, plaintiffs' Rule 60.02 Motion was filed two (2) days short of the one (1) year anniversary date of entry of the order of dismissal. Moreover, almost eight (8) months passed between the entry of the "Order on Post-Judgment Motions" and the filing of plaintiffs' "Motion for Rule 60.02 Relief". Most important, as discussed *supra*, plaintiffs' Rule 60 motion raised no new issues, presented no additional evidence

and was nothing more than a motion to reconsider issues the Court had addressed eight (8) months earlier in its August 10, 2008, "Order on Post-Judgment Motions" and which plaintiff chose not to appeal. There is no reason nor is there any reasonable explanation offered by the plaintiffs why they did not file their Rule 60 Motion earlier. When you consider plaintiffs' "Memorandum in Support of Motion for Rule 60.02 Relief" is substantially identical to the plaintiffs' "Memorandum in Support of Motion to Alter or Amend Judgment" filed June 9, 2010, it is difficult to conceive of any circumstances justifying waiting until April 6, 2011, to refile a motion on exactly the same grounds. In considering plaintiffs' "Motion for Rule 60.02 Relief", the trial court found that "to wait until two days before the year passes" after entry of the "Order Dismissing Case" on April 8, 2010 when considered in the context of the length the case had been pending, the two dormant notices, and "everything else that's happened" (i.e. the refusal of plaintiffs' only expert to give a discovery deposition by the October 30, 2009, deadline, etc.) "that's not reasonable. It's not timely filed." (R. Vol. 7 at 29). The trial court noted the impact from the overall delay was substantial and prejudicial to Dr. West. (R. Vol. 7 at 31).

Based upon the foregoing, the trial court did not abuse its discretion in ruling plaintiffs' "Motion for Rule 60.02 Relief" was not timely filed.

IV.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING PLAINTIFFS' "MOTION FOR RULE 60.02 RELIEF" ON THE MERITS

As its third ground for denying plaintiffs' "Motion for Rule 60.02 Relief", the trial court held:

> The Court after again considering the entire record and after carefully considering and weighing all relevant factors and circumstances to be considered in determining whether relief should be afforded on grounds of mistake, inadvertence, surprise or excusable neglect finds after such reconsideration of the issue that the plaintiffs are entitled to no relief under Rule 60.02 on such grounds. Accordingly, this Court rules in the alternative that plaintiff's "Motion for Rule 60.02 Relief" when considered on the merits is not well taken and should be denied. (R. Vol. 3 at 107).

The burden of establishing the movant is entitled to relief on grounds of "mistake, inadvertence, surprise or excusable neglect" is on the party asserting such. *Banks vs. Dement Construction Co.*, 817 S.W.2d 16, 18 (Tenn. 1991). A party seeking to have a lower court's holding overturned on the basis of an abuse of discretion undertakes a heavy burden. *Banks v. Dement Construction Co.*, 817 S.W.2d 16, 18 (Tenn. 1991); *State v. Looper,* 86 S.W.3d 189, 193 (Tenn. Ct. App. 2000). Rule 60 has been called "an escape valve" that "should not be opened easily" due to the immense importance of the principle of finality of judgments. *Banks v. Dement Construction Co.,* 817 S.W.2d 16, 18 (Tenn. 1991). Rule 60.02 is not to be used to relieve a party from a "free, calculated and deliberate choice" not to appeal from a final order. *Day v. Day*, 931 S.W.2d 936, 939-940 (Tenn. Ct. App. 1996).

In the present case, the trial court in determining plaintiffs were not entitled to relief under Rule 60.02 did not abuse its discretion. Plaintiffs argue that plaintiffs' counsel's mistaken belief that a non-suit had not been previously taken constitutes excusable neglect entitling the plaintiffs to relief under Tenn. R. Civ. P. 60.02. In holding the plaintiffs were not entitled to such relief, the trial court applied the correct legal standard and properly considered the factors which the Tennessee Supreme

Court enunciated in *Williams v. Baptist Memorial Hospital*, 193 S.W.3d 545, 551 (Tenn. 2006).

A careful review of *Williams* and a comparison of *Williams* to the present case shows that the trial court did exactly what the Supreme Court in *Williams* envisioned it should do in such cases. In *Williams*, the Tennessee Supreme Court set forth the legal standard and factors the trial court is required to analyze in determining whether there is excusable neglect. *Id.* at 551. *Williams* is a medical malpractice case arising from gallbladder surgery Mae Ellen Williams had on December 7, 2000. *Id.* at 548. The anesthesiologist, Dr. Becky Wright, an employee of Metropolitan Anesthesiologist Alliance (MAA) had difficulty intubating Ms. Williams. *Id.* at 548. After four (4) unsuccessful attempts to establish an airway with an endotracheal tube, Dr. Wright was finally able to establish the airway on the fifth attempt. *Id.* at 548. However, following surgery and removal of the endotracheal tube, Ms. Williams was not able to breathe on her own. *Id.* at 548. She was placed on life support and remained comatose or semi-comatose until her death more than a year after her surgery. *Id.* at 548.

On November 30, 2001, prior to Ms. Williams' death, plaintiffs (Ms. Williams, her husband, her daughter and her conservator) filed a medical malpractice action in the Circuit Court for Shelby County. *Id.* at 548. Either at that time or with an amended complaint, Dr. Wright and her employer, MAA, were made parties-defendants. *Id.* at 548. On January 31, 2003, a scheduling order was entered requiring the plaintiffs to identify their trial experts on or before June 1, 2003. *Id.* at 548. Subsequently, another order was entered extending the date for plaintiffs to identify experts to July 1, 2003. *Id.* at 548. The latter order also provided that all pending motions for summary judgment

would be set for hearing on August 29, 2003, and materials concerning the summary judgment motions provided to the trial court by August 22, 2003. *Id.* at 548-549.

Plaintiffs did not identify any experts by the July 1, 2003, deadline nor did they move prior to the expiration of the deadline to extend it. *Id.* at 549. On July 23, 2003, Dr. Wright and MAA filed a motion for summary judgment based upon plaintiffs' lack of expert proof. *Id.* at 549. The motion for summary judgment was also supported by Dr. Wright's own affidavit. *Id.* at 549. On August 22, 2003, plaintiffs filed a response to the motion for summary judgment which included the opposing affidavit of their Rule 26 expert, Dr. Ronald J. Gordon. *Id.* at 549. Dr. Gordon's affidavit opined that Dr. Wright deviated from the standard of care. *Id.* at 549.

The motion for summary judgment was set for hearing on August 29, 2003, as required by the scheduling order but could not be heard at that time because plaintiffs had failed to file a motion seeking substitution of the parties after Ms. Williams' death and had also failed to file an amended complaint alleging a wrongful death cause of action. *Id* at 549. On October 15, 2003, the plaintiffs filed a motion for substitution as well as a proposed amended complaint. *Id.* at 549. On October 17, 2003, plaintiffs filed a motion seeking an enlargement of time in which to identify experts who would testify at trial. *Id.* at 549. Plaintiffs contended their failure to identify their expert (Dr. Gordon) prior to the July 1, 2003, deadline was a result of excusable neglect. *Id.* at 549. The trial court on the same day, October 17, 2003, heard all pending motions. Plaintiffs contended that there were records establishing Ms. Williams was a difficult patient to intubate which, despite "repeated and dogged efforts", they were not able to acquire until August 6, 2003. *Id.* at 549. Plaintiffs contended that only after these records were

given to their expert for review could he offer an opinion concerning Dr. Wright's care. *Id.* at 549.

Following the hearing, the trial court denied plaintiffs' motion for an enlargement of time and granted summary judgment to Dr. Wright and MAA. *Id.* at 550. The Court of Appeals affirmed the trial court's decision finding the trial court did not abuse its discretion in denying the plaintiffs' motion to enlarge the time for identifying expert witnesses. *Id.* at 550. Thereafter, the Tennessee Supreme Court granted plaintiffs' application for permission to appeal.

The Supreme Court noted that Tenn. R. Civ. P. 6.02(2) requires the party requesting an enlargement of time after the original time had elapsed to show the failure was due to "excusable neglect" and the opposing party was not prejudiced. *Id.* at 550. Analyzing excusable neglect, the Court in *Williams* adopted four (4) factors for the lower court to consider in arriving at its discretionary decision. *Id.* at 551. Specifically, the Court in *Williams* stated:

> The Supreme Court's comprehensive framework, which we adopt, requires a court to consider (1) the risk of prejudice to parties opposing the filing, (2) the delay and its potential impact on the proceedings, (3) the reasons why the filings were late and whether the reasons were within the filer's reasonable control and (4) the good or bad faith of the filer. *Id.* at 551.

In considering the risk of prejudice factor, the Court noted that the trial judge had found the defendant doctors had been "under the cloud of this lawsuit for well over two years" and "with the passage of time important witnesses disappear. Memories fade." *Id.* at 551. In addition, the trial court had looked at the case in its entirety and noted plaintiffs had been dilatory in other matters besides expert identification including failing

to timely file a motion for substitution and the amended complaint for wrongful death. (*Id.* at 551-552).

The Supreme Court next considered the effect of delay factor and noted that although the case was not set for trial, the trial court did emphasize that it had previously entered a revised scheduling order at the plaintiffs' request and had warned plaintiffs at that time to adhere to the schedule. *Id.* at 552. Moreover, the plaintiffs conceded there was no reason for failing to file a motion for enlargement of time under Rule 6.02 until October 17, 2003, well after the expiration of the July 1, 2003, deadline and that plaintiffs had also failed to seek substitution of the parties or timely file an amended complaint. The Supreme Court summed up the trial court's findings on delay and prejudice by stating:

> In short, the trial court found that the plaintiffs' delays were prejudicial because they impaired the defendants' ability to prepare for trial. *Id.* at 552.

In considering the trial court's findings relating to prejudice and delay, the Supreme Court stated:

> Although the inquiry of prejudice and the effect of the delay generally should focus on the plaintiffs' failure to identify experts by the deadlines set forth by the trial court, **this failure cannot be isolated from the plaintiffs' failure to comply with other deadlines and magnifies both the prejudice to the defense and the effect of the delay.** *Id.* at 552. (Emphasis Added).

Finally, the Supreme Court noted that although the trial court had made no factual findings as to good or bad faith of the plaintiffs, there was no dispute the plaintiffs had learned of the existence of Williams' prior medical records in March, 2003, (nearly four months before the July 1, 2003, expert disclosure deadline). In addition, they also took note of the fact that although the Complaint was filed in November of

2001, there was no indication as to why the plaintiffs were unable to learn of Williams' prior medical history from a member of the family before the information emerged at a deposition taken by the defendants in March 2003. *Id.* at 552.

Following a review of the record and the trial court's findings, the Court concluded the trial court did not abuse its discretion in finding there was no excusable neglect and denying the plaintiffs' motion. *Id.* at 552. Accordingly, the Court concluded since no plaintiffs' expert affidavit contested the affidavit of Dr. Wright, the motion for summary judgment was properly granted to the defendants. *Id.* at 552.

These four factors including the trial court's findings on each in the present case are now discussed, in turn, with regard to the case before this Court.

A. The Length of Delay, and its Potential Impact on Proceedings

At the July 18, 2011, hearing, the trial court noted the present case was filed on October 20, 2005, and the surgery on which it was based was performed on June 17, 2003. (R. Vol. 7, at 26). The trial court found it had been dealing with the case "for quite sometime" and there had been "delay after delay" with two dormant notices having to be sent out. (R. Vol. 7 at 26). The trial court found that these dormant notices required the plaintiffs to get the case disposed of in a certain length of time or to show cause why it should not be dismissed and that on each of the two occasions dormant notices were sent out, the trial court had allowed the time to be extended. (R. Vol. 7 at 26). On August 6, 2007, when the trial court heard plaintiffs' first motion to remove the case from the dormant list and extend the deadline to conclude the case, the trial court warned plaintiffs that they should get the case prepared or the case would be dismissed on the next dormant docket. (R. Vol. 6 at 25). The "Order Removing Case From

Dormant Docket" entered August 13, 2007, specifically provided: "in the event the case returns to the dormant docket, the matter will be dismissed." (R. Vol. 1 at 58). Notwithstanding this warning, the case returned to the dormant docket, and was included on a second "Notice of Dormant Cases". (R. Vol. 1 at 62-66). However, on motion and supporting affidavit of plaintiffs' counsel, the trial court again removed the case from the dormant list and extended the deadline for disposition by order entered February 26, 2008. (R. Vol. 1 at 67-73, 76-77). The trial court noted it allowed the case to be removed the second time because of plaintiffs' counsel's "extraordinary situation."[8] (R. Vol. 6 at 25-26). The trial court, however, warned plaintiffs at this time that there would be no further extensions. (R. Vol. 7 at 26-27). The deadlines set forth in the original scheduling order were extended by two subsequent orders. (R. Vol. 1 at 12-13, 74-75, 91-92). Plaintiffs' violation of the last such order, which had provided a deadline of October 30, 2009, for plaintiffs' to produce their trial expert for discovery deposition, was imminent at the time plaintiffs' "Notice of Voluntary Non-Suit" was filed on October 23, 2009.[9] It was because plaintiffs were going to violate this deadline that a strategic decision was made to non-suit the case. (R. Vol. 7 at 4-5).

The delay occasioned by plaintiffs filing of the "Notice of Voluntary Non-Suit" in a maneuver to avoid this deadline and the potential consequences of its violation are immense. The filing of the "Notice of Voluntary Dismissal" triggered a whole series of events that added unfounded delay to a case that was old to start with. First, despite the filing of the "Notice of Voluntary Non-Suit" on October 23, 2009, plaintiffs resisted

[8] Mr. Barry Weathers, plaintiffs' counsel at that time outlined in his affidavit some very serious health issues he was having to deal with of his father as well as some personal issues. (R. Vol. 1 at 73-73).

[9] Although plaintiffs contend the filing of a notice of non-suit was not a legal maneuver or tactical decision, the conclusion is almost inescapable that they were considering getting rid of Dr. Clymer, the only expert they had disclosed within the deadline and getting a new and more cooperative expert. This would clearly be a legal maneuver or tactical decision allowing plaintiffs to seek to improve their position at defendant's expense.

entering the order of voluntary dismissal as required by Tenn. R. Civ. P. 41.01(3), with the result that an "Order Dismissing Case" was not entered until April 8, 2010, over five (5) months later. (R. Vol. 2 at 244-246).[10] Thereafter, plaintiffs filed two post-judgment motions, the first twenty-nine (29) days after entry of the final order and the second fifty-four (54) days after entry of the final order. (R. Vol. 2 at 247; R. Vol. 3 at 6-7). After these orders were dealt with by "Order on Post-Judgment Motions" entered August 10, 2010, plaintiffs waited almost eight (8) months before filing their "Motion for Rule 60.02 Relief", without any explanation as to why they could not have filed their motion earlier.

Even if we assume for the sake of argument that the trial court had allowed the notice or order of non-suit to be withdrawn or set aside, plaintiffs would still have to deal with the fact they had violated the scheduling order by failing to provide their only trial expert by the October 30, 2009, deadline. This would require a motion to extend the deadline which would necessitate further delays considering defendant would likely file a motion in limine seeking to exclude the plaintiffs' recalcitrant expert. Assuming the plaintiffs could convince the trial court to extend the deadline, there would be additional delay to get a mutual agreeable date from plaintiffs' expert who has twice reneged at the last minute on dates.

All of the delays occasioned by the entry of the "Notice of Voluntary Non-Suit" magnify the delay occasioned by the age of the case, the fact it had been previously non-suited for almost one year, that the care on which the lawsuit was based occurred in the summer of 2003, and that even after the present case was filed there was "delay after delay" to use the trial court's words.

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[10] Plaintiffs' counsel conceded at the July 18, 2011, hearing, that in retrospect, the order on the notice of voluntary non-suit was required to be entered and was correctly entered by the trial court. (R. Vol. 7 at 2-3).

Based upon the foregoing, the trial court did not abuse its discretion in finding the impact of the delay was substantial and prejudicial to defendant. (R. Vol. 7 at 31).

B. Prejudice to the Defendant

The trial court found prejudice to Dr. West based upon the substantial delay discussed *supra*. The trial court in so concluding stated:

> Dr. West, if I granted your Motion (plaintiffs' Rule 60.02 Motion), would be prejudiced by this. The case is now eight years old. There is an impact from the delay that is substantial. (R. Vol. 7 at 31).

In *Williams*, a case not nearly as old as the present case, the trial court made many factual findings strikingly similar to the trial court in the present case. In determining the delay and its impact, the trial court in *Williams* looked at the age of the case, other delays occasioned by plaintiffs (i.e. failure to timely file a motion for substitution, failure to timely file an amended complaint alleging a wrongful death action, the extension of deadlines previously set by the trial court, the trial court's warning that the last deadline for the disclosure of experts would be adhered to, etc.). In finding no abuse of discretion and affirming the trial court's judgment, the Court in *Williams* stated:

> We conclude that the trial court did not abuse its discretion in denying the plaintiffs' motion for an enlargement of time under Rule 6.02 after finding that there was no excusable neglect. The trial court held an extensive hearing and considered the factors identified above. The trial court considered the reasons for the plaintiffs' delay, the length of the delay, the prejudice caused to the defendants, and the potential impact on the proceedings. Although the inquiry of prejudice and the effect of the delay generally should focus on the plaintiffs' failure to identify expert witnesses by the deadline set by the trial court, this failure cannot be isolated from the plaintiffs' failure to comply with other deadlines and magnifies both the prejudice to the defense and the effect of the delay. (*Williams* 193 S.W.3d at 552) (Emphasis Added).

Like *Williams*, the trial court in the present case considered delay and prejudice in the context of plaintiffs' actions and/or inactions which caused "delay after delay". As in *Williams*, the trial court considered the age of the case, the extensions of deadlines for disposition of the case on two separate occasions, the warnings by the trial court on each occasion the case was removed from the dormant list and the disposition time extended, the extension of scheduling deadlines, and plaintiffs' imminent failure to comply with the deadline for the discovery deposition of plaintiff's expert. As in *Williams*, delays occasioned by filing the "Notice of Voluntary Non-Suit" magnify both the prejudice to the defendant and the effect of the delay. Moreover, even if the focus were narrowed in the present case to consider only delay and prejudice of filing the "Notice of Voluntary Non-Suit", then, as discussed *supra*, the impact of the resulting delay is still substantial and prejudice considerable. As was noted in *Williams*, 93 S.W.3d at 551, "with the passage of time, important witnesses disappear. Memories fade." Quite clearly, the filing of the "Notice of Voluntary Non-Suit" and the resulting delays impaired the defendant's ability to prepare for trial. *See Williams*, 193 S.W.3d at 552. ("In short, the trial court found the plaintiffs' delays were prejudicial because they impaired the defendants' ability to prepare for trial.") The same is true in the present case.

Based upon the foregoing, the trial court did not abuse its discretion in finding the defendant was prejudiced.

C. The Filing of the "Notice of Voluntary Non-Suit" Was Within the Plaintiffs' Counsel's Control

The issue presented to the trial court in plaintiffs' "Motion for Rule 60.02 Relief" and which is the subject of this appeal, is not whether the "Notice of Voluntary Non-Suit"

was properly filed but whether plaintiffs' counsel's mistaken belief that there was no prior non-suit based upon what he was told by a Deputy General Sessions Clerk was excusable neglect. (R. Vol. 3 at 59-70; R. Vol. 7 at 1-33). Considering this issue *vis a vis* the factors to be considered under *Williams,* the trial court unequivocally found the reasons for the filing and the actions of plaintiffs' counsel in filing the "Notice of Voluntary Dismissal" were within his control and were his responsibility. (R. Vol. 7 at 12-13). In considering this issue, the trial court stated:

> But, I mean, he's (plaintiffs' counsel's) responsible. The clerks don't know anything about non-suits you know. And she (the Court Clerk) told him absolutely correct. She looked through the file and didn't see a nonsuit. Well, it wasn't because the case had been dismissed in an earlier file. But that his (plaintiffs' counsel's) responsibility, now, that's not the clerk's. (R. Vol. 7 at 13).

At the trial court level plaintiffs' counsel sought to blame the Clerks for plaintiffs' counsel's mistaken belief that a prior non-suit had not been taken. (R. Vol. 3 at 59-71, Vol. 7 at 1-22). Having been unsuccessful in blaming the Court Clerk below, on appeal, plaintiffs now seek to blame defense counsel for the filing of the "Notice of Voluntary Non-Suit". Plaintiffs' counsel argues that it was defense counsel who "intercepted" the "Notice of Voluntary Non-Suit" and filed it.

Plaintiffs' argument blaming defense counsel for the "filing" is without merit both legally and factually. It is undisputed that on the afternoon of October 23, 2009, plaintiffs' counsel sent to the Dyer County Circuit Court Clerk for facsimile filing the "Notice of Voluntary Non-Suit" which was accompanied by a cover sheet. (R. Vol. 1 at 96-97, 130-131, Vol. 5 at 23-27). It is undisputed that once the facsimile "Notice of Voluntary Non-Suit" and cover sheet were received on the facsimile machine serving Dyer County Circuit Court, the "Notice of Voluntary Non-Suit" was stamped filed by the

Deputy Circuit Court Clerk, Kimberly Hill, on October 23, 2009 at 3:55 p.m. (R. Vol. 1 at 96, 130-131; Vol. 5 at 23-27). It is undisputed that the "Notice of Voluntary Non-Suit" was served by facsimile on counsel for defendant on the afternoon of October 23, 2009, as permitted by Tenn. R. Civ. P. 5.02(1).[11] (R. Vol. 1 at 123; R. 2 at 236-241). It is undisputed that the Skouteris and Magee facsimile cover sheet serving the "Notice of Voluntary Non-Suit" on defense counsel stated:

> "Please find enclosed a copy of the Notice of Non-Suit in the *Dixie Willis v. David West* case **that was filed today**. (R. Vol. 1, 123) (Emphasis Added)

It is likewise undisputed that on Monday, October 26, 2009, the facsimile filed "Notice of Non-Suit" filed in the Circuit Court Clerk's Office and the accompanying cover sheet were thrown away either at the behest of plaintiffs' counsel or without objection from plaintiffs' counsel. (R. 4 at 22).

The Tennessee Rules of Civil Procedure determine the date and time a facsimile filed document is considered filed. Tenn. R. Civ. P. 5A.03(1) specifically provides:

> (1) A facsimile transmission received by the clerk after 4:30 p.m. but before midnight, clerk's local time, on a day the clerk's office is open for filing shall be deemed filed as of that business day. A facsimile transmission received after midnight but before 8:00 a.m., clerk's local time, on a business day, or a facsimile transmission received by the clerk on a Saturday, Sunday, legal holiday, or other day on which the clerk's office for filing is closed, shall be deemed filed on the preceding business day. **Upon receiving a facsimile transmission in its entirety, the clerk shall note the filing date on the facsimile filing in the same manner as with original pleadings or other documents filed by mail or in person. For purposes of this provision, "received by the clerk" means the date and time the facsimile transmission is received by the clerk as indicated by the date and time printed on the facsimile transmission by the clerk's facsimile machine.** (Emphasis Added).

[11] Tenn. R. Civ. P. 5.02(A) provides in pertinent part:
Items which may be filed by facsimile transmission pursuant to 5A may be served by facsimile transmission.

It is clear under Rule 5A.03, that the "Notice of Voluntary Non-Suit" was "filed" on the date and at the time the facsimile transmission was received on the Circuit Court Clerk's facsimile machine and that plaintiff's counsel's "second thoughts" and subsequent request that it not be filed were surplusage since they could have no effect on a document that was already filed.[12] The same is true of defense counsel's request of the Clerk that she stamp his copy and original facsimile "Notice of Voluntary Non-Suit" filed. Defense counsel was asking her to do nothing she was not already obligated to do under Rule 5A.

Moreover, Tenn. R. Civ. P. 5.05 provides:

> All papers after the complaint required to be served upon a party **shall be filed** with the court either before service or within a reasonable time thereafter, but the court may on motion of a party or on its own initiative order that depositions upon oral examination; interrogatories; requests for documents; requests for admission; and answers and responses thereto not be filed unless on order of the court or for use in the proceeding. (Emphasis Added).

It is so obvious it almost goes without saying that all pleadings once served are required to be filed. It's mandatory. Consequently, plaintiffs' counsel attempts to orally "withdraw" or "retract" the "Notice of Voluntary Non-Suit" once it was served on defense counsel were to no avail. The Rules required the "Notice of Voluntary Non-Suit" to be filed.

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[12] After the "Notice of Voluntary Non-Suit" was faxed by plaintiffs' counsel with accompanying cover sheet to the Circuit Court Clerk via the facsimile machine that serves both Dyer County Circuit and General Sessions Court, plaintiffs' counsel purportedly had "second thoughts" and telephoned a Deputy General Sessions Clerk, Jennie Pate Hollingsworth, and told her he did not want to file it. (R. Vol. 4 at 19, Vol. 5 at 13-20). However, Ms. Pate had taken the "Notice of Voluntary Non-Suit" and cover sheet off the facsimile machine and laid it with the other papers to be filed by the Circuit Court Clerk. (R. Vol. 5 at 19). Shortly, after defense counsel was served with his copy of the "Notice of Voluntary Non-Suit" and a cover letter from plaintiffs' counsel stating it "was filed" today," he went to the Circuit Court Clerk's office, confirmed it had in fact been received for filing by the Circuit Court Clerk and asked, Ms. Kimberly Hill, the Deputy Circuit Clerk on duty if she would stamp it as well as his copy "filed" which she did. (R. Vol. at 130-131; R. Vol. 5 at 23-27).

In Tennessee, the trial court clerk is a ministerial officer of the Court. *Woods v. World Truck Transfer, Inc.,* 1999 WL 1086462, page 4 (Tenn. Ct. App. 1999). (copy of case attached in Appendix) As such, the trial court clerk does not have the authority to reject pleadings, papers or other documents. *Id.* at 2. In *Woods*, the Tennessee Court of Appeals considered the responsibilities of the Trial Court Clerk and stated in pertinent part, as follows:

> A trial court clerk is a ministerial, as opposed to a judicial officer. See *Morris v. Smith*, 30 Tenn. (11 Hum.) 133, 134 (1850). Included among a clerk's ministerial duties are accepting and filing papers and documents, and issuing summonses. As a ministerial officer, a Trial Court Clerk does not have the authority to reject pleadings, papers and other documents. . . .

Plaintiffs' counsels' attempt to blame the Clerks, defense counsel or anyone other than themselves is untenable. As one example, the document "Dixie Willis' and Bernard Willis' Answers to First Set of Interrogatories and Request for Production of Documents" signed under oath by both plaintiffs) clearly reflects plaintiffs' knowledge of the prior dismissal, especially in their Answer to Request No. 2 which states, in pertinent part:

> Answer: See Response previously provided to Request No. 2 together with supplementations provided **before voluntary dismissal**. (Emphasis Added). (R. Vol. 3 at 41-54).

Unquestionably, the plaintiffs were aware of the prior nonsuit at the time the "Notice of Voluntary Nonsuit" was filed on October 23, 2009. During the period of almost a year between the first non-suit and the refiling of the case, plaintiffs changed counsel and obviously knew of the prior voluntary dismissal when the present case was refiled. It is not the Clerk's responsibility to know the status of every case. After all, the Clerk is only a ministerial officer. The case belongs to the plaintiffs, and their counsel

should be thoroughly familiar with the file. If counsel becomes involved by way of substitution or addition during the pendency of a case, he/she must be thoroughly familiar with the file, including familiarity with whether the case has been previously non-suited.

Based upon the foregoing, the trial court did not abuse its discretion in finding that the filing of the "Notice of Voluntary Non-Suit" was within plaintiffs' counsel's control and was his responsibility.

D. The Filer's Good or Bad Faith

Although the trial court did not find Mr. Magee (plaintiffs' counsel) acted in bad faith, he did so with some concern for Mr. Magee's conduct. Specifically, in considering the good faith/bad faith factor, the trial court stated:

> And although I don't think Mr. Magee has acted in bad faith, I am concerned about one thing. I'm going to – I have – I have made it very - - a pointed effort to keep Mr. Magee from looking bad on the orders that I have filed.
>
> But, now, in the argument that came in here the very first time we were hearing that, you know, he was saying – one of the things they argued was that there was no cover sheet found with the nonsuit order that was faxed and the Rule requires that.
>
> If you'll remember, in my initial memorandum opinion, I gave him an opportunity to present that. The response I got was We have lost that.
>
> And, Mr. Skouteris, I never faxed anything when I was practicing law that I didn't keep a copy of what I did. I never sent anything by mail or by fax or any other way that I didn't keep a copy.
>
> Now, that was very difficult for the Court to buy. I didn't mention that in the order. I'm not trying to make anybody look bad. Again, I practiced law too, and I know we make mistakes. (R. Vol. 7 at 31-32).

Interestingly, the trial court did not make a finding that plaintiffs' counsel acted in good faith.

E. Trial Court's Conclusion After Carefully Considering All Four Factors

After carefully considering all the four factors adopted in *Williams*, the trial court concluded, the hearing on plaintiffs' Motion for Rule 60.02 relief by stating:

> I cannot find excusable neglect in this case. . . . . Your motion for relief under Rule 60 is denied on the merits of the motion. (R. Vol. 7 at 32).

The trial court did not abuse its discretion in denying plaintiffs' "Motion for Rule 60.02 Relief" on the merits. It applied the correct legal standard and properly considered the four factors adopted by the Supreme Court in *Williams* to guide a lower court's discretionary decision on excusable neglect and found plaintiffs' counsel filing of the "Notice of Voluntary Non-Suit" on the mistaken belief no prior non-suit had been filed was not excusable neglect.

V.

THE "NOTICE OF VOLUNTARY NON-SUIT" WAS PROPERLY FILED BY THE CIRCUIT COURT CLERK

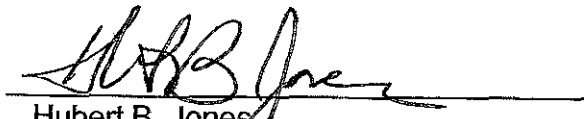
As noted above, plaintiffs failed to appeal, the "Order Dismissing Case" entered April 8, 2010, which held the "Notice of Voluntary Non-Suit" was properly filed. Consequently, the only issues properly on appeal deal with the trial court's denial of plaintiffs' "Motion for Rule 60.02 Relief". However, as discussed *supra* at pages 34-36 of this Brief, plaintiffs "Notice of Voluntary Non-Suit" was properly filed under Tenn. R. Civ. 5A. Moreover, because it was served on defendant, plaintiffs had no choice except to file it under Tenn. R. Civ. P. 5.05. The filing was obligatory.

CONCLUSION

Based upon the foregoing, this Court should affirm the trial court's "Order Denying Plaintiffs' Motion for Rule 60.02 Relief" entered August 2, 2011.

RESPECTFULLY SUBMITTED:

JONES, HAMILTON & LAY, PLC
Attorneys at Law
P.O. Box 763
Dyersburg, TN 38025-0763
(731) 286-5323

BY: 

Hubert B. Jones
B.P.R. No.: 005281
Attorney for Defendant/Appellee,
David A. West, D.O.

CERTIFICATE

The undersigned does hereby certify that a true copy of the foregoing pleading was served upon Mr. Michael C. Skouteris, Skouteris & Magee, PLLC, 50 North Front Street, Suite 920, Memphis, TN 38103 and Mr. Russell D. Lewis IV, Johnson Law Group, 50 North Front Street, Suite 920, Memphis, TN 38103 by depositing same in the U.S. Mail, First Class, postage prepaid.

This the 23rd day of January, 2012.

JONES, HAMILTON & LAY, PLC

BY: _____

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APPENDIX

Application for permission to Appeal to the Supreme Court not sought.

Not Reported in S.W.3d, 1999 WL 1086462 (Tenn.Ct.App.)
(Cite as: 1999 WL 1086462 (Tenn.Ct.App.))

Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.
Mina WOODS and Robert Woods, Plaintiffs/Appellants,
v.
WORLD TRUCK TRANSFER, INC., and Edward J. Seigham, Defendants/Appellees.

No. M1997-00068-COA-R3-CV.
Dec. 3, 1999.

Appeal from the Davidson County Circuit Court at Nashville, Tennessee, No. 93C-280; Barbara N. Haynes, Judge.
Stanley H. Less, Memphis, TN, for plaintiffs/appellants.

John Thomas Feeney, Cynthia DeBula Baines, Feeney & Lawrence, Nashville, TN, for defendants/appellees.

OPINION

KOCH.

*1 This appeal involves a personal injury action that was dismissed because the Clerk of the Circuit Court for Davidson County refused to accept and file a summons that had not been prepared on an original form provided by the clerk. By the time the plaintiff provided another summons acceptable to the clerk, the time for filing the complaint and the summons had elapsed. Accordingly, on motion of one of the defendants, the Circuit Court for Davidson County dismissed the personal injury claim because it was time-barred. We have determined that the clerk's office exceeded its authority when it declined to accept and file the summons and, therefore, that the trial court erred by dismissing the complaint. Accordingly, we vacate the order dismissing the personal injury claims and remand the case for further proceedings.

I.

Mina Woods was traveling on Interstate 65 in Nashville when her automobile was struck by a tractor trailer truck. The force of the collision drove Ms. Woods's automobile into a concrete median. After striking the median, Ms. Woods's automobile ricocheted back into the path of another oncoming tractor trailer truck and then careened over a grassy embankment. Ms. Woods was seriously injured, and her automobile was substantially damaged.

On February 1, 1993, Ms. Woods and her husband filed suit in the Circuit Court for Davidson County against World Truck Transfer, Inc., the owner of the truck that first struck her automobile, and Edward Seigham, the driver of the truck. Ms. Woods had difficulty serving World Truck Transfer and Mr. Seigham because they were Ohio residents. [FN1] The original process to World Truck Transfer was returned unserved on February 23, 1993, marked "forwarding order expired." Likewise, the original process to Mr. Seigham was returned unserved on March 25, 1993, marked "unclaimed." Alias process issued on Mr. Seigman was also returned unserved in August 1993, marked "moved."

FN1. Ms. Woods undertook to serve both defendants through the Secretary of State in accordance with Tenn.Code Ann. §§ 20-2-201, -220 (1994 & Supp.1999).

Ms. Woods and her husband undertook to save their personal injury claims from untimeliness by recommencing their action against both World Truck Transfer and Mr. Seigham pursuant to Tenn. R. Civ. P. 3. Accordingly, their lawyer, who practices in Memphis, mailed a new complaint and summons to the trial court clerk. The clerk received the suit papers on January 27, 1994. While the clerk's office filed the new complaint on January 27, 1994, it declined to accept or file the summonses accompanying the complaint because they

were prepared on photocopies of the original printed summons form used by the circuit courts in Davidson County. In a telephone conversation, the chief deputy clerk requested Ms. Woods's lawyer to provide new summonses on original forms and agreed to mail these forms to Memphis. The lawyer prepared new summonses, and they were received by the trial court clerk on February 18, 1994.

As with the original suit, the process in the second case was initially returned unserved. The process issued to Mr. Seigham was returned on March 11, 1994, marked "moved, not forwardable," and the original process to World Truck Transfer was returned marked "forwarding order expired." Stymied by their continuing inability to effect service through the Secretary of State, Ms. Woods and her husband placed alias summonses in the hands of a private process server in Ohio who was eventually able to locate and serve World Truck Transfer on June 7, 1994. All efforts to serve Mr. Seigham proved unsuccessful.

*2 World Truck Transfer promptly moved for a partial summary judgment on the ground that the second complaint was untimely under the statute of limitations in Tenn.Code Ann. § 28-3-104(a)(1) (Supp .1999). World Truck Transfer argued that Ms. Woods and her husband had not successfully recommenced their original action within one year after the issuance of the original process because the circuit court clerk had not accepted the summonses in their recommenced action until February 18, 1994-more than one year after the issuance of the original process. In response, Ms. Woods and her husband asserted that the unwillingness of the clerk's office to accept and file the summonses was an "omission" or "clerical mistake" correctable under Tenn. R. Civ. P. 60.01. Accordingly, they moved to "correct the record" to show that they had delivered both their complaint and the summonses to the trial court clerk in a timely manner. The trial court eventually denied Ms. Woods's Tenn. R. Civ. P. 60.01 motion and granted World Truck Transfer's partial summary judgment motion, with regard to the personal injury claims.

While the motions in the second proceeding were pending, Ms. Woods and her husband had pluries process issued against World Truck Transfer in the moribund first suit. Their private process server served World Truck Transfer with this process on August 4, 1994. In the spring of 1995, World Truck Transfer moved to dismiss the first suit based on the running of the statute of limitations and the lack of service. After the trial court dismissed the first suit on August 29, 1996, Ms. Woods and her husband filed a timely notice of appeal but failed to file an appeal bond. When their lawyer failed to appear at a show cause hearing, the trial court dismissed Ms. Woods's and her husband's appeal from the dismissal of their first complaint for failure to file an appeal bond. The trial court later declined to set aside its dismissal of the first appeal after Ms. Woods belatedly filed an appeal bond. Ms. Woods and her husband appealed from this order.

Ms. Woods and her husband let their second renewed complaint languish while attempting to resurrect their first complaint. In January 1997, the trial court dismissed what was left of the second suit for lack of prosecution. At that point, Ms. Woods and her husband, completely out of court on all their claims in both actions, filed a notice of appeal in the second suit. In the interests of judicial economy, we ordered that the appeals involving the first and second suits be consolidated for disposition.

II.
THE DISMISSAL OF THE SECOND COMPLAINT

The primary issue confronting us concerns the legal effect of the trial court clerk's refusal to accept and file the summonses accompanying the second complaint filed by Ms. Woods and her husband. While Ms. Woods and her husband frame the issue with reference to the trial court's denial of their Tenn. R. Civ. P. 60.01 motion, their substantive arguments address the same question. Accord-

ingly, we focus first on the trial court clerk's actions regarding the summonses accompanying the second complaint. We have determined that the trial court clerk erred by declining to accept and file these summonses.

A.
THE EFFECT OF THE CLERK'S REFUSAL TO ACCEPT THE SUMMONS

*3 Ms. Woods and her husband filed suit against World Truck Transfer and Mr. Seigham within one year after her cause of action accrued. After they were unable to serve either World Truck Transfer or Mr. Seigham, they decided to keep their suit alive by recommencing the action within one year from the issuance of the original process. *See* Tenn. R. Civ. P. 3(2). At that time, Tenn. R. Civ. P. 3 provided that "[a]ll civil actions are commenced by filing a complaint and summons with the clerk of the court." Thus, when Ms. Woods and her husband "recommenced" their action in 1994, they were required to file a complaint and the accompanying summonses within one year from the issuance of the original process.

The Memphis lawyer representing Ms. Woods and her husband mailed the trial court clerk a new complaint and the accompanying summonses well before Tenn. R. Civ. P. 3(2)'s deadline. The summonses were photocopies of the original summons form used by the trial court clerk. The trial court clerk accepted and filed the new complaint but declined to accept and file the summonses because they were photocopies, as opposed to original, summons forms.[FN2] By the time the lawyer provided summonses acceptable to the clerk, the time for recommencing the action had lapsed.

> FN2. These photocopied summonses are not part of the record. Accordingly, we do not know whether they were photocopied on two sides of a single sheet of paper or whether the front and back of the summonses were copied separately on two sheets of paper. If the photocopied summonses were on a single sheet of paper, it would have been the functional equivalent of an original printed summons. If the photocopied summonses were on two sheets of paper, it might have been more difficult to use because one sheet could be separated from the other. There is no indication in this record that the summonses submitted by the lawyer representing Ms. Woods and her husband were functionally defective or that they did not contain the required information.

As a result of the trial court clerk's refusal to accept their summonses, Ms. Woods and her husband did not successfully recommence their action because they failed to file a new complaint and summons within one year after the issuance of the original process. Their failure to do so meant that they could not "rely upon the original commencement to toll the running of a statute of limitations." *See* Tenn. R. Civ. P. 3. Preventing Ms. Woods and her husband from taking advantage of the relation-back feature of Tenn. R. Civ. P. 3 caused their renewed complaint to be filed late. Thus, the correctness of the dismissal of the renewed complaint filed by Ms. Woods and her husband hinges on the correctness of the trial court clerk's refusal to accept and file the photocopied summonses received by the clerk on January 27, 1994.

B.
LEGAL REQUIREMENTS GOVERNING THE FORM AND CONTENT OF SUMMONSES

The term "process," as generally understood in the context of legal proceedings, means the command issued in the state's name to effect the jurisdiction of a court either at the beginning of, during, or at the end of a lawsuit. *See* Sam B. Gilreath, *Caruthers' History of a Lawsuit,* § 29 (6th ed.1937). In courts of record, the original, or leading, process used in most cases is the "summons." A summons is nothing more than a formal written notice to the defendant to appear and to answer the plaintiff's complaint.

When Ms. Woods and her husband filed their

second complaint, the legal requirements concerning the content of a summons were set out in the Constitution of Tennessee,[FN3] the statutes,[FN4] and the Tennessee Rules of Civil Procedure.[FN5] While these provisions dictate the information to be included in a summons and who must sign a summons, they are silent concerning how the required information should be arranged in the summons document itself. Thus, the Advisory Commission Comment to the 1992 amendment to Tenn. R. Civ. P. 3 points out that "there is no officially prescribed form for a summons" and provides a recommended format for a summons in order to achieve statewide uniformity.

FN3. *See* Tenn. Const. art. VI, § 12.

FN4. *See* Tenn.Code Ann. § 18-1-105(a)(1) (1994); Tenn.Code Ann. § 20-2-103(a) (1994); Tenn.Code Ann. § 26-2-114(c) (1980).

FN5. *See* Tenn. R. Civ. P. 4.02.

***4** Nothing in the applicable statutes, rules, or constitutional provisions requires that a summons be prepared only on pre-printed forms provided by a clerk's office or that the contents of a summons appear on the front and back of a single sheet of paper, as opposed to two sheets of paper. Clearly, the primary concern should be the content of the summons, not its form or appearance, as long as the form or appearance of the summons does not defeat its purpose or materially interfere with its use. A summons should not be considered invalid as long as the form used is reasonable and contains all the information required by law. *See Hometown Lumber and Hardware, Inc. v. Koelling,* 816 S.W.2d 914, 916 (Mo.1991); *Young v. Seaway Pipeline, Inc.,* 576 P.2d 1144, 1147 (Okla.1977).

C.
THE RESPONSIBILITIES OF THE TRIAL COURT CLERK

Trial court clerks hold a public office established and defined by the Constitution of Tennessee and statutory law. They serve as the principal administrative aides to the trial courts. Trial court clerks and their deputies provide assistance with courtroom administration, records management, collection of fees, maintenance of case files and minutes, and docket scheduling. *See* Frederic S. LeClercq, *The Tennessee Court System,* 8 Mem. St. U.L.Rev. 185, 260-64 (1978). Thus, they are officers of the court, rather than agents of the parties. *See Kennedy v. Kennedy,* 81 Tenn. 24, 25 (1884); *Burford v. Memphis Bulletin Co.,* 56 Tenn. (9 Heisk.) 691, 696 (1872).

A trial court clerk is a ministerial, as opposed to judicial, officer. *See Morris v. Smith,* 30 Tenn. (11 Hum.) 133, 134 (1850). Included among a clerk's ministerial duties are accepting and filing pleadings and documents, [FN6] and issuing summonses.[FN7] As a ministerial officer, a trial court clerk does not have the authority to reject pleadings, papers, and other documents for lack of conformity with formal requirements. *See McClellon v. Lone Star Gas Co.,* 66 F.3d 98, 101 (5th Cir.1995); *Rojas v. Cutsforth,* 79 Cal.Rptr.2d 292, 293 (Ct.App.1998); *Ferlita v. State,* 380 So.2d 1118, 1119 (Fla.Dist.Ct.App.1980); *Dwyer v. Clerk of Dist. Court for Scott County,* 404 N.W.2d at 170; *Director of Fin. v. Harris,* 602 A.2d 191, 194 (Md.Ct.Spec.App.1992); *Bowman v. Eighth Judicial Dist.,* 728 P.2d 433, 435 (Nev.1986). This task is more properly suited to judicial officers. *See Price v. Obayashi Haw. Corp.,* 914 P.2d 1364, 1372 (Haw.1996).

FN6. *See* Tenn.Code Ann. § 18-1-105(a)(8) (Supp.1999); Tenn.Code Ann. § 18-5-102 (1994); *see also Lewis v. Superior Court,* 70 Cal.Rptr.2d 598, 599 (Ct.App.1998); *Gorod v. Tabachnick,* 696 N.E.2d 547, 548 (Mass.1998); *Stokes v. Aberdeen Ins. Co.,* 917 S.W.2d 267, 268 (Tex.1996).

FN7. *See* Tenn.Code Ann. § 18-1-105(a)(1); Tenn.Code Ann. § 18-5-102(3); *see also City of Des Moines*

v. Iowa Dist. Court for Polk County, 431 N.W.2d 764, 766 (Iowa 1988); *Beck v. Voncannon,* 75 S.E.2d 895, 898 (N.C.1953); *R.A.G. v. State,* 870 S.W.2d 79, 82 (Tex.App.); *rev'd on other grounds, In re R.A.G.*, 866 S.W.2d 199 (Tex.1993).

The parties and their lawyers are ultimately responsible for complying with the filing requirements governing papers filed in the trial court. When presented with an apparently non-conforming paper, a trial court clerk should stamp it received or filed and then should notify the filing party of the problem with the paper. *See Bing Constr. Co. v. Nevada Dep't of Taxation,* 817 P.2d 710, 711 (Nev.1991); *White v. Katz,* 619 A.2d 683, 687 (N.J.Super.App.Div.1993). The clerk should leave it to others to question the legal sufficiency of any paper tendered for filing. Thus, the parties themselves should be the ones to present the sufficiency of a paper to the court for determination. *See Barker v. Heekin Can Co.,* 804 S.W.2d 442, 443-44 (Tenn.1991) (noting that the party seeking to challenge the sufficiency of process should present the issue to the court by motion).

D.
WORLD TRUCK TRANSFER'S SUMMARY JUDGMENT

*5 We now consider whether World Truck Transfer was entitled to a summary judgment in light of our conclusions regarding the form and content of summonses and the responsibilities of trial court clerks for filing documents. Even though the facts are essentially undisputed, we have determined that the trial court erred by denying the Tenn. R. Civ. P. 60.01 motion filed on behalf of Ms. Woods and her husband. Had the trial court corrected the record to show that Ms. Woods and her husband filed a summons with the trial court on January 27, 1994, World Truck Transfer would not have been able to demonstrate that it was entitled to a judgment as a matter of law on the statute of limitations defense asserted in its summary judgment motion.

Summary judgments are appropriate only when there are no genuine factual disputes with regard to the claim or defense embodied in the summary judgment motion and when the moving party is entitled to a judgment as a matter of law. *See* Tenn. R. Civ. P. 56.04; *Bain v. Wells,* 936 S.W.2d 618, 622 (Tenn.1997); *Carvell v. Bottoms,* 900 S.W.2d 23, 26 (Tenn.1995). Because summary judgments enjoy no presumption of correctness on appeal, *see City of Tullahoma v. Bedford County,* 938 S.W.2d 408, 412 (Tenn.1997), courts reviewing them must make a fresh determination concerning whether the requirements of Tenn. R. Civ. P. 56 have been satisfied. *See Hunter v. Brown,* 955 S.W.2d 49, 50-51 (Tenn.1997); *Mason v. Seaton,* 942 S.W.2d 470, 472 (Tenn.1997).

The trial court's decision to grant summary judgment in this case was colored by an overly strict interpretation of the Tennessee Rules of Civil Procedure and an overly generous view of the powers of a trial court clerk. The Tennessee Rules of Civil Procedure should be interpreted to prevent parties from having their claims time-barred as a result of actions of the trial court clerk or other officials over whom they have no control. *See Hine v. Commercial Carriers, Inc.,* 802 S.W.2d 218, 220 (Tenn.1990); *General Elec. Supply Co. v. Arlen Realty & Dev. Corp.,* 546 S.W.2d 210, 214 (Tenn .1977). When a paper or other document is presented for filing, the trial court clerk should accept the document, rather than refuse to accept and file the document because of perceived shortcomings in its form or content.

This record contains undisputed evidence that the trial court clerk received summonses from Ms. Woods and her husband on January 27, 1994 that contained all the information required to be included on a summons. The trial court clerk erroneously refused to accept the summonses, but the failure to mark the summonses "filed" on January 27, 1994 should not prejudice either Ms. Woods or her husband. A pleading should be deemed filed when it is handed to an employee in the clerk's of-

fice with authority to receive documents to be filed. *See Rush v. Rush*, 97 Tenn. 279, 283, 37 S.W. 13, 14 (1896); *Montgomery v. Buck*, 25 Tenn. (6 Hum.) 416, 417 (1846); *Fry v. Cermola*, No. 03A01-9507-JV-00246, 1996 WL 30903, at *3 (Tenn.Ct.App. Jan. 29, 1996) (No Tenn. R.App. P. 11 application filed).

*6 Based on the undisputed evidence that Ms. Woods and her husband submitted summonses to the trial court clerk on January 27, 1994, the trial court clerk should have granted their Tenn. R.App. P. 60.01 motion to correct the record to reflect that they filed a renewed complaint and summonses on January 27, 1994. Once this correction is made, the record will show that Ms. Woods and her husband renewed their complaint within one year after the issuance of the original process in the first lawsuit and, accordingly, that they are entitled to take advantage of the relation-back features in Tenn. R. Civ. P. 3. Because Ms. Woods and her husband are entitled to take advantage of their first complaint's filing date, World Truck Transfer is not entitled to a judgment as a matter of law on its defense that their second complaint was time-barred.

III.

THE FATE OF THE REMAINING CLAIMS

We will consider several other issues raised in this appeal in an effort to simplify and expedite the resolution of the remaining issues after this case is remanded to the trial court. These issues involve (A) the status of the first complaint, (B) the status of the claims against Mr. Seigham, and (C) the status of the property damage claims against World Truck Transfer. We have determined that none of these claims have survived the five-year procedural snarl resulting from the unsuccessful efforts to serve World Truck Transfer and Mr. Seigham.

A.

THE STATUS OF THE FIRST COMPLAINT

Ms. Woods and her husband decided to keep their claims against World Truck Transfer and Mr. Seigham alive by filing a renewed complaint as permitted by Tenn. R. Civ. P. 3. Ordinarily, the maneuvering regarding the first complaint would become secondary once the renewed complaint is filed. In this case, however, for reasons that are not readily apparent, the lawyer representing Ms. Woods and her husband had pluries process issued for the first complaint after successfully obtaining service of the second complaint on World Truck Transfer.

World Truck Transfer moved to dismiss the first complaint based on the statute of limitations and the lack of service. The "lack of service" argument is somewhat mystifying in light of the evidence that World Truck Transfer had, in fact, been served with both the first complaint and the second complaint by the time it filed the motion to dismiss. The trial court dismissed the first complaint on the ground that the "plaintiffs have failed to demonstrate the requisite diligence to require a tolling of the statute of limitations, and that service of process upon defendants has not been effectuated." Later, the trial court dismissed Ms. Woods's and her husband's appeal from the dismissal of the first complaint because they had not filed a timely appeal bond.

1.

THE TRIAL COURT'S DISMISSAL OF THE APPEAL

Ms. Woods and her husband filed a timely notice of appeal from the trial court's order dismissing their first complaint. They did not, however, file an appeal bond with their notice of appeal as required by Tenn. R.App. P. 6. In accordance with Rule 37.06 of the Local Rules for the Circuit Court, Chancery Court, Criminal Court and Probate Court of Davidson County, the trial court issued an order directing Ms. Woods and her husband to show cause why their appeal should not be dismissed for failure to file an appeal bond. The trial court ordered the appeal dismissed after neither Ms. Woods, nor her husband, nor their lawyer appeared at the show cause hearing. Even though Ms. Woods and her husband filed an appeal bond four days later, the trial court refused to set aside its order

dismissing the appeal.

*7 The trial court was not empowered to dismiss the appeal from its dismissal of the first complaint. A trial court's jurisdiction over a case is significantly curtailed thirty days after it enters a final order. Its authority over the case, if any, must be defined either by rule or statute. Because no rule or statute empowers a trial court to dismiss an appeal, [FN8] only appellate courts can consider and act on motions to dismiss an appeal. Thus, the trial court should not have dismissed the appeal. *See Dunlap v. Dunlap,* 996 S.W.2d 803, 810 (Tenn.Ct.App.1998); *Muesing v. Ferdowsi,* No. 01A01-9005-CV-00156, 1991 WL 20403, at *2 (Tenn.Ct.App. Feb. 21, 1991) (No Tenn. R.App. P. application filed).

FN8. A local court rule cannot take precedence over an applicable statute or generally applicable procedural rule promulgated by the Tennessee Supreme Court. *See* Tenn.Code Ann. § 16-2-511 (1994); Tenn. S.Ct. R. 18; *Brown v. Daly,* 884 S.W.2d 121, 123-24 (Tenn.Ct.App.1994).

The Tennessee Rules of Appellate Procedure should be construed to enable, rather than defeat, the consideration of appeals on their merits. *See* Tenn. R.App. P. 1. Accordingly, we view the dismissal of an appeal as a harsh sanction that should not be casually imposed. *See Trakas v. Quality Brands, Inc.,* 759 F.2d 185, 186-87 (D.C.Cir.1985). The appellate rules and the decisions construing them make clear that once an appeal bond has been filed-even if late-the courts should waive the strict application of Tenn. R.App. P. 6. *See* Tenn. R.App. P. 3(e); *Bush v. Bradshaw,* 615 S.W.2d 157, 158 (Tenn.1981). Thus, had the appeal bond issue been presented to us, we would have accepted the late appeal bond and would have permitted the appeal to proceed on its merits.

2.

THE DISMISSAL OF THE FIRST COMPLAINT

We now turn to the trial court's dismissal of the first complaint. We have determined that the trial court reached the correct result but for the wrong reason.[FN9] The trial court should have dismissed the first complaint simply because the first complaint was no longer a viable pleading after Ms. Woods and her husband preserved their claims against World Truck Transfer and Mr. Seigham by filing a renewed complaint.

FN9. This court may affirm a trial court's decision that reaches the correct result, irrespective of the trial court's reasons. *See Continental Cas. Co. v. Smith,* 720 S.W.2d 48, 50 (Tenn.1986); *Kaylor v. Bradley,* 912 S.W.2d 728, 735 n. 6 (Tenn.Ct.App.1995); *Clark v. Metropolitan Gov't,* 827 S.W.2d 312, 317 (Tenn.Ct.App.1991).

Tenn. R. Civ. P. 3, as it read in 1994, provided plaintiffs with two alternatives for keeping their claims alive. They could either continue to obtain new process within six months from the issuance of the previous process or recommence the action within one year from the issuance of the original process by filing a new complaint and summons. It would have been duplicative for a plaintiff to undertake to do both simultaneously.

Ms. Woods and her husband kept the claim against World Truck Transfer alive by timely recommencing their action within one year following the issuance of the original process. It was not necessary for them to also undertake to serve World Truck Transfer with the first complaint as well. In addition to being unnecessary, their effort to serve the first complaint was to no avail because it did not comply with Tenn. R. Civ. P. 3. The pluries process was issued on July 20, 1994; while the previous process regarding the first complaint had been issued seventeen months earlier on February 1, 1993. The July 20, 1994 process had no legal effect because it was issued more than six months after the issuance of the previous process. Accordingly, the trial court should have dismissed the first complaint because it duplicated the second complaint and because the process associated with the

first complaint was issued more than six months after the issuance of the previous process regarding the first complaint.

B.
THE STATUS OF THE CLAIMS AGAINST MR. SEIGHAM

*8 Despite filing two complaints and making numerous attempts to serve process, Ms. Woods and her husband have never been able to serve a copy of a complaint on Mr. Seigham. The case had been pending for four years by the time the trial court dismissed both the first and the second complaint. Accordingly, the trial court properly dismissed all claims against Mr. Seigham for lack of service of process.

C.
THE PROPERTY DAMAGE CLAIMS AGAINST WORLD TRUCK TRANSFER

Both complaints filed by Ms. Woods and her husband sought damages for personal injuries and property damage. These claims have different limitations periods. The limitations period for personal injury claims is one year; while the period for property damage claims is three years. *See* Tenn.Code Ann. §§ 28-3-104(a)(1) & -105(1) (Supp.1999). Thus, the property damage claims in both the complaint filed in February 1993 and the renewed complaint filed in January 1994 were timely in that they were filed within three years after the cause of action accrued.

Ms. Woods and her husband did not pursue the property damage claims in their renewed complaint after the trial court dismissed their personal injury claims in August 1994. That order of dismissal was not a final, appealable judgment because it did not resolve all their claims against World Truck Transfer. For reasons not apparent in the record, Ms. Woods and her husband did not pursue their property damage claims that had not been dismissed. Finally, in January 1997, the trial court dismissed the property damage claims in their renewed complaint for lack of prosecution.

Trial courts must dispose of pending cases and avoid congestion of their dockets in order to be efficient. *See Chrisman v. Curle,* 18 Tenn. (10 Yer.) 488, 488 (1837). Accordingly, trial courts may manage their dockets to move cases along with reasonable dispatch and may, when necessary, dismiss a complaint involuntarily when the plaintiff has failed to prosecute the case. *See* Tenn. R. Civ. P. 41.02(1). Accordingly, trial courts may dismiss a complaint when a plaintiff fails to have process issued or served on a defendant over a long period of time, *see Ford v. Bartlett,* 62 Tenn. (3 Baxt.) 20, 21-22 (1873), or when a plaintiff fails to move a case toward adjudication when there is no compelling reason for delay. *See Timber Tracts, Inc. v. Fergus Elec. Coop., Inc.,* 753 P.2d 854, 856 (Mont.1988); *Penn Piping, Inc. v. Insurance Co. of N. Am.,* 603 A.2d 1006, 1009 (Pa.1992).

We understand that Ms. Woods and her husband were reluctant to pursue only their property damage claim. However, we find no reason in the record why they would have allowed the property damage claim in their renewed complaint to languish from August 1994 until January 1997. Their procedurally incorrect and futile efforts to reinvigorate their first complaint do not adequately account for this delay. After the trial court dismissed the first complaint in August 1996, the lawyer representing Ms. Woods and her husband failed to press forward on their property damage claim. Based upon the absence of a cogent explanation for the five year delay in prosecuting their property damage claim against World Truck Transfer, the trial court properly dismissed the claim for lack of prosecution.

IV.

*9 We affirm the dismissal of the personal injury and property damage claims against Mr. Seigham and the property damage claims against World Truck Transfer. We also vacate the portion of the trial court's orders dismissing Ms. Woods's and her husband's claims against World Truck Transfer stemming from the personal injuries she

sustained in the collision and remand the case for further proceedings consistent with this opinion. We tax the costs of this appeal to Mina Woods and Robert Woods and their surety for which execution, if necessary, may issue.

TODD, P.J., M.S., and CANTRELL, J., concur.

Tenn. Ct. App.,1999.
Woods v. World Truck Transfer, Inc.
Not Reported in S.W.3d, 1999 WL 1086462 (Tenn.Ct.App.)

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Slip Copy, 2009 WL 2589089 (Tenn.Ct.App.)
(Cite as: 2009 WL 2589089 (Tenn.Ct.App.))

Court of Appeals of Tennessee.
William Jeffrey WALKER
v.
NISSAN NORTH AMERICA, INC.

No. M2009-00273-COA-R3-CV.
Assigned On Briefs June 24, 2009.
Aug. 21, 2009.

West KeySummary Pretrial Procedure 307A 697

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)6 Proceedings and Effect
307Ak696 Vacating or Setting Aside Dismissal
307Ak697 k. After Dismissal for Want of Prosecution. Most Cited Cases

The trial judge did not abuse his discretion when he denied a motion to set aside an order of dismissal for failure to prosecute. The personal injury case arose from an accident that occurred at the injured party's place of employment, an automobile manufacturing plant. In making his motion the employee only presented the affidavit of his current attorney. The affidavit did not disclose why the employee failed to appear at the show cause hearing. The failure to appear may have been caused by the excusable neglect or mistake of the previous attorney, but the employee failed to present any evidence on this issue. The employee asserted that lack of notice of the initial hearing date constituted excusable neglect, but he failed to present any evidence supporting this assertion to the trial court. Rules Civ.Proc., Rule 60.02.

Direct Appeal from the Circuit Court for Rutherford County, No. 51909; Royce Taylor, Judge.

Lawrence D. Sands, Columbia, Tennessee, for the Appellant, William Jeffrey Walker.

Steven D. Parman, Nashville, Tennessee, for the Appellee, Nissan North America, Inc.

J. STEVEN STAFFORD, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

OPINION

J. STEVEN STAFFORD, J.

*1 This appeal involves the dismissal of a personal injury case arising from an accident that occurred at Defendant's automobile manufacturing plant. The suit was originally filed and then voluntarily dismissed for improper venue. The case was filed again and later dismissed for failure to prosecute. Plaintiff filed a Motion to Set Aside the Order of Dismissal which was denied by the trial court. Plaintiff appeals. Finding that the trial judge did not abuse his discretion, we affirm the judgment of the trial court.

Appellant William Jeffrey Walker ("Mr.Walker") was injured while working at Nissan North America, Inc. ("Nissan") in Smyrna, Rutherford County, Tennessee. Plaintiff was an employee of Atlas Industrial Contractors ("Atlas"). Atlas contracted with Nissan to perform work inside the plant. Under the contract, Nissan supplied Atlas with an overhead crane to complete its work. On December 17, 2003, Mr. Walker was working with the crane's operator at the Nissan facility. While moving the crane, the operator unsuccessfully tried to stop the movement of the crane. Mr. Walker attempted to dodge the crane as it approached but he lost his balance and fell. Unfortunately, the crane then struck Mr. Walker and crushed both of his legs. dismiss for improper venue. The suit was then filed in the Rutherford County Circuit Court on

May 31, 2005. On August 24, 2007, the court entered a Show Cause Order requiring the parties to either dispose of the case or set it for final hearing at least five days prior to November 9, 2007. The order further stated that if neither of these actions were taken, the parties must appear for a hearing on November 9, 2007 and show cause why the case should not be dismissed. Neither Mr. Walker nor his counsel appeared, and on November 16, 2007, the court entered an order dismissing the matter without prejudice for failure to prosecute.

On November 14, 2008, Mr. Walker's current counsel, Lawrence D. Sands, [FN1] filed a Motion to Set Aside the Order of Dismissal. In this motion, Mr. Walker stated that he had no knowledge of the pending dismissal until he received notice from his former counsel on November 29, 2007. Nissan filed its response to Mr. Walker's motion on December 17, 2008. On December 18, 2008, Mr. Walker filed an amended motion asking the trial court to set aside the order of dismissal pursuant to Tennessee Rule of Civil Procedure 60.02(1). The amended motion included the affidavit of Mr. Sands. After hearing oral argument, the trial court issued a memorandum stating that Mr. Walker failed to establish the grounds for relief required under Rule 60.02(1). The trial court also found that the motion was not filed within a "reasonable time" because Mr. Walker had actual knowledge of the order of dismissal as early as thirteen days after its execution but waited nearly a full year before filing his Rule 60.02(1) motion. The trial court entered its final order denying Mr. Walker's motion on January 21, 2009. Mr. Walker appeals and raises one issue for review: whether the trial court erred in denying his Motion to Set Aside Order of Dismissal.

FN1. According to his affidavit, Mr. Sands began representing Mr. Walker on March 30, 2007 but did not represent him in the present action until the filing of the motion to set aside the order of dismissal.

Law and Analysis

*2 We review a trial court's decision to grant or deny relief pursuant to Rule 60.02 under the abuse of discretion standard of review. *Henry v. Goins*, 104 S.W.3d 475, 479 (Tenn.2003). Under this standard, a trial court's ruling "will be upheld so long as reasonable minds can disagree as to propriety of the decision made." *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn.2001). A trial court abuses its discretion only when it "applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining." *Id.* Under the abuse of discretion standard, the appellate court may not substitute its judgment for that of the trial court. *Id.* Furthermore, our Supreme Court emphasizes that great deference is given to the trial court when reviewing its decision to grant or deny relief pursuant to Rule 60.02. *Henry*, 104 S.W.3d at 479.

Under Rule 60.02(1), the court may relieve a party or the party's legal representative from a final judgment, order or proceeding for mistake, inadvertence, surprise or excusable neglect. Tenn. R. Civ. P. 60.02(1). The motion for relief under Rule 60.02(1) must be made within a reasonable time but not more than one year after the judgment, order or proceeding was entered. *Id.*

In the present case, the trial court first found that Mr. Walker's motion was not filed within a reasonable time. The motion was filed on November 14, 2008, two days prior to the one-year limitation imposed by Rule 60.02. The trial court found this unreasonable because Mr. Walker learned of the dismissal on November 29, 2007 but waited nearly a year before filing his motion. A Rule 60.02(1) motion filed within the one-year limitation may be considered untimely "if the trial court finds, as a matter of fact, that the movant has not acted reasonably and that he could have fairly and reasonably been expected to file the motion much more promptly." *Wooley v. Gould, Inc.*, 654 S.W.2d 669, 670 (Tenn.1983), *rev'd on other grounds, Betts v. Tom Wade Gin*, 810 S.W.2d 140 (Tenn.1991). Whether a Rule 60.02(1) motion is filed within a reasonable time is a question of fact for the trial

court, and this Court will review the trial court's determination under the abuse of discretion standard. *Rogers v. Estate of Russell*, 50 S.W.3d 441, 445 (Tenn.Ct.App.2001).

Mr. Walker concedes that he was made aware of the trial court's order of dismissal by notification from his previous counsel on November 29, 2007. Mr. Walker's current counsel, however, asserts that he did not know that the action had been previously filed and dismissed in the Maury County Circuit Court until November 13, 2008. Before he learned of this previous dismissal, current counsel intended to re-file the action pursuant to the savings statute, Tenn.Code Ann. § 28-1-105. This option became unavailable because the action had been dismissed on two separate occasions. Mr. Walker contends that he would have filed his Rule 60.02(1) motion earlier had he known that the savings statute was inapplicable. In his affidavit, Mr. Walker's attorney also notes that he filed the Rule 60.02(1) motion only a day after he learned of the first dismissal. Having reviewed the record in this case, we decline to address the trial court's finding on the timeliness of the motion because its ruling can be upheld on a separate ground.

*3 Assuming that Mr. Walker's motion was timely filed, the trial court also found that he failed to establish the grounds for relief under Rule 60.02(1). To obtain relief under Rule 60.02(1), "a party must present properly supported facts explaining why he or she was justified in failing to avoid mistake, inadvertence, surprise or neglect." *Dockery v. State*, No. M2006-00014-COA-R3-CV, 2007 WL 2198195, at *3 (Tenn.Ct.App. July 23, 2007). The trial court should then consider both these facts and the type of the underlying judgment or order from which the party seeks relief. *Id.* The second step is critical because Rule 60.02 is "construed with liberality to afford relief from a default judgment." *Tenn. Dep't of Human Servs. v. Barbee*, 689 S.W.2d 863, 867 (Tenn.1985). Similar liberality is also applied when the party seeks Rule 60.02(1) relief from a dismissal for failure to prosecute. *Henry*, 104 S.W.3d at 481.

In the present case, Mr. Walker only presented the affidavit of his current attorney, Mr. Sands, in support of his Rule 60.02(1) motion. This affidavit does not disclose why Mr. Walker failed to appear at the show cause hearing on November 9, 2007. The failure to appear may have been caused by the excusable neglect or mistake of Mr. Walker's previous attorney, but Mr. Walker failed to present any evidence on this issue. Mr. Walker asserts that lack of notice of the initial hearing date constitutes excusable neglect under Rule 60.02(1), but he failed to present any evidence supporting this assertion to the trial court. Even under the more lenient standards applied to Rule 60.02(1) motions seeking relief from dismissals, the moving party must offer proof of the basis upon which relief is sought. *Henry*, 104 S.W.3d at 482. Mr. Walker failed to do so. Consequently, we find that the trial court did not abuse its discretion in refusing to grant Mr. Walker relief under Rule 60.02(1).

For the foregoing reasons, the ruling of the trial court is affirmed. Costs of appeal are assessed to Appellant, William Jeffrey Walker.

Tenn.Ct.App.,2009.
Walker v. Nissan North America, Inc.
Slip Copy, 2009 WL 2589089 (Tenn.Ct.App.)

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ETHICAL CONSIDERATIONS WHEN DEALING WITH MEDICAL RECORDS

A. Introduction

Rule 1.1 of the Rules of Professional Conduct requires lawyers to provide competent representation to a client. Competent representation requires the lawyer to have legal knowledge necessary for the representation of his or her client. Obtaining this competence in the area of confidentiality of medical records has become quite challenging over the last couple of decades due to changes in federal and state law. Since the lifeblood of lawyers handling medical malpractice cases is the patient's medical records, it is incumbent upon counsel handling such cases to be cognizant of applicable federal and state law including potential areas of conflict between such laws and unresolved questions in those areas.

B. Tennessee Law

1. Common law of Tennessee concerning confidentiality of medical records prior to *Givens v. Mullikin,* 75 S.W.3d 383 (Tenn. 2002).

Prior to the *Givens* case, the leading Tennessee case dealing with confidentiality and privilege as relates to the physician-patient relationship was *Quarles v. Sutherland*, 389 S.W.2d 249 (Tenn. 1965). In *Quarles*, the plaintiff was injured on October 14, 1963, as a result of an accident at the Top Value Stamp Store in Nashville. She was subsequently treated by the defendant, who was the regular physician of the Top Value Stamp Store, and to whom the plaintiff had been sent by the store.

On November 6, 1963, plaintiff's attorney advised the defendant-physician that the plaintiff was represented by counsel and requested that no medical reports be given

to anyone without first notifying plaintiff's counsel's office. Thereafter, the defendant-physician wrote a letter to plaintiff's counsel dated November 8, 1963, advising plaintiff's counsel of his medical findings and forwarded a copy of the letter to the attorney for the Top Value Stamp Store.

Plaintiff sued the defendant-physician alleging he had a duty to keep private and privileged all information he obtained by virtue of his contract of employment as the plaintiff's physician and that the defendant-doctor breached his duty by forwarding a copy of the report as alleged. The issue before the Court was whether communications between physician and patient are by law privileged communications and whether a disclosure of such information to a third party gives rise to a cause of action under the law.

The Court noted that the common law of England as it stood at and before the separation of the colonies had been adopted by the State of Tennessee. The Court found that under the English common law, neither the patient nor the physician had a privilege to refuse to disclose in Court a communication of one to the other, nor does either have a privilege that the communication not be disclosed to a third person. The Court further noted that the Tennessee General Assembly had not seen fit to enact any statute changing this common law rule.

The Court specifically rejected the argument that there was an implied contract between the plaintiff and the defendant physician requiring that the results of the examination would remain confidential. In so holding, the Court stated that the declaration (complaint) filed in the case made it clear that Dr. Sutherland was not the plaintiff's physician nor did the plaintiff at any time attempt to compensate Dr.

Sutherland for his services. Instead, the plaintiff simply received gratuitous medical treatment from Dr. Sutherland, the consulting physician of the Top Value Stamp Store. Accordingly, the Tennessee Supreme Court affirmed the dismissal of this case for failure to state a claim.

Quarles, as decided, stood for two propositions:

a. No implied covenant of confidentiality existed between physician and patient – (at least in those situations in which medical services were gratuitously rendered).

b. Physicians had no testimonial privilege at common law.

As will be discussed *infra*, in the wake of *Givens, Alsip and Overstreet*, the first proposition is no longer the law in Tennessee. However, the second proposition is still the law in Tennessee.

2. *Givens v. Mullikin*, 75 S.W.3d 383 (Tenn. 2002).

In 2002, the Tennessee Supreme Court, in a sweeping decision, held that an implied covenant of confidentiality of a patient's medical records can arise from the original contract for treatment for payment. In 1988, the plaintiff, Connie Jean Givens, was involved in a traffic accident involving the defendant, Larry McElwaney.[1]

Plaintiff, Givens, filed a lawsuit for personal injuries against defendant, McElwaney. The defendant's insurance carrier, Allstate Insurance Company, engaged The Richardson Firm to defend Mr. McElwaney. It is alleged The Richardson Firm issued more than seventy (70) discovery subpoenas to various records custodians; that in no case did The Richardson Firm actually depose a records custodian; that instead, all but six (6) of the discovery subpoenas stated that the records custodian could send a

[1] Defendant McElwaney died during the course of the litigation and Mr. Ed Mullikin, as Administrator *Ad Litem* of the McElwaney estate was substituted as a party-defendant.

copy of the plaintiff's "entire file" to The Richardson Firm "in lieu of personal appearance". It was also alleged that The Richardson Firm also notified plaintiff's counsel that depositions of records custodians would not be taken unless the plaintiff objected. After receiving this notice, the plaintiff's attorney wrote letters to the custodians directing them not to comply with the subpoenas. In addition, it was alleged that counsel for the defendant had a private *ex parte* conversation with one of the plaintiff's treating physicians.

On June 12, 1998, the plaintiff (Givens) filed a separate lawsuit against Mr. McElwaney and Allstate alleging, among other things, that The Richardson Firm's practice of obtaining her medical records through use of defective subpoenas invaded her right to privacy and induced the involved health care providers to breach their confidential relationship with her. The plaintiff also alleged in her lawsuit that The Richardson Firm induced her treating physician to breach express and implied contracts of confidentiality with her by privately speaking with counsel from The Richardson Firm. Interestingly, the plaintiff (Givens) did not sue The Richardson Firm directly but instead sued McElwaney and Allstate alleging they were vicariously liable for the tortious acts of The Richardson Firm. Both McElwaney and Allstate filed motions to dismiss the complaint pursuant to Rule 12.02(6) for failure to state a claim on which relief can be granted.

In *Givens,* the Tennessee Supreme Court held that an implied covenant of confidentiality can arise from the original contract of treatment for payment.

In so holding, the Court stated:

> Since our decision in *Quarles*, however, the General Assembly has enacted several statutes that expressly require a physician and

> others to keep a patient's medical records and identifying information confidential. *See* Tenn. Code Ann. §§ 63-2-101(b)(1)(1997); 68-11-1502(2001); 68-11-1503(2001). Through the enactment of these statutes patients and physicians now clearly expect that the physician will keep the patient's information confidential, and this expectation arises at the time that the patient seeks treatment. *Id.* at 407.

The Court held that the physicians to whom the record subpoenas were directed were not under a duty to discover technical defects and would not be liable for responding to technically defective subpoenas absent a showing that the physician acted in bad faith or with actual knowledge of the subpoena's invalidity. Finally, the Court held that the existence of an implied covenant of confidentiality prohibits a physician from having *ex parte* communications which divulge confidential medical information informally without the patient's consent.

The Court in *Givens* distinguished the *Quarles* case by stating that the *Givens* decision arose from an implied covenant wherein the patient agreed to pay money in return for medical treatment while in *Quarles* there was no such agreement and the patient's treatment was rendered gratuitously to the patient by the physician. The Court, however, did cite the *Quarles* case with approval for the proposition that there is no testimonial privilege between a physician and patient at common law and if called to give testimony in a court proceeding via deposition or live testimony the physician must do so.

3. *Alsip v. Johnson City Medical Center,* 197 S.W.3d 722 (Tenn. 2006).

In *Alsip*, the trial court entered an order permitting counsel for the defendants in a medical malpractice lawsuit to have private *ex parte* communications with the treating physicians for the plaintiff's decedent. The Supreme Court held the trial court erred in

issuing this order and ruled that such *ex parte* communications violated the implied covenant of confidentiality that exists between physicians and patients. In so holding, the Court stated:

> Although no testimonial privilege protecting the doctor-patient communications has ever been recognized by this Court or declared by Tennessee statute, in *Givens v. Mullikin*, 75 S.W.3d 383 (Tenn. 2002), we recognized an implied covenant of confidentiality in medical-care contracts between treating physicians and their patients. This covenant forbids doctors from "releas[ing] without the patient's permission . . . any confidential information gained through the [physician-patient] relationship." *Givens*, 75 S.W. 3d at 407. *Id.* at 725-726.
>
> . . . .
>
> Like all contract terms, however, the implied covenant of confidentiality becomes unenforceable when it offends public policy. (Citation omitted). For example, as we explained in *Givens*, the covenant is voided when a doctor determines that a patient's illness presents a foreseeable risk to third parties; in such circumstances the doctor has the duty to break the patient's confidence and risks no civil liability when he does so. 75 S.W.3d at 409. State law also requires doctors to report "any wound or other injury inflicted by means of a knife, pistol, gun or other deadly weapon or other means of violence" to police in clear violation of the covenant of confidentiality, in order to promote vital societal interests in public safety, law enforcement and crime deterrence. Tenn. Code Ann. § 38-1-101 (2005). Public policy as reflected by state law also vitiates the covenant of confidentiality by requiring doctors to report suspected child abuse, sexual assault and instances of venereal disease in minors who are thirteen and under. Tenn. Code Ann. § 37-1-403 (2001). Thus, the covenant of confidentiality is not absolute and can be voided when its enforcement would compromise the needs of society.
>
> Most important to this case, public policy considerations reflected in the Tennessee Rules of Civil Procedure require the covenant of physician-patient confidentiality be voided for the purpose of discovery. (Citations omitted). Tennessee Rule of Civil Procedure 26.02, which defines the scope of discovery, clearly states that unprivileged information relevant to the lawsuit is discoverable. In *Givens* we stated "a physician cannot withhold [the plaintiff's relevant medical] information in the face of a subpoena or other

> request cloaked with the authority of the court." 75 S.W.3d at 408. This exception stems from "public policy [concerns] as expressed in the rules governing pre-trial discovery: in any medical malpractice action, the dictates of due process require voidance of the covenant of confidentiality so that the truth of the matter can be revealed and the defendant can defend himself against civil liability. *Id.* Thus, for example, if the parties dispute whether certain information is relevant, the trial court may order discovery upon a finding of relevance **because, by filing the lawsuit, the plaintiff impliedly consents to disclosure of his *relevant* medical information.** *Id.* at 726-727. (Emphasis Added).

The Court went on to hold:

> Because consent here to disclose the decedent's confidential, relevant medical information was *implied at law* as a consequence of the plaintiff's conduct (i.e., by the filing of the lawsuit), rather than done expressly (e.g. by written waiver) **the scope of the plaintiffs' consent must be determined by the express terms of the Tennessee Rules of Civil Procedure, which do not prescribe *ex parte* communications.** *Id.* at 728 (Emphasis Added).

4. *Overstreet v. TRW Commercial Steering Division*, 256 S.W.3d, 626 (Tenn. 2008).

In *Overstreet*, the Tennessee Supreme Court abandoned the legal fiction that the covenant of confidentiality was "implied in fact" based upon the patient's agreement to pay for services provided by the physician and instead held that the covenant of confidentiality was implied in law. In so holding, the Supreme Court stated:

> We maintain that "[a]ny time a doctor undertakes the treatment of a patient, and the consensual relationship of physician and patient is established . . . the doctor warrants that any confidential information gained through the relationship will not be released without the patient's permission". *Id.* at 634.

5. The Tennessee Patient's Privacy Protection Act, T.C.A. § 68-11-1501, *et seq.*

In 1996, the Tennessee General Assembly passed the "Patient's Privacy Protection Act" found in Tenn. Code Ann. § 68-11-1501 *et. seq.*. This Act statutorily

recognizes that every patient entering and receiving care at a health care facility licensed by the board for licensing health care facilities has the expectation of and right to privacy for care received at such facility. T.C.A. § 68-11-1502.

The Act further provides that the name, address and other identifying information of a patient shall not be divulged except in certain limited instances. These limited instances include the following:

(a) Any statutorily required reporting to health or governmental authorities;

(b) Access by an interested third-party payer or designee, for the purpose of utilization reviews, case management, peer reviews or other administrative functions;

(c) Access by health care providers from whom the patient receives or seeks care;

(d) If the patient does not object, any directory information, including not only the patient, the patient's general health status and the patient's location and telephone number. Directory information shall be released to all inquirers, only if the patient has been notified, upon admission to the hospital, of the patient's right to object to the information that may be released and has not objected; or, if the patient is in a physical or mental condition such that the patient is incapable of making an objection and the next of kin or patient representative does not come forward and object; and

(e) Any request by the office of inspector general or medicaid fraud control unit with respect to an ongoing investigation.[2]

The Act provides that any violation of the confidentiality provision of the Act shall be an invasion of the patient's right to privacy.[3] Civil lawsuits for damages for invasion of privacy shall be available to a person for violation(s) of the Act.[4] The Act further provides that it shall not be unlawful to disclose nor shall there be any liability for

[2] T.C.A. § 68-11-1503(a)(1).
[3] T.C.A. § 68-11-1503(c).
[4] T.C.A. § 68-11-1504.

disclosing, medical information in response to a subpoena, court order or other request authorized by state or federal law.[5]

6. Medical Records Act of 1974, T.C.A. § 68-11-301, *et seq.*

This Act deals exclusively with hospital records.

T.C.A. § 68-11-302(5)(A) defines "hospital records" as including "those medical histories, records, reports, summaries, diagnoses, prognoses, records of treatment and medication ordered and given, entries, X-rays, radiology interpretations and other written, electronic, or graphic data prepared, kept, made or maintained in hospitals that pertain to hospital confinements or hospital services rendered to patients admitted to hospitals or receiving emergency room or outpatient care."

T.C.A. § 68-11-302(4) defines "hospital" as "any institution, place, building or agency that has been licensed by the board, as defined in § 68-11-201, or any clinic operated under the authority of a local or regional health department established under chapter 2, parts 6 and 7 of this title.

T.C.A. § 68-11-302(6)(A) defines "patient" to mean "outpatients, inpatients, persons dead on arrival, persons receiving emergency care and the newborn." However, a "patient" under the Act does not include an unborn fetus. T.C.A. § 68-11-302(6)(B).

The Act provides that "unless restricted by state or federal law or regulation, a hospital shall furnish to a patient or a patient's authorized representative such part or parts of the patient's hospital records without unreasonable delay on request in writing by the patient or the representative." T.C.A. § 68-11-304(a)(1). The party requesting the patient's records is responsible for the reasonable cost of copying and mailing the

[5] T.C.A. § 68-11-1503(d).

patient's records. T.C.A. § 68-11-304(a)(2)(A)(i). The charges to a patient or lawyer authorized by the patient to review the patient's records shall not exceed the "reasonable cost for copying and the actual cost of mailing the records". T.C.A. § 68-11-304(a)(2)(A)(ii). The statute also sets forth certain copying charges which are presumed to be reasonable. The copying charges presumed to be reasonable are a fee of $18.00 for the first five (5) pages, a fee of $.85 per page for the 6th through the 50th page and a fee of $.60 per page for the 51st to the 250th page and $.35 for each page thereafter. T.C.A. § 68-11-304(a)(2)(A)(i). A fee for certifying medical records not to exceed $20.00 for each record certified is also presumed to be reasonable. T.C.A. § 68-11-304(a)(2)(A)(i).

Practice Point: It is not uncommon for the cost of hospital records to run in excess of $1,000.00 or more in the event of extended or multiple hospitalizations. Before obtaining all records of all hospitalizations of a patient at a particular hospital, thought should be given as to whether you need all these records. If you do, by all means obtain them via authorization, subpoena or court order. However, if you do not, there is nothing wrong with limiting your request to certain types of records or a certain hospitalization.

T.C.A. § 68-11-312 provides that as relates to communications between health care providers while rendering care to their patients there is "no implied covenant of confidentiality or other restriction that precludes health care providers from communicating with each other in the course of providing care and treatment to a patient". T.C.A. § 68-11-312(b)(1)(A). The statute also provides there is no implied covenant of confidentiality or other restriction that precludes a health care provider from responding to a request from a hospital regarding entries in the patient's records of the requesting hospital made or reviewed by that health care provider during the patient's hospitalization. T.C.A. § 68-11-312(b)(1)(B).

7. "Hospital Records as Evidence" Act, T.C.A. § 68-11-401 *et seq.*

The "Hospital Records as Evidence" Act provides a process to admit into evidence a hospital record provided pursuant to subpoena in such a way as it minimizes the need for the custodian to appear in person at trial. The Act should be read in *pari materia* with Tenn. R. Evid. 803(6) and Tenn. R. Evid. 902(11) to insure that it falls within the hearsay exception relating to records of regularly conducted activity and the self-authentication of such records.

The records covered by this Act are the same "hospital records" as defined in T.C.A. § 68-11-302 provided a subpoena d*uces tecum* for records under the Act shall not be deemed to include x-rays, electrocardiograms and like graphic matter unless specifically referred to in the subpoena.[6] The Act provides that when a subpoena d*uces tecum* is served upon a custodian of records of a hospital or any community mental health center in an action or a proceeding in which the hospital is neither a party nor the place where the cause of action is alleged to have arisen and the subpoena requires the production of any part of the records of the hospital or the community health center relating to the care or treatment of a patient, it is sufficient compliance with the subpoena if the custodian or other officer of the hospital or community health center within five (5) days after being served with a subpoena d*uces tecum* either by personal delivery or certified or registered mail, files with the court clerk or the officer, body or tribunal conducting the hearing, a true and correct copy.[7] Any party intending to use this statute must furnish the adverse party or the adverse party's attorney a copy of the

[6] T.C.A. § 68-11-401(2)(A)
[7] T.C.A. § 68-11-402(a)

subpoena *duces tecum* not less than ten (10) days prior to the date set for the trial of the matter for which the records may be introduced.[8]

Practice Point: This statute does not, on its face, apply in instances in which the hospital is a party to the malpractice case or the place where the medical care which was the subject of the lawsuit was rendered. Thus, in those cases in which the hospital is not sued but the alleged malpractice occurred at the hospital (i.e. a surgeon is sued over an alleged negligently performed procedure), it would appear this statute has no application and the medical records custodian would not be exempt from subpoena to trial.

The copy of the records so produced shall be separately enclosed in an inner envelope or wrapper, sealed, with the title and number of the action, name of witness (medical records custodian) and date of subpoena clearly inscribed on the inner envelope or wrapper; the sealed envelope or wrapper shall then be enclosed in an outer envelope or wrapper directed to the clerk of the court or to the judge if the subpoena directs attendance in court or if the subpoena directs attendance at a deposition to the officer before whom the deposition is to be taken, at the place designated in the subpoena for taking of the deposition or at such officer's place of business; and in any other case to the officer, body or tribunal conducting the hearing at a like address.[9]

The copy of the records shall remain sealed and shall be opened only at the time of trial, deposition or other hearing, upon the direction of the judge, court, officer, body or tribunal conducting the proceeding, in the presence of all parties who have appeared in person or by counsel at such trial, deposition or hearing. T.C.A. § 68-11-404(a)(1).

Upon receipt of a subpoena, the custodian is required to send the records to the attorney responsible for the issuance of the subpoena at the place, and on or before the date specified in the subpoena if such subpoena states **conspicuously on its face that**

[8] T.C.A. § 68-11-402(b)
[9] T.C.A. § 68-11-403

"the records are required in a tort action or proceeding in which the plaintiff has raised the issue of plaintiff's physical or emotional condition" and directs the custodian's attendance at a deposition.[10] In such instances, the attorney responsible for the issuance of the subpoena need not meet the requirements of subsection (a) before opening the sealed records, if the attorney provides a copy of the records to the plaintiff or someone authorized on the plaintiff's behalf to receive them.[11]

The records are required to be accompanied by an affidavit of a custodian stating in substance:

a. That the affiant is duly authorized custodian of the records and has authority to certify the records;

b. That the copy is a true copy of all the records described in the subpoena;

c. That the records have been prepared by the personnel of the hospital or the community mental health center, staff physicians or persons acting under the control of either, in the ordinary course of the hospital or the community mental health care center business, at or near the time of the act, condition or event reported in the records; and

d. Certifying the amount of reasonable charges of the hospital or community mental health center for furnishing such copies of the records.[12]

If the hospital or community health center has none of the records described or only part of the records, the custodian is required to so state in the affidavit and file the affidavit and such records as are available.[13] The filing of the affidavit with respect to

[10] T.C.A. § 68-11-404(b)(1)
[11] T.C.A. § 68-11-404(b)(2)
[12] T.C.A. § 68-11-405(a)
[13] T.C.A. § 68-11-405(b)

reasonable charges shall be sufficient proof of the expense which shall be taxed as court costs.[14]

The copy of the record so produced shall be admissible into evidence to the same extent as though the original of the records were offered and the custodian had been present and testified as to the matters stated in the affidavit.[15] **Caveat** – Consider T.C.A. § 24-7-122 which, among other things, provides when medical records or copies thereof are used at trial, the party desiring to use the records must serve the opposing party with a copy of the records **no later than sixty (60) days before the trial**, with notice that the records may be offered in evidence, notwithstanding any other rules or statutes to the contrary.

The affidavit shall be admissible into evidence and the matters stated in the affidavit shall be presumed true in the absence of the preponderance of the evidence to the contrary.[16] Under the Act, when the personal attendance of the custodian is required for trial or deposition, the subpoena d*uces tecum* shall contain a clause which reads:

> The procedure authorized pursuant to § 68-11-402 will not be deemed sufficient compliance with the Subpoena.[17]

Where both the personal attendance of the custodian and production of the original records are required, the subpoena d*uces tecum* must contain a clause that reads:

> Original records are required and the procedure authorized pursuant to § 68-11-402 will not be deemed sufficient compliance with the subpoena.[18]

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[14] T.C.A. § 68-11-405(c)
[15] T.C.A. § 68-11-406(a)
[16] T.C.A. § 68-11-406(b)(1)
[17] T.C.A. § 68-11-407

8. "Medical Records" of Health Care Providers Statute, T.C.A. § 63-2-101 *et seq.*

T.C.A. § 63-2-101(a)(1) provides that a health care provider is required to furnish to a patient or a patient's authorized representative a copy or summary of such patient's medical records, at the option of the health care provider, within ten (10) working days upon request in writing by the patient or such patient's authorized representative. Upon a failure of the health care provider to comply with this provision, proper notice shall be given to the provider's licensing board or boards and the provider may be subject to disciplinary actions that include sanctions and a monetary fine.[19]

The statute defines "health care provider" as any person required to be licensed under Title 63 of Tennessee Code Annotated. This includes, but is limited to, the following: medical doctors, dentists, chiropractors, podiatrists, nurses, osteopathic physicians, pharmacists, psychologists, physician assistants and professional counselors.

"Medical records" means "all medical histories, records, reports and summaries, diagnoses, prognoses, records of treatment and medication ordered and given, X-ray and radiology interpretations, physical therapy charts and notes and lab reports.[20]

T.C.A. § 63-2-102(a) provides the party requesting the patient's records is responsible to the provider for the reasonable cost of copying and mailing such patient's records. The statute sets forth certain charge limits for copying which cannot be exceeded.[21] Copying charges cannot exceed $20.00 for 5 pages or less, and $0.50 per

[18] T.C.A. § 68-11-407(b)
[19] T.C.A. § 63-2-101(a)(2)
[20] T.C.A. § 63-2-101(c)(4)
[21] T.C.A. § 63-2-102(a)

page for each page copied after the first 5 pages. Upon request, the health care provider is required to submit a notarized affidavit by the custodian of records certifying that the records provided in response to the request:

(a) Are true and correct copies of the records in the custody of the affiant;

(b) Were made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of and a business duty to record or transmit these matters;

(c) Were kept in the course of regularly conducted activity; and

(d) Were made by the regularly conducted activity as a regular practice.[22]

In addition to the charges for the copying of the records, the provider may charge up to $20.00 for this affidavit and the affidavit shall qualify for the business record exception to the hearsay rule.[23] **Caveat** – Consider T.C.A. § 24-7-122 which, among other things, provides when medical records or copies thereof are used at trial, the party desiring to use the records must serve the opposing party with a copy of the records **no later than sixty (60) days before the trial**, with notice that the records may be offered in evidence, notwithstanding any other rules or statutes to the contrary.

The statute specifically provides that payment of such costs may be required by the provider prior to the records being furnished; however, upon payment of costs, the patient or the patient's authorized representative has the right to receive the records without delay.[24]

9. Statutory exemption from subpoenas to trial, T.C.A. § 24-9-101.

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[22] T.C.A. § 63-2-102(c)(1)
[23] T.C.A. § 63-2-102(c)(2)
[24] T.C.A. § 63-2-102(e)

T.C.A. § 24-9-101(a)(8) provides that a custodian of medical records, if such custodian files a copy of the applicable records with an affidavit with the Court and follows the procedure provided in Title 68, Chapter 11, Part 4 for the production of hospital records pursuant to a subpoena d*uces tecum* is exempt from a subpoena to trial but subject to a subpoena for a deposition. This exemption applies only to a hospital's records custodian and does not apply to other record custodians such as one in a doctor's office. *Phipps v. Insurance Co. of the State of Pennsylvania*, 2002 WL 83602 (Tenn. 2002); *Shipley v. Insurance Company of North America*, 1995 WL 688886 (Tenn. 1995). T.C.A. § 24-9-101(b) provides that if a records custodian exempt from subpoena is required to file a motion to quash the subpoena, the court may award reasonable attorneys fees incurred in defending against the subpoena.

10. Tenn. R. Civ. P. 45 – Subpoenas.

Rule 45 of the Tennessee Rules of Civil Procedure is the applicable court rule dealing with subpoenas in state court. Effective July 1, 2012, Rule 45.01 has been amended to provide as follows:

> The subpoena also must state in prominently displayed, bold-face text: **"The failure to file a motion to quash or modify within fourteen days of service of the subpoena waives all objections to the subpoena, except the right to seek the reasonable costs for producing books, papers, documents and electronically stored information or tangible things.**

Tenn. R. Civ. P. 45.02 provides:

> A subpoena may command a person to produce and permit inspection, copying, testing, or sampling of designated books, papers, documents, electronically stored information, or tangible things, or inspection of premises with or without commanding the person to appear in person at the place of production or inspection. When appearance is not required, such a subpoena shall also require the person to whom it is directed to swear or affirm that the

> books, papers, documents, electronically stored information, or tangible things are authentic to the best of that person's knowledge, information and belief and to state whether or not all books, papers, documents, electronically stored information or tangible things responsive to the subpoena have been produced for copying, inspection, testing, or sampling. Copies of the subpoena must be served pursuant to Rule 5 on all parties, and all material produced must be made available for inspection, copying, testing or sampling by all parties.

Tenn. R. Civ. P. 45.02 also provides that a subpoena may specify the form or forms in which electronically stored information is to be provided.

Tenn. R. Civ. P. 45.07 provides that a party may move within fourteen (14) days after service of the subpoena or before the time specified in the subpoena for compliance therewith, whichever is earlier, to quash or modify the subpoena if it is unreasonable and oppressive or to condition denial of the motion on the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, electronically stored information or tangible things. The timely filing of a motion to quash or modify obviates the need for compliance with the subpoena pending further order of the court; however, failure to file a motion within the required time period waives all objections to the subpoena except the right to seek the reasonable cost for producing books, papers, documents and electronically stored information or tangible things.

When information subject to discovery is withheld claiming it is privileged or subject to a work product protection, the claim must be made expressly and must be supported by a description of the nature of the documents, communications or things not produced that is sufficient to enable the demanding party to contest the claim.[25]

[25] Tenn. R. Civ. P. 45.08(2)(B)

Practice Point: With the advent of e-records becoming the order of the day, some thought ought to be given to subpoenaing records in an electronic format as opposed to a paper format. It would seem this would cut down considerably on copying expense, mailing expense and the "clutter" found in many lawyers' offices. After all, HIPAA now requires covered entities that manage PHI via electronic health records to make records available to patients in an electronic format if requested.

11. Recent Amendment to T.C.A. § 29-26-121 Permitting *Ex Parte* Communications in Health Care Liability Actions Upon Court Order.

During the 2012 legislative session, an amendment to T.C.A. § 29-26-121 of the Medical Malpractice Act was passed. This amendment added subpart (f) to the statute which read as follows:

(f)

(1) Upon the filing of any "healthcare liability action," as defined in Section 29-26-101(a)(1), the named defendant(s) may petition the court for a qualified protective order allowing the defendant(s) and their attorneys the right to obtain protected health information during interviews, outside the presence of claimant or claimant's counsel, with the relevant patient's treating "healthcare providers," as defined by Section 29-26-101(a)(2). Such petition shall be granted under the following conditions:

(A) The petition must identify the treating healthcare provider(s) for whom the defendant(s) seek a qualified protective order to conduct an interview;

(B) The claimant may file an objection seeking to limit or prohibit the defendant(s) or the defendant(s)' counsel from conducting the interviews, which may be granted only upon good cause shown that a treating healthcare provider does not possess relevant information as defined by the Tennessee Rules of Civil Procedure; and

(C) The qualified protective order shall expressly limit the dissemination of any protected health information to the litigation pending before the court.

(2) Any disclosure of protected health information by a health care provider in response to a court order under this section shall be deemed a permissible disclosure under Tennessee law, any Tennessee statute or rule of common law notwithstanding.

(3) Nothing in this part shall be construed as restricting in any way, the right of a defendant or defendant's counsel from conducting interviews outside the presence of claimant or claimant's counsel with the defendant's own present or former employees, partners, or owners concerning a health care liability action.

This amendment becomes effective July 1, 2012 and only applies to healthcare liability actions commenced on or after July 1, 2012.

During the most recent legislative session, the Tennessee General Assembly amended T.C.A. § 29-26-121(f)(1)(c) by deleting the subsection in its entirety and by substituting the following language:

(C)

(i) The qualified protective order shall expressly limit the dissemination of any protected health information to the litigation pending before the court and require the defendant or defendants who conducted the interview to return to the healthcare provider or destroy any protected health information obtained in the course of any such interview, including all copies, at the end of the litigation.

(ii) The qualified protective order shall expressly provide that participation in any such interview by a treating healthcare provider is voluntary.

Practice Point: Defense counsel seeking a qualified protective order under T.C.A. § 29-26-121(f) should make sure the language of their motion is consistent with the HIPAA requirements for "qualified protective orders" discussed *infra*. Counsel should also be mindful that such orders are being opposed by plaintiff's counsel in certain instances on various grounds including the constitutionality of the statute and preemption by HIPAA. As yet, there has not been any definitive resolution of challenges to the statute.

12. Prerequisites to Admission of Medical Records into Evidence at Trial Under T.C.A. § 24-7-122

T.C.A. § 24-7-122 sets forth certain requirements to be followed before medical records can be admitted into evidence under that statute at trial. The statute provides as follows:

> (a) As used in this section, "medical records" means all written **clinical information** that relates to the treatment of individuals, when the information is kept in an **institution**.
>
> (b) Medical records or reproductions of medical records, when duly certified by their custodian, physician, physical therapist or chiropractor, need not be identified at the trial and may be used in any manner in which records identified at the trial by these persons could be used. The records shall be accompanied by a **statement** signed by the person containing the following information:
>
> (1) The person has authority to certify the records;
>
> (2) The copy is a true copy of all the records described in the subpoena; and
>
> (3) The records were prepared by the personnel of the company acting under the control of the company, in the ordinary course of business.
>
> (c) When records or reproductions of records are used at trial **pursuant to this section**, the party desiring to use the records or reproductions in evidence shall serve the opposing party with a copy of the records or reproductions **not later than sixty (60) days before the trial, with notice that the records or reproductions may be offered in evidence, notwithstanding any other rules or statutes to the contrary.**

Practice Point: It is unclear how T.C.A. § 24-7-122; T.C.A. § 68-11-401, et seq; T.C.A. § 63-2-101 et seq; Tenn. R. Civ. P. 45; Tenn. R. Evid. 803(6) Records of Regularly Conducted Activity – Exception to Hearsay Rule; and Rule 902(11) Self-Authentication – Certified Records of Regularly Conducted Activity are to be reconciled. These statutes and rules have some degree of inconsistency between and among them unless you look at each as simply being one road to a common destination, namely the admission of hospital and medical records into evidence. However, no matter how you try to resolve conflicting provisions in these rules and statutes the safe and prudent thing to do is serve records you

may use at trial with the required notice on the opposing party at least sixty (60) days before trial.

13. "Tennessee Patient Safety And Quality Improvement Act of 2011", T.C.A. § 68-11-272.

a. Introduction:

In 1967, the Tennessee legislature passed the "Tennessee Peer Review Law", codified at Tenn. Code Ann. § 63-6-219. This law protected information and findings of a "peer-review committee" from discovery. Tenn. Code Ann. § 63-6-219(e). However, the law was ambiguous and sometimes contradictory. Courts had a difficult time interpreting the statute, noting that the statute contained syntax errors and irreconcilable differences. *See Roy v. City of Harriman*, 279 S.W.3d 296, 305 (Tenn. Ct. App. 2008).

In 2010, two decisions of the Tennessee Supreme Court severely limited the scope of Tenn. Code Ann. § 63-6-219.[26] Many records of healthcare providers thought to be protected by peer review privilege were in fact not protected under T.C.A. § 63-6-219.

b. Repeal of Tenn. Code Ann. § 63-6-219 and Enactment of the "Tennessee Patient Safety and Quality Improvement Act of 2011":

On April 12, 2011, in apparent response to the Court's decisions in *Beecher* and *Powell*, the Tennessee legislature repealed Tenn. Code Ann. § 63-6-219 and passed the "Tennessee Patient Safety and Quality Improvement Act of 2011," codified at Tenn. Code Ann. § 68-11-272 (2011). Section 68-11-272 has significant differences from the law it replaced. First, it never uses the language "peer-review." Instead, committees are termed "Quality Improvement Committees." Second, the purpose is stated distinctively different than the limited purpose as stated in § 63-6-219(b). The new

[26] *Lee Medical, Inc. v. Beecher*, 312 S.W.3d 515 (Tenn. 2010); *Powell v. Community Health Systems*, 312 S.W.3d 496 (Tenn. 2010).

statute states the purpose as, "... to encourage the improvement of patient safety, the quality of patient care and the evaluation of the quality, safety, cost, processes and necessity of healthcare services by hospitals, healthcare facilities and healthcare providers." Tenn. Code Ann. § 68-11-272(a). Both of these differences are significant because the court in *Beecher* based its holding that a peer review proceeding only applied to a "physician's professional conduct, competence, or ability to practice medicine" on the fact that the legislature used the term "peer" review and that § 63-6-219(b) only referred to a "physician's professional conduct, competence, or ability to practice medicine." With these differences, the legislature cleared up the ambiguities that were present between § 63-6-219(b) and § 63-6-219(c) in a very different way than did the Court.

The "Tennessee Patient Safety and Quality Improvement Act's privilege section reads:

> *Records of a Quality Improvement Committee (QIC)* and testimony or statements by a healthcare organization's officers, directors, trustees, healthcare providers, administrative staff, employees or other committee members or attendees *relating to activities of the QIC* shall be confidential and privileged and shall be protected from direct or indirect means of discovery...

Tenn. Code Ann. § 68-11-272(c)(1). The statute defines "Records" as "all reports, incident reports, statements...and any and all other documentation generated by or in connection with activities of a QIC..." Tenn. Code Ann. § 68-11-272(b)(5). In order for the records to be protected by § 68-11-272(c)(1), they must have been "generated by or in connection with the activities of a QIC."

Under the statute, there are two basic requirements for a committee or individual to meet the definition of a QIC. First, the committee must have been either formed or

retained by a healthcare organization or it must be one or more individuals employed by the healthcare organization. Tenn. Code Ann. § 68-11-272(b)(4). Second, at least one of the purposes of the committee or individual must be to evaluate the "safety, quality, processes, costs, appropriateness or necessity of healthcare services..." *Id.* The statute provides a non-exclusive list of functions that meet the purpose of evaluating the "safety, quality, processes, costs, appropriateness or necessity of healthcare services." One such function is "the evaluation of reports made pursuant to § 68-11-211 and any internal reports related thereto or in the course of a healthcare organization's patient safety and risk management activities." Tenn. Code Ann. § 68-11-272(b)(4)(N).

The new law specifically includes "incident reports" in the definition of "records". § 68-11-272(b)(5). It also includes filling out incident reports as a function of a QIC. § 68-11-272(b)(4)(N). The *Powell* court said that incident reports were not protected when the definition of a "peer-review" proceeding was very narrow. The legislature has significantly broadened the scope of the privilege and has specifically included incident reports.

C. Federal Law

1. Introduction. In 1996, Congress enacted the Health Insurance Portability and Accountability Act (HIPAA). The Department of Health and Human Services (HHS) subsequently published the "Privacy Rule" and the "Security Rule" which set national standards for the protection of individually identifiable health information ("protected health information" or "PHI") and the protection of electronic protected health information ("ePHI"). "Health information" means any information "whether oral or recorded in any form or medium that is created or received by a healthcare provider . . .

." 42 USCA § 1320(d)(4). In 2009, Congress updated and revised HIPAA with enactment of the "Health Information Technology for Economic and Clinical Health Act" ("HITECH Act"). In January 2013, HHS promulgated the "Final Omnibus Rule" with an effective date of March 26, 2013. Covered entities and business associates must comply with the applicable requirements of the final omnibus rule by September 23, 2013.

2. Permitted and Authorized Uses and Disclosures of Protected Health Information Under HIPAA. In the context of medical malpractice cases, most issues which arise relate to the privacy and security standards of HIPAA which were enacted to protect the confidentiality, integrity and availability of the patient's healthcare information. The privacy rule defines and limits circumstances in which a patient's PHI may be used or disclosed by a covered entity. A covered entity encompasses healthcare providers that transmit any health information in electronic form in connection with a transaction covered by HIPAA. 45 CFR § 160.103.[27]

What are the ways HIPAA permits records to be disclosed and used in the context of a medical malpractice lawsuit?

(a) The healthcare provider must generally disclose PHI direct to the plaintiff-patient or their personal representative upon request. The HITECH Act extends the requirements to healthcare providers that manage PHI via electronic health records and such covered entities must now provide the patient, upon request, with an electronic copy of patient's record.

(b) The healthcare provider may disclose PHI to a third party pursuant to a written authorization from the patient or his or her personal representative. In order to

[27] "Covered entity" and "healthcare provider" will hereafter be used interchangeably.

be a HIPAA compliant authorization, it must be in writing and have certain specific terms. It must be in plain language, contain specific information concerning the information to be disclosed or released, state the person or persons disclosing and the person or persons receiving the information, expiration, right to revoke in writing, and other data. When psychotherapy notes are sought, a separate authorization related solely to the use and disclosure of those records must be obtained. A checklist for a HIPAA compliant authorization and a sample authorization are attached respectively as Exhibit "A" and Exhibit "B" in the Appendix. Tenn. Code Ann. § 29-26-121(a)(2)(E) requires pre-suit notice letters include a HIPAA compliant medical authorization permitting the provider receiving the notice to obtain the medical records of all other providers being sent a notice. Tenn. Code Ann. 29-26-121(d)(2) requires the parties obtaining such records keep them as confidential to be used only by the parties, their counsel and their consultants.

PRACTICE POINT: T.C.A. § 29-26-121(a)(2)(E) only requires that the claimant-patient give the recipient of the notice a HIPAA compliant authorization from other potential defendants who received notice. Counsel should review the authorizations to ensure they are HIPAA compliant and then request the records of other notice recipients. If additional records are needed in order to evaluate liability and/or damages, contact the patient's attorney and advise him or her concerning the need and see if they will provide you with such records or will voluntarily give you an authorization by which you can obtain them.

(c) The healthcare provider may disclose PHI in a judicial or administrative proceeding in response to a subpoena, discovery request or other lawful process that is not accompanied by the order of a court or administrative tribunal if certain requirements are met. 45 CFR § 164.512(e). The covered entity must receive satisfactory assurance from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the

PHI has been given notice of the request or the healthcare provider receives satisfactory assurance from the party seeking the information that such party has made reasonable efforts to secure a qualified protective order which meets the requirements of the privacy rule. 45 CFR § 164.512(e)(1)(ii)(A).

When the person seeking the PHI is providing satisfactory assurance of reasonable efforts to give the patient notice of the request, the person seeking the information is required to give the healthcare provider a written statement and accompanying documentation demonstrating that:

(1) the party requesting such information has made a good faith attempt to provide written notice to the individual (or, if the individual's location is unknown, to mail a notice to the individual's last known address);

(2) the notice included sufficient information about the litigation or proceeding in which the protected health information is requested to permit the individual to raise an objection to the court or administrative tribunal; and

(3) the time for the individual to raise objections to the court or administrative tribunal has elapsed and no objections were filed or all objections filed by the individual have been resolved by the court or the administrative tribunal and the disclosures being sought are consistent with such resolution. 45 CFR § 164.512(e)((1)(iii).

When the person seeking the PHI is providing satisfactory assurance that reasonable efforts have been made to obtain a qualified protective order, the person seeking the information is required to give the provider a written statement and accompanying documentation that:

(1) The parties to the dispute giving rise to the request for PHI have agreed to a qualified protective order and have presented it to the court or the administrative tribunal having jurisdiction;

or

(2) The party seeking the PHI has requested a qualified protective order from the court or administrative tribunal.

(d) The healthcare provider may disclose PHI in response to an order of a court or administrative tribunal. 45 CFR. § 164.512(e)(1)(i). These orders are referred to as "qualified protective orders". These orders must contain language which:

(1) Prohibits the parties from using or disclosing the PHI for any purpose other than the litigation or proceeding for which such information was requested; and

(2) Requires return to the healthcare provider of the PHI or the destruction of same (including all copies made) at the end of the litigation or proceeding.

45 CFR 164.512(e)(1)(v).

(e) Healthcare providers will generally provide PHI to the healthcare providers' attorneys. For purposes of HIPAA, this makes the attorney for the healthcare provider the "business associate" of his or her healthcare provider/client. HIPAA defines "business associate" to include persons who provide legal and consulting services to or for the healthcare provider when the service involves the disclosure of PHI from such healthcare provider. 45 CFR § 160.103(1)(ii). HIPAA further requires that the healthcare provider/client and the business associate/law firm have a contract or other written arrangement that meets the requirements of 45 CFR § 164.504 (e). The contract or other written arrangement must:

(1) Establish the permitted and required uses and disclosures of PHI by the business associate.

(2) Provide that the business associate will:

(a) not use or further disclose the information other than as permitted or required by the contract or as required by law;

(b) use appropriate safeguards and comply, where applicable, with the security standards set forth in subpart C of 45 CFR 164 with respect to electronic PHI to prevent use or disclosure of the information other than as provided for by its contract;

(c) report to the covered entity any use or disclosure of the information not provided for by its contract of which it becomes aware, including breaches of unsecured PHI as required by 45 CFR § 164.410. (notification by business associate to covered entity of a breach);

(d) in accordance with 45 CFR 164.502(e)(1)(ii) ensure that any subcontractors of the business associate that receive the PHI on behalf of the business associate agree to the same restrictions and conditions that apply to the business associate with respect to such information;

(e) make available PHI in accordance with 45 CFR § 164.524. (access of individuals to PHI);

(f) make available PHI for amendment and incorporate any amendments to PHI in accordance with 45 CFR § 164.526. (patient's right to request amendment of PHI);

(g) make available the information required to provide an accounting of disclosures in accordance with 45 CFR 164.528. (accounting for disclosures of protected health information);

(h) to the extent the business associate is to carry out a covered entity's obligation under the subpart to comply with the requirements of this subpart that apply to the covered entity;

(i) make its internal practice, books and records relating to the use and disclosure of PHI received by the business associate from the covered entity available to the Secretary of HHS for purposes of determining the compliance of the covered entity with this subpart;

(j) At termination of the contract, if feasible, return or destroy all PHI received by the business associate on behalf of the covered entity that the business associate still maintains in any form and retain no copies of such information or, if such return or destruction is not feasible, extend the protections of the contract to the information and limit further uses or

disclosures to those purposes that make the return or destruction of the information infeasible; and

(k) Authorize termination of the contract by the covered entity if the covered entity determines that the business associate has violated a material term of the contract.

3. Rule 26 experts of business associate/law firms. Rule 26 experts retained by counsel for healthcare providers to whom PHI is furnished appear to fall within the definition of "subcontractor" under HIPAA. This requires that the law firm serving as business associate must obtain satisfactory assurances that the expert will comply with pertinent provisions of HIPAA. The requirements for the contract or other written arrangement between the expert and the business associate/law firm are essentially the same as those required between the healthcare provider/client and the business associate/law firm. 45 CFR § 160.103(3)(iii); 45 CFR § 164.502(e)(1)(ii); and 45 CFR § 164.504(e)(1).

4. Other Pertinent Provisions of HIPAA.

(a) The HITECH Act and the final omnibus rule now make business associates of covered entities including subcontractors of business associates directly liable for compliance with certain of the HIPAA privacy and security rule requirements.

(b) The HITECH Act and the final omnibus rule expand the individual's rights to receive electronic copies of their health information and to restrict disclosure to a health plan concerning treatment for which the individual has paid out of pocket in full.

(c) The HITECH Act and the final omnibus rule increase and tier the civil money penalty structure, for which covered entities, business associates and subcontractors have direct liability.

CATEGORIES OF VIOLATIONS AND RESPECTIVE PENALTY AMOUNTS AVAILABLE

Violation category – Section 1176(a)(1)	Each violation	All such violations of an identical provision in a calendar year
(A) Did Not Know	$100-$50,000	$1,500.000
(B) Reasonable Cause	1,000-50,000	1,500.000
(C) (i) Willful Neglect-Corrected	10,000-50,000	1,500.000
(C) (ii) Willful Neglect-Not Corrected	50,000	1,500.000

(d) To the extent the business associate receives electronic PHI, HIPAAs security rules now apply to business associates in the same manner as they do covered entities and business associates are both civilly and criminally liable for violations of those provisions. For guidance on this see http://www.hhs.gov/ocr/privacy/hipaa/administrative/securityrule .

(e) For purposes of HIPAA, a personal representative for a decedent is the executor, administrator or other person who has authority under applicable law to act on behalf of the decedent or the decedent's estate. A healthcare provider may also disclose a decedent's PHI to family members and others who were involved in the care of the deceased patient or paid for care of the decedent prior to death unless doing so is inconsistent with any prior preference of the individual which is known to the healthcare provider.

(f) Certain notification responsibilities are triggered following the discovery of a "breach" of unsecured PHI. A "breach" generally means the unauthorized acquisition, assess, use or disclosure of PHI which compromises the security or privacy of such information. Added language to the definition of "breach" in the final omnibus rule clarifies that an impermissible use or disclosure of PHI is presumed to be a "breach" unless the covered entity or business associate, as applicable, demonstrates there is a

low probability that the PHI has been compromised. Thus, it is up to the covered entity or the business associate to demonstrate there is a "low probability" that the PHI has been compromised. This requires a risk assessment be performed showing a low probability that the PHI has been compromised. The risk assessment factors require consideration of the following:

(1) The nature and extent of the PHI involved including the types of identifiers and the likelihood of re-identification;

(2) The unauthorized person who impermissibly used the PHI or to whom the impermissible disclosure was made;

(3) To investigate an impermissible use or disclosure to determine if the PHI was actually acquired or viewed, or alternatively, if only the opportunity existed for information to be acquired or viewed.

(4) To consider the extent to which the risk to the PHI has been mitigated.

A covered entity is responsible to notify each affected individual whose unsecured PHI has been or is reasonably believed by the covered entity to have been assessed, acquired, or disclosed as a result of a breach. Upon discovering a breach, a business associate is required to advise its covered entity. A subcontractor of a business associate is required to advise the business associate with whom it has contracted. Covered entities are required to notify the affected individuals of a breach without unreasonable delay but in no case later than sixty (60) days from the discovery of the breach. The notification of the breach must have a brief description of what happened including the dates of the breach and the date of the discovery of the breach,

if known; a description of the types of unsecured PHI that were involved in the breach; any steps the individual should take to protect themselves from potential harm resulting from the breach; a brief description of what the covered entity involved is doing to investigate the breach, mitigate the harm to individuals and to protect against any further breaches; and contact procedure for individuals to ask questions or to learn additional information. Also, the covered entity is required to provide notice of the breach to prominent media outlets serving the involved state or jurisdiction following the discovery of the breach if the unsecured PHI of more than five hundred (500) residents of such state or jurisdiction is reasonably believed to have been accessed, acquired or disclosed during the breach. Finally, the covered entity is required to notify the Secretary of HHS of breaches of unsecured protected health information. Healthcare providers are required to report breaches affecting 500 or more individuals to the Secretary immediately. For breaches affecting fewer than 500 individuals, covered entities may maintain a log of all such breaches occurring during the year and annually submit such logs to the Secretary.

D. What To Release

The custodian of records who receives a request to release medical records pursuant to a properly executed authorization, subpoena or qualified protective order must first look carefully at the list of records requested and under no circumstances release records other than those expressly authorized by the authorization, subpoena or qualified protective order. Under HIPAA, covered entities and business associates when releasing information must take steps to ensure that the "minimum necessary

information" is released to accomplish the intended purpose of the disclosure.[28] In short, the first rule is under no circumstances should records other than those expressly asked for be released. Second, a category such as "all the patient's medical records" or "all the patient's hospital admissions" bears watching because certain categories of records cannot be disclosed unless there is a specific authorization allowing that category of records to be released or the patient affirmatively states he is aware the authorization covers that type of records. Foreinstance, records of patients who have participated in or received counseling or any other service from a federally assisted alcohol abuse program are discloseable only upon the patient's specific consent to the disclosure of such records. 42 CFR Part 2. In Tennessee, certain statutory privileges exist which protect communications between certain health care providers and their patients including the following:

(1) T.C.A. § 63-11-213. Psychologist/Psychological Examiner-Client Privilege;

(2) T.C.A. § 24-1-207. Psychiatrist-Patient Privilege; and

(3) T.C.A. § 63-22-114. Professional Counselor/Marital and Family Therapist/Clinical Pastoral Therapist – Client Privilege.

Generally, information protected by statutory privilege should only be disclosed upon written waiver and properly executed authorization of the patient unless there is statutory exception to the privilege. Also, care should be undertaken not to release any information which is privileged or protected by the Tennessee Safety and Quality Improvement Act of 2011 (T.C.A. § 68-11-272) or which has been undertaken in

[28] The "minimum necessary standard" does not apply to disclosures by the healthcare provider to the patient or uses or disclosures made pursuant to the patient's authorization.

anticipation of litigation. (i.e. legal papers relative to a lawsuit or documents prepared by or at the request of the health care provider's attorney or insurance company).

E. Some Things About Which To Be Mindful

1. Retaining a Rule 26 Expert who turns out to be a treating physician. In medical malpractice litigation, defendant-health care providers will early on in the lawsuit retain experts to review the records of the defendant-health care provider in hopes that such retained expert will be able, after reviewing the records, to be supportive of the defendant-health care provider's care and offer favorable opinions and testimony. If it later turns out that your retained expert reviewer had at some time provided medical care to the plaintiff, both defense counsel and the expert have a problem. The person who you retained as your expert has a physician-patient relationship with the plaintiff which under *Givens and Aslip* creates a duty of confidentiality which has been inadvertently breached by your discussions with the physician of the patient's condition. Consequently, due diligence should be exercised by the defendant-health care provider's attorney and the retained expert reviewer to make sure no physician-patient relationship has ever existed between the defendant's retained expert reviewer and the plaintiff patient.

2. Be mindful that "medical records" may turn up in nontraditional places. For the longest, we have thought about medical records as

being "the chart" or "the file" in the physician's office or at the hospital. However, increasingly decisions concerning a patient's health care are made via text messaging and email which often does not find its way into the patient's permanent file. Consequently, in health care litigation, counsel needs to be mindful of this and counsel defending health care providers should at the outset request that your client check his or her text messages and emails for anything involving the patient's care.

3. Counsel representing health care providers should be leery of requests for medical information on a patient from a government agency conducting an investigation when the agency is not clearly a health oversight agency. Foreinstance, it is extremely doubtful that a request made as part of an investigation by the State of Tennessee Department of Commerce and Insurance Division of Consumer Affairs based on a patient complaint would permit disclosure of protected health information of the patient without proper consent or other legal process authorized under the Privacy Rule of HIPAA. This does not mean you should ignore the request but by reply letter request that the government agency provide you with a signed HIPAA compliant authorization of the patient allowing the information to be provided or to point to you a specific provision in the law whereby the health care provider is obligated to furnish that information without the patient's authorization.

F. Conclusion.

Attorneys involved in medical malpractice litigation are faced with a wide variety of legal requirements and ethical considerations under both state and federal law in dealing with medical records and health care information. These issues deal with how records can be lawfully obtained, how records are handled by counsel after they are obtained and what should be done with them at the conclusion of the lawsuit. Each circumstance which raises a legal or ethical concern must be separately analyzed because circumstances often dictate when you are on safe ground and when you are not. When providing records to others or considering what to do with them at the end of the lawsuit consider how the records were obtained to start with and the extent to which that places legal and/or ethical obligations on you. If after analyzing the concern both legally and factually you are still in a quandary, consult other attorneys that handle this type litigation to see if they have encountered a similar problem and how they dealt with it. If after all is said and done, you still have a legitimate doubt as to whether something can be legally or ethically done, don't do it.

APPENDIX

Checklist – HIPAA Compliant Authorization
(45 CFR 164.508)

	√	#	Description
Required Core Elements		1.	A description of the **information to be used or disclosed** that identifies the information in a specific and meaningful fashion. Can be "entire medical record", "complete patient file", "all paid claims from date of accident forward". "Any and all information" might not be sufficiently precise. 164.508(c)(1)(i).
		2.	The **name of who is allowed to release** the PHI. Can be a category or class of persons, e.g. "all medical sources". 164.508(c)(1)(ii)
		3.	The **name of who will receive** the information. Can be a category or class of persons, e.g. "employees of XYZ division of the ABC Corp.". (164.508(c)(1)(iii)
		4.	A description of **each purpose** of the requested use or disclosure. The statement "at the request of the individual" is a sufficient description of the purpose when an individual initiates the authorization and does not, or elects not to, provide a statement of the purpose. 164.508(c)(1)(iv)
		5.	An **expiration** date or an expiration event that relates to the individual or the purpose of the use or disclosure. The statement "end of the research study," "none," or similar language is sufficient if the authorization is for a use or disclosure of protected health information for research, including for the creation and maintenance of a research database or research respository. Or "until I am no longer enrolled in Medicaid". 164.508(c)(1)(v)
		6.	Individual's **signature and date**. If a personal representative of the individual signs the authorization, a description of such representative's authority to act for the individual must also be provided. 164.508(c)(1)(vi)
Required Statements (to place individual on notice)		7.	Contains information stating the individual's **right to revoke** the authorization in writing, and either: The exceptions to the right to revoke and a description of how the individual may revoke the authorization; 164.508(c)(2)(i)(A) **or** A reference to the covered entity's Notice of Privacy Practices that explains the exceptions to the right to revoke and how to revoke. 164.508(c)(2)(i)(B)
		8.	Contains information that states the **ability** or **inability** to **condition treatment, payment, enrollment or eligibility** for benefits on the authorization, with an explanation of why or why not. 164.508(c)(2)(ii)(A) or (B).
		9.	Contains information that states the potential for information disclosed pursuant to the authorization is subject to **redisclosure** by the recipient and no longer is protected. 164.508(c)(2)(iii)
		10.	*If* information is being released for marketing and the organization releasing the information is being paid, then the authorization must state that payment is involved. 164.508(a)(3)
		11.	Authorization must be in **plain language**. 164.508(c)(3)
		12.	"I understand that this information may include, when applicable, information relating to sexually transmitted disease, Human Immunodeficiency Virus (HIV Infection, Acquired Immune Deficiency Syndrome or AIDS Related Complex) and other communicable disease. It may also include information about behavioral or mental health services and referral and/or treatment for alcohol and drug abuse (42 CFR Part 2)."

AUTHORIZATION FOR RELEASE OF PROTECTED HEALTH INFORMATION (PHI)

Section A: This section must be completed for all Authorizations

Patient's Name:	**Birth Date:**	**Social Security No. *(optional)*:**
Provider's Name:	**Recipient's Name:**	
Provider's Address:	**Address 1:**	
	Address 2:	
	City:	**State:** **Zip:**

This authorization will expire on the following: (Fill in the Date or the Event but not both.)

Date: **Event: At the final disposition of the lawsuit filed in the _____ Court for _____ County, Tennessee, Civil Action No.: _____**

Purpose of disclosure: For all uses permitted by law in connection with the above referenced lawsuit.

Description of information to be used or disclosed

Is this request for psychotherapy notes? ☐ Yes, then this is the only item you may request on this authorization. You must submit another authorization for other items below. X No, then you may check as many items below as you need.

Description:	Description:	Description:
√ All Protected Health Information (PHI)	√ Medication Records	√ Graphic Records(EKG/EEG)
√ Admission/Intake forms	√ Operative/Procedure Rpts.	√ Office Notes
√ History & Physical Reports	√ Radiology Reports	√ Correspondence
√ Discharge Summaries	√ X-Rays, MR & CT Scans	√ Itemized Bill/Statement
√ Consultation Reports	√ Diagnostic Tests	√ Insurance Claim Forms
√ Nurses Notes	√ Pathology slides, body fluid and tissue samples	√ Other:
√ Progress Notes	√ Pathology Reports	
√ Laboratory Reports	√ Occ./Phy. Therapy Record	
√ Doctors Orders	√ Emergency Dept. Records	

I acknowledge, and hereby consent to such, that the released information may contain alcohol, drug abuse, psychiatric, HIV testing, HIV results or AIDS information. _____ (Initial) If not applicable, check here.

I understand that:

1. I may refuse to sign this authorization and that it is strictly voluntary.
2. My treatment, payment, enrollment or eligibility for benefits may not be conditioned on signing this authorization.
3. I may revoke this authorization at any time in writing, but if I do, it will not have any affect on any actions taken prior to receiving the revocation.
4. If the requester or receiver is not a health plan or health care provider, the released information may no longer be protected by federal privacy regulations and may be redisclosed.
5. I may see and obtain a copy the information described on this form, for a reasonable copy fee, if I ask for it.
6. I get a copy of this form after I sign it.
7. I understand that a copy of this authorization may be used in place of and with the same force and effect as the original.

Section B: Signatures

I have read the above and authorize the disclosure of the protected health information as stated.

Signature of Patient/Patient's Personal Representative:	**Date:**
Print Name of Patient/Patient's Personal Representative:	**Relationship to Patient:**
Witness Name:	**Date Released:**