The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: Patrick A. Flynn

Office Address: 207 West 8th Street, Columbia, Tennessee 38401
(including county) Maury County

Office Phone: 931-388-0832 Facsimile: 931-381-9530

INTRODUCTION

The State of Tennessee Executive Order No. 41 hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application 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 Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website www.tncourts.gov). The Council requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit original (unbound) completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with electronic or scanned signature via email to debra.hayes@tncourts.gov, or via another digital storage device such as flash drive or CD.

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Attorney, Shareholder with Fleming, Flynn & Murphy, P.C.
207 W. 8th St.
Columbia, Tn. 38401

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

Licensed 1981; BPR# 009449

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

Tennessee BPR # 009449; Licensed in 1981, 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).

I have not.

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).

Since graduating from law school, I have been employed only in the practice of law.

Upon graduation from Vanderbilt School of Law, I was hired by the late Judge Hewitt P. Tomlin, Tennessee Court of Appeals (Western Section) as his clerk. I worked with Judge Tomlin from 1981 until 1982.

Upon leaving the employ of Judge Tomlin, I went to work for Judge Tomlin's former law firm, now known as Waldrop & Hall, P.A., 106 S. Liberty Street, Jackson, Tennessee from 1982-1985.

In 1985, I left Waldrop & Hall and became an associate with the current firm of Fleming, Flynn & Murphy, P.C., 207 West 8th Street, Columbia, Tennessee 38401. I continue to this date as an owner and shareholder of the firm.

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.

N/A

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.

Presently I am engaged in a general practice that includes insurance defense (85%), domestic relations (5%), plaintiff's personal injury (5%) and other matters (5%).

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

I am licensed in the State of Tennessee, admitted before the Tennessee Supreme Court, as well as the United States District Court (Middle and Western Section of Tennessee) and the United States Court of Appeals, Sixth Circuit.

I have appeared in courts throughout West Tennessee and Middle Tennessee over the last 33 years. I have argued appeals before the Tennessee Supreme Court, the Tennessee Courts of Appeal (Civil and Criminal) and the Sixth Circuit Court of Appeals.

Early in my career I handled criminal cases, divorces, title examinations, property disputes and

general civil litigation and other general practice areas, as directed by my supervising attorneys. My last appointed criminal defense case went to jury on a disturbing case of child sexual and physical abuse. At about that same time, the 22nd Judicial District Public Defender's Office became well entrenched, and I have not engaged in a criminal practice since then. We have two attorneys in our office that have an active criminal practice, and I refer any criminal work to the two of them.

As my expertise and reputation allowed, I was able to focus my practice on civil work and predominately defense work. Currently, I represent Tennessee Farmers Mutual Insurance company along with The Tennessee Municipal League Pool and some remaining State Farm files. In addition to that work I represent divorce clients, I do some probate work, I handle some personal injury work on behalf of plaintiffs when a conflict does not arise, and a variety of other types of assistance I provide when former clients call requesting assistance.

I attach in response to this question as well as question #9, a list of reported decisions in which I have been involved as examples of the types of cases I have handled over the years.

(See Attachment #1)

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

I have tried a number of jury trials throughout my career, both civil and criminal, and I have taken matters before the appellate courts as necessary. I attach to this response (Attachment #1) a list of reported cases in Tennessee and the Sixth Circuit that offer a representation of the types of cases I have handled over the years.

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 completed general civil mediation training in 2006 (Chattanooga) and was a Rule 31 listed mediator for approximately 18 months. I did not market my services effectively, and therefore did not maintain my Rule 31 listing. I have for many years participated in mediations as counsel, but have only acted as mediator in informal situations on a pro bono basis.

I was once designated to sit as General Sessions Judge in place of Judge Jimmy Matthews, but that was too long ago for me to remember the types of cases that day.

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 none outside of my role as an attorney.

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

I believe I have listed all of my legal experience in response to prior questions.

13. List all prior occasions on which you have submitted an application for judgeship to the Governor's Council for Judicial Appointments or any predecessor 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.

September 24, 2014. Circuit Court Judge for the 22d Judicial District when Judge Holloway was appointed to the Court of Criminal Appeals.

EDUCATION

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

M.T.S.U. B.S. Criminal Justice Administration (magna cum laude) 1978

Vanderbilt University School of Law, J.D. 1981

PERSONAL INFORMATION

15. State your age and date of birth.

I am 61. Date of birth is May 22, 1953.

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

With the exception of my time in the military, I have lived in Tennessee for 51 years.

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

7 1/2 years

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

Lawrence County. I also own property in the City of Columbia, and I am registered to vote in Columbia city elections.

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

I served in the United States Army from 1972-1975. I left service with an Honorable Discharge and the rank of E-5. I received the National Service Defense Ribbon, and held a Top Secret security clearance with the U.S. Army and NATO.

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

No.

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

No.

22. Please state and provide relevant details regarding any formal complaints filed against you with any supervisory authority including, but not limited to, a court, a board of professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you.

I was sued by James Omer & Associates in the Circuit Court of Marshall County, Tennessee. James Omer & Assoc. v. Patrick A. Flynn, Dkt # 16144, dismissed on Summary Judgment,

2/24/2006. Plaintiff attorneys alleged that it was my responsibility to inform them that they could stack insurance coverages of the permissive driver and vehicle coverage. Omer & Associates were sued for malpractice for obtaining only one-half of the available policy limits, and in turn, sued me to recover for their losses.

In 2014, I was notified by the Board of Professional Responsibility that I had not paid my annual fee. That was resolved that same day electronically.

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.

Margaret E. Flynn v. Patrick A. Flynn, Dkt. # 9781, Bedford County Chancery, divorce granted 4/6/1977

Patrick A. Flynn v. Janet T. Flynn, Dkt.# 97-010, Maury County Chancery, divorce granted 1/10/1997

Janet T. Flynn v. Patrick A. Flynn, Dkt.# 03-095, Maury County Chancery, divorce granted 10/4/2005

John Gibson, et. al. v. Patrick Flynn, Successor Trustee, Dkt.# 86-062, Maury County Chancery; a deed description case involving the erroneous placement of a decimal point in the calls of the deed

James Omer & Associates v. Patrick Flynn, Dkt.# 16144, Marshall County Circuit Court, dismissed on Summary Judgment, 2/24/2006

In re: Donald Lee Schofield v. Fleming, Flynn & Murphy, P.C., et. al., Case No. 3:10-bk-05743, Chapter 11, U.S. Bankruptcy Court, Middle District of Tennessee, Malpractice claim against one of the firm's associate attorneys

This list is prepared to the best of my memory, and a review of Lexis for cases listed in my name.

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

Columbia Kiwanis Club (past board member)

Maury County Habitat for Humanity, Former Board Member (past President)

Tennessee Bar Foundation, Fellow

Tennessee Board of Responsibility Hearing Panel member, 2000-2003, 2003-2006, 2013-2016

American Bar Association

Tennessee Bar Association

Maury County Bar Association (past President)

First Presbyterian Church, Columbia, Tennessee

Elks Club, Lodge 2206 Lawrenceburg, Tn.

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

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

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

I have not.

ACHIEVEMENTS

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

American Bar Association 2014

Tennessee Bar Association 1981- present

Maury County Bar Association 1985-present (past President)

Fellow, Tennessee Bar Foundation 2013 - present

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

I was given an award by the Maury County Bar Association for coordinating the mock trial competition in Maury County from 1987 -1996.

I consider being a Fellow of the Tennessee Bar Foundation as recognition of my expertise and reputation in the legal community.

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

None.

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.

None.

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 submitted a qualifying petition to run for the Maury County School Board approximately 15 years ago. I decided not to campaign, and I lost the election by 13 votes.

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 that reflect your personal work. Indicate the degree to which each example

reflects your own personal effort.

Attached hereto as Attachment (2) are the following:

Memorandum of Facts and Law in Support of Motion for Summary Judgment filed by Defendant Jerry Simmons; U.S. District Court for the Middle District of Tennessee; Case No. 1:12CV0087, and

Stanley Scott's Memorandum of Facts and Law in Support of Motion for Summary Judgment; Circuit Court of Maury County, Tennessee; Dkt# 12350

Both of these documents represent my work to the extent of at least 90%, although my associate did assist with the research and work on the draft versions.

ESSAYS/PERSONAL STATEMENTS

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

I consider being a Judge to be an accomplishment and an achievement with regard to the career in law that I have chosen. I have significant experience in the courtroom and with a number of judges over the last 33 years of practicing law. I know myself well, and I am confident that I can bring to the bench a history of solving issues and considering all points of view in a fair and non-biased manner. At my age, I feel that being a judge would allow me to continue in my legal career for a longer period of time, and allow me to use 33 years of legal experience and 61 years of life experience to benefit the profession. My experiences with other judges confirms for me that I am capable of the job and that I can offer quality experience and reasoning to the position.

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

I do not believe that pro bono service is strictly limited to the practice of law, but rather applies to the practice of life. As an attorney I gave ten years to coordinating the mock trial series in this region, I served on the Board for Keep Maury Beautiful and offered legal advice as appropriate, I served on the Maury County Habitat for Humanity Board of Directors for several years, and my legal advice was solicited on occasion for that endeavor. I frequently assist individuals that come to the office with advice and direction as to where they can actually find assistance for their problems with it does not require legal advice. I often discount my services to assist individuals that just cannot afford the full charge. I spent many years as a youth baseball and soccer coach as well as referee for youth soccer, and my wife and I are anonymous sponsors of the second grade classes at a local elementary school to assist financially when the students cannot afford field trip costs, school supplies, clothing, etc. I have been a member of the Columbia Kiwanis Club and participated in numerous benefits for the community during my tenure with the Club, and I recently joined the Elks Club in Lawrenceburg to participate in their

community programs.

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)***

This position is for both a Circuit Court Judge and a Chancellor (as applicable in the 22nd District). All of the current judges have offices in Columbia and all live in Columbia. I live in Lawrenceburg and have for the last seven and a half years. It is my intention to remain in Lawrenceburg and have my office there to afford greater accessibility to the citizens and attorneys of the three southernmost counties, Lawrence, Giles and Wayne. I have maintained my office in Columbia for over 30 years, and that gives me a connection with regard to attorneys as well as the members of the community in Maury County. My belief is that maintaining an office in Lawrenceburg will be of considerable service and benefit to the District.

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)***

As I have stated above, I have been involved in the community (Maury County) for nearly 30 years. I moved to Lawrenceburg in 2007 as a result of marriage and the fact that my wife had two girls that we needed to get through high school. I stayed in Columbia for two years after our marriage when my ex-wife was diagnosed with and succumbed to cancer, in order to care for my youngest son that needed to finish high school in Columbia. As a result of having children, I have been involved in youth sports with my two boys. I coached youth baseball and soccer with them for approximately 10 years. I was a referee for several years in youth soccer as well as TSSAA soccer. I have been a member and past Board member of the Columbia Kiwanis Club for 28 years, and I have served on the Keep Maury Beautiful Board as well as the Maury County Habitat for Humanity Board. I am a member of First Presbyterian Church in Columbia, and will continue membership there. My wife and I sponsor a local elementary school's second grade classes anonymously by offering financial assistance to the kids that need help with field trip costs, clothing costs, shoes, school supplies and the sort. This is something that we have only recently undertaken, meaning that we are also learning the ropes as to what will be expected of us. If appointed to this position, my day-to-day life will take place in Lawrenceburg to a great extent. I have worked, hands on, on a number of Habitat houses, and expect to continue that if I am in Lawrenceburg. The Habitat coordinator in Lawrenceburg was our next door neighbor, and I have discussed this with him on several occasions.

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

I grew up as one of three siblings with a stay at home mother and a career Air Force Warrant Officer. We did not have money to burn, but I learned from my parents the importance of wise spending and behavior. My dad died 3 years ago, and the lessons I learned during the all-day

visitation for him both stuck with me and reinforced in me the lessons that he had tried to teach me throughout his life. The stories that were told about my dad gave me a new perspective on him and my mother, and have forced me to look at myself with a new eye and to attempt to model myself after my dad. I have always been him, but his death placed on me a mantel that I do not take lightly.

Being the child of a career Air Force member also exposed me to desegregation much earlier than most people in the South. My dad was stationed in Okinawa when I was 6, and we lived on the island with him for 2 ½ years. During that time on a foreign land we lived off base, but spent much time on base. I was introduced to people of color and ethnicity early on, and I was taught by my parents that there was to be no distinction.

My parents did not go beyond high school in education, but my sister has obtained two Master's degrees, my brother has a Ph.D. in clinical psychology and after 30 years of that decided to attend law school, graduating when he was 60 years old. I have had to apply myself my entire life to keep up with my siblings.

I spent three years in the U.S. Army growing up rather rapidly. I was the typical goof off teenager when I graduated from high school, but the Army changed all of that. At the age of 19, I was promoted to "Acting Sergeant" in order that I could act as the NCOIC of my section, classified documents management. I was given a Top Secret clearance not only for U.S. documents but also for NATO documents. Responsibility appealed to me. I left the Army with the G.I. Bill and graduated from college in just over 2 ½ years, because I had a goal in life, and I had a confidence in myself that did not exist at the time of high school graduation.

I have been fortunate in my life to have family that loved and cared for me, but I have had an interesting 33 years in the practice of law. College and law school do not prepare you for the individuals that come to you with barely any education, little or no money, but have been caught up in the judicial system. It takes time applying yourself to those situations to understand real life and the hardships that many in the community face. As an insurance defense attorney for most of my career, I have not been able to pick and choose either the clients or the situations. As a consequence, I have become accustomed to accepting the people and the situations presented to me and making every effort to understand those people and their problems. I cannot think of any better preparation for being a judge.

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)***

Certainly I would uphold the law. I truly believe that most attorneys have faced any number of experiences where they have believed that their client was justified according to the facts and life in general, but we have all had to explain to these same clients that we cannot help, because the law has been written differently.

While in law school, I clerked for a criminal law attorney, and I had difficulty with representing some of the people that came to him, when it was obvious that they were guilty. When I expressed that to the attorney he simply explained to me, "the Constitution entitles everyone to

competent and zealous representation; it is not our duty to find the clients guilty or not-guilty, it's our job to make sure the State of Tennessee does its job of proving beyond a reasonable doubt that they are guilty." My first employment with a law firm presented me with a new mentor/attorney that explained to me, with regard to insurance defense files; "they come in brown envelopes; we can't change the people or the facts, but we have a duty to apply all that we know to bring justice to the case." Those words from wise attorneys still ring with me many years later.

As an advocate, I think it is difficult to recall specific instances of when you upheld the law over your personal feelings. As an advocate you are supposed to apply the law in each experience, but you are also required to zealously advocate for your client. Years of being in front of judges arguing Motions, trials, etc., have taught me that the law when properly applied can be painful to your cause, but a good attorney has already advised his client of that possibility.

I am opposed to the judiciary legislating from the bench. While I admit that societal and technological changes require the law to adapt, I firmly believe that is the role of the legislative branch rather than the judicial branch. As such, I intend to apply the law to the facts as presented, but I recognize that a part of selecting a judge is to understand that his or her life experiences will influence those decisions. The law is written, and it is incumbent on the bench and bar to follow the law, but it is also important to understand that those interpreting the law bring their experiences into that discussion.

REFERENCES

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

A. Judge Robert L. Holloway, Jr., Tennessee Court of Criminal Appeals
B. Judge James D. Todd, U.S. District Court Judge, Western District of Tennessee, Phone (731) 421-9222, U.S. District Court Bldg., 417 U.S. Courthouse, 111 S. Highland Avenue, Jackson, TN 38301
C. Matthew M. Scoggins, Jr., CEO Tennessee Farmers Mutual Insurance Company, Phone (931) 388-7872 (office)
D. LTG William N. Phillips, U.S.A. (Ret.)
E. Waymon L. Hickman, Senior Chairman, First Farmers and Merchants Bank, Phone (931) 388-3145 (office)

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] 22nd Judicial District of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended questionnaire with the Administrative Office of the Courts for distribution to the Council 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 Council may publicize the names of persons who apply for nomination and the names of those persons the Council nominates to the Governor for the judicial vacancy in question.

Dated: February 24, 2015.

Signature

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

THE GOVERNOR'S COUNCIL FOR JUDICIAL APPOINTMENTS
ADMINISTRATIVE OFFICE OF THE COURTS

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

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

WAIVER OF CONFIDENTIALITY

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

Patrick A. Flynn
Type or Print Name

Signature

February 24, 2015
Date

009449
BPR #

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

ATTACHMENT 1

LIST OF CASES

DONALD E. MABON v. STATE OF TENNESSEE, 1985 Tenn. Crim. App. Lexis 2633, April 3, 1985

STATE OF TENN. V. ECKFORD, 1985 Tenn. Crim. App., Lexis 2627, April 3, 1985

RAYMOND V. DERRYBERRY and wife, MARGARET S. DERRYBERRY, Plaintiffs-Appellants, v. STEVE HILL, MIKE HILL, L. D. HILL, Individually and L. D. HILL D/B/A L. D. HILL AND SONS REALTY, LARRY HUBBELL and LARRY HUBBELL D/B/A LARRY HUBBELL REALTY AND AUCTION SALES, Defendants-Appellees; 745 S.W.2d 287; 1987 Tenn. App. LEXIS 3037; Court of Appeals of Tennessee, Middle Section at Nashville; November 4, 1987, Filed; No. 87-172-II

JOHN SHIRLEY GIBSON, THOMAS P. GIBSON, and VERNON L. INMAN, Plaintiffs-Appellants v. PATRICK A. FLYNN, Successor Trustee; GRACE H. EVANS, HOUSTON EVANS, and ALICE EVANS DOWNIE, Defendants-Appellees; 1988 Tenn. App. LEXIS 713; Court of Appeals of Tennessee, Middle Section; November 10, 1988, Filed; No number in original

NANCIE E. HOLLAND, LISA DIANE HOLLAND, and MATTHEW LEDON HOLLAND, by next friend, NANCIE E. HOLLAND, Plaintiffs-Appellees, v. KENTUCKY CENTRAL LIFE INSURANCE COMPANY, WAKEFIELD & MARTIN INSURANCE AGENCY, and GLENDA MARTIN, Defendants-Appellants; 1989 Tenn. App. LEXIS 790; 1989 WL 143999; Court of Appeals of Tennessee, Middle Section, at Nashville; December 1, 1989, Filed; No. 89-253-II

FLOSSIE D. SCOTT, Plaintiff-Appellee, VS. CITY OF MT. PLEASANT, TENNESSEE, Defendant/Appellant.; 1991 Tenn. App. LEXIS 933; 1991 WL 254565; Court of Appeals of Tennessee, Middle Section, at Nashville; December 4, 1991, Filed; APPEAL NO. 01-A-01-9106-CV-00227

VICKEY CLYMORE WATSON, Plaintiff/Appellee, VS. WILLIAM LEROY WATSON, JR., Defendant/Appellant; 1992 Tenn. App. LEXIS 345; 1992 WL 74565; Court of Appeals of Tennessee, Western Section, at Nashville; April 15, 1992, Filed; MAURY CHANCERY NO. 01A01-9110-CH-00388

WALTER E. GRAY, Appellee, v. HOLLOWAY CONSTRUCTION COMPANY and

ROYAL INSURANCE COMPANY, Appellants; 834 S.W.2d 277; 1992 Tenn. LEXIS 363; Supreme Court of Tennessee, at Nashville; May 26, 1992, Filed; No. 01-S-01-9104-CV-00026

KENTUCKY CENTRAL LIFE INSURANCE COMPANY v. VONDA L. JONES and NANCY GAY JONES, beneficiaries of JAMES A. JONES, deceased-799 F. Supp. 53; 1992 U.S. Dist. LEXIS 14192; United States District Court for the Middle District of Tennessee, Columbia Division August 19, 1992, Decided; August 20, 1992, Entered, No. 1-90-0025

BETTY JO ROGERS, Plaintiff/Appellant, v. LOUIS A. DAY, SR., d/b/a PIGGLY WIGGLEY # 31, Defendants/ Appellees; 1993 Tenn. App. LEXIS 772; 1993 WL 526270; Court of Appeals of Tennessee, Middle Section, at Nashville; December 17, 1993, Filed; Appeal No. 01-A-01-9306-CV-00268

ERNIE ROLES and BRENDA ROLES, Plaintiffs/ Appellants, v. THE CITY OF FAYETTEVILLE, ELGIN BROOKS, in his official capacity as Mayor; CITY OF FAYETTEVILLE FIRE DEPARTMENT; ROBERT STROPE, in his official capacity as Fire Chief; CITY OF FAYETTEVILLE POLICE DEPARTMENT, LINCOLN COUNTY; JIMMY PENDERGRASS, in his official capacity as County Executive, Defendants/Appellees; 1994 Tenn. App. LEXIS 338; 1994 WL 279757; Court of Appeals of Tennessee, Middle Section, at Nashville; June 24, 1994, Filed; Appeal No. 01-A-01-9401-CV-00030

JOE H. PARKS, Plaintiff/Appellee, v. GEORGE ESLINGER, and wife VIRGINIA ESLINGER, Defendants /Appellants; 1994 Tenn. App. LEXIS 497; 1994 WL 470428; Court of Appeals of Tennessee, Middle Section, at Nashville; August 31, 1994, Filed; No. 01A01-9401-CH-00022

KATHY L. RUSSELL and WILLIAM A. RUSSELL, Plaintiffs/Appellees, v. THE CITY OF LAWRENCEBURG, Defendant/Appellant; 1995 Tenn. App. LEXIS 703; 1995 WL 638555; Court of Appeals of Tennessee, Middle Section, at Nashville; November 1, 1995, FILED; Appeal No. 01-A-01-9505-CV-00200

STATE OF TENNESSEE, APPELLEE, v. PHILLIP RAY GRIFFIS and MELISSA FAITH ROGERS, APPELLANTS; 964 S.W.2d 577; 1997 Tenn. Crim. App. LEXIS 427; Court of Criminal Appeals of Tennessee, at Nashville, April 30, 1997, FILED, No. 01-C-01-9506-CC-00201

MARION SHOFNER, Individually and as personal representative of the estate of Danny Shofner, deceased, PLAINTIFF/APPELLANT, v. RED FOOD STORES (TENNESSEE), INC., CORKER PROPERTIES III LTD. and CORKER DEVELOPMENT CORPORATION, DEFENDANTS/APPELLEES; 970 S.W.2d 468; 1997 Tenn. App. LEXIS 754; Court of Appeals of Tennessee, Middle Section, at Nashville; October 31, 1997, Filed; Appeal No. 01-A-

01-9609-CV-00437

SHERRY T. KING, Plaintiff-Appellant, v. JAMES BOYD, in his official capacity as Police Chief of Columbia, TN; DOUGLAS RUNIONS, individually and in his official capacity as a Police Officer for Columbia, TN; KORY COOPER, individually and in his official capacity as a Police Officer for Columbia, TN, Defendants-Appellees, 1999 U.S. App. LEXIS 29626, United States Court of Appeals for the Sixth Circuit, November 4, 1999, Filed, No. 98-6668

ROBIN A. HOWELL v. CITY OF COLUMBIA, 2002 Tenn. App. LEXIS 743; 2002 WL 31322529, Court of Appeals of Tennessee, at Nashville; December 11, 2001, Assigned on Briefs; October 16, 2002, Filed; No. M2001-00620-COA-R3-CV

VERNON D. FRIERSON v. TOMMY GOETZ -227 F. Supp. 2d 889; 2002 U.S. Dist. LEXIS 19415; United States District Court for the Middle District of Tennessee, Columbia Division October 10, 2002, Decided; October 11, 2002, Entered; No. 1-01-0119

JOE H. PARKS v. GEORGE ESLINGER, ET AL.; 2003 Tenn. App. LEXIS 94; 2003 WL 237597; Court of Appeals of Tennessee, at Nashville; February 4, 2003, Filed; No. M1999-02027-COA-R3-CV

VERNON FRIERSON, Plaintiff-Appellant, v. TOMMY GOETZ, Defendant-Appellee. 99 Fed. Appx. 649; 2004 U.S. App. LEXIS 10037 -United States Court of Appeals for the Sixth Circuit, May 19, 2004, Filed, No. 02-6522

MICHELLE SULLIVAN, by and through her Conservator, Brenda Hightower v. EDWARDS OIL COMPANY, 141 S.W.3d 544; 2004 Tenn. LEXIS 653; Supreme Court of Tennessee, At Nashville; June 3, 2004, Session ; August 19, 2004, Filed; No. M2003-01560-SC-R3-CV

JOHNNY R. BUNCH v. CITY OF RIDGETOP, TENNESSEE, et al., 2005 U.S. Dist. LEXIS 44565; 2005 WL 2333965, United States District Court for the Middle District of Tennessee, September 22, 2005, Filed, NO. 3:04-0211

DAVID D. ORRICK v. BESTWAY TRUCKING, INC., ET AL.; 184 S.W.3d 211; 2006 Tenn. LEXIS 124, Supreme Court of Tennessee, At Nashville; October 6, 2005, Session; February 21, 2006, Filed; No. M2003-02661-SC-WCM-CV

WILLIAM GUTHOERL, Plaintiff v. CITY OF MOUNT JULIET, TENNESSEE, ROBERT G. SHEARER, City Manager of Mt. Juliet, in his official and personal capacity, and KENNETH D. MARTIN, Police Chief of the City of Mt. Juliet in his official and personal capacity, Defendants, 2006 U.S. Dist. LEXIS 32630, United States District Court for the Middle District of Tennessee, Nashville Division, May 22, 2006, Filed, Case No. 3:05-0131

WILLIAM GUTHOERL, Plaintiff, v. CITY OF MOUNT JULIET, TENNESSEE, ROBERT G. SHEARER, City Manager of Mt. Juliet, in his official and personal capacity, and KENNETH D. MARTIN, Police Chief of the City of Mt. Juliet in his official and personal capacity, Defendants -2006 U.S. Dist. LEXIS 32804; United States District Court for the Middle District of Tennessee, Nashville Division, May 22, 2006, Decided; Case No. 3:05-0131

HEATH B. CLARK v. JIM F. RING, et al., 2008 U.S. Dist. LEXIS 23185; 2008 WL 723579, United States District Court for the Middle District of Tennessee, Nashville Division, March 14, 2008, Decided; March 14, 2008, Filed, Civil No. 3:06-0667

MARY SUSAN HOLLY v. JIM HOLLY, ET AL., 2008 Tenn. App. LEXIS 399; 2008 WL 2695656; Court of Appeals of Tennessee, at Nashville, April 24, 2008, Assigned on Briefs; July 9, 2008, Filed; No. M2007-02130-COA-R3-CV

JOE T. WILLIAMS, Plaintiff, v. THE CITY OF FRANKLIN, TENNESSEE, JAMES R. JOHNSON, RANDY WETMORE, SHIRLEY HARMON, and MARY DODSON RANDOLPH, Defendants; 586 F. Supp. 2d 890; 2008 U.S. Dist. LEXIS 93734; United States District Court for the Middle District of Tennessee, Nashville Division; November 18, 2008, Filed; Case No. 3:08-cv-0164

MARTHA FLETCHER and ROOSEVELT FLETCHER, her husband, Plaintiffs, VERSUS MICHAEL E. LOVETT and PROGRESSIVE CASUALTY INSURANCE COMPANY, an Ohio Corporation, Defendants.; 2009 U.S. Dist. LEXIS 31264, United States District Court for the Middle District of Tennessee, Nashville Division, April 10, 2009, Decided; April 10, 2009, Filed; CASE NO. 1-08-cv-0047

JOE T. WILLIAMS, Plaintiff, v. THE CITY OF FRANKLIN, TENNESSEE, JAMES R. JOHNSON, RANDY WETMORE, SHIRLEY HARMON, and MARY DODSON RANDOLPH, Defendants; 2009 U.S. Dist. LEXIS 33200; 2009 WL 1033179; United States District Court for the Middle District of Tennessee, Nashville Division; April 16, 2009, Decided; April 16, 2009, Filed; Case No. 3:08-cv-0164

WILLIAM H. KRAUS, Plaintiff, v. CITY OF OAK HILL,THOMAS C. ALSUP, in his individual capacity, Defendants; 2010 U.S. Dist. LEXIS 93116; 2010 WL 3521754; United States District Court for the Middle District of Tennessee, Nashville Division, September 7, 2010, Decided; September 7, 2010, Filed; Case No. 3:09-0419

JAMES V. KIMBRO, CATHEY P. KIMBRO, AND JEFFREY G. KIMBRO, Plaintiffs, v. OFFICER ERIC TOMS, et al., Defendants; 2011 U.S. Dist. LEXIS 108977; 2011 WL 4361499; United States District Court for the Middle District of Tennessee, Nashville Division, September 16, 2011, Decided; September 19, 2011, Filed; No. 3:11-cv-00049

TERRY WYNN, Plaintiff, v. CITY OF PULASKI, TENNESSEE; OFFICER CHAD ESTES, in his individual and official capacities; SERGEANT JUSTIN YOUNG, in his individual and official capacities; OFFICERS #1-#20, in their official and individual capacities, Defendants; 2013 U.S. Dist. LEXIS 17776; 90 Fed. R. Evid. Serv. (Callaghan) 840; United States District Court for the Middle District of Tennessee, Columbia Division; February 11, 2013, Filed; No. 1:11-0025

WALTER EARL DODD, JR., Plaintiff, v. JERRY SIMMONS, OFFICER CHARLES PIERCE, and CITY OF CENTERVILLE, Defendants, 2013 U.S. Dist. LEXIS 160346; 2013 WL 5946589, United States District Court for the Middle District of Tennessee, Columbia Division, November 5, 2013, Decided; November 6, 2013, Filed, No. 1:12-cv-0087

ATTACHMENT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

WALTER EARL DODD, JR.,	)	
	)	
Plaintiff,	)	**Case No.: 1:12CV0087**
	)	
v.	)	**Chief Judge William J. Haynes, Jr.**
	)	
JERRY SIMMONS,	)	**Jury Demand**
OFFICER CHARLES PIERCE, and	)	
CITY OF CENTERVILLE,	)	
	)	
Defendants.	)	

MEMORANDUM OF FACTS AND LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT FILED BY DEFENDANT JERRY SIMMONS

Comes now this Defendant, Jerry Simmons, by and through his undersigned counsel and in support of his Motion for Summary Judgment, filed simultaneously herewith, states as follows:

FACTS

On or about October 24, 2011, Jennifer Racheal Simmons, at the behest of Officer Danny Roberts, (Depo. Robert Howard Bohn, Ex. 6), sought an Order of Protection against Walter Earl Dodd, Jr. (Complaint, para. 17). The allegations contained in the Petition for Order of Protection stemmed from an altercation involving Racheal Simmons and her mother, brother, and Jonathon Merle Dodd and Walter Earl Dodd, Jr. at McDonald's on or about October 22, 2011. (Depo. Danna Nicholson, Ex. 7). In her Petition, Jennifer Racheal Simmons states that there was a weapon involved in the McDonald's altercation. (Ex. F to Sumbission). The Plaintiff testified that he went to McDonald's aware of the dispute, had his gun in his holster on his way there, and carries his gun in his holster 90% of the time. (Depo. Walter Earl Dodd, pp. 56, 60). Jennifer Racheal is Jerry Simmons' daughter. (Depo. Jerry Simmons, pp. 7-8).

Jonathon Merle Dodd is the Plaintiff's son. (Depo., Walter Earl Dodd, Jr., pp 5-6). It is undisputed that Jerry Simmons was not present at McDonald's for any of the events alleged to have occurred there on or about October 23, 2011. (Depo. Jerry Simmons, p. 63; Depo. Walter Earl Dodd, Jr., p. 64).

On November 9, 2011, a hearing on the request for Order of Protection was scheduled before the General Sessions Court. (Complaint, para. 18). While in attendance for the hearing, the Plaintiff was served an arrest warrant by Deputy Shane Davis, court security officer for the Hickman County Sheriff's Department. (Depo. Shane Davis, p. 5). The Plaintiff did not appear to be surprised by the warrant. (Depo. Shane Davis, p. 11). Deputy Davis testified that he had picked up the warrant from the clerk's office some fifteen (15) to twenty (20) minutes before serving it on the Plaintiff. (Depo. Shane Davis, p. 6). Davis did not believe Jerry Simmons was in the courtroom at all on November 9 and did not believe he had any dealing with Jerry Simmons, whatsoever, on that date. (Depo. Shane Davis, p. 8). Jerry Simmons testified hat he was not in the courtroom when the Plaintiff was arrested on November 9. (Depo. Jerry Simmons, pp. 81-82). Likewise, Charles Pierce was not in the courtroom on November 9. (Depo. Shane Davis, p. 19; Affidavit of Charles Pierce, para. 21).

The warrant served on the Plaintiff on November 9, 2011, had been obtained by Officer Charles Pierce, Investigator with the Centerville Police Department, on or about October 27, 2011. (Complaint, para. 15; Depo. Charles Pierce, Jr., p. 58-59; Submission, Ex. F). Officer Pierce had been made aware of the McDonald's incident when he was summoned to the Hickman County Jail on October 24, 2011 to handle a walk-in complaint. (Depo. Charles Pierce, Jr., p. 10). At the time, Officer Pierce and Jerry Simmons were the only two officers on duty for the Centerville Police Department. (Depo. Charles Pierce, Jr., p. 72; Affidavit of Charles Pierce,

para. 7). Initially, Jerry Simmons was called to handle the walk-in claim, (Depo. Jerry Simmons, pp. 45, 70; Affidavit of Charles Pierce, para. 10), but when Jerry Simmons arrived, he discovered the complainants were members of his family, which forced him to pass the complaint to another officer. (Depo. Charles Pierce, Jr., p. 11; Affidavit of Charles Pierce, para. 10). Jerry Simmons and Charles Pierce did not talk to one another either when Charles Pierce first arrived at the scene or when he left the jail after taking the statements from the Simmons family members. (Depo. Jerry Simmons, p. 71; Affidavit of Charles Pierce, para. 23). Officer Pierce never discussed with Jerry Simmons the statements he took from Pam Simmons and Cory Chandler or the content of those statements. (Depo. Jerry Simmons, pp. 47, 76).

Officer Pierce proceeded to talk with the Simmons' family members who claimed they had been threatened by Earl Dodd and wanted the Plaintiff charged. (Depo. Charles Pierce, Jr., pp. 13, 17). Pam Simmons advised Officer Pierce that the Plaintiff had his hand on a gun at McDonald's on October 22, 2011. (Depo. Charles Pierce, Jr., p. 22). It was the statement that Walter Earl Dodd, Jr., had his hand on his gun at McDonald's that suggested to Officer Pierce that he move forward with the charges against Mr. Dodd. (Depo. Charles Pierce, Jr., pp. 22-23). Officer Pierce took the information he gathered from the Simmons family members, as well as Officer Roberts' statement, to Assistant District Attorney Kate Yeager to discuss whether he should obtain an arrest warrant. (Depo. Charles Pierce, Jr., p. 23; Affidavit of Charles Pierce, para. 17). The responding officers on the Centerville Police Department had neither seen a gun nor initially written a report concerning the McDonald's incident. (Depo. Robert Howard Bohn, Ex. 6; Depo, Charles Pierce, p. 23). As a part of his investigation, Officer Pierce discovered that there was no report from Officer Danny Roberts, one of the responding officers. (Depo, Charles Pierce, p. 23). Pierce instructed Officer Roberts to prepare a report, which he did. (Depo.

Pierce, p. 24; Affidavit of Charles Pierce, para. 16; Ex. A to Submission). That report affirmed that police had been called to McDonald's, had seen Mr. Dodd with a holster but no handgun, but they were also advised by the Simmons family that Dodd had his hand on his gun during the altercation. (Ex. A to Submission). Because Officer Roberts' report indicated that there was no gun when the police arrived, Pierce took his complete finding to Assistant District Attorney Yeager for advice. (Depo. Charles Pierce, Jr., p. 41; Affidavit of Charles Pierce, para. 17). ADA Yeager told Pierce to proceed with presenting the warrant to the Magistrate (Depo. Charles Pierce, Jr., pp. 43, 57; Affidavit of Charles Pierce, para. 17). Officer Pierce reported his findings, including the affidavits from the Simmons family and Officer Roberts' report to the Magistrate. (Depo. Charles Pierce, Jr., p. 59-60; Affidavit of Charles Pierce, paras. 18-19). The Magistrate found probable cause and issued the warrant. (Ex. F to Submission; Affidavit of Cindy Bowman, paras. 8, 10). Once the warrant was issued, Officer Pierce's involvement ended. (Depo. Charles Pierce, Jr., p. 70; Affidavit of Charles Pierce, para. 21).

Jerry Simmons had no discussions with Charles Pierce about what happened at McDonald's. (Depo. Jerry Simmons, p. 96; Affidavit of Charles Pierce, para. 23).

Although it was Jerry Simmons who called Officer Pierce to address the initial walk-in complaint, there was no "meeting" between the two officers on October 24, 2011. (Depo. Charles Pierce, Jr., p. 73). Officer Pierce acknowledged that he and Jerry Simmons were friends and had worked together on the police force for years (Depo. Charles Pierce, Jr., p. 30), but he did not allow his association to impact his investigation. (Depo. Charles Pierce, Jr., p. 25). Jerry Simmons was not present at any time that Officer Pierce interviewed and talked with Pam Simmons and Justin Corey Chandler or thereafter, and Officer Pierce did not discuss the

situation with Jerry Simmons before or after his interviews. (Depo. Charles Pierce, Jr., p. 26; Affidavit of Charles Pierce, para. 23).

The Plaintiff was given numerous opportunities during his deposition to offer evidence or even the identity of any person that could support the allegations in his Verified Complaint that Jerry Simmons and Charles Pierce met or acted in any way to conspire to harm the Plaintiff or violate his civil rights. Each request received essentially the same response: 'I heard it from somebody, but I cannot recall names, or I heard it on Facebook.' (Depo. Walter Earl Dodd, Jr., pp. 21, 23, 28, 29, 30, 45, 46, 48, 112-13).

The procedure for handling the service of the Plaintiff's arrest warrant was not out of the ordinary. (Depo. Danna Nicholson, p. 21). It is not uncommon for a courtroom deputy to serve an arrest warrant on an individual he or she knows to be coming before the court. (Depo. Danna Nicholson, pp. 33-34; Depo. Shane Davis, p. 15). It is further not uncommon for a warrant to remain un-served for a period of 11 days. (Depo. Shane Davis, p. 16).

SUMMARY JUDGMENT STANDARD

Judge Aleta Trauger for the Middle District of Tennessee has recently set forth the applicable standard for Summary Judgment cases, as follows:

> Rule 56 requires the court to grant a motion for summary judgment if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a) (2013). At the summary judgment stage, the moving party bears the initial burden of identifying those parts of the record that demonstrate the absence of any genuine issue of material fact. Moldowan v. City of Warren, 578 F.3d 351, 374 (6th Cir.2009); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322–23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). However, if the moving party seeks summary judgment on an issue for which it does not bear the burden of proof at trial, the moving party may meet its burden by showing that there is an absence of evidence to support the non-moving party's case. Id. (*citing* Celotex, 477 U.S. at 325). "When the moving party has carried this burden, 'its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.' " Id. (*quoting* Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586, 106

S.Ct. 1348, 89 L.Ed.2d 538 (1986) .) The non-moving party also may not rest upon its mere allegations or denials of the adverse party's pleadings, but rather must set forth specific facts showing that there is a genuine issue for trial. Id.

At this stage, " 'the judge's function is not ... to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial.' " Moldowan, 578 F.3d at 374 (*quoting* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). "In evaluating the evidence, the court must draw all inferences in the light most favorable to the nonmoving party." Moldowan, 578 F.3d at 374 (*citing* Matsushita, 475 U.S. at 587). But "[t]he mere existence of a scintilla of evidence in support of the non-moving party's position will be insufficient," Moldowan, 578 F.3d at 374 (*quoting* Anderson, 477 U.S. at 252), and the non-movant's proof must be more than "merely colorable." Anderson, 477 U.S. at 249. An issue of fact is "genuine" only if the record taken as a whole could lead a rational trier of fact to find for the non-moving party. Moldowan, 578 F.3d at 374 (*citing* Matsushita, 475 U.S. at 587).

Dunn v. Auto. Fin. Corp., 3:11-CV-01079, 2013 WL 3335084 (M.D. Tenn. July 2, 2013).

LAW AND ARGUMENT

Defendant Jerry Simmons is Entitled to Qualified Immunity as to All of the Plaintiff's § 1983 Claims

As to any allegations in the Verified Complaint directed at Jerry Simmons and alleged to be in violation of 42 USC § 1983, this Defendant would assert that he is entitled to the defense of qualified immunity and states that at all times relevant to allegations contained in the Verified Complaint, he acted in a manner consistent with the law and as a reasonable police officer would act under the circumstances then and there existing. The Sixth Circuit has summarized the law of qualified immunity as follows:

In civil damages actions arising out of government officials' performance of discretionary functions, the officials are generally entitled to qualified immunity from suit 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) (citations omitted). To determine if qualified immunity attaches, we employ the sequential analysis prescribed by the Supreme Court in Saucier v. Katz, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). First we must determine whether, taken in the light most favorable to the party asserting the injury, the facts alleged are sufficient to make out a violation of the constitution. Saucier, 533 U.S. at 201,

> 121 S.Ct. 1251. "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." If, however, "a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right is clearly established." Id.

Greene v. Barber, 310 F.3d 889, 894 (6th Cir. 2002).

Defendants in their individual capacity enjoy qualified immunity from suit under § 1983 "insofar as [their] conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Pearson v. Callahan, 555 U.S. 223, 231 (2009) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). Qualified immunity is "an *immunity from suit* rather than a mere defense to liability." Mitchell v. Forsyth, 472 U.S. 511, 526 (1985), quoted by Pearson, 555 U.S. at 237. "For a right to be clearly established," the Sixth Circuit has stated,

> [t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987). "It is important to emphasize that this inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition." Brosseau v. Haugen, 543 U.S. 194, 198 (2004). "The general proposition, for example, that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established." Ashcroft v. al-Kidd, 131 S.Ct. 2074, 2084 (2011). Thus, "[t]he relevant, dispositive inquiry is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Saucier, 533 U.S. at 202.
>
> "We look first to the decisions of the Supreme Court, and then to the case law of this circuit in determining whether the right claimed was clearly established when the action complained of occurred." Gragg v. Ky. Cabinet for Workforce Dev., 289 F.3d 958, 964 (6th Cir. 2002). "[T]he case law must dictate, that is, *truly compel* (not just suggest o allow or raise a question about). The conclusion for *every* like-situated, reasonable government agent that what defendant is doing violates federal law in the circumstance." Id.

Clemente v. Vaslo, 679 F.3d 482, 490 (6th Cir. 2012) (internal citations, ellipsis, emphasis, quotation marks omitted; emphasis added). Significantly, it is not the Defendant's burden to

prove that he is entitled to qualified immunity, but rather, once the defendant has asserted this as a defense, *it is the plaintiff's burden to prove that the defendant is not.* Id. (emphasis added).

Noting a recent change in the analysis for applying qualified immunity, the court in Kinzer v. Schuckmann, 850 F. Supp. 2d 785 (S.D. Ohio 2012), stated:

> Prior to the Supreme Court's decision in Pearson, a two-tiered analysis was required [for determining the applicability of qualified immunity], beginning with the threshold question: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" Saucier v. Katz, 533 U.S. 194, 201 (2001). If the answer to that initial inquiry is negative, immunity attaches. If not, "[and] a violation could be made on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established." Id. Pearson ruled that following Saucier's "two-step protocol" is not mandatory, but remains permissible. 555 U.S. at 241. A lower court, in its discretion, now may consider the second question first if it believes such a path "will best facilitate the fair and efficient disposition" of the case before it. We still are at liberty, however, to follow the Saucier-prescribed sequence if we find it "worthwhile." Id.

Kinzer, 850 F. Supp. 2d at 790.

Jerry Simmons urges this Court to recognize that the Plaintiff has the burden to prove his case as to Jerry Simmons, individually. Defendant Simmons insists that the Plaintiff must present proof of some involvement on Simmons' part in his allegations in Plaintiff's Verified Complaint. However, to defend himself fully, Jerry Simmons presents his arguments on the Plaintiff's claim that he is somehow associated with the actions taken by Officer Pierce and others.

Even if the Plaintiff offers competent proof that Charles Pierce procured the warrant for the Plaintiff's arrest by use of what the Plaintiff alleges are the false claims in the Simmons family sworn statements and then proves that Jerry Simmons was a co-conspirator, both officers would still be entitled to qualified immunity. See, e.g., Vakilian v. Shaw, 335 F.3d 509 (6th Cir. 2003). "To overcome an officer's entitlement to qualified immunity, however, a plaintiff must

establish: (1) a substantial showing that the defendant stated a deliberate falsehood or showed reckless disregard for the truth and (2) that the allegedly false or omitted information was material to the finding of probable cause." Vakilian v. Shaw, 335 F.3d at 517 (citations omitted). In other words, a plaintiff must show that the judge would not have issued the warrant without the allegedly false material. Id. The Vakilian Court determined that, even though the plaintiff had made the required showing that the officer had recklessly disregarded the truth, other parts of the officer's testimony provided probable cause. Id. at 518. Because the officer's remaining testimony was sufficient to establish probable cause, he was entitled to qualified immunity on the Fourth Amendment claims of unlawful arrest and malicious prosecution. Id.

Plaintiff has suggested in his deposition testimony that the sworn statements of the Simmons' were concocted only after Pierce and Jerry Simmons met to discuss the McDonald's incident. The Plaintiff submits that thereby Defendants Pierce and Simmons acted to injure him. This Defendant contends that the Plaintiff has failed and cannot overcome his duty to prove deliberate falsehoods or a reckless disregard for the truth by Pierce or Simmons. Assuming, however, that the Court, in weighing the evidence in the light most favorable to the Plaintiff disagrees, the Plaintiff still cannot avoid the content of Officer Roberts' report that on the day in question with neither Charles Pierce or Jerry Simmons being present, Pam Simmons and family alleged that the Plaintiff had his hand on a gun. Furthermore, Roberts' report advises that he told Racheal Simmons to seek an Order of Protection against the Plaintiff. That information is clearly sufficient to support probable cause under Vakilian, therefore, supporting the Defendants' claim for qualified immunity.

The Plaintiff has made no showing that this Defendant deprived the Plaintiff of any right, privilege, or immunity secured by the United States Constitution or United States Statutes while this Defendant was acting under color of statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia.

The Plaintiff has alleged a claim against this Defendant pursuant to 42 USC § 1983, which statute reads:

> Every person who, **under color of any statute, ordinance, regulation, custom, or usage**, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the **deprivation of any rights, privileges, or immunities secured by the Constitution and laws**, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C.A. § 1983 (West) (Emphasis added). The statute requires a showing initially that a defendant was acting under color of law. In the instant case, no such showing has been made in the Verified Complaint as to Jerry Simmons. Additionally, the Plaintiff has been unable throughout discovery to make any showing that this Defendant took any action or inaction relative to the Plaintiff. For these reasons, Jerry Simmons should be entitled to Summary Judgment as a matter of law.

Interpreting § 1983, the United States Supreme Court has stated:

> To state a claim for relief in an action brought under § 1983, respondents must establish that they were deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed under color of state law. Like the state-action requirement of the Fourteenth Amendment, the under-color-of-state-law element of § 1983 excludes from its reach "'merely private conduct, no matter how discriminatory or wrongful.'"

Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 49-50, 119 S. Ct. 977, 985, 143 L. Ed. 2d 130 (1999) (internal citations omitted).

The Plaintiff Has Made No Showing That He Has Suffered a Constitutional Violation Relative to the Allegations in His Complaint

Plaintiff's claims under § 1983 as to Jerry Simmons are difficult to decipher from his Verified Complaint. The entirety of the Plaintiff's § 1983 claims against Jerry Simmons in his Verified Complaint are as follows:

> 38. Plaintiff Walter Earl Dodd, Jr. was indicted, arrested, and detained without probable cause that he had committed a crime in violation of his Fourth Amendment rights, and in violation of 42 U.S.C. § 1983.
>
> 39. Plaintiff Walter Earl Dodd, Jr. was harmed by the conduct of Defendants Jerry Simmons and Charles Pierce and seeks compensatory and punitive damages and such other relief as may be just and proper.

(Verified Complaint, paras. 38-39).

Initially, the Plaintiff was never indicted. There was, however, a probable cause presentment before the appropriate Magistrate that in and of itself presents a major hurdle for the Plaintiff to climb.

Fourth Amendment/False Arrest Claims

The Fourth Amendment to the United States Constitution reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, **but upon probable cause**, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

USCA CONST Amend. IV-Search and Seizure (emphasis added).

The Plaintiff's Verified Complaint cites his indictment, arrest and detention as allegedly in violation of the Fourth Amendment to the U.S. Constitution. (Complaint, para. 38). Thus this Defendant believes the line of cases dealing with false arrest claims are most appropriate to the Court's analysis of the Plaintiff's civil rights claims. Plainly, these allegations do not support a claim of liability against Jerry Simmons.

First, Jerry Simmons was not involved in the investigation that led to the Plaintiff's arrest. (Depo. Pierce, p. 26). Officer Charles Pierce was the Centerville Police Officer who investigated the McDonald's incident, and he did so wholly without involvement of Jerry Simmons. (Depo. Pierce, p. 26). Second, the process that Charles Pierce conducted included discussion with the District Attorney's office, who agreed that there was sufficient basis to present the matter to the Magistrate. (Depo, Charles Pierce, Jr., pp. 42-43, 57). Third, Officer Pierce presented his findings to the Magistrate, and she independently determined there existed sufficient probable cause to issue an arrest warrant for the Plaintiff. (Depo. Charles Pierce, Jr., p. 59, 60; Affidavit of Cindy Bowman, paras. 8, 10). In this instance, the constitutional procedures were followed, and probable cause was established wholly without the involvement of Jerry Simmons.

"A false arrest claim under [§1983] requires a plaintiff to prove that the arresting officer lacked probable cause to arrest the plaintiff." Voyticky v. Village of Timberlake, Ohio, 412 F.3d 669, 677 (6th Cir. 2005) (internal citations omitted). "An arrest pursuant to a facially valid warrant is normally a complete defense to a federal constitutional claim for false arrest or false imprisonment made pursuant to § 1983. Id. In the case at bar, the only plausible Fourth Amendment claim that the Plaintiff can make is his claim that he was wrongly indicted, arrested and detained. (See Complaint, para. 38). The fact remains, however, that the arrest and detention of the Plaintiff followed the establishment of probable cause, at more than one stage of the proceeding. (See *supra.*). Again, that probable cause was established through a proper investigation, of which Jerry Simmons played absolutely no role. (See *supra.*).

The Plaintiff will, no doubt, attempt to rest on the fact that the charges against him have been dismissed as evidence that they were impermissibly brought against him in the first place.

The Sixth Circuit Court of Appeals has noted, however, that an arrest based on probable cause does not become invalid simply because the charges are subsequently dismissed. See Stone v. City of Grand Junction, Tenn., 765 F.Supp.2d 1060, 1075 (6th Cir. 2011) (citing Manley v. Paramount's Kings Island, 299 Fed.Appx. 524, 530 (6th Cir. 2008) and Williams ex rel. Allen v. Cambridge Bd. of Educ., 370 F.3d 630, 638 (6th Cir. 2004)). Therefore, any such argument by the Plaintiff is without merit.

In order to pursue his claim in the face of the probable cause finding evidenced on the warrant's face, the Plaintiff must establish by competent proof that Charles Pierce or Jerry Simmons omitted facts from the Affidavit submitted to the Magistrate, or in some form or fashion create a substantial showing that Pierce or Simmons stated a deliberate falsehood or showed a reckless disregard for the truth in the information submitted to the Magistrate. Wesley v. Rigney, 913 F. Supp. 2d 313 (E.D. Ky. 2012). In fact, to be successful, the Plaintiff must establish that Charles Pierce or Jerry Simmons acted knowingly or intentionally in seeking to violate his constitutional rights by their submission to the Magistrate. Ahlers v. Schebil, 188 F3d 365 (6th Cir. 1999).

Even if the Plaintiff is able to somehow convince this Court that the assertions made by the Simmons' family to Charles Pierce were false with regard to Plaintiff having a gun at McDonald's, the Plaintiff still has the burden of establishing through competent proof at this stage of the proceedings that Charles Pierce somehow knew that the information was false and chose to intentionally submit that false information to the Magistrate in an effort to obtain an arrest warrant. The Plaintiff has failed to present any such evidence of proof during discovery in this cause. Instead, the Plaintiff argues that the supplemental reports submitted by Office Danny Roberts supports his argument that the Affidavits completed by the Simmons' family members

were necessarily false and thereby caused Officer Pierce's Affidavit to be lacking in probable cause. A thorough review of Officer Roberts' supplemental report clarifies that on the date and time of the incident at McDonald's, the Simmons' family clearly advised Officer Roberts that Mr. Dodd had "... his hand resting on [his] weapon during the exchange of words". The fact that a weapon was discussed with the responding officer immediately upon his arrival at McDonald's certainly renders Plaintiff's allegations that somehow Officer Pierce and Officer Simmons met two days later and concocted the basis for the arrest Affidavit to be rather weak. A further review of Officer Roberts' statement reveals that he himself suggested to Rachael Simmons that she seek an Order of Protection against Merle Dodd inasmuch as she had expressed fear for her and her baby arising from the McDonald's incident. There have been no allegations made by the Plaintiff that somehow Officer Roberts is involved in the alleged conspiracy between Pierce and Simmons.

The Sixth Circuit has held that a party challenging the veracity of an affidavit may do so only "if that party can make a 'substantial preliminary showing that a false statement knowingly and intentionally or with reckless disregard for the truth, was included by the affiant in the warrant affidavit,' and that allegedly false statement was necessary for a finding of probable cause." Mays v. City of Dayton, 134 F.3d 809, 815 (6th Cir. 1998) (*citing* Franks v. Deleware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978)).

Here, there has been no showing that any statements made by Charles Pierce or Jerry Simmons throughout the process of securing an arrest warrant for the Plaintiff were false. Further, Plaintiff must prove that the falsehood was made knowingly, intentionally, or with reckless disregard for the truth. See Id. The fact remains that the Plaintiff has offered no evidence in any form that would comply with this standard.

While the Plaintiff does not make a clear allegation in his Verified Complaint that Charles Pierce failed to share all information with the Magistrate to obtain the arrest warrant, inferences to that effect have been made through the discovery process. First, Officer Pierce has acknowledged that he included the Roberts' report in his warrant request. (Affidavit of Charles Pierce, para. 19). More importantly, a reading of the Roberts report (Ex. A to Submission), clearly reveals that the officers were advised of allegations of the Plaintiff having his hand on his gun. That was prior to any alleged conspiracy between Pierce and Simmons and prior to any known involvement of Pierce or Jerry Simmons.

Supporting affidavits "are normally drafted by nonlawyers in the midst and haste of a criminal investigation." Mays, 134 F.3d at 815 (*citing* United States v. Ventresca, 380 U.S.102, 108, 85 S.Ct. 741, 746, 13 L.Ed.2d 684 (1965)). "An affiant cannot be expected to include in an affidavit every piece of information gathered in the course of an investigation." 134 F.3d at 815 (*citing* United States v. Ventresca, 380 U.S. 102, 108, 85 S.Ct. 741, 746, 13 L.Ed.2d 684 (1965)). "Clearly an affidavit should not be judged on formalities, as long as probable cause is evident." 134 F.3d at 815.

"Except in the *very* rare case where [a party] makes a strong preliminary showing that the affiant *with an intention to mislead* excluded critical information from the affidavit, and the omission is critical to the finding of probable cause, Franks is inapplicable to the omission of disputed facts." Mays, 134 F.3d at 816 (emphasis in original). In so holding, the Mays Court distinguished this line of inquiry from the more stringent requirements set forth in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). 134 F.3d at 815. The duty set forth in Brady requires a prosecutor to disclose to the defendant exculpatory evidence, defined as material evidence that would have a bearing upon the guilt or innocence of the defendant. 134

F.3d at 815 (*citing* Brady, 373 U.S. 83,87, 83 S.Ct. 1194, 1196-1197, 10 L.Ed.2d 215 (1963) (other internal citations omitted). "By contrast, the probable cause determination in Franks, derived from the Fourth Amendment, involves no definitive adjudication of innocence or guilt and has no due process implications. Because the consequences of arrest or search are less severe and easier to remedy than the consequences of an adverse criminal verdict, a duty to disclose potentially exculpatory information appropriate in the setting of a trial to protect the due process rights of the accused is less compelling in the context of an application for a warrant." 134 F.3d at 816.

The Brady and Franks standards differ further in that the Brady obligation attaches regardless of the prosecutor's intent, see United States v. Agurs, 427 U.S. 97, 112-13, 96 S. Ct. 2392, 2401, 49 L. Ed. 2d 342 (1976), whereas a Franks violation requires a showing of intent, i.e., a "deliberate falsehood" or "reckless disregard for the truth." Mays, 134 F.3d at 815 (*citing* Franks v. Deleware, 438 U.S. at 171, 98 S.Ct. at 2684). The Mays Court further noted:

> Whereas the "overriding concern" of Brady is with the "justice of finding guilt" that is appropriate at trial, Agurs, 427 U.S. at 112, 96 S.Ct. at 2401, Franks recognizes that information an affiant reports may not ultimately be accurate, and is willing to tolerate such a result at that early stage of the process, so long as the affiant believed the accuracy of the statement at the time it was made. Franks, 438 U.S. at 165, 98 S.Ct. at 2681.
>
> These disparate standards of intent reflect differences in the consequences of error in the two contexts. They also indicate recognition that the non-lawyers who normally secure warrants in the heat of a criminal investigation should not be burdened with the same duty to assess and disclose information as a prosecutor who possesses a mature knowledge of the entire case and is not subject to the time pressures inherent in the warrant process. A statement of these differences does not condone deliberate misrepresentations in the warrant application process. Rather it points out that the obligations shouldered during the adjudication process should not be imposed by inference onto the warrant application process.

Mays, 134 F.3d at 816. The statement of Roberts that the Plaintiff suggests was somehow exculpatory and should have been included was both included and references the hand on the gun, just as did the Simmons family's sworn statements.

In presenting the results of his investigation to the Magistrate, Officer Pierce was entitled to rely on the information he had been given. "Whether [an] arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." Beck v. State of Ohio, 379 U.S. 89, 91, 85 S. Ct. 223, 225, 13 L. Ed. 2d 142 (1964). "Not surprisingly, '[a]n eyewitness identification will constitute sufficient probable cause unless, at the time of the arrest, there is an apparent reason for the officer to believe that the eyewitness was lying, did not accurately describe what he had seen, or was in some fashion mistaken regarding his recollection of the confrontation.'" United States v. Harness, 453 F.3d 752, 754 (6th Cir. 2006) (*citing* Ahlers v. Schebil, 188 F.3d 365, 370 (6th Cir. 1999) (internal quotation marks omitted); see also Thacker v. City of Columbus, 328 F.3d 244, 257 (6th Cir. 2003) (holding that a victim's statement that the defendant "had abused her alone is sufficient to establish probable cause" to arrest the defendant for domestic violence); *Klein v. Long,* 275 F.3d 544, 551 (6th Cir. 2001)). Pam Simmons and Cory Chandler were the eyewitnesses in this case. The Plaintiff has made no showing that Charles Pierce should have regarded the statements he took from witnesses as anything other than reasonably trustworthy.

In Harness, a woman told police officers that her ex-husband had sexually molested their son. Harness, 453 F.3d at 753. The officers then spoke with the son and his brother, and verified

that Mr. Harness had a previous conviction for sexual battery, although they were unable to locate his name on the sex-offender database. Id. The officers proceeded to Mr. Harness' residence, where they arrested him on the front porch. Id. at 754. The officers asked Mr. Harness if he needed back into his home for any reason prior to being taken to jail, and they followed him in to turn off the stove and gather some personal items. Id. While inside the home, the officers saw four guns, which they seized. Id. It was later determined that Mr. Harness had fully complied with the sex offender registration requirements, and the charge of attempted sexual battery was dismissed. Id. Mr. Harness then filed a Motion to Suppress the guns found in his house, and when that motion was overruled, he entered a conditional guilty plea to being a felon in possession of a firearm and was sentenced. Id. In upholding the denial of the motion to suppress, the Sixth Circuit Court of Appeals noted that probable cause for the arrest was present based upon Beck and the other cited decisions. Id. Harness further complained that the officers did not obtain "independent, trustworthy evidence" to support the allegations against him. Id. The Court noted, however, that once probable cause for an arrest is established, the officer need not investigate further. Id. (*citing* Klein v. Long, 275 F.3d 544, 551 (6th Cir. 2001); see also id. at 552).

A reading of Klein brings the Court's attention to the fact that an officer is required to consider the totality of the circumstances, including whether any exculpatory evidence exists, in making a probable cause determination. Klein v. Long, 275 F.3d at 551-52. To the extent the Plaintiff in the instant case has made allegations that Charles Pierce disregarded potentially exculpatory evidence and to the extent the actions or inactions of Charles Pierce will be imputed to Jerry Simmons, they merit addressing here. The record is clear that Charles Pierce took both the statements of Pam Simmons and Cory Chandler, which mentioned that the Plaintiff was

armed, and the report drafted by Officer Roberts at Charles Pierce's request to General Yeager and Magistrate Bowman to secure an arrest warrant. (Depo. Charles Pierce, Jr., pp. 59-60; Affidavit of Charles Pierce, paras. 17, 19). Assuming, *arguendo*, that the report of Officer Roberts amounts to exculpatory evidence, the fact remains that Charles Pierce did, in fact, consider it in his investigation. (Depo. Charles Pierce, Jr., pp. 59-60). The totality of the circumstances in this case supports Summary Judgment in favor of Jerry Simmons, because the Plaintiff has made no showing that Jerry Simmons made any false statement.

The Plaintiff Has Made No Showing Sufficient to Support His Allegation That A Conspiracy Existed Between Charles Pierce and Jerry Simmons

The Complaint suggest that Charles Pierce and Jerry Simmons acted "in concert" with one another. (Verified Complaint, para. 21). The Complaint is fatally flawed and should be dismissed in this regard. First, the Sixth Circuit has stated that "It is well-settled that conspiracy claims must be pled with some degree of specificity and that vague and conclusory allegations unsupported by material facts will not be sufficient to state such a claim under § 1983." Spadafore v. Gardner, 330 F.3d 849, 854 (6th Cir. 2003) (*citing* Gutierrez v. Lynch, *826* F.2d 1534, 1538 (6th Cir.1987). The Sixth Circuit noted that in Spadafore, the Complaint was devoid of sufficient allegations of a § 1983 conspiracy stemming from an incident where two police officers fired shots at the plaintiff outside his home. Spadafore, 330 F.3d at 854. The Spadafores vaguely alleged that the officers had intentionally filed false affidavits regarding the Spadafores. Id. The Court further noted that "the Spadafores have submitted no evidence that the defendants had a single plan when they made the allegedly false statement." Id.

These facts are similar to those presented in the case at bar. First, inasmuch as this Court may read the Plaintiff's Verified Complaint to allege a conspiracy to violate his constitutional rights, such an allegation does not comply with the pleading requirements enumerated by the

Sixth Circuit. See, e.g., Id. Second, Plaintiff Dodd has failed to come forward with any competent, admissible evidence that would support either that Jerry Simmons or Charles Pierce made any false statements or that a conspiracy between them ever existed. Jerry Simmons is entitled to Summary Judgment as a matter of law on the Plaintiff's § 1983 conspiracy claim. The Plaintiff testified that he had no more specific information than the bare allegations made in his Verified Complaint as to his conspiracy claim. (Depo. Walter Earl Dodd, Jr., p. 73).

Plaintiff Cannot Sustain a Claim Against Defendant Simmons For the State Law Claim for the Tort of False Light

The Plaintiff next seeks to recover from this Defendant under a theory of the tort of false light. The false light alleged by the Plaintiff is not a constitutional claim, but rather it is one based solely on state law. While this Defendant maintains that he is entitled to Summary Judgment as a Matter of law as to the Plaintiff's § 1983 claims and this Court should, thereafter, decline to exercise supplemental jurisdiction over purely state law claims, he will nonetheless address the tort of false light.

In 2001, the Tennessee Supreme Court first recognized the tort of false light as a distinct, actionable tort. See West v. Media Gen. Convergence, Inc., 53 S.W.3d 640 (Tenn. 2001). The West case involved a suit by a private citizen who claimed her privacy had been invaded by a television report implying that she had engaged in an inappropriate relationship with a General Sessions judge. Id. at 641. The Court noted that "while the law of defamation and false light conceivably overlap in some ways, we conclude that the differences between the two warrant their separate recognition." Id. at 645. In so doing, the Tennessee Supreme Court adopted the majority view, which it noted is set forth in Section 652E of the *Restatement (Second) of Torts* (1977), which defines the tort of false light:

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
>
> > (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
> >
> > (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

West v. Media Gen. Convergence, Inc., 53 S.W.3d at 643-44. The Tennessee Court departed, however, from the Restatement on the applicable standard for false light claims involving private plaintiffs and matters of private concern. See Id. at 647. Rather than the actual malice standard set forth by the United States Supreme Court in Time, Inc. v. Hill, 385 U.S. 374 (1967), and its progeny, the Tennessee Supreme Court adopted the same simple negligence standard it had previously adopted for defamation claims asserted by private individuals about matters of private concern. West v. Media Gen. Convergence, Inc., 53 S.W.3d at 647-48, *citing* Memphis Publishing v. Nichols, 569 S.W.2d 412 (Tenn. 1978).

The Court went on to cite Memphis Publishing for the proposition that "consistent with defamation, we emphasize that plaintiffs seeking to recover on false light claims must specifically plead and prove damages allegedly suffered from the invasion of their privacy." West v. Media Gen. Convergence, Inc., 53 S.W.3d at 648, *citing* Memphis Publishing v. Nichols, 569 S.W.2d 412 (Tenn. 1978). The Memphis Publishing case was brought by a husband and wife, both private citizens, claiming that a news outlet had defamed them and invaded their privacy by publishing a story that implied that the wife was having an adulterous affair. Memphis Publishing, 569 S.W.2d at 414. The Court laid out that the ordinary negligence standard would apply to private party defamation claims. Id. By that standard, the Plaintiff cannot sustain a claim for the tort of false light against Jerry Simmons.

In the case at bar, the Plaintiff has been unable to make any showing that this Defendant took any action or inaction with regard to the Plaintiff, whatsoever. The Plaintiff was given opportunity after opportunity to make a showing that Defendant Simmons had placed the Plaintiff in a false light, and time after time he was unable to do so. (Depo. Walter Earl Dodd, Jr., pp. 47,79-80, 89, 99, 186). The following exchange is quite illustrative:

> Q. All right. Now, I'll recognize and point out for the record that you and your attorney objected to Interrogatory No. 5 but also that you went forward and provided an answer. And in that answer, you say that Jerry Simmons gave false statements so that others under his supervision would publish false statements in writing concerning you. Do you have any information or do you have any proof that shows that Jerry Simmons gave any false statements about you?
>
> A. No. Just what you hear.
>
> Q. Is there anything that you can tell me in regard to that response that Jerry Simmons gave false oral statements as far as any source of information that you haven't earlier given me today in this deposition?
>
> A. No, sir.

(Depo. Walter Earl Dodd, Jr., p. 98, l. 24 – p. 99, l. 15).

It is undisputed that Officer Pierce, and not Jerry Simmons, was the officer who obtained the warrant on the Plaintiff. (Depo. Charles Pierce, Jr., pp. 59-60). The Plaintiff makes the unsupported allegation that Officer Pierce did so acting on instruction from Jerry Simmons. Notwithstanding the fact that Officer Pierce flatly denies any such conversation ever took place, at most the Plaintiff is alleging that Jerry Simmons actions amounted to an oral publication to Charles Pierce of information that placed him in a false light. Even Plaintiff concedes in his Interrogatory Responses that the false statements he alleges Jerry Simmons made relative to this action were made orally. (Plaintiff' Walter Earl Dodd, Jr.s' Responses to Defendant Jerry Simmons's First Set of Interrogatories and Request for Production of Documents, No. 5). As

such, the Plaintiff's claims for false light against Jerry Simmons are subject to the same six-month statute of limitations that would apply to slander actions. See West, 53 S.W.3d at 648; Tenn. Code Ann. § 28-2-103. The West Court addressed what the appropriate statute of limitations for a false light claim would be, stating:

> Finally, we recognize that application of different statutes of limitation for false light and defamation cases could undermine the effectiveness of limitations on defamation claims. Therefore, we hold that false light claims are subject to the statutes of limitation that apply to libel and slander, as stated in *Tenn.Code Ann.* §§ 28–3–103 and 28–3–104(a)(1), depending on the form of the publicity, whether in spoken or fixed form.

West, 53 S.W.3d at 648. Slander actions are subject to a six month statute of limitations, see Tenn. Code Ann. § 28-2-103, and libel actions are subject to a one year statute of limitations, see Tenn. Code Ann. § 28-3-104(a)(1).

The alleged interaction between Jerry Simmons and Officer Pierce on which the Plaintiff is basing his false light claims against Jerry Simmons took place on or about October 24, 2011. (Plaintiff' Walter Earl Dodd, Jr.s' Responses to Defendant Jerry Simmons's First Set of Interrogatories and Request for Production of Documents, No. 5). The Plaintiff's Verified Complaint was filed with this Court on or about August 7, 2012, well outside the six-month statute of limitations. (See Verified Complaint). For this reason the Defendant Jerry Simmons is entitled to Summary Judgment as a matter of law as to all the Plaintiff's claims for damages under a theory of false light.

Also of note is that, as with defamation cases, there must be proof of actual damages to sustain a claim under a theory of false light. West, 53 S.W.3d at 648, see also Myers v. Pickering Firm, Inc., 959 S.W.2d 152 (Tenn. Ct. App. 1997). The Plaintiff has presented no such proof in the case at bar. For these reasons, this Defendant is entitled to Summary Judgment as a matter of law as to the Plaintiff's claims under the state law tort of false light.

Plaintiff Cannot Sustain a Claim Against Defendant Jerry Simmons For Either the State Law Claims of Tort of Negligent Infliction of Emotional Distress or the Tort of Intentional Distress

Like defamation, intentional infliction of emotional distress, by itself, cannot amount to a constitutional violation. Voyticky, 412 F.3d at 678. Thus the Plaintiff's claims for emotional distress are entirely state law claims. Again, while this Defendant maintains that he is entitled to Summary Judgment as a Matter of law as to the Plaintiff's § 1983 claims and this Court should, thereafter, decline to exercise supplemental jurisdiction over purely state law claims, he will nonetheless address the tort of intentional or negligent infliction of emotional distress.

"The law of negligent infliction of emotional distress is one of the most disparate and confusing areas of tort law." Camper v. Minor, 915 S.W.2d 437 (Tenn. 1996). Under Tennessee law, a plaintiff may recover for the negligent infliction of emotional distress only in limited circumstances. The Camper Court was the first to apply a general negligence approach to infliction of emotional distress cases. Camper, 915 S.W.2d at 446. In so doing, the Tennessee Supreme Court stated:

> In other words, the plaintiff must present material evidence as to each of the five elements of general negligence -- duty, breach of duty, injury or loss, causation in fact, and proximate, or legal, cause, Kilpatrick v. Bryant, 868 S.W.2d 594, 598 (Tenn. 1993); Bradshaw v. Daniel, 854 S.W.2d 865, 869 (Tenn. 1993) -- in order to avoid summary judgment. Furthermore, we agree that in order to guard against trivial or fraudulent actions, the law ought to provide a recovery only for "serious" or "severe" emotional injury. Burgess v. Superior Court (Gupta), 831 P.2d 1197, 1200 (Cal. 1992); St. Elizabeth Hosp. v. Garrard, 730 S.W.2d 649, 653 (Tx. 1987). A "serious" or "severe" emotional injury occurs "where a reasonable person, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." Rodrigues v. State, 472 P.2d 509, 520 (Haw, 1970); Paugh v. Hanks, 451 N.E.2d 759, 765 (Ohio, 1983); PLaisance v. Texaco, Inc., 937 F.2d 1004, 1010 (5th Cir. 1991); *Prosser and Keeton on the Law of Torts,* § 54, at 364-65, n. 60.

Id. The Court continued: **"Finally, we conclude that the claimed injury or impairment must be supported by expert medical or scientific proof."** Id. (emphasis added).

In the case at bar, the Plaintiff has produced no medical proof. Jerry Simmons took no action with regard to the arrest or detention of the Plaintiff. It then follows that if Jerry Simmons took no action with regard to the Plaintiff, his actions cannot be the cause of any emotional distress the Plaintiff may have suffered.

CONCLULSION

For the foregoing reasons, Jerry Simmons is entitled to Summary Judgment on the basis of undisputed facts and as a Matter of Law as to all the Plaintiff's claims against him.

Respectfully submitted,

FLEMING, FLYNN & MURPHY, P. C.

By: /S/Patrick A. Flynn
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CERTIFICATE OF SERVICE

I, Patrick A. Flynn hereby certify that on the 17th day of July, 2013, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to the following:

John A. Beam, III
Andrew Cameron
Attorneys for Plaintiff
P.O. Box 280240
Nashville, TN 37228

Robert Burns
Attorney for Officer Charles Pierce
300 James Robertson Parkway
Nashville, TN 37201

Kristin Berexa
Mark McGrady
Attorneys for City of Centerville
211 Seventh Avenue, N., STE 500
Nashville, TN 37219.

Any other parties will be served by regular U.S. Mail. Parties may access this filing through the Court's electronic filing system.

/s/Patrick A. Flynn
Patrick A. Flynn

IN THE CIRCUIT COURT FOR MAURY COUNTY, TENNESSEE
AT COLUMBIA

JONATHON DELK,	)	
	)	
Plaintiff,	)	
	)	
VERSUS	)	**NO. 12350**
	)	**JURY DEMAND**
BRIAN MORROW and STANLEY SCOTT,	)	
	)	
Defendants.	)	

STANLEY SCOTT'S MEMORANDUM OF FACTS AND LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Comes now the Defendant, Stanley Scott, by and through his undersigned counsel and submits this Memorandum of Facts and Law in Support of his Motion for Summary Judgment. In addition, the Defendant has filed a Statement of Undisputed Material Facts; the deposition testimony of Jonathon Delk, Affidavits of Stanley Scott and Dalton Mounger and refers the Court to the previously filed deposition testimony of Stanley Scott and Brian Morrow. This Defendant has laid out certain defenses in his previously-filed Motion to Dismiss alleging the Plaintiff has failed to state a claim upon which relief can be granted under the laws of the State of Tennessee as to this Defendant. This Defendant incorporates the arguments in the Motion to Dismiss and based upon the undisputed material facts set forth herein with this Motion that he is entitled to Summary Judgment as a matter of law on all the Plaintiff's claims.

FACTS

Defendant Stanley Scott owns certain real property, one tract consisting of 160 acres located at 2241 Mooresville Pike, Culleoka, Tennessee. (Stanley Scott Depo. p. 5; Affidavit of

Stanley Scott, ¶3). Said real property was owned by Scott's parents, Ann C. Scott and Ewell T. Scott prior to their deaths in October 2005 and March 2006. (Affidavit of Stanley Scott, ¶4). The Will of Ann C. Scott (copy attached) entered into Maury County Probate (Will Book 44, Pages 387-393, Probate #P-006-06) established a trust involving the real property in question. Stanely Scott and his brother, Steven Scott were Co-Trustees. The Ann Scott Trust retained a 50% interest in the real property but provides: Article IV, paragraph 6 "Termination of Trust. Upon my spouse's death, the Trustee shall terminate the trust and distribute the trust principal... On March 4, 2007, Ewell Scott's probate estate had not yet been closed. (Affidavit of Stanley Scott, ¶5). Attorney Dalton Mounger represented the executors of Ewell Scott's estate through probate. (Affidavit of Stanley Scott, ¶5; Affidavit of Dalton Mounger, ¶3). Ewell Scott's Last Will and Testament as well as the Ann Scott Trust left certain real property to Stanley Scott, including the 160-acre tract where Scott now lives and on which the Plaintiff, Jonathon Delk, was injured March 4, 2007. (Affidavit of Stanley Scott, ¶6). Knowing that the 160 acre tract was bequeathed to him in his father's will and that he would have need for a barn to house his farming equipment, Stanley Scott contacted Attorney Dalton Mounger to discuss whether he could proceed with building the barn prior to his father's probate estate being closed. (Affidavit of Stanley Scott, ¶8). Attorney Dalton Mounger advised Stanley Scott that he could proceed. As set forth in Mr. Mounger's Affidavit, he felt that Tennessee Code Annotated § 31-2-103 and the provisions of the Will of Ewell Scott and the Trust of Ann Scott meant the 160 acre tract had already passed to Stanley Scott by operation of law. (Affidavit of Stanley Scott, ¶8; Affidavit of Dalton Mounger, ¶ 4 & ¶5).

Stanley Scott is employed as a lineman for Duck River Electric and maintains a beef cattle operation on his farm. (Scott Depo. p. 6). Mr. Scott contacted Defendant Brian Morrow about building a barn on the property. (Scott Depo. p. 12; Affidavit of Stanley Scott, ¶9). There

were no drawings for the building, and nothing was in writing between the parties. (Scott Depo. p. 10; Morrow Depo. p. 20; Affidavit of Stanley Scott, ¶13). Morrow quoted Scott a price for the barn, and Morrow was to be paid a flat fee for the work. (Scott Depo pp. 10, 18; Morrow Depo. p. 21). Morrow was hired to erect the building. (Scott Depo. pp. 28, 30; Affidavit of Stanley Scott, ¶11, Morrow Depo. p. 21). Scott did not supervise the work being performed, (Scott Depo. 31; Affidavit of Stanley Scott, ¶22), and he did not instruct any of Morrow's workers on how to conduct the work. (Morrow Depo. 57; Affidavit of Stanley Scott, ¶19, Delk Depo. p. 52). Morrow was the supervisor. (Jonathon Delk Depo. p. 57, Morrow Depo. p. 31).

Morrow maintained control over the workers and was in charge of the jobsite. (Affidavit of Stanley Scott, ¶12)(Morrow Depo. p. 31). Morrow chose and hired the workers who assisted him in building the barn. (Affidavit of Stanley Scott, ¶20)(Morrow Depo. p.44). Scott did not hire any of Morrow's assistants, and Scott played no role in their hiring. (Affidavit of Stanley Scott, ¶20). Morrow could have instructed Delk to leave and not come back at any time had he chosen to do so. (Morrow Depo. p. 28). Each of the workers on the jobsite provided his own tools. (Morrow Depo. p. 28). The Plaintiff, who was injured at the jobsite, has no recollection of Scott directing him to do anything in connection with erecting the building. (Jonathon Delk Depo. p. 52). The Plaintiff acknowledges that he was an employee of Brian Morrow. (Complaint, ¶4).

Stanley Scott had the barn constructed for his own use on the farm and was not compensated for his services from any source. (Affidavit of Stanley Scott, ¶9 &¶21) Morrow advised Scott that he could not do certain tasks on the barn and told Scott he would have to hire other contractors to complete those tasks (Affidavit of Stanley Scott,¶11) (Morrow Depo. p. 20-21). Scott did coordinate the contractors to pour the concrete floor, run the electrical and plumbing and to finish out the addition to the barn. (Affidavit of Stanley Scott, ¶16, Scott Depo.

pp.13-15). Scott also offered his tractor and auger to Morrow and his crew to dig the holes for the poles (Affidavit of Stanley Scott, ¶16) (Scott Depo. p.18-19; Delk Depo p.54-55).

This Defendant contends that Jonathon Delk, approximately 32 years old at the time the barn was being constructed was an independent contractor working with Morrow to erect the building. (Jonathon Delk Depo. p. 6; Morrow Depo. pp. 43-44). He was hired by Morrow. (Morrow Depo. p.44). Morrow was the supervisor. (Delk Depo. p. 57; Affidavit of Stanley Scott). Delk had done roofing work for Morrow and others many times before, dating back to 1994 or 1995. (Delk Depo. pp. 13-14). He had done at least three other metal roofs and a number of shingle roofs for Morrow. (Delk Depo. p. 19). In deposition testimony, Delk was able to describe in great detail how to erect a metal roof. (Delk Depo. pp. 19-26). In fact, Delk was skilled in putting on metal roofs. (Delk Depo. pp. 52, 53). Jonathon Delk had the skill level to go out onto the job and do whatever needed to be done. (Morrow Depo. p. 58). Morrow had no hesitation sending Delk up onto the roof to work. (Morrow Depo. p. 59).

Scott had never been in the construction business (Scott Affidavit ¶ 2) and had never employed Delk in any capacity. (Scott Affidavit ¶ 26). Inasmuch as Scott did not pay Delk for his labor and Delk was on the property for the purpose of constructing the barn, he would be considered at very best a "casual employee" pursuant to the workers' compensation statutes and excluded from compensation benefits.

Morrow and his workers, including Delk, were responsible for constructing the barn to include placing the roof on the structure. Stanley Scott was never on the roof and was not involved in the roof construction. (Scott Affidavit, ¶ 17). Instead, Morrow and Delk testified that those individuals placing the purlins on the structure were responsible for inspecting the purlins. They knew they would ultimately be placing their weight on them. (Morrow Depo. p. 54; Delk Depo. p. 27).

Notwithstanding Delk's skill level, he fell from the roof of the jobsite on March 4, 2007 and was injured. (See Complaint). At the time of Delk's fall, he was standing or kneeling near the middle of a ten foot, two by six inch purlin that was 17 feet above a concrete floor. (Delk Depo. pp. 20, 33, 61). The purlins were two by six inch boards placed between the roof rafters to hold the roof weight. (Delk Depo. p.20). At the time of Delk's fall, there was no reason for him to be where he was. (Morrow Depo. p. 64). When Delk fell, he had purposefully stepped onto the purlin to move about the roof. (Delk Depo. p. 28). He should not have stepped out that far onto the purlin. He should have been closer to the truss for support. (Morrow Depo. 32).

In their previous roof work, Delk and Morrow had used safety ropes on at least one other job. (Delk Depo. p. 43). Delk did not feel the need for a safety device on this particular jobsite, and Delk never asked Morrow for a safety device. (Delk Depo. p. 43). It never occurred to Delk to place tin or plywood across the purlins to disburse his weight. (Delk Depo. p. 35).

Throughout the building project, including the day that Delk was injured, Scott was in and out of the jobsite. (Scott Depo. pp. 23, 31). The day Delk was injured, Scott was on the property but not actually present at the jobsite. (Scott Depo. p. 8; Morrow Depo. pp. 80-81).

Prior to the filing of this action, Plaintiff filed a request for assistance with the Tennessee Department of Labor and Workforce Development dated January 14, 2008. In that request, Plaintiff claimed that Mr. Morrow and Mr. Scott were his employers. (See attached Request). The Department specialist determined that Mr. Delk was not employed by either Mr. Morrow or Mr. Scott at the time of injury but was an independent contractor. (Certified copy attached).

ISSUES

1. Whether, under the facts and law applicable to this case, Plaintiff can maintain a cause of action for workers' compensation benefits against Stanley Scott as the owner of the real property.

   A. Whether Stanley Scott as owner of the property or as an uncompensated agent of the owner is exempt from workers' compensation responsibilities.

   B. Whether the undisputed facts of this case establish that the Plaintiff was a casual employee, thus not entitled to Workers' Compensation benefits.

2. Whether, under The Tennessee Occupational Safety and Health Act, Tennessee Code Annotated § 50-3-101 *et seq.*, the Plaintiff can maintain a private right of action against the landowner.

3. Whether the Plaintiff can urge upon the Court a claim of *negligence per se* for a violation of TOSHA regulations when no private cause of action exists under the Tennessee Occupational Safety and Health Act, Tennessee Code Annotated § 50-3-101.

4. Whether Stanley Scott owed any duty to protect Jonathon Delk while on the premises.

5. Whether the Plaintiff, Jonathon Delk, can maintain an action against Stanley Scott as a result of Plaintiff's own negligence.

SUMMARY JUDGMENT STANDARD

Rule 56.03 of the Tennessee Rules of Civil Procedure provides that summary judgment shall be granted "if there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." The issues that lie at the heart of evaluating a motion

for summary judgment are: (1) whether a factual dispute exists; (2) whether the disputed fact is material to the outcome of the case; and (3) whether the disputed fact creates a genuine issue for trial. Byrd v. Hall, 847 S.W.2d 208, 214 (Tenn. 1993). The procedure is designed to secure an expedited and inexpensive determination of actions that are factually unsupported rather than being viewed as a disfavored procedural shortcut. Bellamy v. Federal Express Corp., 749 S.W.2d 31, 33 (Tenn. 1988). More recently the Tennessee Supreme Court has stated that summary judgment is appropriate when a necessary element of a claim has been affirmatively negated or when the moving party can show that the nonmoving party cannot prove an essential element of the claim at trial. Hannan v. Alltel Publ'g Co., 270 S.W.3d 1, 9 (Tenn. 2008); Byrd, 847 S.W. 2d at 211. When only one conclusion can be drawn from the undisputed facts, the movant is entitled to summary judgment as a matter of law. McCall v. Wilder, 913 S.W.2d 150, 153 (Tenn. 1995).

> To make a properly supported Motion for Summary Judgment and to shift the burden of production, a moving party may: 1) affirmatively negate an essential element of the non-moving party's claim; or 2) show that the nonmoving party's claim; or 2) show that the non-moving party cannot prove an essential element of the claim at trial. Martin v. Norfolk Southern Ry. Co., 271 S.W.3d 76, 83 (Tenn. 2008); Hannan, 270 S.W.3d at 5. Whichever approach the moving party takes, both require more than assertions of the non-moving party's lack of evidence. Martin, 271 S.W.3d at 83-84. In addition, the moving party must present evidence that more than "raises doubts" about the ability of the non-moving party to prove its claim at trial. Id. at 84. The moving party must produce evidence or refer to previously submitted evidence. Id; accord Hannon, 270 S.W.3d at 5. Generally, "[c]onclusory assertions in support of a defendant's Motion of Summary Judgment are not sufficient to shift the burden to the plaintiff to come forward with evidence to create a material dispute of fact." Barna v. Seiler, No. M2008-01573-COA-R3-CV, 2011 WL 1486613, at *5(Tenn. Ct. App. April 19, 2011)(perm. App. Denied July 13, 2011) (citing Giggers v. Memphis Housing Auth., 277 S.W. 3d 359, 363 (Tenn. 2009); Blanchard v. Kellum, 975 S.W.2d 522, 525 (Tenn.1998)). Thus, to negate an essential element of a claim, a moving party must refer to evidence that tends to disprove an essential element of the claim made by the non-moving party. Martin, 271 S.W.3d at 84.

Simply Stated:

In motions for summary judgment in any civil action in Tennessee, the moving party who does not bear the burden of proof at trial shall prevail on its motion for summary judgment if it:

(1) Submits affirmative evidence that negates an essential element of the nonmoving party's claim; or

(2) Demonstrates to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim.

Tennessee Code Annotated § 20-16-101

LAW AND ARGUMENT

The Plaintiff seeks recovery against this Defendant for workers' compensation benefits, pursuant to Tennessee Code Annotated, specifically §50-6-113(f)(3), and on claims of *negligence per se*, citing the Tennessee Occupational Safety and Health Act (OSHA), Tennessee Code Annotated §50-3-101 *et seq*.

JONATHON DELK'S CLAIM FOR WORKERS' COMPENSATION BENEFITS AGAINST THIS DEFENDANT CANNOT SUCCEED UNDER THE LAW AND FACTS.

A. Stanley Scott, either as owner of the property or as an uncompensated agent of the owner is exempt under Tennessee Code Annotated § 50-6-113(f)(1)(3).

Notwithstanding the Plaintiff's allegations, workers' compensation benefits are unavailable to the Plaintiff through Stanley Scott. First, the Complaint alleges in paragraph four that the Plaintiff was the employee of Brian Morrow. (Complaint, ¶4). That fact is undisputed for the purposes of this Motion. Additionally, the Workers' Compensation Specialist for the Tennessee Department of Labor previously determined that the Plaintiff was not an employee of

this Defendant or Co-Defendant, Brian Morrow, but rather the Plaintiff was an independent contractor. (Certified copy attached). The Plaintiff has alleged that Brian Morrow was his employer. He cannot now allege that he was an employee of Stanley Scott in order to impose liability for workers' compensation benefits. It is understood that the Plaintiff hopes to attach Workers' Compensation liability to Stanley Scott pursuant to Tennessee Code Annotated § 50-6-113(f)(1)-(3), as alleged in the Complaint. However, the statute, as it read on the date of the Plaintiff's injury, contained an ownership exemption that would not impose workers' compensation liability on Scott on his own property, for his own use, and for which he received no compensation. The statute read, in pertinent part:

> (f)(1) Except as provided in subdivision (f)(4), any person engaged in the construction industry, including principal contractors, intermediate contractors, or subcontractors, shall be required to carry workers' compensation insurance. This requirement shall apply whether or not the person employs fewer than five (5) employees. Sole proprietors and partners shall not be required to carry workers' compensation insurance on themselves. In addition, **the provisions of this subsection (f) shall not apply to any person building a dwelling or other structure, or performing maintenance, repairs, or making additions to structures, on the person's own property for the person's own use and for which the person receives no compensation.**
>
> (2) Nothing within this subsection (f) shall be construed to impact any person whose employment at the time of injury is casual as provided in § 50-6-106.
>
> (3) For purposes of this subsection (f), "a person engaged in the construction industry" means any person or entity who undertakes to, attempts to, or submits a price or bid or offers to construct, supervise, superintend, oversee, schedule, direct, or in any manner assume charge of the construction, alteration, repair, improvement, movement, demolition, putting up, tearing down, or furnishing labor to install material or equipment for any building, highway, road, railroad, sewer, grading, excavation, pipeline, public utility structure, project development, housing, housing development, improvement, or any other construction undertaking.
>
> Tenn. Code Ann. § 50-6-113(f) (1)-(3) (2007) (emphasis added) (In 2010, the General Assembly amended the statute to remove subsection (f) from Tenn. Code Ann. § 50-6-113; however, it is the previous version that is applicable to the Plaintiff's Complaint).

The Complaint alleges that Morrow was Delk's employer. The Complaint attempts to place liability on Stanley Scott pursuant to Tennessee Code Annotated § 50-6-113 (f) without recognizing the exemption carved out in subsection (f)(1). In that attempt the Plaintiff alleges that the property on which he was working was not then owned by Scott, but rather by the estate of Ewell Scott.

Stanley Scott submits that Tennessee Code Annotated § 31-2-103 deems title to the real property to have vested immediately upon the death of Ewell Scott and the Trust of Ann Scott was to terminate on the death of Ewell Scott. Accordingly, title to the real property was transferred to Stanley Scott on March 14, 2006 when Ewell Scott died.

> The real property of an intestate decedent shall vest immediately upon death of the decedent in the heirs as provided in § 31-2-104. The real property of a testate decedent vests immediately upon death in the beneficiaries named in the will, unless the will contains a specific provision directing the real property to be administered as part of the estate subject to the control of the personal representative. Upon qualifying, the personal representative shall be vested with the personal property of the decedent for the purpose of first paying administration expenses, taxes, and funeral expenses and then for the payment of all other debts or obligations of the decedent as provided in § 30-2-317. If the decedent's personal property is insufficient for the discharge or payment of a decedent's obligations, the personal representative may utilize the decedent's, the personal representative may utilize the decedent's real property in accordance with Title 30, Chapter 2, Part 4. After payment of debts and charges against the estate, the personal representative shall distribute the personal property of an intestate decedent to the decedent's heirs as prescribed in § 31-2-104, and the property of a testate decedent to the distributees as prescribed in decedent's will.
>
> Tennessee Code Annotated § 31-2-103

Regardless of whether this Court determines Scott to have owned the real property on which the Plaintiff was injured or concludes that the Estate of Ewell T. Scott and a Trust created by the Last Will and Testament of Ann C. Scott, owned it, the statutory ownership exemption afforded by the 2007 statute and case law interpreting it plainly applies to shield Stanley Scott

from liability for the Plaintiff's claims. For this reason, he is entitled to Summary Judgment as a matter of law relative to the claim for Workers' Compensation.

The Tennessee Supreme Court extended the statutory exemption highlighted in the 2007 statute cited above and made that exemption applicable to this cause by holding that an uncompensated agent of the landowner is not liable under workers' compensation statutes for injuries sustained by an employee of a contractor hired to perform construction on the landowner's property. Bostic v. Dalton, 158 S.W.3d 347 (Tenn. 2005) (copy attached). The Court must keep in mind that Stanley Scott was a Co-Executor of the estate of Ewell Scott as well as Co-Trustee of the Ann Scott trust. By virtue of those positions he would be able to act as owner of the property to appoint himself as an uncompensated agent.

The facts and law in Bostic are directly applicable to this case. See Bostic, 158 S.W.3d 347. In Bostic, daughter owned property and her father agreed to oversee the construction of a house on the property. Bostic, 158 S.W.3d 347. The father did not receive any compensation, but hired a contractor to frame the house. Id. The contractor then hired the plaintiff, who was injured when he fell from an unstable eight-foot wall onto a pile of 2x4s. Id. The trial court, applying the statutory exemption, found that the plaintiff was not entitled to recovery from either the landowning daughter or the supervising father and denied workers' compensation benefits. Id. Applying the statute, the Special Workers' Compensation Appeals Panel affirmed the lower court, as did the full Tennessee Supreme Court. Id. In so holding, the Court noted that the father performed many functions, including: obtaining and signing the permits; communicating with subcontractors; supervising plumbing activities; collecting information on each laborer's hours; and giving general directions on construction progress, sufficient that Tenn. Code Ann. § 50-6-113(f) would normally impose workers' compensation coverage. Id. However, The Court found

that those activities were insufficient to overcome the protection afforded him by Tenn. Code Ann. § 50-6-113(f) as the uncompensated agent of the landowner.

Stanley Scott submits that he is entitled to the statutory exemption as set forth in Bostic. Scott either owned the property or was acting as an uncompensated agent for the Estate of Ewell Scott. The Plaintiff suggests that Scott's involvement by virtue of hiring sub-contractors to run the plumbing and electrical, as well as pouring the concrete, somehow establishes him as the general contractor and, thus, liable under workers' compensation. As in Bostic, Scott hired a contractor, Brian Morrow, to perform the actual construction of the barn. While Scott also contracted out specific work on the project (i.e. concrete, plumbing, electrical) he did not undertake all of the tasks considered by the Tennessee Supreme Court in Bostic, the combination of which were insufficient to negate the exemption in Tennessee Code Annotated § 50-6-113(f)(1).

JONATHON DELK WAS, AT MOST A CASUAL EMPLOYEE, THEREBY REMOVING HIM FROM COVERAGE UNDER THE WORKERS' COMPENSATION STATUTES

The proof is that Jonathon Delk was employed by Brian Morrow for the purpose of constructing a barn on Stanley Scott's farm. There is no proof that Delk was on the property for any other purpose nor is there proof that he had ever been employed by Stanley Scott for any reason. As such, the Defendant contends that Delk was a casual employee for purposes of the workers' compensation statutes. The Defendant submits that the Court is left to determine as a matter of law whether or not Delk was a casual employee. Creek V. McLennan, 752 S.W.2d 511, 512-513(Tenn. 1988).

Tennessee Code Annotated §50-6-106 states:

> "This Chapter shall not apply to:
>
> . . .
>
> (2) Any person whose employment at the time of injury is casual, that is, one who is not employed in the usual course of trade, business, profession or occupation of the employer."

See also:

> "Generally, employee employed for direct and exclusive purpose of repair and construction work, where employer is not contractor or builder, is casual employee and excluded from coverage by workman's compensation." Travelers Insurance Company v. Dozier, 410 S.W.2d 904 (Tenn. 1966) See also Powell v. Marter, 2011 WL2348320 (Tenn. Special Worker's Compensation Panel) (Copy Attached)

There is no dispute that Delk was on site for the sole purpose of building the barn. Even if the court somehow concludes that he was employed by Scott he would still be excluded from compensation as a casual employee. Scott was never in the construction business and was only having a barn constructed to allow him to better operate his farming enterprise.

UNDER THE TENNESSEE OCCUPATIONAL SAFETY AND HEALTH ACT, TENNESSEE CODE ANNOTATED § 50-3-101, ET SEQ., THE PLAINTIFF CANNOT MAINTAIN A PRIVATE RIGHT OF ACTION AGAINST THE LANDOWNER.

The Plaintiff's Complaint next attempts to impose liability on this Defendant under a theory of *negligence per se* for his alleged non-adherence to the Tennessee Occupational Safety and Health Act, Tennessee Code Annotated § 50-3-101 *et seq.* The plaintiff alleges that Mr. Scott is an employer under Tennessee Code Annotated § 50-3-103 and, by implication, an employer under 29 USC 652 (5). Tennessee Code Annotated § 50-3-103(8) defines "employer"

as a person engaged in a business who has one or more employees. 29 USC 652 (5) defines "employer" as a person engaged in a business affecting commerce who has employees. Mr. Scott was not engaged in a "business" as it relates to Mr. Delk, and did not have employees on the barn project. He hired a contractor, Brian Morrow, who then hired workers to perform the work.

The United States Court of Appeals for the Sixth Circuit, applying Tennessee law and considering a claim brought by the deceased's representative for violation of OSHA regulations, has held that "**absent evidence of actual control, the owner of the property or the general contractor owes no duty of care to the employees of an independent contractor, aside from the duty to warn of latent dangers.**" Ellis v. Chase Communications, Inc., 63 F.3d 473 (6th Cir. 1995) (emphasis added). (Copy attached). See also, Johnson v. Empe, Inc. and Dempsey v. Int. Assoc. of Bridge Structural and Ornamental Workers, 1998 WL 254017 (TN App 1998)(Copy attached).

> "Furthermore, the policy of placing the risk of incurring physical harm during a repair job on a contractor holding himself or herself out as an expert in that work, as opposed to the lay premises owner, is not unjustified, at least as long as the owner does not willfully or intentionally harm the contractor. To hold otherwise would be to require the untutored owner to inspect the roof for defects before calling a roofing contractor; it would also require the owner to inspect the electrical box before employing an electrician. We do not believe sound public policy requires such an anomalous result"
>
> Blair v. Campbell 924 S.W.2d 75 (TN 1996)

In Ellis, the owner of a television tower hired a company to clean their tower. That company hired the decedent, who fell to his death while cleaning the tower. Ellis v. Chase Communications, Inc., 63 F.3d 473. The lower court declined to impose a duty of care on the landowner, holding that OSHA "does not enlarge the responsibility of the defendants for the

death of [Ellis]...and the plaintiffs do not have a cause of action under OSHA as **the act does not create a private right of action.**" Ellis, 63 F.3d at 475 (emphasis added). The Sixth Circuit agreed with the lower court and declined to impose liability on the owner, stating that Chase owed no duty to Ellis, because Ellis was not an employee of Chase. Id. The Court found that the owner/independent contractor relationship did not create a duty of care on the owner aside from the duty to warn of latent dangers. Id.

In the case at bar, the purlin which broke allowing the plaintiff to fall was not a latent danger of which the Defendant Scott had any knowledge. It was instead a danger created by the Plaintiff or those involved in the construction of the barn roof structure. Scott paid for the wood for the project, but he had no further involvement, and never was on the roof. Morrow and his crew inspected the purlins when placed.

Because of that, it is only reasonable to conclude that the structural integrity of the purlin was more obvious to Delk than to Scott. The Ellis court cites Inman v. Aluminum Co. of America, 697 S.W.2d 350 (Tenn. Ct. App. 1985), which plainly states that a landowner's duty to provide a safe workforce extends only to warn of latent defects. There is no duty to warn against obvious, apparent, or known dangers. See Inman, 697 S.W.2d 350; See also Ellis, 63 F.3d at 475. The fact that the dangers which befell Delk were obvious, apparent, known, and of his own making, entitle Scott to Summary Judgment as a matter of law.

Defendant Scott entered into a verbal agreement with Brian Morrow to build a pole barn on Scott's property. (Scott Depo. p. 10; Morrow Depo. p. 20). Morrow was hired to construct the barn (Scott Depo. pp. 28, 30; Affidavit of Stanley Scott), and he then hired Jonathan Delk to assist. (Morrow Depo pg. 25). Morrow was the supervisor. (Delk Depo. p. 57). A part of the construction of a pole barn necessarily includes putting a roof on the structure. Morrow and his crew, to include Delk, were in the process of placing the sheet metal on the roof when Delk fell,

breaking through one of the purlins strung between the trusses. (Delk Depo. pp. 20, 33, 61). There will be no proof presented that Scott was involved in placing the trusses or purlins on the structure. In fact, Scott denies any such involvement. (Scott Affidavit ¶ 17). Instead, Morrow, Delk and the other individuals assisting in the construction created the roof framework from which Delk fell. Delk, himself, was able to describe in great detail how to erect a metal roof. (Delk Depo. pp. 19-26). In fact, Delk was skilled in putting on metal roofs. (Delk Depo. pp. 52, 53). Jonathon Delk had the skill level to go out onto the job and do whatever needed to be done. (Morrow Depo. p. 58). Morrow had no hesitation sending Delk up onto a roof to work. (Morrow Depo. p. 59). As Morrow stated in his deposition when discussing placing the purlins ". . . it's a general rule of thumb the man handing them up will look at it and hand it up, and then once it gets up, you need to visually inspect it and see . . . if there are any obvious defects with it, then it needs to be thrown aside. " (Morrow Depo. p. 52) Mr. Delk responded in his deposition (pg 27):

Q. Do you as a part of putting the purlins on generally inspect it for stability or strength?

A. Sure, you look at it.

. . .

Q. Is it important to your safety up there on the roof to make sure that those purlins are substantial enough to do the job?

A. Yes sir.

It necessarily follows that Delk had a greater knowledge of the structure and any defects that may have existed within the structure than did Mr. Scott. The additional fact that Delk was employed for the specific purpose of placing the roof on the barn puts him on notice of the

danger inherent in the process of working on the roof. See Ownby v Tennessee Farmers Cooperative Corp. U.S.A. 2009 WL 1392574 (copy attached). In Ownby, the Court stated:

> There is an important exception to the general rule of a property owner's duty to an independent contractor, as set out by this court in Shell Oil Co v. Blanks: An exception to the general rule is recognized where the risks arise from, or are intimately connected with, defects of the premises or of machinery or appliances located thereon which the contractor has undertaken to repair. As to contracts for such repair work, it is reasoned that the contract is sufficient in itself to impart notice of a defect, the extent of which the repairman must discover for himself.
>
> Ownby, 2009 WL1392574 at 3.

Delk was involved in creating the condition that led to his fall. Delk was on notice of the danger he placed himself in by climbing onto the roof both by virtue of the existence of the contract to construct the barn and more importantly his own efforts to construct the roof. As such, he was or should have been aware of the potential risks of being on the purlin that broke as well as the potential risk of being toward the center of the purlin that broke. More importantly, Delk's knowledge of the dangers would have far exceeded any knowledge held by Mr. Scott, who had not been in any way involved in the actual construction of the roof structure.

THE PLAINTIFF CANNOT URGE UPON THE COURT A CLAIM OF *NEGLIGENCE PER SE* FOR A VIOLATION OF TOSHA REQULATIONS WHEN NO PRIVATE CAUSE OF ACTION EXISTS UNDER THE TENNESSEE OCCUPATIONAL SAFETY AND HEALTH ACT, TENNESSEE CODE ANNOTATED § 50-3-101

The Ellis court focused on the issue of *negligence per se*, similar to what Plaintiff has alleged in the instant case. See Ellis, 63 F.3d at 475. The Court noted that violating a specific duty imposed by OSHA equates to *negligence per se* only if the injured party is a member of the class of persons the OSHA regulation intended to protect. Id. Under the facts of Ellis, the

alleged OSHA violation did not amount to *negligence per se*, because Ellis was not an employee of Chase Communications. Id. Similarly, in the instant case, Delk was not an employee of Scott.

OSHA defines "employer" as a "person engaged in a business affecting commerce who has an employee" 29 USC § 652(5). Under the facts in this case Scott was not an employer of Delk. He did not hire him, pay him or direct his efforts. The Plaintiff argues that Scott affected commerce by having the barn constructed. That is too narrow of an interpretation. Clearly the definition, as interpreted by case law, contemplates "the employer doing business" to be in the business at which the alleged employee is working.

The United States Occupational Safety and Health Review Commission has held that common law interpretations of "employer" and "employee" are applicable to OSHA regulations.

> "In determining whether [an individual] was the employer, the Review Commission in *Don Davis*, 19 BNA OSHC 1477, 1479 (No. 96-1378,2001), citing *Nationwide Mutual Ins., Co. v. Darden*, 503 U.S. 326 (1992), articulated the following factors for determining whether an employment relationship exists:"
>
> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. (emphasis added)
>
> Secretary of Labor v. Saul Ramirez, Docket #11-0412 (Copy attached) (Sept. 2011)

The Commission further held in Ramirez that "The key factor in finding an employment relationship is the right to control the work". Citing Abbonizio Contractors, Inc., 16 BNA OSHC 2125, 2126 (No. 91-2929, 1994)

There is no proof that Scott controlled Delk in any aspect of the construction process. Delk provided his own tools. Scott had nothing to do with hiring Delk, controlling his hours, the rate of pay, method of payment or otherwise, and the work in constructing the barn was certainly not a regular part of Scott's business.

Moreover, even if the Court finds that the violation makes out evidence of negligence or *negligence per se*, the law would require a theory of liability independent of OSHA, because *negligence per se* does not establish liability. Ellis, 63 F.3d 473. The OSHA regulations can never provide a private basis for liability. Ellis, 63 F.3d 473. The act itself explicitly states that it is not intended to affect the civil standard of liability. 29 USC 653(b)(4). Minichello v. U.S. Industries, Inc., 756 F2d 26 (6th Cir. 1985). "There is no legislative history or case law to support the proposition that OSHA created a private civil remedy and the clear language of §653(b)(4) of the Act specifically evidences a congressional intention to the contrary." Russell vs. Bartley, 494 F2d 334, (6th Cir. 1974). Tennessee law does not require Scott to protect Delk from an obvious danger, and an OSHA violation does not, in and of itself, create a basis for liability. Violation of a Tennessee statute can constitute *negligence per se*, but the violation is only evidence of conduct falling below the standard of care. Violation of a statute does not establish the element of proximate cause. Biscan v Brown, 160 S.W. 3d 642 (Tenn. 2005).

DID STANLEY SCOTT OWE TO JONATHON DELK ANY DUTY WITH REGARD TO THE PREMISES OR TOOLS

Initially, Stanley Scott contends that the Plaintiff has failed to properly plead any negligence claims, but should the court disagree, Mr. Scott addresses that issue. The Complaint alleges that Scott and Morrow had a duty to provide Plaintiff with a safe place to work and safe tools and equipment to perform the work.

Stanley Scott submits that Plaintiff was injured as a result of a structure created by Delk and his fellow workers. Plaintiff has made no allegations that Scott provided him a less than safe place to work. There is no proof that Scott's property was unsafe and if the claim is that the building was unsafe, that falls on Morrow and Delk since they constructed the building. Instead, Plaintiff is attempting to tie the OSHA regulations to a negligence claim. As set forth in this Memorandum, the Plaintiff cannot apply OSHA regulations to this Defendant. Plaintiff, apparently recognizing that, asserts that the Defendants owed a duty to provide a safe property on which to work along with safe tools and equipment. That argument fails if Delk is an independent contractor. Blair v. Campbell, 975 S.S.2d 75 (Tenn.1996). Consider also, Brian Morrow's testimony that each man provided his own tools (Morrow Depo. pg. 28). Plaintiff is attempting to place the blame for his fall on Scott for not providing a fall arrest device. Stanley Scott submits that he has countered those claims throughout this Memorandum but reiterates that: Delk testified he had used a rope on prior projects but did not on this job and does not know why; Delk was not employed by Scott, and Scott had no duty to provide equipment or tools to Delk. (Blair v. Campbell, 975 S.W.2d 75 (Tenn. 1996); Delk ascended onto the roof voluntarily and aware of the risks.

Tennessee common law requires a Plaintiff claiming damages in tort to prove a duty owed, a breach of that duty and a causal connection between the breach and any injuries. In

order for Scott to be liable to the Plaintiff for any injuries, the Plaintiff must set forth and prove a duty owed by Scott. Absent a duty to the Plaintiff, a Defendant cannot be held liable. There is no duty on the landowner to discover and warn a contractor's employee of conditions created by the contractor and his employees during the course of the work on the project. Johnson v. Empe, Inc., 837 S.W. 2d 62 (Tenn. App. 1992). (copy attached). When the contractor has control of the premises where the accident occurred and the owner retains no control, except to the extent of determining if the work is being performed according to the contract, the owner owes no duty of care to the employees of the contractor. T.P.I. - Civil 9.06 (2011), *citing* Blair v. Campbell, 924 S.W. 2d 75 (Tenn. 1996) and others.

Similarly, in the case at bar, the Plaintiff was either an employee of the Co-Defendant, Morrow or an independent contractor. There is no proof that the Plaintiff worked directly for Mr. Scott or that Scott exerted any control over Delk's work. Just the opposite, in fact, as Delk testified that he has no recollection of Scott directing him to do anything in connection with erecting the building. (Delk Depo. p. 52). Mr. Scott as landowner or "uncompensated agent" of the landowner owed the Plaintiff no duty to warn against dangers that were obvious, apparent or known. This Defendant would submit that it defies logic to suggest that the dangers of roof construction some 17 feet above a concrete floor is anything other than obvious, apparent or known. And, any defect in the purlin would clearly be more obvious and open to Delk who was involved in placing and kneeling on it than it would be to Scott. As pointed out above, Morrow and Delk both acknowledged that it was their duty to inspect the purlins for strength and safety. Therefore, this claim cannot be sustained and entitles this Defendant to Summary Judgment as a matter of law.

The concept of duty remains entirely a question of law for determination by the court. See Inman, 697 S.W.2d 350, *supra.* As such, it is incumbent upon the Court to determine

whether, under the undisputed facts set forth herein, the Plaintiff can make out this essential element of his claim. This Defendant submits that case law cited herein makes clear that under the facts of this case this Defendant did not owe the Plaintiff any duty of care, and the allegations of a violation of OSHA regulations being *negligence per se* do not sufficiently state a claim upon which relief can be granted. *Negligence per se* is not the equivalent of liability per se. However, the Court need not even consider whether compliance with OSHA standards cited by the Plaintiff amount to *negligence per se*. The Ellis Court makes clear that for an OSHA violation to amount to *negligence per se*, the defendant must be an employer subject to the OSHA regulation in question. Ellis, 63 F.3d at 477. (See also OSHA opinion letter of December 29, 2004 (copy attached) wherein Russell Swanson, Director, Directorate of Construction, opined in response to a question concerning the responsibilities of a homeowner having work done on his house, that "typically, a homeowner will not meet the statutory definition of an "employer"). The Plaintiff cannot cross this initial threshold, which constitutes an essential element in any attempt to make out a claim for *negligence per se*. Even if the Plaintiff were able to meet that burden, the Plaintiff is still required to establish the basis of a negligence claim against Mr. Scott. Mr. Scott argues that the Plaintiff has not and cannot establish a duty owed by Scott, nor can the plaintiff establish a causal connection between any alleged violations of the OSHA regulations and plaintiff's injuries that outweigh the plaintiff's own negligence. A plaintiff must show that any alleged *negligence per se* was the proximate cause of the injury. Brookins v. The Round Table, 624 S.W.2d 547, 550 (TN 1981). It is not enough for Mr. Delk to allege that the Defendants failed to provide a fall arrest system under OSHA guidelines. The lack of a restraint system was not the proximate cause of Plaintiff's injuries. Instead, the proximate cause of Plaintiff's injuries was the placing of a defective purlin on the roof, and the Plaintiff's failure to stay close to the trusses for additional support. Mr. Morrow was on the

roof at the same time Delk fell. He was not using a fall arrest system. It was not the lack of a fall arrest that caused Delk to fall. The Plaintiff is attempting to come through the back door on this claim. The fall and the lack of a fall arrest are two distinct issues. A fall arrest system may have prevented Delk from landing on concrete seventeen feet below but even that does not say that Delk would not have been injured. No, the fall occurred because Delk sought casual employment, volunteered to ascend to the roof, chose to place his weight on the purlin four feet from the truss supporting it and because the purlin snapped. The Plaintiff is attempting to camouflage his own negligence by arguing *negligence per se* for violating OSHA regulations, but the law does not support his arguments

If the Plaintiff wants to argue that the failure to provide a fall arrest system was the proximate cause of his injuries he must accept the fact that he voluntarily chose not to utilize such a system despite knowing that they existed and voluntarily placing himself on the roof without such a system. Delk testified that he had used a safety rope on a metal roof job with Morrow prior to his fall, stated he could have done so on this job and was not sure why he didn't this time. (Delk Depo. pp. 40-41).

CONCLUSION

Stanley Scott did not employ Mr. Delk, did not direct Mr. Delk and did not create any defect, whether latent or obvious, that caused any harm to Mr. Delk. Scott, as owner of the property or even as uncompensated agent is excluded from liability under the workers' compensation statutes. If the Court determines that Delk was an employee of Scott the facts establish that he could be nothing more than a casual employee, thereby excluding Delk under workers' compensation. Scott does not qualify as an employer of Delk under the OSHA

guidelines preventing the regulations from applying to Scott. Even so, there is no private cause of action available to Delk under OSHA. At best, he can claim that violating the regulations of OSHA amount to actions below the standard of care, but he cannot climb the mountain to establish any duty that Scott owed to him. Finally the court must recognize that any negligence claims made against Scott are subject to comparative fault considerations, and the undisputed facts show that Mr. Delk's fault is at least equal to or greater than any fault on the part of the Defendants.

Based on all of the above, Stanley Scott submits to the Court that he is entitled to Summary Judgment as to all claims in Plaintiff's Complaint.

Respectfully submitted,

FLEMING, FLYNN & MURPHY, P. C.

By:_____

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CERTIFICATE OF SERVICE

I, Patrick A. Flynn hereby certify that I hand-delivered a copy of the foregoing instrument to Mr. L. Bruce Peden, 219-B West 7th Street, Columbia, TN 38402-0981 and Mr. Lawrence D. Sands, 813 S. Main Street, Columbia, TN 38401, by U. S. Mail, postage prepaid this the 2nd day of August, 2012.

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Patrick A. Flynn