The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: Thomas Fay Mink II

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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.

Managing Partner of Mink & Duke PLLC.

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

Licensed to practice law in Tennessee in 1978—BPR# 006067

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 Bar # 006067 1978--present

Pro Hac Vice admission in Alabama-2007

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

NO

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

I have been employed in a law office since1975 first as a law clerk then as a lawyer.

LAW SCHOOL YEARS

YEARS	POSITION	EMPLOYER
1974 to 1975	Traffic Analysis	Department of Transportation State of Tennessee

1975 to 1978	Law Clerk	Parker, Nichol & Finley Nashville, TN

LAW PRACTICE

1979 to 1981	Associate Lawyer	Parker, Nichol & Finley Nashville, TN
1981 to 1983	Partner	Parker, Paul & Mink Nashville, TN
1983 to 1985	Partner	Parker, Leech, Paul & Mink Nashville, TN
1985 to 1988	Partner	Parker, Mink & Jones Nashville, TN
1988 to 1991	Partner	Glasgow, Veazy & Mink Nashville, TN
1991 to 2007	Owner	Mink & Blair Nashville, TN
2007 to 2012	Partner	Taylor, Pigue, Marchetti & Mink Nashville, TN
2012 to Present	Managing Member	Mink & Duke, PLLC

Throughout my practice of law, I have worked in several practice areas, but my primary work has been in litigation. I have tried both civil and criminal jury cases; however, I have had an emphasis on civil cases since 1986. Many of these cases have involved criminal or quasi-criminal behavior and punitive damages.

I have tried between 50 and 75 jury cases and have participated in well over 100 mediations. Among the cases in which I have served as lead counsel include:

Acuff Rose-Opryland v. Orbison – Entertainment litigation

Amprite Aviations v. Stevens Aviation – Airplane crash

Nancy Matterm v. Gilreath & Associate, et al – Legal malpractice case

John Doe v. Roman Catholic Diocese of Nashville – Clergy abuse defense

John Doe v. Metro-Davidson County Board of Education –Special Outside Counsel, Child abuse

defense

Estate of Larkins v. E.B. Brown – Wrongful death of THP – Plaintiff

Nishiyama v. Dickson County, TN – Wrongful death – defense

These are but a very few of the hundreds of cases I have handled or tried which include cases for K-Mart, various tractor trailer companies, manufacturers, insurance companies, lawyers, and Judges.

I have represented numerous plaintiffs in cases as varied as product liability, airplane crashes, gas pipeline explosions, auto accidents, tractor trailer accidents, and train accidents.

I presently represent both plaintiffs and defendants in many different kinds of cases throughout the State of Tennessee

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

I have been continuously practicing Law since October 28,1978, the day I passed the Bar exam

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.

My practice is predominately civil litigation. I would estimate that 95% of my present practice is a trial based practice. The remaining 5% is business related.

The 95% trial practice is divided between plaintiff's representation (estimated 30%) , Tort defense(estimated 50%) and commercial litigation (estimated 15%). The plaintiff's practice includes personal injury and wrongful death actions many of which are referred to me by other lawyers. The defense practice includes aviation defense, products liability defense, legal malpractice defense & Tractor Trailer defense. The Commercial Litigation includes plaintiff actions which involve fraud, or breach of contract or breach of fiduciary duty. I also appear before administrative and regulatory bodies, defending judges before the Court of the Judiciary, Lawyers accused of misconduct and aircraft maintenance facilities for alleged FAA regulations violations.

I oversee and assist lawyers in my office who handle domestic relations cases, Estate matters and workmen's compensation cases. I am also serving as an expert witness for the defense in a legal malpractice case.

I am admitted to practice in all state courts in the state of Tennessee. I am admitted to practice in the Middle, Western and Eastern U.S. District Courts as well as the Sixth Circuit Court of Appeals. My practice leads me to many different areas in Tennessee and beyond.

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.

The practice of law is not a job, it is a way of life and the successful lawyers I know have embraced that principle. I have known very few lawyers who retired with the exception being those who have health reasons which necessitated them "slowing down". I have been blessed to have worked with and against some of the finest lawyers in the United States and I have experienced many thing both good and bad but all of which are necessary to give a person the requisite ability to evaluate and solve problems—to be a judge.

I have maintained a law office in Nashville, Tennessee since 1978 and the majority of my cases have been generated from that location. Approximately 19 years ago I opened an office in

Lawrenceburg. In approximately 1997 I purchased an old home, built in 1835 on Waterloo Street next door to the Lawrenceburg City Administration Building . I renovated this building and fashioned it into a law office. My personal secretary is in Lawrenceburg and I spend as much time as possible in that location.

I have been privileged to have been mentored by or gained experience from such lawyers as Henry Finley, R.B. Parker, Hal Hardin, Bill Leech, Tom Higgins and Jack Madden. I have tried cases in rural counties where I was taught by such talented lawyers as Bill Boston, William Keaton, Jerry Colley, Jack Henry, and Bill Peeler that very talented lawyers reside throughout the State of Tennessee.

I have tried criminal and civil cases in both state and federal court. Although I have not undertaken representation of a defendant in a criminal case in several years, as a young lawyer I handled, as lead counsel, a myriad of criminal cases including, but not limited to, Armed Robbery, Strong Arm Robbery, Murder and Bond Jumping. Although I have not tried criminal cases in several years, I would welcome the opportunity to participate as a judge in criminal matters and I think it would take me very little time for me to get up to speed to fully participate in such proceedings.

In my final year of law school, I applied for and was granted the right to participate in a limited practice where, under the direction of a licensed attorney, I would represent indigent persons in cases which would not generate a fee many of which were criminal cases. This opportunity combined with being a full time law clerk for attorney, R.B. Parker for three years prior to graduating from law school, proved to be very valuable.

I tried my first jury case in the First Circuit Court for Davidson County (a premise liability defense matter) approximately 4 months after passing the Bar exam. I tried the case alone and received a defense verdict. Since that time I have tried many cases, with an emphasis on jury trials. In all, but one of these cases I served as lead counsel. The one exception being a wrongful death case tried in Atlanta, Ga by Arthur Wolk of Philadelphia, Pa as lead counsel with me assisting.. This wrongful death case arose out of an airplane crash which occurred in Kentucky. I have tried between 50-75 jury trials as lead counsel in civil cases which involve: airplane crashes, dump truck accidents, automobile collisions, tractor trailer accidents, premises liability accidents, malicious prosecution, products liability, violation of the Federal Firearms Act, motorcycle accidents, outrageous conduct, and alleged sexual abuse. In addition to the above I have tried many bench trials throughout middle Tennessee, all as lead counsel. I have handled hundreds of significant cases which were successfully resolved prior to trial throughout the state of Tennessee.

I have appeared and argued on several occasions before the Tennessee Court of Appeals and the Tennessee Supreme Court. I have handled matters before the Sixth Circuit Court of Appeals. A list of Tennessee appellate cases in which I participated is attached hereto as "Exhibit 1".

I have represented professionals usually judges and lawyers and occasionally, a doctor before regulatory Boards.

I have handled, as lead counsel, a number of very significant plaintiff matters including catastrophic Gas pipeline explosions in West Virginia and Tennessee; airplane disasters in Kentucky and in Virginia; tractor-trailer disasters throughout Tennessee. I was privileged to assist the plaintiff's steering committee (of which R.B. Parker was a member) in the Waverly –

L&N railroad disaster which occurred in the approximately 1978.

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

From 2001 until 2005 I served as lead counsel for the Roman Catholic Dioceses of Nashville and Knoxville in the abuse cases brought as the result of the criminal and heinous acts of Edward Mckown a former priest of the Nashville Diocese. I was successful in having the case dismissed as to the Knoxville Diocese. I obtained summary judgment for the Nashville Diocese and the Court of Appeals affirmed, however the Supreme Court reversed the Court of Appeals and remanded. The case settled approximately 11 months later,

In approximately 2004 or 2005 I served as lead counsel in representing Amprite Electric and Amprite Aviation as the result of the crash of the King Air aircraft which killed all aboard and destroyed the aircraft. I defended the Aircraft Owner , who was also the pilot. All death cases were settled by co-defendants Dallas Airmotive and Stevens Aviation. My clients paid nothing. I then tried the hull case (property damage case) to a jury in the Sixth Circuit Court for Davidson County against Stevens Aviation (after having settled a portion of the claim with Dallas Airmotive) . After 10 days of trial and 2 days of jury deliberations, the jury returned a verdict for my client. We were successful in obtaining recovery for the entire amount of the property damage.

In 2006 I represented the widow and child of Trooper Todd Larkins, the Highway Patrolman who was hit and killed in Dickson County by a tractor-trailer. I filed suit immediately and obtained records which showed a lack of driver training, a lack of driver discipline, and an absence of company knowledge of sleep apnea and the absence of testing for the malady. This case was resolved quickly for a sum which is subject to a non-disclosure agreement. This is the case that gave rise to the "Move Over law" in Tennessee. It is Trooper Todd Larkin's picture which is found on the "Move Over" bumper sticker.

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

I have served as a mediator only one time several years ago. I have completed my mediation training and just received my Rule 31 listing in January 2015.

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 never served in that capacity

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

In 1983, I was retained to represent Joe Melson, a co-writer, along with Roy Orbison, of many of the songs made famous by Orbison, including "Pretty Woman". Roy Orbison, as well as Joe Melson, sued their local publishing company for fraud and inappropriate behavior related to the collection of royalties from foreign sub-publishers. Through litigation, our efforts disclosed that the foreign sub-publishing companies with whom the local publishing company contracted, were actually fully owned subsidiaries of the local publishing company and, thus, the local publishing company was able to manipulate the writer's share of foreign royalties and dramatically decrease the money the writers were to receive. Our efforts lead to settlement, which included large monetary rewards and reversion of copyright ownership from the publishing company to Roy Orbison. This victory was the start of Roy Orbison's comeback in 1985 until his death in 1988.

In 1989, following the death of Roy Orbison, suit was filed in the United States District Court for the Middle District of Tennessee by the new owner of the former local publishing company against the Estate of Roy Orbison and his widow, Barbara Orbison, over alleged breach of contract and procurement of breach of contract, regarding Roy's ownership interest in the album "The Traveling Wilburys" and the "Mystery Girl" album. I represented Barbara Orbison, the Estate was represented by Jon Ross of Neal & Harwell. After lengthy and strenuous litigation, we were able to finally resolve the matter.

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.

None-This is my first time

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.

Austin Peay State University 1969 -1974 B.S. Degree

I served as an associate justice on the Student Tribunal for my final two years of undergraduate school.

In 1974 I served as a Senator from APSU in the Tennessee Intercollegiate State Legislature (TISL)

Nashville School of Law 1974—1978 Doctorate of Jurisprudence

PERSONAL INFORMATION

15. State your age and date of birth.

I am 63

DOB—10/25/1951

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

55 Years

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

20 years,6 months

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

Lawrence County

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

Not Applicable

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

No

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

No

22. 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.

In 1992, a formal Complaint was filed against me by a former client, over a fee dispute which had existed for a period of time. When the dispute first began, I was uneasy with the situation and in order to avoid any appearance of impropriety, I contacted Chief Disciplinary Counsel for the Board of Professional Responsibility, Lance Bracey, seeking advice and guidance in this matter. I followed Mr. Bracey's advice to the letter. Upon following Mr. Bracey's advice, a Complaint was filed with the Board of Professional Responsibility which was immediately dismissed.

In Re: Mattox – Davidson County Circuit Court

Around 1982 or 1983, disputes between all counsel in complex litigation regarding conflicts of interest by all counsel, lead a representative of the Board of Professional Responsibility to assist in the resolution of the dispute. No one was sanctioned and no conflicts were found to exist. I do not recall if a formal Complaint was filed, or if informal opinions were requested. All counsel were and remain close friends.

In Re: McFall – Lawrence County Circuit Court

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.

In early the 1980's, as a young lawyer, I was involved in a landlord/tenant case representing the tenant, who was a dentist. After winning my client's case, the defendant landlord sued me personally for representing my client. This case was promptly and summarily dismissed. This took place in the Circuit Court for Dickson County, Tennessee in Charlotte. 22CC-1982-CV-3, Bernie Bishop v. Thomas F. Mink II (1982)

In approximately 1982, I filed for divorce against my former wife, Julia Mink, in the Circuit Court for Dickson County, Tennessee in Charlotte, and was awarded a divorce. There were no children involved. Thomas Mink II v. Julia Smith Mink Dickson Chancery 6375 (1983)

In approximately 1997, I was involved in an automobile collision, which lead to litigation in the General Sessions Court for Lawrence County, Tennessee, for property damage to my automobile. The case was tried and ultimately settled. Thomas F. Mink II v. Mary Berryhill, Edward Foust, Lawrence Co.50GS1-1997-CV-3306 (1997)

Construction dispute- case settled Kelly Construction v. Thomas F. Mink II, Lawrence Co. 50GS1-1999-CV-5058 (1999)

Amount of bill in dispute-case settled-Greenwood Trust v. Thomas F. Mink II, Lawrence Co.50GS1-1996-CV-2256 (1996)

Through the years, I have probably filed three lawsuits against former clients who refused to pay my bill. I can only specifically remember one such lawsuit, which was filed in the Chancery Court for Davidson County, Tennessee against a trucking company from Peoria, Illinois who owed my law firm in excess of $20,000.00 for the defense of a serious tractor-trailer case. The trucking company had refused to pay its self-insured retention and litigation was necessary to resolve that issue. The case was ultimately settled with payment received on terms.

Mink, Thomas F DBA Mink & Blair v. Star Transport, Inc. Case No: 08-1571-IV (2008)

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.

Eta Tau Pi Kappa Alpha Alumni Association

Board Member 2010 to 2012

President 2012 to 2014

Member Church of the Messiah Episcopal Church – Pulaski, Tennessee

Lawrenceburg Golf & Country Club – Lawrenceburg, Tennessee

Club Le Conte – Knoxville, Tennessee

Legend's Golf Course – Franklin, Tennessee

University Club of Chicago – Chicago, Illinois

The Skyline Club – Chicago, Illinois

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 never been a member of such an organization. I was a member of a social fraternity, Pi Kappa Alpha in under graduate school. Pi Kappa Alpha does not exclude people on the basis of race or religion and had a little sister organization directly associated with it.

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 – 1979 to Present

Tennessee Bar Association – 1979 to Present

Nashville Bar Association – 1979 to Present

Lawyer Pilot Bar Association – 2009 to 2014

Aviation Insurance Association – 2014, 2015

Tennessee Bar Foundation – 2003 to Present

Lawrence County Bar Association

Tennessee Defense Lawyers Association

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.

Tennessee Bar Foundation

– Invitation to join Abota in process

I have been an AV rated lawyer with Martindale & Hubbell for approximately 20 to 25 years

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.

None

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.

I here attach as "Exhibit 2", a copy of the defendant Altec Industries Memorandum In Support of Defendant's Motion to Exclude plaintiff's Expert Witness, Jahan Rasty PH.d.(sans Exhibits) This was filed in the US District Court for the Western District of Tennessee at Jackson. I served as lead counsel in this litigation and this Memorandum was 90% to 95% prepared by me.

I here attach as "Exhibit 3" a copy of the Motion For Summary Judgment, The Statement of Undisputed Material Facts and the Defendant's Memorandum of Facts and Law in Support of the motion For Summary.(sans exhibits). This was filed in a legal malpractice case which was pending in the Circuit \Court for Montgomery County, in Clarksville, Tennessee this was

prepared 100% by me. The motion was granted and the case was dismissed. The dismissal was affirmed on appeal.

ESSAYS/PERSONAL STATEMENTS

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

I have been privileged to have appeared before some judges who, though strict were wise and instructive, as much a mentor as a jusist.

It made an impact on me. It inspired me to try daily to develop the qualities I so admired. There are occasions when one person can be both mentor and judge. A person who occupies both positions has the opportunity to have a profound impact on the lawyers with whom he interacts .Young practitioners and seasoned trial lawyers alike recognize and respect a judge with trial experience and a proper demeanor, a judge who remembers what it takes to be a lawyer and to practice law. I want to be such a judge.

A judge who is studious, fair, honest and structured is an asset to the profession and the community. I think I have the ability to have such an impact. I have the responsibility now to give back to the community and the profession which has given so much to me.

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)***

The essence of the practice of law is to help people. Not just people who can afford a lawyer, but also people in need who cannot bear such a financial burden. . I have routinely represented people who could not pay a lawyer and I knew their financial condition when I agreed to represent them. With ability comes responsibility, therefore it is every lawyer's duty to help less fortunate persons who are mistreated or oppressed. I have on many occasions and recently reduced a contingent fee drastically for an injured person or a widow who has suffered the death of a mate especially when there are minor children in need.. Approximately three years ago, I agreed to assist, pro bono, a person who, through no fault of his own, suffered severe damage to his tractor and trailer which caused him to lose his business and put him in jeopardy of losing everything he and his family owned, I effected a six figure settlement which included compensation for economic losses. I voluntarily waived my fee and I have never regretted my decision

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)***

Lawrence, Maury, Giles and Wayne Counties. The four Circuit Judges in this district also serve as Chancellors, and a Criminal Court Judges, hearing civil litigation, business/ contract matters equitable matters, criminal cases, will contests, divorce and domestic matters as well General Session Appeals. I have extensive experience in these matters. I will dedicate myself to refresh my knowledge of criminal law and criminal procedure promptly.

I was born in Lawrence County. I attended grade school and high school in Lawrence County. My wife is from a large family from Lawrence County and we returned to Lawrence County to live and raise our two children. I have maintained a Law office in Nashville, Tennessee since 1978. I established an office in Lawrence County approximately nineteen years ago where I spend a considerable amount of time. I have tried jury cases in Maury, Lawrence and Giles Counties. I have handled nonjury matters in all four counties in this district and enjoy an amicable relationship with all three of the remaining sitting Judges. If selected for this position I will close my Nashville office and will remain in Lawrence County where I returned to live over twenty years ago. With the three remaining Judges living in Maury County, there is a need for a judge in one of the three lower counties. I possess the ability, desire, experience and demeanor to fill this need. I think my presence and input will have a positive impact on the administration of justice in the 22nd Judicial 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)***

I, along with my wife, Julie, moved back to Lawrenceburg, Tennessee in 1994 to live in this community and to raise our children. Julie is a pharmacist and has actively practiced in Lawrenceburg since our return in 1994.

Although, I established an office in Lawrenceburg, the majority of my practice has taken me to other areas of the state and, thus, my ability to participate in community services has been limited. I have served on the Board of Main Street Lawrenceburg. I also served on the Lawrence County Economic Development Board for a period of time. I have been involved with the Lawrenceburg Quarterback Club and also with the Cat Backers Organization, an organization which supports Lawrence County High School football. I have been a member of the Lawrence County Chamber of Commerce. I have routinely purchased ads on various calendars, including the Lawrence County Sheriff's Calendar the Lawrenceburg Police Department's Calendar. I have always supported "A Kid's Place" which is a refuge and shelter for women and children who are the victims of domestic violence. This is a very fine organization and one with which I would like to have more input.

Because my work schedule has been difficult over the past 20 years, I have not had an opportunity to belong to any type of civic/service club, but would certainly welcome that opportunity if appointed Judge for the 22nd Judicial District. It would provide me with a more predictable schedule, which would allow me to become more involved in community activities. I would certainly want to join a civic/service organization and participate more fully with charitable organizations to the extent such service did not conflict with my duties as a Judge.

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 come from a family of hard workers who were self-motivated. My father grew up on and helped run a dairy farm in Lawrence County, before serving in the United States Army. He worked on a farm in Auburn, Alabama while he attended college and Veterinary School. My maternal grandfather owned and ran railroad crosstie yards in Lawrence County, Wayne County, Tennessee and Lauderdale county, Alabama..

In 1961, My father died of a massive heart attack when he was thirty four years of age. I was nine years old at the time of his death. I was the oldest of three brothers and received a dose of the harsh reality of life. My first job was in a dime store when I was 11 years of age. With the exception of when I played football in high school and part of college and a few other brief periods, I have been employed. Prior to working in a law office, I have worked in retail establishments, hauled hay, stacked and loaded crossties, worked as a general laborer for the Lawrenceburg Street Department, worked in the engineering departments of the Lawrenceburg Electric Department and Cumberland Electrical Mutual Cooperative in Clarksville, Tennessee, worked in a book factory and worked as a traffic analysis for the Tennessee Department of Transportation. I finally received the opportunity to work in a law office when I was a second year law student in 1975 when I became a law clerk for R.B.Parker, Jr. in Nashville, Tennessee.

As a law clerk, I performed accident investigation, interviewed witnesses, drafted pleading and performed legal research. Mr Parker had a very active trial practice, thus much of my time was spent in trial preparation. I worked 50 to 60 hours a week and attended law school at night, This work while strenuous, provided me with the tremendous opportunity to learn and experience what the practice of law was about. I got to meet and know many different lawyers and judges. I grew to understand how lawyers approach and solve problems and what judges expect of lawyers.

The experiences cited above would serve me well if appointed to the bench, just as they have in the practice of law.

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)***

As a practicing attorney, I frequently encounter laws with which I may disagree, but it is my job to understand the particular statute or rule in question and recognize its impact on my client's position. I must then explain the situation to my client and follow the law. I think it is improper to misstate the substance of the law in question or invite the judge to improperly apply the law. .I know of no judge who feels differently. Certainly if appointed to be a circuit court judge, I would

take this conviction with me to the bench.

A classic example of law with which I disagree, but would enforce, is the ruling set forth in the case of **Ridings v Parsons**, 914 SW2d. 79 (Tn. 1996) wherein it was established that the fault of an employer cannot be compared to the alleged fault of a non-employer party in an accident or tort case. Proof of the acts or omissions of the employer can be introduced in evidence for the purpose of "proof of fact" but not the purpose of comparative fault. In my eye this is bad law because a climate is created wherein the employer is not answerable for its negligent acts or omissions, but instead places increased exposure on non-employer parties, but the law is clear and I would apply it as mandated by the Supreme Court of Tennessee.

Another area of the law with which I disagree but would enforce is the fact that in most tort cases in the state courts of Tennessee insurance policy limits are not discoverable. This is different from discovery in the U.S. District Courts, where insurance policy limits are not only discoverable but are mandated by the initial disclosure requirements. Policy limit disclosures promote early resolution in many cases and also acts to eliminate the unnecessary involvement of uninsured motorist carriers. Notwithstanding my personal opinion I would apply the law as set forth by the appellate courts and the legislature.

REFERENCES

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

A The Honorable J Russell Parkes Circuit Court Judge, 22nd Judicial District 102 W. 7th Street P.O.Box 929 Columbia, Tn. 38402-0929 (931) 388-4022
B. Joseph W. Henry, Jr, Attorney at Law Member of Henry, Henry & Underwood, P>C> 119 South First Street P.O. Box 458 Pulaski, Tn. 38476-3215 (931)363-4571
C. Ben Boston, Attorney at Law Member of Boston, Holt, Sockwell & Durham, PLLC 235 Waterloo Street P.O. Box 357 Lawrenceburg, Tn. 38464 (931) 762-7167
D. James F. Parkes, Jr.
E. Larry B. Martin State Of Tennessee Commissioner of Finance & Administration First Floor, State Capitol 600 Charlotte Ave.

Nashville, Tn. 37243

(615) 741-7739

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] Circuit Court of the 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 25th , 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.

Thomas Fay Mink II
Type or Print Name

Signature

February 25th, 2015
Date

_006067
BPR #

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

Licensed to Practice Law

Tennessee Supreme Court

Board of Professional Responsibility

#006067

EXHIBIT 1

Doe 1 ex rel. Doe 1 v. Roman Catholic Diocese of Nashville, 154 S.W.3d 22 (Tenn. 2005).

C.S. v. Diocese of Nashville, 2008 WL 4426891, Court of Appeals

Newton v. Ceasar, 2000 WL 863447, Court of Appeals

Degan v. K Mart Corp, 1990 WL 150019, Court of Appeals

Aleo v. Weyant, 2013 WL 6529571, Court of Appeals

Roberts v. Roberts, 845 S.W.2d 225 (Tenn. Ct. App. 1992).

Southeastern Engineering and Development, Inc. v. Moore, 1988 WL 30178, Court of Appeals

Snyder v. LTG Luftte Chnische Gmbh, 955 S.W.2d 252 (Tenn. 1997).

Clinard v. Blackwood, 46 S.W.3d 177 (Tenn. 2001).

Squeeky Clean Laundries, Inc. v. Harvey, 2003 WL 21634316, Court of Appeals

Daniels v. Davis, 1997 WL 576342, Court of Appeals

Howell v. Howell, 2000 WL 1050900, Court of Appeals

Gleason v. Gleason, 164 S.W.3d 588 (Tenn. Ct. App. 2004).

Doe ex rel. Doe v. Roman Catholic Diocese of Nashville, 2003 WL 22171558, Court of Appeals

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
AT JACKSON

JERRY WAYNE JERNIGAN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 05-1126-T
	)	JURY DEMAND
ALTEC INDUSTRIES, INC.,	)	JUDGE JAMES TODD
	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO EXCLUDE PLAINTIFF'S EXPERT WITNESS JAHAN RASTY, PH.D.

Defendant Altec Industries, Inc. (Altec) has moved this Court for an Order pursuant to Rule 702 of the Federal Rules of Evidence excluding the testimony of Plaintiff's putative expert witness, Jahan Rasty, Ph.D. (Rasty) and submits this Memorandum in Support of its Motion. The opinions of this witness are not reliable under the test set forth in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 579 (1993), and its progeny, and therefore should be excluded under Rule 702.

STATEMENT OF RELEVANT FACTS

Plaintiff Jerry Wayne Jernigan (Jernigan) seeks damages for injuries sustained when, while setting a utility pole, the winch line of an Altec digger derrick separated and the pole fell on his arm. Jernigan's causes of action consist of products liability claims based on negligence, strict liability, and warranty liability. Specifically, Jernigan alleges that the Altec digger derrick was defectively designed, that this defect caused his injuries, and that an alternative design would have prevented this accident. To support his allegations, Jernigan hired Jahan Rasty to provide expert opinions on the cause of the accident and any alleged defects of the Altec digger derrick, and to propose alternative designs. As set forth below, these opinions are unreliable, are

unsupported by the evidence and are mere conclusions based on unsupported theories, and this Court should exclude Rasty's testimony.

Rasty is a professor of mechanical engineering who also offers consulting services. (Deposition of Jahan Rasty, pg. 6, L 14-15; pg. 86, L 23-25; pg. 87, L 1-2). Rasty opines without any basis that the accident's cause was that the winch line became trapped in a gap created by movement of two weldments of the Altec digger derrick and that those components came together with enough force to cut the line with a "scissor action." *Id.* at pg. 33, lines 15-21; pg. 38, L 18-25. He also believes that the constant coming together of the two components over time created sharp edges which enhanced the "scissor" action. *Id.* at pg. 39, L 6-11.

Rasty further alleges that the design of the Altec digger derrick is defective because it supposedly allows for the winch line to become caught in a gap between the two components and to be cut by a "scissor action." *Id.* at pg. 32, L 13-24; pg. 48, L 2-16. He proposes that Altec could have incorporated a plate on the components that would cover the gap when they come together, thereby closing the gap and preventing a winch line from entering. *Id.* at pg. 34, L 14-18; pg. 72, L 1-7. However, Rasty has no basis for these speculative conclusions.

ARGUMENT

The United States Supreme Court has determined that pursuant to Rule 702 of the Federal Rules of Evidence, a District Court Judge faced with proffered expert testimony must determine whether the expert is qualified to testify about the subject matter and whether that testimony is reliable. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592-93 (1993). Proposed expert testimony that does not pass this inquiry should be excluded. *Id.*

Rasty's testimony should be excluded from consideration in the disposition of this case. He is not qualified to testify about the cause of the accident, the presence of any defects in the

Altec digger derrick design or any alternative designs. Also, the testimony he has to offer is inherently unreliable under *Daubert* and Federal Rule of Evidence 702. Thus, Rasty's testimony will not assist the trier of fact in this case and should be excluded.

I. RASTY IS NOT QUALIFIED TO TESTIFY AS AN EXPERT IN THIS CASE.

Under Federal Rule of Evidence 702, expert testimony is admissible only when delivered by an expert qualified "by knowledge, skill, experience, training, or education." To qualify as an expert, the witness must have "scientific, technical, or other specialized knowledge" sufficient to "assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702 (2007). The court must ignore the abstract qualifications of the purported expert and examine the relation of the witness's training and qualifications to the proposed testimony's specific subject matter. *Smelser v. Norfolk Southern Ry. Co.*, 105 F.3d 299, 303 (6th Cir. 1997).

To determine whether a witness is qualified, the court must define the issues at trial and assess whether the witness has specialized knowledge on the subject sufficient to formulate a relevant and reliable opinion. *First Tenn. Bank Nat'l Assoc. v. Barreto*, 268 F.3d 319, 333 (6th Cir. 2001). Here the issues are the design and operation of digger derricks in general and, specifically, the Altec digger derrick involved in this accident. Rasty has none of the specialized knowledge gained through experience, training or education that Rule 702 requires in order to qualify him to expound on these issues.

First, Rasty has no significant experience in or knowledge about the design and operation of digger derricks. Although Rasty has degrees in mechanical engineering and has researched and taught in the general areas of design and failure analysis, these abstract qualifications are not sufficiently related to the specific matter at issue to qualify him as an expert. (Deposition of Rasty, pg. 6, L 18-23; pg. 7, L 5-8). Rasty has never operated a digger derrick nor witnessed a

utility pole setting operation such as the type involved in this accident. *Id.* at pg. 35, L 24-25; pg. 36, L 1-3; pg. 57, L 19-21, 23-25; pg. 58, L 1. Rasty has never seen the actual digger derrick involved or even an exemplar of the same model. *Id.* at pg. 36, L 21-25; pg. 37, L 1-10. Rasty has not observed a digger derrick operated with a load attached to it. *Id.* at pg. 15, L 18-22; pg. 19, L 13-17, 23-25; pg. 20, L 1-7.Finally, Rasty has never designed a digger derrick. *Id.* at pg. 49, L 14-20.

Rasty's opinions on the separation of the winch line, the alleged defective digger derrick design, or any proposed alternative designs have no basis in any first-hand knowledge of or experience with the operation and design of digger derricks. Thus, Rasty is not qualified to testify about the issues in this case. These issues require the expertise of someone with first-hand knowledge of and experience with the operation and design of digger derricks. Rasty is not that person and his testimony should be excluded.

II. RASTY'S TESTIMONY IS INADMISSIBLE UNDER DAUBERT AND RULE 702 BECAUSE IT IS NOT BASED ON RELIABLE PRINCIPLES AND METHODOLOGIES.

Rasty proposes to testify in this case about: (1) how, in his opinion, the winch rope separated, causing the utility pole to fall on Jernigan, and (2) why, in his opinions, the Altec digger derrick was defective, and what design would have cured this condition. Pursuant to Rule 702 of the Federal Rules of Evidence, *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 579 (1993), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 137 (1999), the opinions of Rasty are not based on reliable principles and methodology, and this Court should exclude his testimony from consideration in this matter.

Expert testimony should be analyzed under Rule 702 of the Federal Rules of Evidence. *Dancy v. Hyster Co.*, 127 F.3d 649, 652-53 (8th Cir. 1997). That rule provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.
>
> FED. R. EVID. 702 (2007).

Rule 702 was revised in 2000 to reflect the Supreme Court's declaration in *Daubert* that Rule 702 requires the trial court to screen all expert testimony to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." 509 U.S. at 589; *see also* FED R. EVID. 702 Advisory Committee Note to 2000 Amendment. Rule 702 also reflects the Court's extension of the trial court's screening function in *Kumho Tire* to all proposed expert testimony, whether it is scientific, engineering, experiential, or of any other nature. 526 U.S. at 140, 148.

In declaring this "gatekeeper" function, the *Daubert* Court emphasized that all expert testimony must be both relevant and reliable to be admitted. 509 U.S. at 589. Thus, expert testimony must be supported by objective methods and procedures rather than "subjective belief or unsupported speculation." *Kannankeril v. Terminix Intern., Inc.*, 128 F.3d 802, 806 (3d Cir. 1997). The trial court must assess whether the reasoning or methodology underlying the testimony is valid in its respective field and can properly be applied to the facts in issue." *Daubert*, 509 U.S. at 592-93. Thus, the focus of the inquiry is not on the substance of the opinions, but the methodology and principles used to reach them. *Id.* at 595.

In this reliability determination, trial courts may consider a number of nonexclusive factors including: (1) whether the theory or opinion can be and has been tested, (2) whether the theory or opinion has been subjected to peer review or publication, (3) the known or potential

rate of error of the technique applied, and (4) "general acceptance" of the theory or opinion in the relevant field. *Id.* at 593-94. The trial court's gatekeeping inquiry is context-specific and "must be tied to the facts of a particular case." *Id.* at 150. In determining which factors to employ, the trial court should consider any factors that are reasonable measures of reliability. *Id.* at 152-53. As shown herein, Rasty's testimony must be excluded pursuant to these reliability factors.

In the present case, this Court should emphasize the *Daubert* "testing" factor as a reasonable measure of the reliability of Rasty's engineering testimony. Such testimony must rest upon scientific knowledge for which the key inquiry of reliability is whether the purported expert's opinion is testable, and has actually been tested. *Id.* at 150; *Daubert*, 509 U.S. at 593. As the *Daubert* Court noted, scientific methodology is "based on generating hypotheses and testing them to see if they can be falsified." *Id.* The Committee Notes to Rule 702's 2000 Amendments clarify that this testing consideration emphasizes the objective over the subjective. The Sixth Circuit has even held that a failure to test is justification for a trial court to exclude expert testimony as unreliable. *See Cook v. American Steamship Co.*, 53 F.3d 733, 739-40 (6th Cir. 1995). Rasty did no testing. Thus, in the context of his engineering testimony, the absence of testing by Rasty requires his opinions to be excluded.

In addition to testing, of which Rasty did none, Federal courts in Tennessee take other factors into account. *See e.g. Johnson v. Manitowoc Boom Trucks, Inc.*, 406 F. Supp. 2d 852, 863-66 (M.D. Tenn. 2005). Particularly in products liability, weight is also given to peer review and publication and "general acceptance" in the relevant community. *Id.* Also, the Sixth Circuit considers whether the expert's opinions are developed solely for the purpose of testifying in the litigation at hand. *Smelser*, 105 F.3d at 303. The fact that an expert witness prepared opinions for litigation and at the behest of counsel militates against reliability and admissibility, as it

shows potential bias of the expert. *Nelson v. Tennessee Gas Pipeline Co.*, 243 F.3d 244, 252 (6th Cir. 2001). As shown below, Rasty does not fulfill any of the requirements of *Daubert* and should be excluded.

A. Rasty's opinions on causation should be excluded due to his failure to perform any testing or analysis

Rasty's opinions are unreliable and thus inadmissible under *Daubert* and Rule 702. The Sixth Circuit in *Pride v. BIC Corporation*, 218 F.3d 566, 566 (6th Cir. 2000), has addressed the reliability of expert testimony on causation in products liability cases, and provides this Court with a "roadmap" in considering Rasty's faulty methodology.

In *Pride*, the Sixth Circuit evaluated the reliability of expert testimony on a product's contribution to the cause of a fire-related death. *Id.* at 566, 568-69. Upon the defendant's Motion, the trial court excluded plaintiff's expert for failing to perform tests to confirm his theory when such tests were feasible. The Sixth Circuit Court affirmed the decision of the District Court excluding Plaintiffs' expert's testimony.

In the instant case, as in *Pride*, Plaintiff's expert performed no testing to confirm and validate his theory when such testing was possible. Thus, the court should find that Rasty's testimony on the cause of the accident is unreliable and inadmissible under *Daubert* and Rule 702. *Id.* When a theory of causation can be confirmed and validated through testing but the expert offering the theory has done no such testing, that theory is inherently unreliable and should not be admitted.

Some of Rasty's omissions are as follows: Rasty never tested the Altec digger derrick or an exemplar of the same model either with or without a loaded winch line to confirm his opinions despite the fact that such testing was feasible. (Deposition of Rasty at pg. 37, L 11-13). He performed no calculations to develop or support his opinions. *Id.* at pg. 35, L 11-20. He

made no attempt to recreate the conditions of the accident to determine whether any of his assumptions are accurate. *Id.* His observations involved a different model of Altec digger derrick than the one involved in the accident, and the conditions during his observations were vastly different than those present at the time of the accident.

The following shows how different the conditions were: At the time of the accident specifically, the boom of the digger derrick was elevated and a load was attached to the winch line. In stark contrast, when Rasty observed the retraction of the boom on a different model digger derrick, the boom was not elevated and no load was attached. *Id.* at pg. 23, L 1-6, 20-22. Thus, Rasty failed to consider the impact of the elevation of the boom or the weight of a load on the movement of the weldments. Without such movement, the assumptions on which Rasty based his opinions did not exist. First, the gap in which the winch line allegedly became caught might not have formed. Second, even if the winch line did get caught, the weldments cannot come together to create a "scissor" action. Rasty and the Plaintiff have never tested or created the fictitious "scissor" action on any machine. Further, assuming a coming together did occur, Rasty performed no tests to confirm that this "coming together" would actually cut a winch line. In short, nothing done by Rasty even remotely simulated the conditions present at the time of the accident. Also, nothing done by Rasty supports any of his opinions or either the cause of the accident or any alleged defect or alternative design.

Rasty could easily have performed a number of tests to attempt to confirm his opinions but simply failed to do so, and he offers no explanation why he did not. He could have set the digger derrick's boom at an elevation similar to its position at the time of the accident. He could have placed a load on the winch line and determined whether he could cause the line to become caught in a gap between the weldments. He could have retracted the boom to determine whether

the weldments would come together to cut the winch line. He could have placed a winch line in the gap between the weldments without a load attached and retracted the boom to determine whether the weldments would cut the line. He could have done any number of things to test his theories. However, despite the ability to do so, by his own testimony, Rasty did not perform these or any other tests to confirm his opinions as required by *Daubert* and *Pride*. *Id.* at pg. 37, L 11-13.

No one disputes that the winch line separated. The real question is *how* the winch line separated, and what factors contributed to the separation. Rasty's untested opinions are unreliable and are pure speculation. In addition to not performing any tests, Rasty performed no calculations to support his supposed "failure analysis." Although the principles of failure analysis might support a particular theory, only testing can conclusively confirm one explanation and rule out any others. Thus, Rasty must conduct tests or perform some type of calculations using facts to prove the specifics of his theory to render it reliable. He did neither.

One need look no further than Rasty's own testimony on the need to do testing to support or even to give an opinion. When asked what scientific method he used in formulating his opinions, Rasty identified the "failure analysis" standards developed by the American Society of Materials (ASM). *Id.* at pg. 58, lines 12-23. According to the ASM Handbook, the principal stages of a failure analysis include nondestructive and mechanical testing. D.A. Ryder, et al., *General Practice in Failure Analysis*, *in* 11 ASM Handbook (William T. Becker, et al. eds., 2002). Thus, the very same standards which Rasty claimed to follow require testing. He was required to do testing to confirm his theories, yet he did not.

Later in his deposition, Rasty was shown a photograph of a digger derrick with a gap between the weldments but was not informed of the manufacturer or model. The following line of questions and answers ensued:

> Q. Let me show you a picture and ask you: Based upon your opinion, does the design of that machine with the third-stage weldment, transferable tips and the second-stage weldment, is that a defective design?
>
> A. Is this from the subject vehicle that we're talking about?
>
> Q. I'm asking you if that's a defective design.
>
> A. Well, it – it has some sort of a gap. Depending on whether it allows for the rope to, you know, get entrapped in there or not, ***I haven't tested this particular piece of machinery to see if it does or not*** . . . . But whether it actually – those pieces would slam against each other or not, from looking at this picture, I can't tell you.

Deposition of Rasty, pg. 62, lines 9-22, 25; pg. 63, lines 1-3 (emphasis added).

As is clear from this excerpt, Rasty would not and could not give his opinion about whether this particular digger derrick was defective without testing. Again, Rasty himself admits that testing is necessary to support his opinions.

In summary, Rasty failed to perform any tests to confirm his theories on the cause of the accident, despite the requirements of *Daubert*, *Pride*, and the ASM Handbook, and his own admissions that such testing is necessary. Therefore, his methodology was and is inherently unreliable and this Court should exclude his testimony from consideration.

B. Rasty's opinions on the alleged defective condition of the Altec digger derrick and proposed alternative designs should be excluded for multiple reasons

Rasty also opines that the Altec digger derrick design was defective, and suggests alternative designs he claims would make the machine safer. However, as with his opinion on the cause of the accident, his methodology used to reach these opinions is not reliable, and therefore his testimony is inadmissible. Tennessee Federal courts have analyzed the reliability of

design defect opinions, and certainly, when this Court applies this analysis to Rasty's testimony, it will find his testimony inadmissible. One very helpful approach is that taken by the Middle District of Tennessee in *Johnson v. Manitowoc Boom Trucks, Inc.*, 406 F. Supp. 2d 852, 852 (M.D. Tenn. 2005).

In *Johnson*, the court considered the reliability of an expert's opinion that a boom truck crane was defective and that an alternative design would have prevented the accident. *Johnson*, 406 F. Supp. 2d at 852. The boom truck crane tipped over and injured a worker when the operator began to operate it while one of the four stabilizing outriggers was partially retracted. *Id.* at 855. The injured worker then sued the manufacturer of the boom truck crane under a theory of products liability. *Id.*

The plaintiff hired an expert, a self-employed mechanical engineer. After reviewing depositions, manuals, discovery responses, statements, brochures, the accident report, and photographs, and inspecting the subject truck crane itself, the expert determined that the boom truck crane was defective. *Id.* at 858. The expert opined that the truck lacked a critical design feature in the form of an "outrigger-boom interlock system" that would prevent operation of the crane if all four riggers were not firmly extended. *Id.* at 855-56, 858. He further suggested that the accident probably would not have happened if such a system had been incorporated into the design of the boom truck crane. *Id.* at 856. Finally, he even created a schematic drawing detailing an alternative design of the crane truck with an outrigger-boom interlock system. *Id.* at 856. However, he did not build or test his proposed design. *Id.* at 861.

In analyzing the reliability of the plaintiff's expert, the court applied the *Daubert* factors of testing, peer review and publication, and general acceptance in the relevant community, and the Sixth Circuit factor of opinions developed solely for litigation purposes. *Id.* at 860-66.

Finding that all of these factors weighed against the reliability of the proposed testimony, the court excluded the alleged expert's testimony as unreliable due to a lack of any testing of his theories. *Id.* at 866.

Rasty offers opinions in the same manner as the plaintiff's "expert" in *Johnson*. Rasty reviewed the same kinds of materials, but as the excluded "expert" in *Johnson*, Rasty has offered unsupported opinions without any testing or calculations to support his conclusions. Thus, as shown below in the discussion of the analysis the court used to exclude the *Johnson* expert's testimony, the same process can be applied to exclude Rasty's testimony.

1. Testing

The *Johnson* court emphasized that the testing factor is particularly important for a theory involving a proposed alternative design. *Johnson*, 406 F. Supp. 2d at 860-61 (citing *Bourelle v. Crown Equipment Corp.*, 220 F.3d 532 (7th Cir. 2000)). The court explained that an expert testifying "that a product is unreasonably dangerous because it should have been designed differently . . . should provide some indication that the proposed design would at least be functional." *Johnson*, 406 F. Supp. 2d at 862-63. It concluded that "testing the proposed alternative design not only makes sense, but also is ***nearly indispensable*** to providing the requisite indicia of reliability of the proffered expert testimony." *Id.* at 862 (emphasis added).

In considering the plaintiff's expert's theories, the *Johnson* court focused heavily on the fact that the expert never implemented or tested his design concept. *Id.* at 861-62. Although the expert relied on the incorporation of such a system on a different type of truck to support his theory, the court noted that the expert never inspected or operated that truck either, and that that truck's function was markedly different than the boom truck crane's function. *Id.* at 861. Further, the court was not impressed that the expert had provided a schematic drawing of his

proposed design since, as with Rasty, the expert had never designed his proposed system for manufacture or discussed such a system with a manufacturer. *Id.* Finally, the court dismissed the plaintiff's argument that incorporation of interlock systems on other construction equipment and devices showed the feasibility of such a system. *Id.* at 861-62. The court emphasized that the focus of the inquiry was whether or not testing was actually performed, not the existence of systems similar to the expert's proposal. *Id.* at 862. As with Rasty in this case, the expert performed no testing whatsoever, a factor which the court found to weigh heavily against the reliability of his opinions and excluded his testimony. *Id.*

Rasty, like the expert in *Johnson*, offers his unsupported opinion that the design of the Altec digger derrick involved in the accident is defective and unreasonably dangerous. Yet, he does so without any specific proposal or even a drawing or model. (Deposition of Rasty, pg. 32, L 13-24; pg. 34, L 14-18; pg. 48, L 2-16; pg. 72, L 1-7).

Rasty never once tested the digger derrick to determine whether this proposed "fix" is even possible or functional. *Id.* at pg. 66, L 1-3. He relied solely on photographic and anecdotal evidence to support his opinion but did nothing that would definitively affirm it.

Rasty has performed no tests to determine what factors are necessary for his theory to actually happen. Although Rasty admits that side loading is necessary for the winch line to get caught in the gap between the weldments, he never tested his theory to determine the extent of side loading that is necessary. *Id.* at pg. 57, L 1-10. He simply opines that any possibility of the line being in the gap is a defective design but fails to adequately take into consideration the effect of gross misuse by the operator. Without knowing how much side loading is necessary for the line to potentially be cut, Rasty cannot reliably say that there is any danger of the winch line being cut while the digger derrick is being operated with a reasonably foreseeable degree of side

loading. Therefore, Rasty has not confirmed his opinion about the defectiveness of Altec's design through testing, and this factor weighs against the reliability of Rasty's testimony.

Rasty vaguely proposes that the incorporation of some guard into the design of the digger derrick which Rasty assumes will keep the winch line from slipping into the gap between the weldments. *Id.* at pg. 72, L 21-25; pg. 73, L 1-6. Though Rasty discussed his proposed design in very general terms, he never developed a model, drawings or even a sketch of his "design" which anyone could test or see if it worked. He admits that he did not perform any tests to determine whether such a design would actually work or not. *Id.* at pg. 73, L 7-11.[1] As the *Johnson* court pointed out, testing a proposed alternative design is nearly indispensable in proving the reliability of proffered expert testimony. Rasty could have tried using a plate or guard on a digger derrick to determine whether it would be a practical solution, but he chose not to do so. Therefore, as with the *Johnson* expert, this factor weighs heavily against the reliability of his proposed testimony.

2. Peer Review and Publication

The second factor to be satisfied to allow an expert's testimony is whether the plaintiff's expert's theory had been subjected to peer review and publication. *Johnson*, 406 F. Supp. 2d at 863. The court explained that the *Daubert* Court had discussed this factor "in the context of submission of theories and propositions to the relevant scientific or technical community through mediums such as peer-reviewed journals." *Id.*

The *Johnson* court focused on the expert's inability to identify any other expert opinions or published literature supporting his opinion that boom truck cranes are defective if they lack an

[1] Rasty's failure to test his theories and opinions has resulted in the exclusion of his testimony under *Daubert* and Rule 702 in at least two other cases. *See Schipp v. General Motors Corp.*, 443 F. Supp. 2d 1023, 1031 (E.D. Ark. 2006); *Green v. Schutt Sports Manufacturing Co.*, [citation unknown] (N.D. Texas Nov. 16, 2006). A copy of the *Schipp* opinion is attached to this Memorandum for the Court's reference.

interlock system. *Johnson*, 406 F. Supp. 2d at 863. Although the court noted that such writings may in fact exist, it emphasized that the inquiry is directed only to whether the expert has cited to such writings. *Id.* The court also relied on the fact that the expert had never submitted his proposed design to any industry organizations, nor had he published anything relating to crane design. *Id.* Thus, because the expert's theory had not been subjected to peer review and publication, the court found that this factor weighed against the reliability of his testimony. *Id.*

Rasty testified that he has never read any article or publication that supports his opinion that the Altec digger derrick design is defective or unreasonably dangerous. (Deposition of Rasty, pg. 51, L 21-25; pg. 52, L 1-7). Neither has he seen any article or publication that proposes that the Altec digger derrick or any other digger derrick should be designed with a guard such as the one he proposes. *Id.* Rasty also stated that he has not seen any drawings or prototypes of his specific design or any other design incorporating guards as he proposes. *Id.* at pg. 52, L 2-7; pg. 71, L 14-17. Finally, Rasty has never proposed his theories or designs to other experts or colleagues. *Id.* at pg. 68, lines 6-10. Rasty's unsupported opinion and proposed "fix" design have not been subject to peer review. This failure of peer review is yet another factor against the reliability and admissibility of his testimony.

3. General Acceptance Within the Relevant Community

The third factor the *Johnson* court considered was whether the plaintiff's expert's theory and proffered alternative design were generally accepted in the pertinent community. *Johnson*, 406 F. Supp. 2d at 863-65. The court noted that the relevant community in that case was the engineering community, and more particularly the crane manufacturing community. *Id.* at 863. Also, the court stated that because in Tennessee liability attaches only when a product is in a defective or unreasonably dangerous condition when it leaves the manufacturer or seller's

control, the "general acceptance" inquiry is time-specific. *Id.* at 864. In other words, the expert's theory and proposed design must have been generally accepted at the time of manufacture of the product. *Johnson*, 406 F. Supp. 2d at 864.

In its analysis, the court relied on the expert's testimony that it was not the industry practice at the time of the boom truck crane's manufacture to provide outrigger interlocks, and that he did not know of any manufacturers who did use such a system around that time. *Id.* at 863. Also, the expert admitted that the American National Standards Institute (ANSI) standard directly applicable to boom truck cranes does not require or even address an outrigger interlock system. *Id.* Based on the fact that no other machine contained the design proposed by the expert, the court found that the expert's theory and proposed design had not been generally accepted in the engineering or manufacturing communities, and thus that this factor weighed against the reliability of the expert's proffered testimony. *Id.* at 865.

Rasty did not and cannot provide any evidence that his defective design theory or alternative design is generally accepted in the digger derrick manufacturing community in 1995 when the machine was manufactured. Like the *Johnson* expert, he could not point to any ANSI standards regarding digger derricks that specifically prohibit a design that allows any possibility of a winch line being cut. (Deposition of Rasty, pg. 67, L 16-19; pg. 91, L 14-21). Further, he has not compared the Altec digger derrick to those designed by other manufacturers, nor has he contacted other manufacturers to discuss either his defective design theory or his alternative design. *Id.* at pg. 68, lines 2-5. Finally and perhaps most telling, Rasty admits that he has never seen a digger derrick design that incorporates his proposed design. *Id.* at pg. 51, lines 17-20; pg. 72, lines 14-20. Under the *Johnson* analysis, clearly neither Rasty's defective design theory nor

his alternative design is generally accepted in the digger derrick manufacturing community, which provides yet another reason to exclude his testimony.

4. Opinions Developed Solely for Litigation Purposes

The final reliability factor the *Johnson* court considered was whether the plaintiff's expert had developed his defective design theory or his proposed design solely for testifying. *Johnson*, 406 F. Supp. 2d at 865-66. Also, his inexperience with the subject showed that he had developed his theories for this litigation only. *Id.* Finally, he had never conducted any studies, testing, or research and writing on any of the issues prior to the litigation. *Id.*

The court then emphasized that defective design theories and alternative designs especially require careful consideration because the benefits of hindsight increase the potential for abuse. *Id.* at 866. This is particularly so when the alternative design endeavors only to prevent the specific accident at issue in the litigation. *Id.* As the court stated, "[i]t is nearly impossible to envision a scenario where such specific 'Monday morning quarterbacking' would not reveal some potential solution to almost any problem, or where some creative design element conceived after the fact might fail to prevent a tragic accident." *Id.*

The court recognized that the expert's proposed design attempted only to prevent the specific accident in question. *Id.* at 866. In fact, the court noted that the proposed design might not necessarily make the crane safer at all; it merely offered a "mechanism that might have prevented a very specific accident that occurred under very specific conditions." *Id.* Based on this act of "Monday morning quarterbacking" and the expert's nature as an "expert for hire," the court found this factor to weigh against the reliability of the expert's testimony. *Id.*

All that the *Johnson* court said about plaintiff's expert in that case are especially applicable to Rasty in this case. Although true and reliable experts are necessary to aid the trier

of fact in certain areas, Rasty clearly developed his defective design theory and alternative design solely for the purposes of this litigation. Although he is a professor of mechanical engineering, he is also an "expert for hire," having been hired to offer opinions in dozens of cases. (Deposition of Rasty, pg. 86, lines 23-24; pg. 87, lines 3-5; pg. 88, lines 20-25). Also, he has no experience with digger derricks and developed his opinions about the Altec machine after Plaintiff hired him. *Id.* at pg. 49, lines 14-20. Most importantly, Rasty is merely a "Monday morning quarterback." His opinions on how this specific accident might have been prevented by alternative designs are useless because he developed them only with the benefit of hindsight. Further, like the *Johnson* expert, he sought only to provide a potential solution to this specific accident, a proposed "solution" which would not make the digger derrick safer as a whole. Even the Plaintiff has testified this was a "freak accident." Rasty developed his opinions solely for litigation purposes to address one specific "freak" accident and not to address or design a machine to make it safer. Therefore, this factor weighs against the reliability of his testimony.

5. Conclusions Regarding Rasty's Defective Design Theories and Proposed Alternative Designs

In summary, each factor in the *Johnson* court's *Daubert* analysis as applied to Rasty's defective design theories and alternative designs weighs against the reliability of his testimony and its admissibility. This Monday morning quarterback's vague, invalid and unsupported testimony should be excluded from consideration pursuant to *Daubert* and Rule 702.

C. Rasty's opinions should be excluded because they are based on unconfirmed and incorrect assumptions

Under Rule 702, courts consider the factual basis of an expert's testimony when considering its reliability. *Ellipsis, Inc. v. The Color Works, Inc.*, 428 F. Supp. 2d 752, 760 (W.D. Tenn. 2006). In particular, the District Court for the Western District of Tennessee in

Ellipsis recognized that expert testimony is unreliable when it is based on "a number of 'guesstimations' and speculations." *Id.* Quoting the Middle District, the Western District stated that "[l]ike a house of cards, once those foundations are disproved, the whole analysis collapses." *Id.* (quoting Coffey v. Dowley Mfg., Inc., 187 F. Supp. 2d 958, 976 (M.D. Tenn. 2002)). Guesstimations and speculations are the sole basis for Rasty's opinion. Also, further suspicion arises when the expert relies solely on facts and data provided by the hiring party. *Ellipsis*, 428 F. Supp. 2d at 760. Finally, the court noted that the reliability of testimony is particularly suspect when the expert fails to confirm such speculative facts and data. *Id.*

Rasty's causation theory, his alleged defective design, and his untested and vague description of some proposed alternative design opinions should be excluded because they are based on unconfirmed "guesstimations" and speculations. He has performed no testing, has done no calculations, and has not even seen, much less operated, the model machine involved in this accident. Rasty relied on assumptions about the ability of the weldments to cut the winch line under the accident conditions and the effectiveness of his proposed designs. (Deposition of Rasty, pg. 37, L 11-13). These speculations are based solely on information learned from Plaintiff or his witnesses, and Rasty did nothing to confirm them. *Id.* at pg. 44, L 19-25; pg. 45, L 1-4, 17-23. Rasty bases his opinions on speculations and information provided only by Plaintiff, and despite the ability to do so in the many months during which he was retained by Plaintiff, he did not confirm any of these facts or opinions. His testimony is unreliable and should be excluded from consideration.

CONCLUSION

Jahan Rasty opines first, that a "design flaw allowed the winch rope to be trapped between two components of the Altec digger derrick," and second, that some type of guard could

be placed to prevent the rope from slipping into this gap. Additionally, he states that the Defendant could have and should have developed and installed some type of guard on its digger derrick. Yet, Jahan Rasty offers absolutely nothing, other than his own self-acclamation, to connect his testimony to existing data in order to support his opinion. He has never operated, tested or ever seen examples of the proposed guard he claims would have prevented the Plaintiff's injuries. Accordingly, Jahan Rasty's testimony must necessarily fail the first *Daubert* inquiry for reliability.

Jahan Rasty offers no testimony as to the remaining three of the four *Daubert* inquiries. With the burden squarely on the Plaintiff, this Court must assume that Jahan Rasty cannot show (1) that his theory has ever been subjected to peer review—Rasty admits it has not; (2) that his theory is impervious to any known or potential rate of error—Rasty admits it is not; or, (3) that anyone within the relevant community has ever generally accepted his theory—Rasty admits no one has.

For the multiple reasons noted above, the testimony of Jernigan's proposed expert, Jahan Rasty, is inadmissible. It does not meet the requirements of Federal Rule of Evidence 702 or the standards established by *Daubert* and its progeny and should be excluded. Rasty lacks the knowledge, training, or experience in the operation and design of digger derricks necessary to qualify him to testify on those subjects. Further, his proposed testimony on the cause of the accident that injured Jernigan, the alleged defective Altec digger derrick design, and his vague, untested, and unreviewed alternative designs are unreliable under the factors developed by *Daubert* and other courts. Therefore, Defendant Altec Industries, Inc., respectfully requests that this Court exclude the testimony of Rasty from consideration in this lawsuit.

Respectfully submitted,

TAYLOR, PIGUE, MARCHETTI & MINK, PLLC

s/ L. Gino Marchetti, Jr.
L. Gino Marchetti, Jr. (BPR# 5562)
Thomas F. Mink, II (BPR# 6067)
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(615) 320-3225
marchetti.dc@tpmmlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Lewis Cobb
James Brandon McWherter
Spragins, Barnett, Cobb & Butler
P.O. Box 2004
Jackson, TN 38302-2004

s/ L. Gino Marchetti, Jr.
L. Gino Marchetti, Jr.

EXHIBIT 3

IN THE CIRCUIT COURT FOR MONTGOMERY, TENNESSEE
AT CLARKSVILLE

KAREN RENEA ALEO,	)	
	)	
Plaintiff,	)	Docket No. MCCCCV-CT10-1126
	)	JURY DEMAND
v.	)	
	)	
JOE WEYANT,	)	
	)	
Defendant.	)	

FILED
12 OCT 24 PM 1:54
CHERYL J. [illegible]
CIRCUIT COURT CLERK
BY: [signature]

MOTION FOR SUMMARY JUDGMENT

Comes now the defendant, Joe Weyant, and moves this Court, pursuant to Rule 56 of the Tennessee Rules of Civil Procedure, for an Order granting summary judgment dismissing this case in its entirety or, in the alternative, granting partial summary judgment dismissing the plaintiff's cause of action based upon negligent infliction of emotional distress. For grounds, the defendant would state and show as follows:

1. All causes of action alleged in plaintiff's Complaint are barred by the applicable statute of limitations.

2. Any action alleged in plaintiff's Complaint for negligent infliction of emotional distress must fail because the requisite elements of the tort do not exist.

Respectfully submitted

MINK & DUKE, PLLC

Thomas F. Mink, II, BPR # 006067
Charles M. Duke, BPR#23607
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mduke@minkdukelaw.com

Attorneys for Joe Weyant

CERTIFICATE OF SERVICE

The undersigned certified that a true and exact copy of the foregoing has been electronically mailed and hand-delivered to:

napolitanolaw@aol.com
Mr. Peter Napolitano
Attorney at Law
215 Legion St.
2nd Floor, Bank of America Building
Clarksville, TN 37040

On this the 4th day of October, 2012.

Thomas F. Mink, II
Charles M. Duke

NOTICE OF HEARING

IT IS ANTICIPATED THAT THIS MOTION WILL BE HEARD BY CHANCELLOR THOMAS E. GRAY, LOCATED AT 100 PUBLIC SQUARE, ROOM 300, IN GALLATIN, TENNESSEE, 37066, ON THE 26TH DAY OF NOVEMBER, 2012 AT 9:00 A.M.

IN THE CIRCUIT COURT FOR MONTGOMERY, TENNESSEE
AT CLARKSVILLE

KAREN RENEA ALEO,	)	
	)	
Plaintiff,	)	**Docket No. MCCCCV-CT10-1126**
	)	**JURY DEMAND**
v.	)	
	)	
JOE WEYANT,	)	
	)	
Defendant.	)	

DEFENDANT, JOE WEYANT'S,
STATEMENT OF UNDISPUTED MATERIAL FACTS

Comes now the defendant, Joe Weyant, pursuant to Rule 56.03 of the Tennessee Rules of Civil Procedure, and submits this Statement of Undisputed Material Facts relevant to the Motion for Summary Judgment, filed simultaneously herewith.

1. On February 21, 2008, Joe Weyant filed a Complaint for Absolute Divorce on behalf of Karen Renea Aleo. (Source: Certified Copy of Complaint for Absolute Divorce, the same bearing docket number MC-CC-CV-DV08-209, attached as EXHIBIT "1" hereto)

RESPONSE:

2. On February 21, 2008, Joe Weyant, on behalf of the Petitioner, Karen Renea Aleo, filed a proposed Marital Dissolution Agreement. (Source: Certified Copy of Marital Dissolution Agreement, the same bearing docket number MC-CC-CV-DV08-209, attached as EXHIBIT "2" hereto)

RESPONSE:

3. On or about June 16, 2008, a Divorce Decree was entered in the Circuit Court for Montgomery County, Tennessee, signed by Judge Michael R. Jones, which included the Marital Dissolution Agreement and a Permanent Parenting Plan. (Source: Certified Copy of Final Decree for Divorce, attached as EXHIBIT "3" hereto)

RESPONSE:

4. Ms. Aleo advised Joe Weyant that the Divorce Decree and/or Marital Dissolution Agreement were incorrect, because it/they failed to adequately dispose of the military retirement of Mr. Aleo, which was a marital asset. This discussion occurred in close proximity to the time when the Divorce Decree, and incorporated Marital Dissolution Agreement, were entered on the Court's minutes. (Source: EXHIBIT "4" hereto, Deposition of Karen Renea Aleo, page 12, lines 17-25; page 13, lines 1-24)

RESPONSE:

5. On the 27th day of June 2008, Ms. Aleo went to the office of the staff Judge Advocate and was advised that she would not get a portion of the military retirement because the decree was silent as to that asset. (Source: EXHIBIT "8" hereto; Sign-in sheet provided by plaintiff in response to written discovery, and deposition of Karen Renea Aleo, page 22, lines 5-21)

RESPONSE:

6. During the month of October 2008, Ms. Aleo spoke to Peter Napolitano about this matter, and her inability to obtain her portion of Mr. Aleo's military benefits. (Source: EXHIBIT "4" hereto, Deposition of Karen Renea Aleo, page 26, lines 18-25; deposition of Peter Napolitano, page 8, lines 4–25; page 9, lines 1-25; page 10, lines 1-25)

RESPONSE:

7. After speaking with Ms. Aleo regarding her divorce matter, Peter Napolitano undertook to represent Ms. Aleo to correct the Decree/Marital Dissolution Agreement. (Source: EXHIBIT "5" hereto, Deposition of Peter Napolitano, page 10, lines 1-4)

RESPONSE:

8. Upon agreeing to represent Ms. Aleo, Peter Napolitano prepared an Affidavit for Joe Weyant to execute. (See EXHIBIT "7" hereto) This Affidavit was signed by Joe Weyant on or about the 24th day of October 2008, and delivered back to Peter Napolitano. (Source: EXHIBIT "5" hereto, Deposition of Peter Napolitano, page 11, lines 18-23; deposition of Joe Weyant, page 20, lines 13-25).

RESPONSE:

9. Paragraph 10 of the Affidavit of Joe Weyant, executed on October 24, 2008, states:

"10. I hereby respectfully urge the Court to grant Ms. Aleo and attorney Napolitano's Motion to Amend the Marital Dissolution Agreement and Final Decree, and enter the new documents to effectuate the terms therein as agreed between the parties and inadvertently admitted my me from these documents." (Source: EXHIBIT "7" hereto, Affidavit of Joe Weyant)

RESPONSE:

10. A proposed Amended Marital Dissolution Agreement was prepared and was signed by Ms. Aleo on the 18th day of November, 2008. This Amended Marital Dissolution Agreement was notarized by Peter Napolitano's secretary, Rebecca Williams, on November 18, 2008. (Source: EXHIBIT "12"hereto, the same being Exhibit "6" to the deposition of Karen Aleo, page 44, lines 1–25; page 45, lines 1–25; page 46, lines 1-21)

RESPONSE:

11. Peter Napolitano met with Mr. Aleo in an effort to convince him to agree to and to sign the Amended Marital Dissolution Agreement, which Mr. Aleo refused to do. (Source: EXHIBIT "5" hereto, Deposition of Peter Napolitano, page 14, lines 1–25; page 15, lines 1-10)

RESPONSE:

12. After Mr. Aleo's refusal to sign the Amended Marital Dissolution Agreement, Mr. Aleo was represented by Elizabeth Rankin in this domestic matter. (Source: Letter of Elizabeth Rankin to Peter Napolitano, EXHIBIT "9" hereto, the same being EXHIBIT "9" to the deposition of Peter Napolitano, page 17, lines 24–25; page 18, lines 1-6)

RESPONSE:

13. On December 11, 2008, Elizabeth Rankin wrote to Peter Napolitano advising him of her representation of Michael James Aleo. (Source: Letter of Elizabeth Rankin, dated December 11, 2008, EXHIBIT "9" hereto, the same being EXHIBIT "9" to deposition of Peter Napolitano, page 24, lines 24–25; page 25, lines 1-8)

RESPONSE:

14. On January 21, 2009, Peter Napolitano wrote to attorney Elizabeth Rankin enclosing documents which included, but were not limited to, a proposed Rule 60 Motion to Amend the Marital Dissolution Agreement and Final Divorce Decree. (Source: EXHIBIT "10" hereto, the same being EXHIBIT "10" to deposition of Peter Napolitano, page 16, lines 9-15)

RESPONSE:

15. In the letter to Elizabeth Rankin from Peter Napolitano, dated January 21, 2009, Peter Napolitano represented to Ms. Rankin that Ms. Aleo realized her divorce attorney, Joe Weyant, had made errors and omissions in the divorce papers he filed with the Court. (Source: EXHIBIT "10" hereto, the same being EXHIBIT "10" to the deposition of Peter Napolitano, page 16, lines 16–25; page 17, lines 1-25)

RESPONSE:

16. On January 27, 2009, Ms. Rankin, on behalf of Mr. Aleo, rejected Mr. Napolitano's offer, and presented a counter offer which proposed to pay Ms. Aleo a portion of the retirement benefits. (Source: EXHIBIT"11" hereto, the same being, EXHIBIT "11" to the deposition of Peter Napolitano, page 16, lines 24 and 25; page 17, lines 1–25; page 18, lines 1-25)

RESPONSE:

17. Peter Napolitano relayed the offer of compromise and settlement from Elizabeth Rankin to Ms. Aleo, and Ms. Aleo advised Peter Napolitano she would not accept the same. (Source: EXHIBIT "5" hereto, Deposition of Peter Napolitano, page 18, lines 11-14; EXHIBIT "4" hereto, deposition of Karen Rena Aleo, page 36, lines 15–25; page 37, lines 1–25; page 38, lines 1-7)

RESPONSE:

18. Peter Napolitano never filed, on behalf of Ms. Aleo, any Motion for Rule 60 Relief, despite his representations to Elizabeth Rankin that he would do so. (Source: EXHIBIT "5" hereto, Deposition of Peter Napolitano, page 38, lines 4–25; page 39, lines 1-3)

RESPONSE:

19. Ms. Aleo first realized she had been injured and/or damaged by the actions or omissions of Joe Weyant on or about June 27, 2008. (Source: EXHIBIT "4" hereto, Deposition of Karen Aleo, page 22, lines 1-21)

RESPONSE:

20. Ms. Aleo realized she had been injured by the acts or omissions of Joe Weyant when she visited with the Judge Advocate General and was advised she could not obtain retirement benefits from Mr. Aleo because of the lack of appropriate language in the Divorce Decree, and this meeting occurred on June 27, 2008. (Source: EXHIBIT "4" hereto, Deposition of Karen Aleo, page 22, lines 1-21 ,& EXHIBIT "8" hereto, JAG Sign-in sheet produced pursuant to Request for Production of Documents,)

RESPONSE:

21. Ms. Aleo has not sought the services of a mental health professional as a result of her divorce. (Source: EXHIBIT "4" hereto, Deposition of Karen Aleo, page 18, lines 11-16)

RESPONSE:

22. Ms. Aleo has not been prescribed or taken any medication for depression or anxiety as a result of her divorce or any situation related thereto. (Source: EXHIBIT "4" hereto, Deposition of Karen Aleo, page 18, line 17–25; page 19; lines 1-6)

RESPONSE:

Respectfully submitted

MINK & DUKE, PLLC

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Attorneys for defendant, Joe Weyant

CERTIFICATE OF SERVICE

The undersigned certified that a true and exact copy of the foregoing has been electronically mailed and hand-delivered to:

napolitanolaw@aol.com
Mr. Peter Napolitano
Attorney at Law
215 Legion St.
2nd Floor, Bank of America Building
Clarksville, TN 37040

On this the ____ day of_____, 2012.

_____
Thomas F. Mink, II
Charles M. Duke

IN THE CIRCUIT COURT FOR MONTGOMERY, TENNESSEE
AT CLARKSVILLE

KAREN RENEA ALEO,	)	
	)	
Plaintiff,	)	Docket No. MCCCCV-CT-10-1126
	)	JURY DEMAND
v.	)	
	)	
JOE WEYANT,	)	
	)	
Defendant.	)	

MEMORANDUM OF FACTS AND LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Comes now the defendant, Joe Weyant, by and through counsel, and submits his Memorandum of Facts and Law in Support of the Motion for Summary Judgment filed on his behalf, pursuant to Rule 56 of the Tennessee Rules of Civil Procedure. Throughout this Memorandum, the defendant, Joe Weyant will be referred to as either "defendant" or "Weyant", the plaintiff, Karen Renea Aleo, will be referred to as either "plaintiff" or "Aleo". Counsel for the plaintiff, Peter Napolitano, will be referred to as "Napolitano".

I. INTRODUCTION

This action finds its genesis in a domestic relations case brought as an uncontested divorce between Karen Renea Aleo and her husband, Michael Aleo, which was filed in February of 2008. Neither the Divorce Complaint , the proposed Marital Dissolution Agreement, filed in February of 2008, nor the Marital Dissolution Agreement, which was subsequently incorporated by reference and entered as a portion of the Final Decree of Divorce in June of 2008, deal with the military retirement benefits of Michael Aleo, the same being a marital asset of the parties. As a result of the alleged acts and omissions of Joe Weyant, plaintiff claims to have suffered damages as a result of the professional negligence and malpractice of Joe Weyant, the breach of

contract of Joe Weyant, and the negligent infliction of emotional distress upon the plaintiff by Joe Weyant. It is the position of Joe Weyant that all of the causes of action are time barred by the statute of limitations controlling professional negligence and breach of contract in the actions based upon these premises. It is further the position of Joe Weyant that any action based upon negligent infliction of emotional distress by the plaintiff is time barred and, further, in order to recover under such a theory, there must be a showing of serious mental injury, which is absent in this case.

II. STANDARD FOR REVIEW

Pursuant to Rule 56.01 of the Tennessee Rules of Civil Procedure, a party may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor, as to all or any part of the claims alleged. Summary judgment is appropriate when the moving party can demonstrate there is no genuine issue of material fact, and he is entitled to a judgment as a matter of law. See T.R.C.P. 56.04; Shipley v. Williams, 350 S.W. 3d 527 (Tennessee 2001); See also Byrd v. Hall, 847 S.W. 2d 208, 214 (Tennessee 1993). In Hannah v. Alltel Publishing Company, 270 S.W. 3d 1, 5 (Tennessee 2008), the Tennessee Supreme Court reaffirmed the basic principles guiding Tennessee Courts in determining whether a Motion for Summary Judgment should be granted, stating as follows:

> "The moving party has the ultimate burden of persuading the Court that there is no disputed material facts creating a genuine issue for trial and that he is entitled to judgment as a matter of law. If the moving party makes a properly supported motion, the burden of production then shifts to the non-moving party to show that a genuine issue of material facts exists."

The party seeking summary judgment may shift this burden of production to the non-moving party by either negating an essential element of the non-moving party's claim, or by

showing that the non-moving party cannot prove an essential element of the claim at trial. *Id.* Accordingly, summary judgment is appropriate when the facts and reasonable inferences from those facts would permit a reasonable person to reach but one conclusion. *Id.;* See also Staples v. CBL and Associates, Inc., 15 S.W. 3d 83, 89 (Tenn. 2000).

T.C.A. § 20-16-101 states as follows:

> "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."

III. UNDISPUTED FACTS

The undisputed facts are set forth in a separate document filed simultaneously herewith, entitled "Defendant's Statement of Undisputed Material Facts." To capsulize and summarize those facts, the defendant here states that Weyant had, in the past, represented the plaintiff, Karen Aleo, and her ex-husband, Michael Aleo, in a bankruptcy action. Subsequent thereto, Weyant was approached by Karen Aleo regarding his filing a divorce action on her behalf, and he was advised that both Mr. and Mrs. Aleo had agreed to all terms relevant to the divorce. After meeting with Ms. Aleo, Weyant prepared a Divorce Complaint, along with a proposed Marital Dissolution Agreement, and the same were filed with the Court on February 21, 2008. On May 27, 2008, Weyant gave notice to Michael Aleo that the divorce action would be presented to Judge Michael Jones on or about the 16th day of June, 2008. On June 16, 2008, Weyant appeared in front of the Honorable Judge Michael R. Jones and, at that time, procured a divorce

for Karen Aleo, with the executed Marital Dissolution Agreement being incorporated by reference into the Final Divorce Decree and made a part thereof.

Around the time that the divorce was granted, either immediately prior to or quickly thereafter, it was called to Weyant's attention by Ms. Aleo that neither the Divorce Complaint, the Marital Dissolution Agreement, nor the subsequent Final Decree dealt with and disposed of the military retirement benefits of Michael Aleo, which were a marital asset of the parties. Upon being so informed of the deficiency, Joe Weyant was of the opinion that Ms. Aleo would be entitled to a portion of the retirement benefits as a matter of law, and advised her of the same.

On or about June 27, 2008, Ms. Aleo visited with the staff of the Judge Advocate General Corp and was advised, at that time, that she would not receive benefits from Mr. Aleo's military retirement because the Divorce Decree, and Marital Dissolution Agreement incorporated therein, did not appropriately deal with this marital asset. Ms. Aleo knew she had been damaged by Mr. Weyant's omission at that time. After receiving this information from the Judge Advocate General, Ms. Aleo relayed this information to Joe Weyant, who offered to file a Rule 60 Motion to correct the deficiency, and to do so free of charge.

At some point prior to October 24, 2008, Ms. Aleo discussed the matter of her husband's military retirement benefits with her friend, Peter Napolitano, who is a lawyer in Montgomery County, Tennessee. Thereafter, Napolitano undertook to represent Ms. Aleo on a pro bono basis, seeking to correct the Marital Dissolution Agreement and the Final Decree of record in this matter. On October 24, 2008, at the behest of Peter Napolitano, Joe Weyant executed an Affidavit which was to be used as an exhibit to a Rule 60 Motion seeking to alter or amend the Divorce Decree, including the Marital Dissolution Agreement incorporated therein. This Affidavit fully admits the deficiencies in the Marital Dissolution Agreement and the fact that the

deficiencies were because of the omissions of Joe Weyant. The Affidavit, in paragraph 10 therein, requests that the Court assist Ms. Aleo and her attorney, Peter Napolitano, by altering or amending the prior Decree to appropriately deal with the military retirement benefits of Mr. Aleo.

On or about November 18, 2008, Ms. Aleo executed the proposed Amended Marital Dissolution Agreement, and the same was witnessed by Rebecca Williams, the secretary to Peter Napolitano. After this document was executed, Mr. Napolitano met with Mr. Aleo in an effort to persuade him to voluntarily enter into the Amended Marital Dissolution Agreement; thus, putting into play the agreement of the parties. Mr. Aleo met with Mr. Napolitano, but declined to execute the proposed Amended Marital Dissolution Agreement.

On December 11, 2008, Elizabeth Rankin, a lawyer in Clarksville, Tennessee, wrote to Peter Napolitano, advising him that she represented Mr. Aleo and that all communication with Mr. Aleo should take place through her. Thereafter, on January 21, 2009, Napolitano wrote to Elizabeth Rankin supplying her with a proposed Rule 60 Motion, the Affidavit of Joe Weyant, and the proposed Amended Marital Dissolution Agreement. Ms. Rankin, on behalf of Mr. Aleo, wrote to Napolitano on January 29, 2009, rejecting the invitation to have Mr. Aleo enter into the Amended Marital Dissolution Agreement, but made a counter proposal wherein Ms. Aleo would receive 25% of the military retirement in exchange for recalculation of the child support obligations. This counter proposal was rejected by Ms. Aleo.

In March of 2009, Elizabeth Rankin left the active practice of law to take the place of the recently deceased Jack Hestle as General Sessions Judge for Montgomery County and was; thus, required to withdraw as counsel in this and other matters.

Being unable to effect an agreement on an Amended Marital Dissolution Agreement, Peter Napolitano took no further actions on behalf of Ms. Aleo. No Rule 60 Motion was ever filed by any person.

On June 1, 2010, almost two (2) years from the date of the original entry of the Decree incorporating the original Marital Dissolution Agreement, and some twenty-three (23) months after Ms. Aleo was advised by the Judge Advocate General's staff that she would not receive retirement benefits from Mr. Aleo because of the wording of the Marital Dissolution Agreement, Ms. Aleo filed suit against Joe Weyant alleging professional negligence, breach of contract, and negligent infliction of emotional distress. This action was commences almost two (2) years after she knew she had been damaged, and well in excess of one (1) year from the time she had received legal services from Peter Napolitano as a result of the alleged professional negligence of Joe Weyant, including an offer which would have mitigated her damages, which she refused.

IV. LAW AND ARGUMENT

The statute of limitations for bringing an action based upon attorney malpractice or breach of contract is one (1) after the cause of action accrued. Tennessee Code Annotated § 28-3-104(a) (2) states:

> "(a) the following actions shall be commences within one (1) year after the cause of action accrued: ...
>
> (2) actions and suits against an attorney or a licensed public accountant or certified public accountants for malpractice whether the actions are grounded or based in contract or tort."
>
> A cause of action accrues against an attorney when a client has suffered a legally cognizable or actual injury as a result of an attorney's negligence and either knew it or should have known the injury was caused by attorney's negligence. This is known as the "Legal Malpractice Discovery Rule". This rule is composed of two distinct elements, (1) the plaintiff must suffer an irremediable injury (now characterized by the Tennessee Supreme court as a

> legally cognizable injury) as the result of the defendant's negligence and (2) the plaintiff must have known or in the exercise of reasonable diligence, should have known the injury was caused by the defendant's negligence. See Carvell v. Bottoms, 900 S.W. 2d 23, 28 (Tennessee 1995).

In the case at bar, the plaintiff knew she was damaged shortly after the Divorce Decree was entered. In late June of 2008, when the plaintiff was not receiving any retirement benefits from Mr. Aleo's military retirement, she made inquiry to the Judge Advocate General, and JAG advised her that, because of the deficiency in the Divorce Decree, they could take no further action, since Mr. Aleo was no longer a member of the armed services but was, in fact, a civilian. It was at this time that Ms. Aleo knew she was not receiving benefits, and that she had suffered a loss. (See deposition of Karen Aleo, EXHIBIT "4" hereto, page 22, lines 5-21). Thereafter, in October of 2008, well within the statute of limitations period, Ms. Aleo informed attorney Peter Napolitano of the facts and circumstances surrounding this scenario, and Napolitano was fully aware of the facts of this matter. In fact, it was Napolitano, in October of 2008, who prepared an Affidavit for Joe Weyant's execution which was basically a "mea culpa" wherein Weyant's mistake was disclosed in writing, sworn to by him and notarized on October 24th. Clearly, Napolitano had knowledge of Weyant's acts and omissions and, based upon his proclaimed expertise in this area (Deposition of Peter Napolitano, page 17, lines 5-23) Napolitano knew that Ms. Aleo had suffered damage at that time.

Mr. Napolitano was clearly serving as counsel for Ms. Aleo at this time and, thus, any knowledge of Napolitano of damage sustained to Ms. Aleo is knowledge to Ms. Aleo as well. Even giving Ms. Aleo the benefit of the doubt to say she did not fully understand the damage she has sustained until after retaining the services of Mr. Napolitano, she certainly knew of her losses in October of 2008, at the time the Affidavit of Joe Weyant was executed. Certainly, at that

time, her lawyer, Peter Napolitano, realized that Ms. Aleo had suffered a legally cognizable injury and, therefore, knowledge which Napolitano was possessed of is implied to Ms. Aleo. Smith v. Petkoff, 919 S.W. 2d 595 (1995). The Court, in the Petkoff case, stated that "a client is implied to have notice of facts transmitted to his attorney in the matter and course of his employment for such a client." *Id* at 597. In Moody v. Moody, 861 S.W. 2d 545, 546 (Tennessee 1984), the Supreme Court stated that "counsel's knowledge must be attributed to his client if the actions of the Court are to have any efficacy."

The Petkoff Court went on to quote from C.J.S. as follows "In 7A, C.J.S., Attorney and Client § 182 (1980) the rule is stated as follows: "as otherwise stated, a person generally is held to know what his attorney knows or should communicate to him, and the fact that the attorney has not actually communicated his knowledge to the client is immaterial. So, the facts constituting knowledge, or want of it, on the part of an attorney, are proper subjects of proof, and are to be ascertained by testimony as in other cases; but when ascertained, the constructive notice thereof to the client is conclusive and cannot be rebutted by showing the attorney did not, in fact, impart the information so acquired." In short, Ms. Aleo knew, of her own knowledge, that she had been injured because of her conversations with the JAG. In addition thereto, her attorney, Peter Napolitano, had actual knowledge of the facts and circumstances surrounding Joe Weyant's omissions and, in fact, memorialized those in an Affidavit which was executed on October 24, 2008, some twenty (20) months before this action was commenced.

The question presents itself as to whether or not it can be stated that Ms. Aleo sustained an actual injury for the purposes of legal malpractice and, certainly, she did in June of 2008. An actual injury occurs when there is a loss of a legal right, remedy or interest, or the imposition of liability. An actual injury may also take the form of the plaintiff being forced to take some

action or otherwise suffer some actual inconvenience such as incurring an expense as a result of the defendant's negligent or wrongful act. See John Kohl and Company, PC v. Dearborn and Ewing, 977 S.W. 2d 528, 532 (Tennessee 1998), or, as in this case, being deprived of retirement benefits which are being distributed each month

Finally, plaintiff's counsel has argued that the cause of action for legal malpractice would not accrue until the damages became irremediable through final judgment, or until a Rule 60 Motion had been ruled upon.

The Court dealt with this issue in Spar Gas, Inc. v. McCune, 908 S.W. 2d 400, 404 (Tenn. App. 1995). In this case, the Court basically said that a client's reliance upon erroneous legal advice that their legal malpractice cause of action would not accrue until damages became irremediable through final judgment, verdict and appeal or otherwise, did not operate to toll the statute of limitations for legal malpractice.

Ms. Aleo knew in June of 2008 that her Divorce Decree was defective. She knew after visiting with JAG in late June of 2008 that she would not receive any money from Mr. Aleo's military retirement. Further, her attorney, Peter Napolitano, was aware of this entire situation in October 2008. This lawsuit was not commenced until June 1, 2010, the statute of limitations has clearly run, and this matter is time barred.

V. PLAINTIFF FAILS TO STATE A VALID CAUSE OF ACTION FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

The Courts have long dealt with emotional distress claims and there is, indeed, a wide difference between something as insidious as intentional infliction of emotional distress and something as suspect as negligent infliction of emotional distress. In order to assure real liability of negligent infliction of emotional distress claims, the Courts have traditionally held that the plaintiffs must show that they have suffered serious mental injury as a result of the negligence of

the defendant. Further, such serious mental injury must be proven by expert or scientific means. See Camper v. Minor, 519 S.W. 2d 437 (Tenn. 1996). In Camper, the Court stated "the law governing negligent infliction of emotional distress... is fundamentally concerned with striking a balance between two opposing objectives: first, promoting the underlying purpose of negligence law–that of compensating persons who have sustained emotional injuries attributable to the wrongful conduct of others; and second, avoiding the trivial or fraudulent claims that have been thought to be inevitable due to the subject nature of these injuries." See Camper v. Minor, 519 SW 2d 437, 440 (Tenn. 1996). While the Courts have distinguished and refined NIED cases since Camper v. Minor, generally speaking, cases which do not require scientific or expert proof of serious mental injury are those cases which also include physical injuries or damages which are readily apparent.

In this case, the plaintiff has not seen any mental health professional as a result of her divorce, or any of the conditions surrounding it. The plaintiff has not received any type of medication or therapy. Clearly, this case would also be barred by the statute of limitations, as discussed above but, in addition thereto, it is fatally flawed by the fact that the plaintiff has not supplied any proof and, in fact, has supplied proof to the contrary, that she suffered any type of infliction of emotional distress, because she has not sustained any serious mental injury.

Based upon the above, it is defendant's position that this case should be dismissed in its entirety or, in the alternative; any claim for intentional infliction of emotional distress should be dismissed.

Respectfully submitted

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CERTIFICATE OF SERVICE

The undersigned certified that a true and exact copy of the foregoing has been electronically mailed and hand-delivered to:

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On this the 15 day of October, 2012.

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