The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: James Collins Landstreet II

Office Address: (including county) 404 East Watauga Ave., Johnson City, Washington County, TN 37601

Office Phone: (423) 282-2512 Facsimile: (423) 282-2703

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.

J. Collins Landstreet II, Esq.

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

1988; 13509

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; 13509; November 7, 1988; active. I am also licensed to practice in the U.S. District Court for the Eastern District of Tennessee, and the U.S. Courts of Appeal for the 4th and 6th Circuits. I have been admitted *pro hac vice* in the U.S. District Court for the Western District of North Carolina and the U.S. District Court for the Southern District of Ohio.

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).

Not applicable

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).

Securities Analyst, Allen C. Ewing & Co. (1987 – 1989); sole practitioner in the practice of law (1989 – present).

6. If you have not been employed continuously since completion of your legal education,

describe what you did during periods of unemployment in excess of six months.

Not applicable.

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

General litigation, approximately 75% civil and 25% criminal. Also, I occasionally set up LLC's and Operating Agreements, draft powers of attorney, handle estate matters, etc.

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.

During the course of my legal career, I have handled criminal cases, civil cases, administrative law cases and appellate matters, in both state and federal courts. In the area of criminal law, I have personally handled many hundreds of cases including, but not limited to, DUI's, major and minor drug cases, homicide cases, theft and embezzlement cases, child abuse cases, etc. In the civil arena, I have represented clients in diverse areas including, but not limited to, landlord/tenant and other real estate litigation cases, medical malpractice and personal injury, worker's compensation, social security disability and other administrative law litigation, bankruptcy, both filings of Chapters 7 and 13 and bankruptcy litigation, creditors rights, domestic relations, and major business litigation. To a lesser extent, I have also handled some transactional matters, e.g., deeds, powers of attorney (general, health care and limited), and forming LLC's and drafting Operating Agreements for LLC's.

In all of these cases, being a sole practitioner, I have done virtually 100% of the work involved, from making copies to drafting my own pleadings, to conducting discovery depositions, to court appearances, to writing briefs and arguing appeals. Because I have been a sole practitioner and am not a native of East Tennessee (I was born and raised in Nashville and married my wife, Jennifer, who is from Johnson City), I have been forced to be imaginative and creative and take

risks in my practice, both monetary and temporal. Many of the cases I have handled during my career have required significant expenditures of time and capital on my part, e.g., medical malpractice, business litigation, fire loss cases, etc.

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

From approximately 2002 to 2009, I handled a case in which my client, an insurance mergers and acquisition specialist, sued Swiss Reinsurance (the largest reinsurance company in the world) over a business broker's fee. My client represented a privately held insurance underwriter in Columbus, Ohio, The Midland Company, whose owners wanted to sell. My client was engaged to sell the company. My client had procured an interested buyer, Life Reinsurance. During the due diligence period, the CEO of Life Re called my client and told him that the deal had to be called off, but that he could not divulge the reason at that time. Some months later, it was disclosed that Swiss Re was acquiring Life Re for cash. Approximately one year later, just weeks after the Swiss Re/Life Re closing, it was announced that Swiss Re was acquiring The Midland Company for cash. My client claimed that he was entitled to a fee on the theory that, but for his efforts in bringing Life Re to The Midland Company, the Swiss Re/Midland deal would not have happened. I tried to settle the case with Swiss Re's then general counsel, Weldon Wilson, but Swiss Re claimed that the Swiss Re/Midland deal was done independently, the chain of causation had been severed and that the deal was not a result of my client's efforts. I recalled several real estate cases with similar facts from law school and thought that we had a meritorious cause of action. I put the case together, including organizing the documentary evidence and developing our witnesses, and persuaded a Columbus firm to go in on the case with me as local counsel on a contingency fee basis.

In Swiss Re's response to our request for production of documents, Swiss Re sent me thousands of documents which, when stacked up, were about four feet high. Eventually, I sat down and went through and read each and every page of the discovery materials. Several hundred pages into it, I found e-mail correspondence between Swiss Re and Midland executives showing that approximately one week after the Swiss Re/Life Re closing, Swiss Re executives had visited Columbus to perform due diligence on The Midland Company. That, plus the Life Re CEO's favorable video deposition testimony, persuaded Swiss Re to settle with us for a significant sum.

Several years ago I represented a client in a child day care license revocation action instituted by DHS. After hearings in Johnson City in which DHS' position was upheld, we appealed the case to DHS in Nashville for trial before an ALJ and a five person hearing panel. According to counsel for DHS, Elizabeth Spondholtz, DHS tries on average one of these cases per year. Lead counsel for DHS and numerous assistants made a career of this case for at least six to eight months. At trial on the top floor of the DHS building in Nashville, where the courtroom was filled every day with observers, DHS spent approximately five full days putting on its case and I cross examined its witnesses, both experts and DHS employees involved in the investigation. I put my case in chief on in approximately two hours, calling only my client and two of her day

care clients. The panel ruled unanimously in my client's favor and the ALJ ruled that we had won the case so convincingly that he ordered DHS to pay my considerable legal fees and my client's expenses. It was one of the most gratifying experiences of my career, since my client operated a very small day care operation, was of limited means, and I had taken the case on a very modest retainer.

The two appellate briefs that I submit in response to question 34 of this application are notable. In *Milton E. Sparks v. Gilley Trucking Company, Inc.*, argued before the U.S. Court of Appeals for the 4th Circuit, I got the district judge reversed on an evidentiary matter in a car wreck case. We subsequently settled the case during the second trial.

In *Robert G. Crabtree, Jr., and Bonnie K. Hakey-Crabtree v. Jennifer L. Lund*, argued before the Court of Appeals in Knoxville, I got the trial judge reversed on the issue of the proper interpretation of Rule 4.01(3), T.R.Civ.P., which had been amended relatively recently. I believe this was the first appellate ruling on this amended rule regarding delays in service of summons. Coincidentally, the Circuit Court Judge who was reversed in the *Crabtree* case was Thomas J. Seeley, Jr., whose position we are applying to fill.

I believe both of these briefs I submit in response to this question involved reported cases.

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.

Not applicable.

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.

Several times in the past, I have served as a guardian ad litem for minors. I remember little of these cases, except that it was rewarding representing minors before the court.

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

I have done a considerable amount of pro bono work over the years, though I have not claimed credit or acknowledgement for this work with any legal organization.

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.

I previously submitted an application for the Criminal Court Judgeship for the First Judicial District. The meeting date at which the Judicial Nominating Commission (then named) considered my application was February 8, 2013. Also, I submitted an application for the First Judicial District Chancery Court position. The then named Judicial Nominating Commission considered my application on June 14, 2013. The commission did not submit my name to the Governor on either of these occasions.

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.

Princeton University, B.A., 1972; University of Tennessee College of Medicine, 1978-1980 (I did not enjoy the clinical aspects of medicine, and thought I would be better suited to the law.); University of Tennessee College of Law, class of 1986.

PERSONAL INFORMATION

15. State your age and date of birth.

64; September 26, 1950.

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

Since birth.

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

Since 1989.

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

Carter 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.

I pled guilty to DUI in 1986 in Knox County, Tennessee in General Sessions Court.

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.

Not applicable.

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

I received a public reprimand from the U.S. District court for the Eastern District of Tennessee. I filed several Chapter 7 bankruptcy petitions in which the petitioners had not taken the required credit counseling course prior to filing, although they all completed the course several days after filing. I had been assured by these petitioners' prior counsel that they had taken the course and all of these clients had stated under oath that they had taken the course. All of these petitioners received a discharge. I contested the action and I had a hearing before Judge Collier in Chattanooga, who issued the reprimand. I appealed the case to the 6th Circuit which ruled that Judge Collier had not abused his discretion in issuing the reprimand. The BPR issued a private reprimand related to this case.

I received a private reprimand stemming from a case described in answer to question 9, above (*DHS v Pope*). After being apprised by the ALJ that I was entitled to attorney's fees, I requested from the ALJ, *ex parte*, the information required for such an award. The Board contended that this was substantive guidance in a pending case. Both then and now, I dispute the Board's position, since my query had nothing to do with either the conduct of the trial or the merits and outcome of the case. The Board also claimed that I "failed to report the disciplinary misconduct of the ALJ who engaged in a personal relationship with your client

while the motion for costs was pending." I knew nothing about the nature of any relationship between the ALJ and my client, but I let the private reprimand stand.

I believe I received another private reprimand years ago, but I honestly do not remember the underlying facts.

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.

Not applicable.

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

Not applicable.

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.

Thomas E. Cowan, Jr. v. James Collins Landstreet II et ux, Jennifer Burgess Landstreet and Wiley Bros. – Aintree Capital, LLC, Circuit Court for Carter County at Elizabethton, Tennessee, #C-12271. The plaintiff is a person that I used to share office space with who was convicted of felony tax evasion and has been disbarred. In my opinion and that of my counsel, Earl Booze, there is no merit to this case. Mr. Cowan also filed a complaint with the Board of Professional Responsibility alleging the same facts. The complaint was dismissed by the Board.

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.

I am a member of First Baptist Church, Elizabethton, Tennessee, where I play guitar in the praise group. I am a board member and counsel to Assistance and Resource Ministries, a non-profit corporation in Elizabethton, Tennessee that provides food, clothing, utility deposits, etc., to those less fortunate than we in the community.

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.

Not applicable.

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.

Tennessee Bar Association (current member); Carter County Bar Association (approximately 20 years; President, 1994-1996); Washington County Bar Association (current member).

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.

Not applicable.

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

Antitrust Law-The Clayton Act-The Regulation of Interlocking Directorates Between Competing Banks and Insurance Companies, 51 Tenn. Law Review 3, Spring 1984.

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.

Not applicable.

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

I ran unsuccessfully for the Elizabethton City School Board in 2008.

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

Not applicable.

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

Attached. These examples are solely the result of my own work.

ESSAYS/PERSONAL STATEMENTS

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

I have had a very diverse law practice over my career. The advantage of having a general practice is that things rarely get monotonous and new cases inevitably offer new challenges, both academically and otherwise. Although it may seem selfish, one of the reasons I am seeking the position is that I want and am ready for a new challenge. I am not interested in retiring. Additionally, I think I would be a good judge. I have had a broad range of life experiences, I am a fair minded person and have a good relationship with virtually all members of the bar in my district and others. I can be counted on to do the work necessary to fairly handle all cases before 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)***

As stated previously in answer to question 12, above, I have done a considerable amount of pro bono work over the years, although I have not kept records of this nor have I ever sought acknowledgement for this work. Over the last several years, I performed work for an African American family in Johnson City, which would constitute approximately $15,000 in legal fees from a paying client.

Also, I have taken literally hundreds of court appointed criminal cases and presently work one day a week for the District Public Defender, representing indigent clients. I do this because I enjoy it, I am able to do it, and because I believe that all people deserve competent, zealous

representation when charged with a crime.

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

The judgeship I seek is the Circuit Court Judge for the 1st Judicial District, which district consists of Washington, Unicoi, Carter and Johnson Counties. This court handles civil matters. The majority of cases the Circuit Court hears are domestic matters, including, but not limited to divorce, child support, Protective Orders, etc. The Court also hears a substantial number of cases involving real estate litigation, commercial litigation, personal injury and medical malpractice, and other miscellaneous civil matters. I dare say that I have handled virtually every kind of case that comes before this court.

The retiring judge's tenure on the bench has been one of consistent professionalism. If selected, I will continue in this tradition. I am in excellent health and can be relied on to be on the bench every day, fully prepared to hear the cases before me. As much as is practicable, I will attempt to research in advance difficult issues that come before the court. I can be relied on to show unbiased respect for all parties and counsel that appear before the court.

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

For approximately fifteen years, I have been on the board of directors and acted as counsel to Assistance and Resource Ministries (ARM), a local non-profit corporation. The board is comprised of local business leaders and volunteers. Essentially, what ARM does through charitable donations from local churches, individuals and businesses, is provide food, clothing and housing assistance, e.g., utility deposits, etc., to qualifying low income families in Carter County. ARM is well funded and well managed and has had a very positive effect on hundreds of needy families in our community.

I also play guitar in the praise group at First Baptist Church in Elizabethton, Tennessee. This is an opportunity to play music with an extraordinarily talented group of musicians and vocalists and to further spiritual growth, both in me and the congregation.

If appointed judge, I intend to continue my involvement with both of the aforementioned pursuits.

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 have had a broad range of experiences during my life, both professional and otherwise. I was an NCAA All-American diver as an undergraduate at Princeton. I have been a musician since I was a child, and played professionally for several years. I have worked hard, both professionally and in these other areas to develop and hone my skills. I paid my way through most of medical and law school, through some loans, but primarily through work. Prior to beginning law school I was employed as a professional high diver (up to one hundred feet) and as a model in cigarette commercials for Brown & Williamson. Through this employment I paid for most of the first two years of law school. The remainder I paid for through employment as a law clerk. I understand hard and consistent work because I have done it all my life. If I am appointed to the bench, consistent with my past record, I can be counted on to do my homework and always work to understand all sides of the cases before me.

I have been married for seventeen years to Jennifer Burgess Landstreet, who is a teacher in the Elizabethton City Schools, and we have thirteen year old fraternal twin girls, with whom I am very involved. Both the practice of law and raising girls has taught me the importance of listening, patience and maintaining equanimity during stressful periods. These are important qualities for any judge to possess.

I have taken some roads less travelled during my life. At least some of the responsibility for forming my adventurous attitude toward life lies with a great English teacher I had in high school, Sam Pickering. Robin Williams ably portrayed Mr. Pickering in the Academy Award winning film, Dead Poets Society. Mr. Pickering taught us much about life, literature and convention.

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

I will. Years ago I was appointed to represent a defendant in a child sexual abuse case. The evidence in the case convinced me that my client was guilty, and, frankly, the allegations sickened me. Further, I was of the opinion that the criminal sanctions were not severe enough for this type of offense. Nevertheless, I was obligated to provide a zealous defense. We tried the case, in which I had to cross examine the juvenile victim, and got a hung jury. We subsequently settled for a guilty plea to a lesser charge.

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.Charles Nelson III: Managing Director for Wiley Bros.-Aintree Capital in Nashville, TN.
B.Peter J. Zimmerman: President, Kano Laboratories, Inc., Nashville, TN.
C.Frank Schaff: President, Mapes Piano String Co., Inc., Elizabethton, TN.
D.David Crockett, Esq., Elizabethton, TN.
E.Frank D. Newman, Esq., Elizabethton, TN.

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 Circuit Court for the First 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: April 12, 2015.

/s/: James Collins Landstreet II
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.

James Collins Landstreet II
Type or Print Name

/s/: James Collins Landstreet II
Signature

April 12, 2015
Date

13509
BPR #

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

ORIGINAL CERTIFIED MAIL
5-24-10

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

ROBERT G. CRABTREE, JR., and BONNIE K.HAKEY-CRABTREE,	]	
PLAINTIFFS--APPELLANTS	]	
VS.	]	No. E2009-01561-COA-R3-CV
	]	[Carter Circuit Court No. C10184]
JENNIFER L. LUND,	]	
DEFENDANT--APPELLEE	]	

2010 MAY 26 AM 8:02

BRIEF OF APPELLANTS
Appealing from an Order of Dismissal with Prejudice, filed June 30, 2009, for intentional delay in obtaining service of process upon Defendant

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J. Collins Landstreet II
Attorney for Appellants
B.P.R. No. 13509
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Elizabethton, TN 37643
(423) 543-3500
(423) 543-6531 (fax)

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I. STATEMENT OF ISSUE PRESENTED FOR REVIEW.

Did the trial court err in dismissing Plaintiff's personal injury action that was timely filed within the applicable personal injury statute of limitations for *intentionally and deliberately* withholding service of process thereafter upon Defendant?

II. STATEMENT OF THE CASE.

The parties herein will be referred to a "Plaintiffs" or "Defendant", indicating the capacity they occupied in the trial court, or "Appellants" or "Appellee"; while references to the Record on Appeal, which consists of the Complaint initiating the action against Defendant, the Motion to Dismiss with supporting affidavit, Plaintiff's Response to the Motion to Dismiss with supporting affidavit, and the Order of Dismissal, which record being only one (1) volume will simply be referred to using the abbreviation "R.", denoting the record, followed by a page number.

III. STATEMENT OF FACTS.

1. Plaintiffs were involved in a serious three-car automobile collision on Highway 19-E when Defendant lost control of a Ford Mustang at an extremely high rate of speed in the opposite direction to Plaintiffs travel; crossed the grassed median and struck Plaintiff's Pontiac Grand Prix with such force that her Mustang broke into two separate pieces, the rear end striking a third car; from which collision, Plaintiffs sustained serious personal injuries and incurred medical expenses, provided Defendant's counsel in

discovery, in excess of $28,987.53 (R. 32-33, Affidavit of Thomas E. Cowan, Jr.).

2. Plaintiffs filed this action on Friday, April 21, 2006, seeking compensatory and punitive damages from Defendant and obtained summons to serve upon Defendant on Monday, April 24, 2006 (R. 1, 21). Defendant's residence was listed in the Tennessee Uniform Traffic Crash Report as 360 Fiddler's Branch, Hampton, Tennessee 37658 and her telephone number was listed as "**725-9907**", which number was later learned to be incorrect. Defendant's residence is located in the Simerly Creek section approximately 15-20 miles from Elizabethton. Counsel for Plaintiff's attempted to serve process upon Defendant at her stated residence on June 30, 2006, but was unable to locate Defendant; subsequently, due to the distance of the residence from Elizabethton, attempts to contact Defendant at the telephone number listed in the Accident Report (**ie., 725-9907**) to make arrangements for service of process were unsuccessful. Counsel later learned that this number was incorrect, as the published telephone directory contained no listing for Jennifer L. Lund at all, and a listing for "David Lund, 360 Fiddlers Branch Road, Hamp 37658 . . . . **725-9904**". (emphasis supplied). (R. 33-34, Affidavit, Cowan, par. 3).

3. Process was reissued on April 2, 2007, within the one-year period allowed by TRCvP 3, and service attempted at the Hampton Branch of Citizens Bank where Defendant was believed to be employed. Counsel for Plaintiff learned at that time that Defendant had given birth to a child in February, 2007, and

was on maternity leave, which work absence was subsequently confirmed in follow-up telephone calls to personnel at Citizens Bank during the ninety-day period provided for service of said summons that ended July 3, 2007. (R. 34, Affidavit, Cowan, par. 4).

4. Process was reissued a third time on February 8, 2008, during counsel's absence from his office and returned un-served on May 8, 2008; reissued on September 9, 2008 and served upon Defendant on October 10, 2008, at the Broad Street Branch of Citizens Bank, where she had been assigned after return from maternity leave. (R. 34, Affidavit, Cowan, par. 5).

5. From the date of filing of this action on April 24, 2006 to the date of service of process upon Defendant on October 10, 2008, ***Plaintiff's had process issued four (4) times, rather than only two (2) times as required by TRCvP 3,*** indicating Plaintiff's desire to advance their cause of action, and not *intentionally* delay the process. (R. 32, Affidavit, Cowan, par. 2).

6. From the date of filing of this action to the date process was served upon Defendant, Plaintiff's and their counsel never had any reason or intent to withhold service of process, the gravemen of TRCvP 4.01(3) and Defendant's Motion to Dismiss, absent which the motion fails. (R. 34, Affidavit, Cowan, par. 6). The weakness of Defendant's Motion to Dismiss, is noted in Defense Counsel's own words in the last paragraph of Defendant's Brief under the topic "Applicable Law and Argument", at un-numbered page 5, where **Defendant states:**

". . . <u>one must assume</u> the Plaintiffs' intentionally withheld service of process because, <u>obviously</u> no attempts were made to locate this easily accessible Defendant." (emphasis supplied). (R. 19).

IV. APPLICABLE LAW AND ARGUMENT.

Rule 4.01(3) of the *Tennessee Rules of Civil Procedure* states that:

"3. If a Plaintiff or counsel for Plaintiff (including third-party Plaintiffs) **intentionally** causes delay of issuance of a summons or prompt service of a summons, filing of the Complaint (or Third-Party Complaint) is ineffective." (emphasis supplied). (Effective July 1, 2004).

Since promulgation of Rule 4.01(3), only three appellate courts have addressed the rule, two Court of Appeals decisions expressly finding that for tactical reasons counsel admitted that counsel ***intentionally*** withheld serving summons upon the Defendants, resulting in those two cases being dismissed, as discussed more fully, infra, and the Tennessee Supreme Court in the case of *Building Materials Corporation, d/b/a GAF Materials Corporation vs. Britt,* 211 S.W.3d 706 (Tenn. 2007), finding in that worker's compensation case, that the actions of the employer in filing a worker's compensation case with no intention of serving summons on its' employee during development of the nature and extent of his disability, occurred before the effective date of Rule 4.01(3) (ie., July 1, 2004) and, accordingly, was not controlled by said rule; noting, however, the Court's view of the purpose of the rule in foot note 3 as follows:

" . . . The rule, however, now effectively bars a "secret" suit filed by an employer but intentionally not served on the employee unless and until the employee also files suit."

The Court of Appeals, Middle Section, dealt with two separate appeals resulting in interpretation of the purpose and meaning of Rule 4.01(3), the first the reported case of *The Estate of Robyn Butler, et al., vs. Lamplighter Apartments, et al.*, 278 S.W.3d 321 (Tenn. Ct. App., 2008, decided June 24, 2008), and the unpublished case of *Doris Jones and Billy Jones vs. Lisa June Cox,* No. W2008-00729-COA-R9-CV (Tenn. Ct. App., 2008, decided November 25, 2008), a copy of which unpublished case is filed as supporting authority to Plaintiff's trial brief (R. 36-48).

In both *Butler* and *Jones*, counsel for the Plaintiff's in said cases admitted in sworn statements in the record that they ***intentionally and deliberately*** withheld service of process, for tactical reasons. In *Butler*, suit was filed against various entities thought to be responsible for a catastrophic apartment fire, resulting in multiple Plaintiff's filing an action for wrongful death and personal injuries; Plaintiff's attorney had summons' issued but made a ***deliberate, conscious, voluntary decision to prevent service of process*** on any of the defendants, explaining " . . . that she withheld the summons because she hoped to settle the case." The Court found counsels' conduct intentionally caused delay of service of summons and dismissed the cases as time-barred.

In *Jones*, the history of the case was that Doris Jones was rear-ended by motorist Johnson, resulting in a personal injury suit filed on her behalf by Attorney Cox. Motorist Johnson had moved from Tennessee before the suit could be served upon her; consequently when Attorney Cox realized that she had waited too long to pursue the suit against Motorist Johnson, she informed Ms. Jones who,

in turn, hired Attorney Ryan to attempt to save the original suit against Johnson and, simultaneously, sue Attorney Cox for malpractice. While Attorney Ryan attempted to save the initial tort action against Johnson through appeals, he filed the malpractice case against Attorney Cox, but ***intentionally*** decided to withhold service of summons on Attorney Cox, stating in his affidavit response to a Motion to Dismiss the legal malpractice case pursuant to TRCvP 4.01(3):

> "17. I did not intentionally delay service of the complaint on Ms. Cox to achieve any tactical advantage or benefit. Service on Ms. Cox ***was solely withheld*** in order to see whether the case against Ms. Johnson would be salvaged. If the case against Ms. Johnson were salvaged there would be no need to proceed against Ms. Cox. Once the Tennessee Court of Appeals affirmed the trial court's decision dismissing the case, and the only avenue left was a permissive appeal to the Tennessee Supreme Court, Ms. Cox was served with the lawsuit."

Accepting the reasons advanced by Mr. Ryan for *deciding* not to serve summons on Attorney Cox, the trial court denied her Motion to Dismiss, resulting in an interlocutory appeal. The Western Section, Court of Appeals, in reversing the trial court, held:

"Under Tenn. R. Civ. P. 4.01(3), it it the intent to withhold service of process that is the test. From the facts in the record, and in light of Mr. Ryan's own sworn statements, it is clear that he intentionally withheld service of process in this case, albeit for a very reasonable purpose."

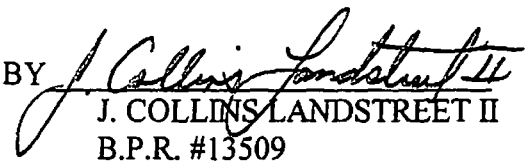
V. CONCLUSION

The Plaintiffs filed this lawsuit to seek compensatory and punitive damages from Defendant and had no other intention. The Defendant lived in a remote location, some 15 to 20 miles from Elizabethton; from what personnel at her former place of employment told counsel for Plaintiff's, she gave birth to a child in February, 2007, which suggests she was pregnant during the period May, 2006 to February, 2007; she in fact was not present at home on June 30, 2006 when service was attempted upon her and

was on maternity leave on April 2, 2007 and subsequently when counsel called personnel at Citizens Bank to ascertain if she had returned to work to permit service of summons upon her; the phone number given on the accident report was not a correct number to contact her on to arrange for service of process; and Plaintiff's obtained re-issuance of summons on four (4) occasions during the two year period following filing of this action, rather than two (2) as permitted by TRCvP 3; and finally, not only does the record not contain any reason or evidence of intent to prevent service of process, Defendant all but concedes there is no factual basis to support dismissal of this cause, by stating in his Brief that ". . . one must ***assume*** the Plaintiff intentionally withheld service of process because ***obviously*** no attempts were made to locate this easily accessible Defendant," (emphasis supplied), which assumption is contradicted by the sworn proof of four attempts by Plaintiff to serve process upon Defendant, which was unsuccessful due to pregnancy, child birth, and absence from work for an extended period of time. The rationale behind the decisions interpreting TRCvP 4.01(3) state ***intent is the test***; no authority having been found for the proposition advanced by Defendant requiring assumptions as to why process had not been served, despite proper and valid reasons being shown by Plaintiffs explaining why Defendant was not served sooner. In fact, the *Advisory Commission Comment to 2004 Amendment*, adding new paragraph TRCivP 4.01(3), gives insight into the reasoning for addition of the section, which would ". . . sanction lawyer misconduct such as that in *Stempa v. Walgreen Company,* 70 S.W.3d 39 (Tenn. Ct. App., 2001), where original counsel for plaintiffs 'instructed' the clerk not to issue summons for almost a year." It is, therefore, respectfully submitted that the trial court was in error in dismissing Plaintiff's complaint for intentionally causing service of process upon

Defendant, and such decision should be reversed and the action remanded to Circuit Court for trial on the merits.

COWAN & LANDSTREET, P.C.
ATTORNEYS FOR APPELLANTS

BY 

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of Appellant's Brief was served upon Hon. J. Eddie Lauderback, Attorney for Appellee, on May 24, 2010, in accordance with TRAP 20, by first-class mail, postage pre-paid.

J. COLLINS LANDSTREET II

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE, NORTHEASTERN DIVISION

DANNY G. AKERS and BARBARA ANN AKERS, Plaintiffs, vs. ALLSTATE PROPERTY AND CASUALTY INURANCE COMPANY, a/k/a ALLSTATE INSURANCE COMPANY, Defendant.	]]]]]]]]]]]]	CIVIL ACTION NO. 2:14-cv-00072 JURY DEMANDED

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

COME NOW Danny G. Akers and Barbara Ann Akers, Plaintiffs herein, by and through their counsel of record and pursuant to Fed. R. Civ. Pro. Rule 56, and hereby serve and file their Memorandum in Opposition to Defendant's Motion for Summary Judgment. This Memorandum, and Plaintiffs' Response to Defendant's Statement of Undisputed Facts are supported by the Deposition of Danny Akers taken September 27, 2010 and attached to Defendant's Memorandum in Support of Motion for Summary Judgment ["DMSMSJ"]; the Deposition of Barbara Ann Akers taken September 27, 2010 and attached to DMSMSJ; the Deposition of Kay Powell taken October 1, 2010 and attached to DMSMSJ; Affidavit of Danny Akers (with attached exhibits) dated January 29, 2015, filed concurrently with Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment ["PMODMSJ"]; Affidavit of Barbara Ann Akers dated January 29, 2015, filed concurrently with PMODMSJ; Affidavit of Thomas Guess dated January 29, 2015, filed concurrently with PMODMSJ;

Affidavit of Lindsey Proffitt dated January 29, 2015, filed concurrently with PMODMSJ; Affidavit of Jerry R. Carter dated September 30, 2014, attached to the DMSMSJ as Exhibit 11; Allstate Policy attached to the DMSMSJ as Exhibit 4.

FACTS

Plaintiff, Danny G. Akers, resident of Elizabethton, Tennessee, is a career insurance agent. Mr. Akers was one of the top Allstate insurance agents in the State of Tennessee for over twenty-seven (27) years, and he owned the Allstate agency in Elizabethton, Tennessee for over twenty-four (24) years. Mr. Akers sold his Allstate agency to Mr. Jeff Lyall on or about April 1, 2009.

Early in calendar year 2010, Mr. Akers and his then wife, Plaintiff Barbara Ann Akers, owned the property that is the subject of this action, located at 1024 Broad Street, Elizabethton, Tennessee, as tenants by the entireties. Danny and Barbara Akers originally purchased the property on July 2, 1998. *See,* Exhibit "A" to Affidavit of Danny Akers. The property had been used previously as a day care business, owned and operated by Barbara Akers. Barbara Akers closed the day care business in or about March, 2009.

During March or April, 2010, Danny and Barbara Akers decided to convert the property from commercial to residential use. Mr. and Mrs. Akers had been having marital problems and they decided that Barbara Akers would move, at least temporarily, to the subject property. Barbara Akers resided there from early in June, 2010, until the date of the fire, July 5, 2010. In this regard, on or about April 29, 2010, Mr. Akers procured a residential insurance policy on the subject property from the Allstate agency that he had recently sold.

Having owned the Elizabethton Allstate agency for over twenty-four (24) years, Mr. Akers signature was on file at the agency. The new owner, Jeff Lyall, and other licensed insurance agent employees had authority to sign his name to certain insurance documents, if so directed by Mr. Akers.

In late April, 2010, Mr. Akers asked Kay Powell, office manager for the Allstate agency at that time, to have Jeff Lyall, the agency's new owner, sign his name on the insurance application for the aforementioned residential insurance policy to be issued for Danny and Barbara Akers, regarding the subject property. Ms. Powell had worked for Mr. Akers for two to three years just prior to Mr. Akers' sale of the agency.

On or about April 29, 2010, Mr. Akers' name was signed, by either Jeff Lyall or someone authorized to do so, on the Application for insurance, as "Mr. Akers," per "File/Phone Req.," above the line designated "Applicant's signature." *See,* Exhibit "B" to Affidavit of Danny Akers, p. 5. Mr. Akers made the insurance premium payments on the subject residential insurance policy, which were accepted by Allstate.

During May and June, 2010, Mr. Akers went personally to the Allstate agency approximately five (5) times and requested a copy of the policy on the subject property. Each time, he spoke to and made this request of the then office manager, Kay Powell, his former employee, who told him she would "pass it on" to April Judkins, the other licensed agent in the office. Mr. Akers did not receive a copy of the policy or the Application until after the fire loss on July 5, 2010. Additionally, Barbara Akers never received a copy of the policy or the Application, despite several attempts to procure one.

The subject property burned during the early morning hours of July 5, 2010. On the morning the house burned, Danny Akers was asleep at his residence, also owned by Danny and Barbara Akers, located at 1808 Woodhaven Drive, Elizabethton, Tennessee. Barbara Akers was staying with her ill father at his home in Butler, Tennessee for the July 4th holiday.

On or about July 5, 2010, Mr. Akers submitted a claim for the fire loss to Allstate. Pursuant to normal Allstate procedures, Mr. Akers made the claim by telephone call to the claims division in Nashville, Tennessee. On or about December 23, 2010, Allstate denied the claim by letter addressed to "B. Akers, 1808 Woodhaven Drive, Elizabethton, Tennessee." Exhitit "C" to Affidavit of Danny Akers. On or about January 18, 2011, Aleania Smith, attorney for the Akers, submitted a sixty (60) day demand for payment in good faith. Exhibit "D" to Affidavit of Danny Akers. Allstate did not respond to this demand.

On July 5, 2011, a lawsuit was filed against Allstate in the case styled *Danny G. Akers v. Allstate Insurance Company and Jeff Lyall,* Carter County, Tennessee Circuit Court, Civil Action No. C-12332. On February 21, 2013, Order of Voluntary Non-suit was entered. The case was refiled on February 11, 2014, styled *Danny G. Akers and Barbara Ann Akers v. Allstate Property and Casualty Insurance Company, a/k/a Allstate Insurance Company*, Carter County, Tennessee Circuit Court, Civil Action No. C-13202.

On or about September 27, 2014, Barbara Akers' son, Thomas Guess, and his fiancée, Lindsey Proffitt, came forward and admitted to Barbara Akers that they had been present in the subject house on the night of July 4, 2010 and the early morning hours of July 5, 2010. At the time (July 4-5, 2010), Lindsey Proffitt had just turned eighteen (18) years old and Thomas Guess

was twenty-four (24) years old, and the couple had a ten month old baby boy. Because of their ages, their respective parents did not approve of their relationship, and the two had to "sneak around" in order to be together.

On the evening of July 4, 2010, Thomas Guess and Lindsey Proffitt, knowing that no one would be present at the subject house, went there after the July 4th fireworks show in Johnson City, Tennessee. They arrived at the house at approximately 11:00 p.m., and stayed until approximately 2:45 a.m. For most of this time, they sat or reclined on the sectional sofa in the bedroom, that the expert witnesses have designated as the point of origin of the fire.

While on the sectional sofa, the two lit a candle and placed it on a paper plate on the arm rest of the sectional sofa. They did this because they didn't want to turn on any of the lights for fear that their presence in the house would be detected. Lindsey Proffitt was also smoking cigarettes while on the sectional sofa, using the aforementioned paper plate as an ashtray. During the evening and early morning hours, the two had intimate relations and subsequently fell asleep on the sectional sofa.

When they woke up, they had to hurry out of the house because Thomas Guess had to be at work at Lowe's in Elizabethton, Tennessee at 3:00 a.m. The two have testified by affidavit that they don't recall extinguishing the candle.

After the fire, Thomas Guess and Lindsey Proffitt did not come forward immediately with this information because they were very young, they were not supposed to be together at the time, and they thought they thought they would get into serious trouble or even charged with a crime.

ARGUMENT AND CITATION OF AUTHORITY

I. Danny Akers has standing to bring suit against Allstate

A. The insured property was owned by Danny Akers and Barbara Ann Akers as tenants by the entireties at all times relevant to this lawsuit.

The threshold issue in this case is whether Danny Akers had standing to sue Allstate in the original state court action. The Plaintiffs alleged that "Both of these Plaintiffs have standing to sue the Defendant, since the Plaintiffs owned the subject real property as tenants by the entireties on the date of loss. Plaintiff Danny G. Akers avers that he is an 'insured person, pursuant to the pertinent definition of such contained in the Allstate Policy Manual. Further, Mr. Akers signature, signed by Allstate agent Jeff Lyall per Mr. Akers' authorization is affixed to the Policy Application. Alternatively, Plaintiff Danny G. Akers avers that he is a third party beneficiary of the subject insurance contract. . . . " Amended Complaint, para. 4.

Allstate Property and Casualty Company issued Policy Number 9 63 330782 04/30 to "B. Akers" as named insured for 1024 Broad Street, Elizabethton, Tennessee effective April 30, 2010. [Hereinafter "the Policy"]. (Allstate Policy attached to the DMSMSJ as Exhibit 4.) There is no dispute that Danny Akers and Barbara Akers owned the 1024 Broad Street property as tenants by the entireties on the date Danny Akers applied for the insurance policy by telephone (April 29, 2010), the effective date of the policy (April 30, 2010) and the date of the fire (July 5, 2010). (Affidavit of Danny Akers dated January 29, 2015, ["D. Akers Aff."] para. 4 and Exhibit "A" (Warranty Deed)). Danny Akers paid the insurance premium on the Policy. (D. Akers Aff., para. 10). Also, Danny and Barbara Akers, although separated, were married throughout this time period. (D. Akers Depo., p. 14, line 12.) Both Danny Akers and Barbara Ann Akers were obligors on the mortgage for the

property held by Carter County Bank. (D. Akers Depo., p. 31, lines 15-21, Exhibit 24.)

"It is a well-settled proposition that tenancy by the entirety is a form of property ownership which is unique to married persons. . . . The essential characteristic of a tenancy by the entirety is that 'each spouse is seized of the whole or the entirety and not of a share, moiety, or divisible part.'" *Tarver v. Ocoee Land Holdings, LLC*, Case No. E2010-01759-COA-R3-CV (Tenn. App. Sept. 19, 2011) (citations omitted); *Heirs of Neil G. Ellis v. Estate of Virgie Mae Ellis*, 71, S.W.3d 705, 712 (Tenn. 2002). "Under Tennessee law, property acquired during a marriage is presumed to be held as a tenancy by the entirety, unless proven otherwise. . . . The Tennessee Supreme Court has permitted extrinsic evidence to establish the type of ownership intended by husband and wife. . . . [T]he Tennessee Supreme Court has previously 'gone very far in finding that spouses owned real or personal property as tenants by the entirety, despite the fact that a title document indicated otherwise.'" *Heartland Payment System, Inc. v. Hickory Mist Luxury Cabin Rentals, LLC*, Case No. 3:11-CV-350, p. 5 (E.D. Tenn. December 8, 2011) (citations omitted).

Tennessee law allows an insurance policy to be reformed where the true owner is not designated as the named insured. In *Milwaukee Ins. Co. v. Gordon*, 390 S.W.2d 680, 54 Tenn. App. 279 (Tenn. App. 1964), husband and wife owned a residence as tenants by the entirety. An insurance policy was obtained for the property in the name of the wife only. After she died, the agent changed the name of the insured to "Estate of Anna Shavin." 54 Tenn. App. at 281. The agent did not inquire as to the title of the property or whether the wife died with or without a will. *Id.* After the dwelling was destroyed by fire, the insurer denied husband's claim for benefits. The Court of Appeals found that the husband had alleged that it was the intent of the insurance company to act on behalf of the

owner of the property and to insure him against loss by fire, and that through failure to determine title, incorrectly named the "Estate of Anna Shavin" as the insured. 54 Tenn. App. at 282. The Court of Appeals held that the husband's claim required reformation of the insurance contract and, because Tennessee has separate courts for claims at law and at equity, the case was remanded to the circuit court for transfer to the chancery court for further proceedings. 54 Tenn. App. at 285. The significance of *Gordon* is that the Court of Appeals did not rule as a matter of law that the husband could not establish a right of recovery. (Federal courts assuming diversity jurisdiction under 28 U.S.C. § 1332 have "original jurisdiction of all civil actions," including equity jurisdiction to reform insurance contracts to correct the designation of named insureds. See, e.g., *Acuity Mutual Ins. Co. v. Frye*, 699 F.Supp.2d 975, 989 (E.D. Tenn. 2010)).

Milwaukee Ins. Co. v. Gordon is consistent with case law from other states. In *Estate of Morton, In re*, 822 S.W.2d 456 (Mo. App. E.D. 1991), the issue was whether the insurance proceeds should go to the surviving spouse where the deceased was the only named insured on the policy. The Missouri Court of Appeals noted that there was "no satisfactory explanation as to why the insurance policy was issued solely in the name of [the husband]." 822 S.W.2d at 457. The Missouri Court of Appeals found that "[A]n insurance contract covering property held as a tenancy by the entirety requires a closer scrutiny because of the unique manner of ownership. . . . Although an insurance contract is ordinarily a personal contract, rather than running with the property, this is not so where the property is held as a tenancy by the entirety. In a tenancy by the entirety, husband and wife each own the whole property." 822 S.W.2d at 459. Accordingly, the Missouri Court of Appeals held that "the proceeds of an insurance policy on property owned by the entirety should presumptively remain

an asset held by the entirety when one of the tenants has purchased the insurance, unless it can be demonstrated that the parties intended otherwise." *Id.*

In *Worrells v. North Carolina Farm Bureau Mutual Ins. Co.*, 103 N.C. App. 69, 404 S.E.2d 188 (N.C. App. 1991), the property was owned as tenants by the entirety, but the couple had separated. The property was occupied by the husband and he was designated as the named insured ***on an insurance policy.*** The policy provided that "'throughout this policy, "you" and "your" refer to the "named insured" shown in the Declarations and the spouse if a resident of the same household.'" 404 S.E.2d at 189. Nevertheless, the North Carolina Court of Appeals held that the wife was entitled to fifty percent of the proceeds after a fire loss, stating "'These two individuals, by virtue of their marital relationship, acquired the entire estate, and each is deemed to be seized of the whole, and not of a moiety or any undivided portion thereof.'... Once such an estate is established, neither spouse can sever it by his or her sole act. ... The exclusionary clause in the insurance contract was thus ineffective to exclude Mrs. Worrells as a named insured." 404 S.E.2d at 191 (citations omitted, emphasis added).

The case cited by Allstate, *Estate of Hilyard Cartwright v. Standard Fire Ins. Co.*, No. M2007-02691-COA-R3-CV, p. 7 (Tenn. App. Aug. 6, 2008), is inapposite because it does not involve a putative insured claiming as a tenant by the entireties. In addition, the underlying insurance policy was, in any event, "void for lack of an insurable interest" after the named insured conveyed his entire interest in the real property to a family member prior to the fire loss. In *Cartwright*, the named insured conveyed the property to a family member, who in turn conveyed the property to the plaintiff, another family member. However, the insurance company was not notified

of the property transfers or that the named insured had died approximately five years before the plaintiff acquired the property and six years before the fire loss. Under those circumstances, the Court of Appeals found that the plaintiff "was neither a party to nor an 'insured' person under the terms of the policy." *Id.*, p. 4. Furthermore, there was no factual basis for finding that the plaintiff was the agent of the named insured or was an intended third party beneficiary, as the named insured had died before the plaintiff acquired the property. *Id.*, p. 6.

The exclusionary language of the Allstate policy in this case is essentially identical to that contained in the *Worrell* case, which found that such language was ineffective to exclude a tenant by the entireties from coverage. Thus, if Danny Akers is entitled to coverage by virtue of his status as a tenant by the entireties with Barbara Akers, he also has standing to sue as an insured under the policy. Therefore, the insurance policy in this case should be reformed in order to reflect his status as an insured as a matter of law.

B. Allstate is estopped from denying coverage to Danny Akers

It is significant that the *Gordon, Morton* and *Worrells* cases do not hinge on ***why*** the co-tenant by the entireties was not a named insured under the policy. The mere fact that a party was a co-tenant by the entireties was sufficient to entitle that party to coverage. However, an inquiry into the issue concerning why Danny Akers was omitted as an insured establishes that Allstate should be estopped from denying coverage to Mr. Akers. In this case, there is conflicting evidence concerning the conversation between Danny Akers and Kay Powell, the office manager for Lyall & Associates, concerning the application for the policy. Clearly though, Danny Akers procured the insurance policy for the property by submitting an application to office manager Kay Powell (D. Akers Aff.,

para. 6), and the policy, issued one day later, was sent to the insurance agency's office, not to Danny Akers or Barbara Akers. (Affidavit of Barbara Ann Akers dated January 29, 2015["B. Akers Aff."], paras. 6-8.) Danny Akers has testified that he wanted the policy to be issued in both his and Barbara's names and he believed that Kay Powell understood his intentions. D. Akers Aff., paras. 8-9. Where an insurer, through its agent, fails to issue a policy as instructed by the applicant, the policy must be reformed to reflect the actual intent of the insured, and the insurer is estopped from denying coverage as requested.

In *Allstate Ins. Co. v. Tarrant*, 363 S.W.3d 508 (Tenn. 2012), Allstate sought a declaratory judgment that the insureds' commercial vehicle had been properly transferred to their personal automobile policy, with lower levels of coverage. The trial court found that the insured's testimony was credible and that Allstate's agent had failed to follow the insured's directions as to which vehicles would be insured under the commercial policy. Rather, the agent switched the commercial van over to the personal automobile policy in order to lower the premiums and induce the insured to continue both policies. The trial court held that the insured ratified the error because he did not seek a correction after receiving the personal automobile policy and paying the premiums. The Court of Appeals reversed, holding that the insured's failure to read the policy did not ratify the error. On appeal, the Supreme Court affirmed the Court of Appeals and further found that Allstate was estopped from denying coverage under the commercial policy, stating that

> An insurance company is generally deemed estopped to deny policy liability on a matter arising out of the negligence or mistake of its agent, and if either party has to suffer from an insurance agent's mistake, it must be the insurance company. *See,* Vulcan Life & Accident Ins. Co. v. Segars, 216 Tenn. 154, 391 S.W.2d 393, 397 (1965); Magnavox Co. of Tenn. v. Boles & Hite Constr. Co., 585 S.W.2d 622, 627 (Tenn.Ct.App.1979); Henry v. S. Fire & Cas. Co., 46 Tenn.App. 335, 330 S.W.2d

18, 32 (1958); 44A Am.Jur.2d *Insurance* § 1580 (2003); 46 C.J.S. *Insurance* § 1207 (2007).

363 S.W.3d at 519-20.

Here, Danny Akers believed that he had conveyed his intent to be a co-named insured on the Policy to Kay Powell. (D. Akers Aff., paras. 8-8.). He paid the premium on the Policy. (D. Akers Aff. Para. 10.) Danny Akers also sought unsuccessfully to obtain a copy of the Policy from the agency prior to the fire. (D. Akers Aff. para. 11.) Thus, under *Tarrant*, there is at least a question of fact as to whether Allstate is estopped from denying coverage to Danny Akers based on its agent's mistake in having the policy issued in Barbara Aker's name alone.

C. Danny Akers is a third party beneficiary under the policy, based on his unitary rights of ownership in the property as a tenant by the entirety.

Under Tennessee law, a party obtains an insurable interest in the property "if by its continued existence he will gain an advantage, or if by its damage or destruction he will suffer a loss." *Duncan v. State Farm Fire & Cas. Co.*, 587 S.W.2d 375, 376 (Tenn. 1979). Danny Akers clearly had an insurable interest in the property. In *Phoenix Ins. Co. v. Brown*, 381 S.W.2d 573 (Tenn. App. 1964), the Court of Appeals held that an ex-husband who had conveyed his interest in the property to his former wife, nevertheless had an insurable interest in the property based on their previous relationship and the possibility that the ex-husband could be held financially liable for loss to the property. Here, Danny Akers was an owner of the property as a tenant by the entireties and was still obligated under the mortgage at the time the Policy was issued.

The Tennessee Supreme Court allows third-parties to enforce a contract if they are the intended beneficiaries of the contract:

> As the Court pointed out in *Owner-Operator Independent Drivers Ass'n v. Concord EFS, Inc.*, 59 S.W.3d 63 (Tenn. 2001), a third party is an intended third-party beneficiary of a contract, and thus is entitled to enforce the terms of a contract, where (1) the parties to the contract have not otherwise agreed, (2) recognition of the third-party's right to performance is appropriate to effectuate the parties' intent, and (3) terms or circumstances indicate that performance of the promise is intended or will satisfy an obligation owed by the promissee to the third party.

Benton v. Vanderbilt University, 137 S.W.3d 614, 618 (Tenn. 2004). In this case, Danny Akers sought to obtain insurance coverage for a home that he owned with Barbara Akers as tenants by the entireties and as to which he was liable on a mortgage. The policy does not expressly exclude Danny Akers as an insured and under the authority cited above, the general exclusions in a standard language policy do not apply to tenants by the entireties. See *Worrells, supra.* Danny Akers as co-tenant by the entireties is entitled to performance by Allstate to effectuate the parties' intent to insure the dwelling at 1024 Broad Street, Elizabethton, Tennessee to protect both Danny and Barbara Akers. Finally, Allstate has an obligation to Barbara Akers as the named insured and Danny Akers as the applicant and co-obligor on the mortgage.

The case relied upon by Allstate, *Ferguson v. Nationwide Property & Cas.*, 218 S.W.3d 42 (Tenn. App. 2008) is inapposite. In *Ferguson*, the Court of Appeals rejected the plaintiff's claim that she was a third party beneficiary of the insurance policy covering the apartment building where she lived rent-free as a resident manager. The Court of Appeals found that the agreement between the plaintiff and the apartment building excluded liability for loss to personal property of the occupant. 218 S.W.3d at 55. Therefore, the plaintiff had no expectation of being covered under the apartment complex's policy and, furthermore, had no direct claim against the insured party's insurance carrier as a third party beneficiary. 218 S.W.3d at 57.

Thus, Danny Akers is a third party beneficiary of the Policy and has standing to sue in his own name.

II. Barbara Akers' suit is not barred by the contractual requirement for filing suit within one year because the lawsuit was timely filed by Danny Akers on her behalf.

Allstate contends that Barbara Akers may not be added as a party because she was not a plaintiff in the original lawsuit filed against Allstate. The original action was filed by Danny Akers on July 5, 2011, in Tennessee circuit court and voluntarily non-suited pursuant to T.R.C.P. 41 on February 21, 2013. The case was refiled by Danny Akers and Barbara Akers on February 11, 2014, again in state court and removed by Allstate on the basis of diversity jurisdiction. D. Akers Aff., paras. 17-18. By adding Barbara Akers as a plaintiff to the second suit, Plaintiffs were essentially adding a party pursuant to T.R.C.P. 15.03.

In *Smith v. Nationwide Property Ins. Co.*, 505 F.3d 401, 405 (6th Cir. 2007), the Sixth Circuit discussed Rule 15:

> The relation back doctrine, codified at Tennessee Rule of Civil Procedure 15.03, provides that an amended complaint relates back to the original complaint so long as it "arose out of the conduct, transaction, or occurrence set forth . . . in the original pleading," regardless of whether the amended claim states a new cause of action. *See Hardcastle v. Harris*, 170 S.W.3d 67, 87 (Tenn.App.2004).
>
> When a complaint is amended to incorporate claims of additional parties, a court applying Tennessee law must consider "whether the defendant received adequate notice of the claims against him [in the original pleading]; (2) whether the relation back of such an amendment would unfairly prejudice the defendant; and (3) whether there is an `identity of interest' between the original party plaintiff and the new party plaintiff." *Osborne Enterprises, Inc. v. City of Chattanooga*, 561 S.W.2d 160, 164 (Tenn.Ct.App.1977). Application of the "relation back" doctrine to newly asserted claims by additional parties requires "[n]ot only [that] the adversary have notice about the operative facts," but also requires that the defendant "had fair notice that a legal claim existed in, and was in effect being asserted by, the party belatedly brought in."

Id. (quoting *Williams v. United States*, 405 F.2d 234, 238 (5th Cir.1968)).

In this case, all three requirements are met: (1) This case involves a single claim based on a single policy. Both Danny Akers and Barbara Akers were insured. Danny Akers filed suit within one year of the date of the loss. As discussed above, Danny Akers is an insured, either pursuant to his status as tenant by the entireties with Barbara Akers, estoppel arising from Allstate's failure to properly name Danny Akers as a named insured, or Danny Akers' status as a third party beneficiary. Barbara Akers participated in the claims process, filing extensive proofs of claim pertaining to the personal property in the residence on August 15, 2010. (2) In addition, Allstate is not prejudiced by adding Barbara Akers as a plaintiff because she has been available throughout the entire claim process and litigation against Allstate, and provided statements to the investigator and has been deposed. Allstate knew or should have known that Barbara Akers had a claim against it identical to that of Danny Akers and was the named insured under the Policy. Accordingly, Allstate cannot contend that it is now "surprised" that Barbara Akers has appeared as a plaintiff in this action. (3) The Policy requires that the action must be "commenced within one year after the inception of the loss or damage." Policy, Section 1, para. 12. There is nothing in this requirement that would bar a co-insured from being added later as an additional plaintiff.

The two cases cited by Allstate for the proposition that the parties and the subject matter must be identical in order for a second complaint to relate back (*Moran v. Weinberger*, 260 S.W.966 (Tenn. 1923) and *Hughes v. Brown*, 13 S.W.286 (Tenn. 1889)) were decided decades before the modern uniform rules of civil procedure were adopted by Tennessee and the federal courts. Accordingly, this Court should allow Barbara Akers to be added as a plaintiff to this lawsuit.

III. Plaintiffs are entitled to recover their losses under the terms of the Policy.

After the issuance of the Policy, the insured property was destroyed by fire on July 5, 2010. Danny Akers submitted a claim of loss on July 5, 2010. Barbara Akers submitted supplemental proofs of claim with respect to the personal property in the residence on August 15, 2010. Danny Akers and Barbara Akers were deposed under oath on September 27, 2010. On December 23, 2010, Allstate sent a denial letter to B Akers, denying the claim of loss, stating: "It is Allstate's position the fire was incendiary in origin, an insured person procured or intentionally set fire to the premises, the property was unoccupied for more than thirty days before the loss, you were not using the dwelling as your private residence, you committed material misrepresentation during your examination under oath and failed to cooperate with Allstate's investigation." (D. Akers Aff. Para. 15 and Exhibit "C").

With respect to Allstate's charge of arson, Allstate's own expert, Jerry Carter, opined that "The fire began on a sectional sofa located at the east side of the rear bedroom." Mr. Carter's report does not mention the presence of accelerants. Thus, there is no dispute that the fire had a single point of origin at the location of the sectional sofa in one of the bedrooms. (Affidavit of Jerry R. Carter dated September 30, 2014, attached to the DMSMSJ as Exhibit 11, p. 14.)

Barbara and Danny Akers have consistently denied having any involvement in the fire or knowledge of how the fire was started. Four years after the fire, in September 2014, Barbara Akers' son, Thomas Guess, and his girlfriend, Lindsey Proffitt, came forward and stated that they purposely went to the house on evening of July 4, 2010, when they knew Barbara Akers would be away, in order to be secretly together. They stated that they lit a candle which they placed on the sectional

sofa. They then left under rushed circumstances in the early morning hours of July 5, 2010, so that Thomas Guess could be at work at 3:00 a.m. They do not recall extinguishing the candle. (D. Akers Aff., para. 19; B. Akers Aff., para. 12; Affidavit of Thomas Guess dated January 29, 2015; and Affidavit of Lindsey Proffitt dated January 29, 2015). Their testimony is consistent with both of the expert reports in this case. This Romeo and Juliette confession exonerates Danny and Barbara Akers from all charges of arson in this case. Therefore, the primary ground for denying coverage has been invalidated, and at a minimum, there is a question of fact as to whether there an insured party under the Policy committed or procured arson.

As to the other ground for denial, that the property was unoccupied for more than thirty days before the loss and that Barbara Akers was not using the dwelling as her private residence, Barbara Akers' deposition testimony refutes those assertions. Barbara Akers testified that she began moving furniture and personal items such as clothes, toiletries, kitchen utensils, dishes, food, pictures, bed linens, towels, etc., into the 1024 Broad Street property in late April and early May. (B. Akers Depo., p. 14, lines 22-25, and Exhibits 9 and 10.) Barbara Akers and her adult daughter Jessica Guess and Jessica's 19 month old child began spending four or five nights a week in the house on June 7, 2010. (B. Akers, depo., p. 17, lines 12-25, p. 26, lines 5-25.) Accordingly, the house was occupied and had been used as a residence prior to the time of the fire.

With respect to the remaining allegations in the denial letter, Allstate did not specify what acts of Danny or Barbara Akers constituted misrepresentations and lack of cooperation. However, it is now clear that neither Danny Akers nor Barbara Akers had knowledge of or participated in the acts of Thomas Guess and Lindsey Proffitt that caused the fire on July 5, 2010. Rather, they have

cooperated fully and truthfully with Allstate's investigation of their claim.

Therefore, Allstate is not entitled to summary judgment on the issue of liability in this case, as the Plaintiffs have established that there is at least a question of fact as to the cause of the fire and other conditions precedent contained in the Policy.

IV. Plaintiffs have satisfied the demand requirement under Tenn. Code Ann. § 56-7-105(a) by virtue of the letter sent by Danny Akers' attorney on January 18, 2011.

Allstate contends that Tenn. Code Ann. § 56-7-105(a) requires that the bad faith refusal to pay letter must be made by the "holder of the policy," and that the letter sent by Danny Akers' attorney fails to comply with this requirement because he is not a "holder" of the Policy. As discussed above, however, Danny Akers is or should be deemed to be an insured under the Policy. Furthermore, the reference section of the letter reads: "Re: Danny and Barbara Akers," and recites the Allstate's claim number and file number. (D. Akers Aff., para. 16 and Exhibit "D"). Furthermore, the Sixth Circuit, in construing Tenn. Code Ann. § 56-7-105(a), has rejected arguments seeking to impose hyper-technical requirements with respect to the form of a bad faith demand letter. *Heil Co. v. Evanston Ins. Co.*, 690 F.3d 722, 731, 32 (6th Cir. 2012). Therefore, although the attorney was retained by Danny Akers, the demand was sent on behalf of Danny and Barbara Akers, and Allstate cannot claim that it did not understand the meaning or import of the demand letter.

V. The issue of Allstate's actual bad faith in denying the claim is a question of fact to be decided at trial

In general, claims of bad faith denial of insurance claims involve questions of fact. The language of Tenn. Code Ann. § 56-7-105(a) supports the conclusion that a jury should decide

whether the evidence demonstrates bad faith on the part of the insurer. *Gaston v. Tennessee Farmers Mutual Ins. Co.*, 120 S.W.2d 815, 822 (Tenn. 2003); *N. H. Ins. Co. v. Blackjack Cove, LLC,* Case No. 3:10-cv-607, pp. 6-7 (M.D. Tenn. March 26, 2014) (denying insurer's motion for summary judgment). Thus, Allstate is not entitled to summary judgment on this issue.

VI. The issue of Allstate's actual bad faith under the Tennessee Consumer Protection Act in denying the claim is a question of fact to be decided at trial

In *Gaston, supra*, The Tennessee Supreme Court reiterated that the Consumer Protection Act, Tenn. Code Ann. § 47-18-109(a)(1), applies to insurer's unfair or deceptive acts or practices, creating a question of fact as to liability. 120 S.W.3d at 822. (The amendment to the insurance code pre-empting other statutory remedies does not apply to causes of action arising before April 29, 2011. *Riad v. Erie Ins. Exchange*, 436 S.W.3d 256, ____ (Tenn. App. 2013))

As discussed in *Fayne v. Vincent*, 301 S.W.3d 162, 170 (Tenn. 2009):

> Whether a particular act is unfair or deceptive is a question of fact. *See Gaston v. Tenn. Farmers Mut. Ins. Co.*, 120 S.W.3d 815, 822 (Tenn.2003) (holding that trial court erred in granting directed verdict because "a jury could reasonably conclude that [the defendant's] conduct was unfair or deceptive" under the Tennessee Consumer Protection Act); *Helton v. Glenn Enters., Inc.*, 209 S.W.3d 619, 629 (Tenn.Ct.App.2006); *Tucker v. Sierra Builders*, 180 S.W.3d 109, 116 (Tenn.Ct. App.2005) (concluding that "whether a specific representation in a particular case is 'unfair' or 'deceptive' is a question of fact"); *Paty v. Herb Adcox Chevrolet Co.*, 756 S.W.2d 697, 699 (Tenn.Ct.App.1988). *Cf. Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 926 (Tenn.1998) (affirming trial court's dismissal of Tennessee Consumer Protection Act claim when record held no evidence of any unfair or deceptive acts by defendant).

Accord, N. H. Ins. Co. v. Blackjack Cove, LLC, Case No. 3:10-cv-607, pp. 7-8 (M.D. Tenn. March 26, 2014) (denying insurer's motion for summary judgment). Thus, Allstate is not entitled to

summary judgment on this issue.

CONCLUSION

The Plaintiffs do not have to win their case at the summary judgment stage. In reviewing the evidence in a Rule 56 motion, the court must draw all reasonable inferences in favor of the nonmoving party and may not make credibility determinations or weigh the evidence. *Williams v. Staples, Inc.*, 372 F. 3d 662, 667 (4th Cir. 2004). Here, both Danny Akers and Barbara Akers are entitled to sue to enforce the Policy. There is evidence that the fire was caused by the negligent acts of Thomas Guess and Lindsey Proffitt, who were not residents of the property and were not insured under the Policy. There is also evidence that Barbara Akers had been residing at the property for a month prior to the fire. And, as it turns out, Danny and Barbara Akers were not lying when they denied any knowledge or participation in causing the fire. Therefore, the Plaintiffs have presented a *prima facie* case they suffered a covered loss under the Policy that is sufficient to defeat Defendant's motion for summary judgment.

For the reasons stated above, the Defendant's Motion For Summary Judgment should be denied.

Respectfully submitted,

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CERTFICIATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing pleading was filed electronically, and that Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the court's electronic filing system

This the 29th day of January 2015.

s/: J. Collins Landstreet II
J. Collins Landstreet II

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

MILTON E. SPARKS,	]	
PLAINTIFF/APPELLANT		
VS.	]	# 92-1547
GILLEY TRUCKING COMPANY, INC.,		
DEFENDANT/APPELLEE	]	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DIVISION OF NORTH CAROLINA

BRIEF ON BEHALF OF APPELLANT, MILTON E. SPARKS

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III. STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

1. The United States District Court for the Western District of North Carolina had jurisdiction of this case pursuant to 28 U.S.C. Section 1332(a)(1)(1991). The plaintiff, Milton E. Sparks, is a citizen and resident of the State of Tennessee, and the defendant, Gilley Trucking Company, Inc., is a North Carolina Corporation. The amount in controversy resulting from the plaintiff's property damage, personal injury, and medical expenses exceeded $50,000.00, exclusive of interest and costs.

2. The United States Court of Appeals for the Fourth Circuit has jurisdiction of this case pursuant to Fed. R. App. P. 3. A jury verdict was rendered finding the plaintiff contributorily negligent and judgment was entered on October 21, 1991. Plaintiff filed a motion for new trial on October 28, 1991. An order was entered denying plaintiff's motion for a new trial on April 10, 1992. Plaintiff filed a notice of appeal with the Clerk of the U. S. District Court for the Western District of North Carolina on May 7, 1992, within the time period prescribed by Fed. R. App. P. 4(a)(1). This appeal is from a final order denying plaintiff's motion for new trial that disposed of all claims with respect to all parties at the trial court level.

IV. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Reversible error was committed when the District Court improperly allowed the defense to introduce inadmissible evidence of the plaintiff's prior speeding tickets.

2. Reversible error was committed when D. K. Doster was allowed to give opinion testimony as to the speed plaintiff's automobile was traveling immediately prior to the accident, since Mr. Doster had no reliable factual basis for such an opinion.

3. Reversible error was committed when Earl Street was not allowed to testify before the jury as a rebuttal witness solely on the issue of the credibility of defendant's employee.

V. STANDARDS OF REVIEW

ISSUE ONE:

This issue involves the introduction into evidence of the plaintiff's prior speeding tickets in an automobile tort case, when contributory negligence is raised as a defense, and speeding on the part of the plaintiff is raised in support of that defense. This is primarily a legal issue concerning the proper use of Fed. R. Evid. 404(b), and should be fully reviewable by the Court of Appeals.

ISSUE TWO:

Whether the Trial Court abused its discretion in allowing expert testimony as to plaintiff's speed without a proper factual basis for that testimony.

ISSUE THREE:

Whether the Trial Court abused its discretion in excluding plaintiff's rebuttal witness.

VI. STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition in the Trial Court.

This automobile tort case, styled MILTON E. SPARKS VERSUS GILLEY TRUCKING COMPANY, INC., Civil No. A-C-88-238, was predicated on the theory that the accident involving plaintiff's automobile and defendant's truck and the injuries sustained by the plaintiff on June 22, 1987, resulted when defendant's employee, approaching the plaintiff in the middle of the roadway, forced the plaintiff off of the road. This caused the plaintiff's vehicle to go out of control, run off the road, and strike a tree. (App. 9-10). The defendant denied this, contending instead that the plaintiff was operating his vehicle in the middle of the road at excessive speed and thus caused the accident. (App. 13-14).

After a jury trial in the United States District Court for the Western District of North Carolina, a verdict was rendered on October 17, 1991, finding the defendant negligent, but also finding that the plaintiff's negligence contributed to the automobile accident which was the subject of this lawsuit. Therefore, under North Carolina law, plaintiff was denied any recovery. Judgment was entered on the verdict on October 21, 1991, and plaintiff filed a motion for new trial on October 28, 1991. The Court denied plaintiff's motion on April 10, 1992, and plaintiff filed a notice of appeal on May 7, 1992. The plaintiff, Mr. Sparks, alleges the commission of several errors which,

individually and collectively, resulted in a verdict which is unjust and should be reversed and set aside.

B. Statement of Facts.

This is an automobile tort claim for the multiple injuries and property damage suffered by the plaintiff, Milton E. Sparks, in an accident which occurred at approximately 4:50 P.M. on June 22, 1987 on Highway 226 in Mitchell County, North Carolina. According to the plaintiff's testimony, as he was proceeding in a northwesterly direction in his 1986 Corvette, defendant's logging truck approached him in the opposite direction in the middle of the road. When defendant's truck failed to move back to its proper lane, plaintiff was forced to swerve off the right hand side of the road to avoid a head-on collision. When the plaintiff did so, he lost control of his car which went back across the road and hit a tree. (App. 80, l. 6 - 82, 11). Plaintiff testified that at the time of the accident he was going 50 to 55 miles per hour which was within the speed limit. (App. 103, l. 1; 229, ll. 10-14). Mr. Sparks initially testified that the defendant's truck was traveling faster than he at the time of accident (App. 107, ll. 11-13), but thereafter qualified that statement, testifying that he was not sure of the truck's speed. (App. 108, ll. 1-3).

Defendant's attorney, Mr. Frank Graham, cross examined Mr. Sparks with respect to the truck's speed and asked Mr. Sparks whether he had testified in his deposition that the truck was going 40 to 45 miles per hour. (App. 107, ll. 14-16). Mr. Sparks responded that he did not know how fast the truck was going but that "the truck was

going pretty fast down the mountain, I can tell you that". (App. 107, ll. 17-19). The Trial Court's Memorandum of Opinion and Order denying plaintiff's motion for new trial states that Mr. Sparks testified at his deposition that the truck was "traveling about 45 miles per hour". (App. 26). Mr. Sparks' actual deposition testimony was that the defendant's truck "was going 45 to 50 miles an hour. He was running empty and he was running hard . . ." (App. 127, ll. 17-23).

On cross examination of the plaintiff, defendant's counsel was allowed to question Mr. Sparks about his past driving record and past speeding tickets over the objection of plaintiff's counsel that it was irrelevant, was inadmissible character evidence, and the probative value of such evidence was substantially outweighed by its prejudicial effect. (App. 71-77; 92, l. 5 - p. 99, l. 16; 117, l. 2 - 121, l. 6; 122, l. 16 - 123, l. 8; 16; See brief in support of plaintiff's motion in limine for grounds upon which objection was based.)

Mr. Todd Allen, the passenger in Mr. Sparks' car at the time of the accident, corroborated Mr. Sparks' testimony as to the position of the defendant's truck and the cause of the accident, and as to the speeds of the two vehicles. (App. 140, ll. 6-12; 141, ll. 7-16 and ll. 23-25; 142, ll. 11-14 and ll. 23-24; 144, ll. 2-20; 145, ll. 11-16; 146, l. 11 - 147, l. 3). Additionally, Mr. Allen testified that Mr. Sparks was driving carefully at the time of the accident. (App. 145, ll. 17-18). Defendant's truck driver, Lawrence Fox, was called as a witness by the plaintiff. On direct examination, Mr. Fox testified that approximately three (3) miles past the accident scene, when he was

stopped by a tractor, the "patrol" went by and he told someone that "I met two cars on the mountain racing and I guess one of them has wrecked". (App. 171, ll. 16-19). Mr. Fox repeated this testimony on cross examination by defense counsel. (App. 178, ll. 17-19). The defendant presented no other evidence as to racing, nor any corroboration of this statement by Mr. Fox.

Mr. Fox testified further that when he passed Mr. Sparks' car, he thought there would be a wreck, yet he did not stop to confirm this, nor did he call an ambulance. (App. 172, ll. 19-25). He stated that during the week after the accident, he drove on Highway 226 in Mitchell County "probably every day" and looked for the scene of the accident. Approximately one week later someone told him that there had indeed been an accident as he had suspected. (App. 173, ll. 2-17).

When questioned by defense counsel, Mr. Fox testified that on the afternoon in question he passed a blue car (determined through other testimony to be that of deposition witness, Danny Ollis) approximately 300 to 400 yards before passing a red car (determined through other testimony to be that of the plaintiff). (App. 174, l. 16 - 175, l. 5). He stated that the blue car was "traveling fast" (App. 174, l. 3), and that the red car was in his lane as the two vehicles approached each other. (App. 176, ll. 5-7).

Mr. Fox testified initially that "I never would say how fast it was going because I couldn't . . . it all happened too quick for me to say how fast the car was going". (App. 176, ll. 23-25). Upon further

questioning by defense counsel, Mr. Fox testified that the car was going "very fast". (App. 177, l. 4). Mr. Fox estimated his own speed at 30 miles per hour when he passed the plaintiff's car. (App. 179, l. 8). Mr. Fox testified further that he looked in his rear view mirror as he passed Mr. Sparks' car, but did not see Mr. Sparks' car cross the road behind him and go off the road, despite the fact that his trailer was empty. (App. 182, l. 10 - 183, l. 11).

Patrick Yelton, witness for the plaintiff, lived near the scene of the accident. On the afternoon of the accident, as Mr. Yelton was leaving his house, he heard a truck coming down the mountain. He then saw part of a flat bed trailer go by and immediately thereafter heard tires squalling and a crash. Mr. Yelton immediately went to the accident scene. (App. 148, l. 15 - 149, l. 7). Mr. Yelton testified with respect to the sound made by plaintiff's car just prior to impact that "it wasn't a locked down skid kind of screech", but rather a "kind of drawn out whining screech . . ." (App. 158, ll. 9-15). He testified further that from hearing the accident and examining the tire marks, it was not a brake skid or a "locked down skid". (App. 161, ll. 16-18; 165, ll. 15-22). Mr. Yelton's observation revealed a "small black mark" on the road. (App. 153, ll. 12-16). This was corroborated by Mr. Sparks' rebuttal testimony that his car was equipped with anti-lock brakes, and by the testimony of plaintiff's expert in traffic accident reconstruction, Larry Williams, who testified that anti-lock brakes could not leave skid marks. (App. 251, ll. 19-25; 252, ll. 1-24; 260, ll. 9-11). Mr. Yelton's testimony that there was a "small black mark" on

the road is also consistent with Officer Williams' testimony that, with anti-lock brakes, the tires will stop rotating for a fraction of a second when the brakes are first applied. (App. 259, ll. 4-10).

Almost immediately after the accident, as Mr. Yelton was attempting to assist Mr. Sparks and Mr. Allen, he asked Mr. Allen how the accident happened. Mr. Yelton testified that Mr. Allen then said to him, "'that tractor trailer run us off the road'". (App. 152, ll. 2-25). Additionally, Mr. Yelton testified that there was absolutely no evidence of alcohol or marijuana at the accident scene and that he had been trained as a military policeman to look for such evidence. (App. 154, ll. 17-21; 155, l. 1 - 156, l. 5).

With respect to alcohol or drug use, Mr. Sparks admitted to taking several sips of beer hours before the accident. (App. 78, l. 1 - 79, l. 6). Toxicologist Kenneth Ferslew, PhD., testified that, based on Mr. Sparks' testimony, his blood alcohol concentration would have been zero percent at the time of the accident. (App. 86, l. 2 - 88, l. 14). This was corroborated by Mr. Sparks' medical records which stated that Mr. Sparks' blood alcohol concentration at 7:14 P.M. on the day of the accident was zero percent. (App. 89, ll. 10-20).

Mr. Sparks denied using marijuana on the day of the accident and testified that in his work at paper mills and nuclear plants he had been subject to random drug tests, all of which he had passed. (App. 101, ll. 6-12; 128, l. 4 - 129, l. 23). The testimony of Officer D. K. Doster as well as that of Patrick Yelton supported this. (App. 217, ll. 5-6; 155, l. 11 - 156, l. 5).

Defense witness, Officer D. K. Doster, testified that there was a strong odor of alcohol around the plaintiff's car and that there were beer cans in the car, which evidence he did not preserve. (App. 206, ll. 7-11; 217, l. 24 - 219, l. 3). However, Officer Doster read into evidence a signed statement he had made to plaintiff's prior counsel on May 8, 1990, in which he said that he "found no evidence of drinking in the car". (App. 216, l. 6 - 217, l. 16).

Although Officer Doster did not witness the accident (App. 210, ll. 12-15), and testified by statement that he had no scientific basis for an estimate as to the speed of the plaintiff's car at the time of the accident (App. 217, ll. 9-22), he was allowed to testify with respect to speed over the repeated objections of plaintiff's counsel. (App. 16; 202, ll. 17-23; 209, ll. 17-25; 229, l. 15 - 230, l. 2; 232, ll. 10-16; 233, ll. 11-23).

In support of his motion in limine, plaintiff also offered expert testimony by Officer Larry Williams. Officer Williams testified with the jury out that there was not enough information gathered on which Officer Doster could make a reliable estimate of speed. (App. 49-66). For example, Officer Williams testified that tests to determine the coefficients of friction of the various surfaces on which plaintiff's car travelled just prior to the impact were necessary to estimate speed. (App. 52, ll. 16-20; 58, ll. 13-21; 62, l. 11 - 64, l. 3; 256, ll. 16-20; 266, l. 16 - 267, l. 5). Officer Doster testified that he had never performed a coefficient of friction test. (App. 212, ll. 3-8). Officer Doster did not charge Mr. Sparks with speeding, reckless driving,

alcohol related offenses, or any other traffic offenses. (App. 219, ll. 4-22; p. 234, ll. 14-15).

The defense called Danny Ollis whose testimony was received into evidence by deposition. Plaintiff had previously testified that Mr. Ollis drove in front of him prior to the accident. (App. 80, ll. 3-17).

Mr. Ollis stated that when he passed defendant's truck he was approximately three-quarters of a mile ahead of plaintiff's car and that he was driving "around the speed limit or so. If I was doing the speed limit." (App. 235, ll. 7-17). Mr. Ollis stated that as he went around a left hand curve, he passed defendant's truck, which at that time was on its side of the road. (App. 238, l. 18 - 239, l. 9). He stated that "it was the same truck that had hauled logs up through there before, you know, a long time up through there". (App. 239, ll. 18-20). Mr. Ollis testified further that when he went back to the accident scene and inspected the area, he saw, among other things, two light skid marks extending diagonally across the road. (App. 237, ll. 11-20; 240, ll. 14-24; 241, ll. 22-25; 242, ll. 8-10). On the day of the accident, Mr. Ollis was driving a 1984 Mazda RX7 with a four cyclinder engine. He testified that "it's a small engine. It ain't nothing fast. Nothing like a Corvette, if that's what you . . . ." (App. 246, ll. 13-16; 249, l. 18 - 250, l. 1).

Plaintiff requested that he be permitted to present, for purposes of rebuttal, the testimony of Mr. Earl Street, whose existence as a potential witness was previously unknown to plaintiff's counsel. (App. 269, ll. 22-25; 283, ll. 9-10). Mr. Street owned a store and gas

station on Highway 226 approximately two and a half to three miles from the accident scene. (App. 270, ll. 7-9; 275, ll. 2-5). During voir dire, Mr. Street testified that on the afternoon of the accident, Mr. Sparks and "another boy . . . that works with him a lot on construction" stopped at his place of business. (App. 272, ll. 20-23; 273, l. 25 - 274, l. 7). Mr. Street testified further that approximately four to five minutes after the plaintiff left his place of business, Gilley's logging truck pulled in and "a guy come in the store and asked to call the ambulance, there was an accident up on the mountain". (App. 270, l. 23 - 271, l. 1; 274, l. 22 - 275, l. 1). Mr. Street called the ambulance, and shortly thereafter, learned from customers that the plaintiff had been involved in the accident. (App. 271, ll. 6-19). Although Mr. Street was unable to identify Lawrence Fox as the driver of the truck (App. 275, ll. 19-21), he was able to identify the truck from its unique markings and from the fact that he had seen the truck on numerous occasions. When asked whether there were other logging trucks that passed through the area, Mr. Street stated that "there are some logging trucks, but not that particular type". (App. 275, l. 22 - 276, l. 8). Mr. Street's description of the Gilley logging truck was consistent with that of Mr. Sparks and Mr. Ollis. (App. 84, l. 24 - 85, l. 16; 247, l. 20 - 248, l. 11; 239, ll. 16-20). The jury was not allowed to hear the testimony of Mr. Street for the reasons stated by the Court. (App. 282, l. 2 - 283, l. 13.)

VII. LAW AND ARGUMENT

1. A REVERSIBLE ERROR WAS COMMITTED WHEN THE COURT IMPROPERLY ALLOWED THE DEFENSE TO INTRODUCE INADMISSIBLE EVIDENCE OF THE PLAINTIFF'S PRIOR SPEEDING TICKETS.

Rule 404(b) of the Federal Rules of Evidence states as follows:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Fed. R. Evid. 404(b).

The first step in determining the admissibility of other crimes, wrongs, or acts under Rule 404(b) is to determine whether those extrinsic acts are "relevant to an issue other than character". U.S. v. Mark, 943 F.2d 444, 447 (Fourth Circuit 1991) [quoting U.S. v. Rawle, 845 F.2d 1244, 1247 (Fourth Circuit 1988)]. This Court has interpreted Rule 404(b) as being one of inclusion that "admits all evidence of other crimes relevant to an issue in a trial except that which tends to prove only criminal disposition". U.S. v. Masters, 622 F.2d 83, 84 (Fourth Circuit 1980) [quoting J. Weinstein and M. Berger, Weinstein's Evidence, Section 404[08] at 404-41 and 404-42 (1972)].

As set out previously in the Statement of Facts, defense counsel was allowed to question Mr. Sparks about his driving record and past speeding tickets over the objection of plaintiff's counsel that it was irrelevant, was inadmissible character evidence, and that the probative value of such evidence was substantially outweighed by its

prejudicial effect. (App. 71-77, l. 5 - 99, l. 16; 117, l. 2 - 121, l. 6; 122, l. 16 - 123, l. 8; 16; See brief in support plaintiff's motion in limine for grounds upon which objection was based). The Court's rationale for admission was that the evidence was relevant to an issue other than character, such as proof of motive, opportunity, intent, preparation, plan, et cetera. (App. 77, ll. 13-20; 93, ll. 15-20). It is plaintiff's first contention in this appeal that his past speeding tickets are relevant to no issue other than character, or the propensity to act in conformity with those prior acts. This is precisely what is impermissible under Rule 404(b). We shall begin the analysis of the issue of admissibility under Rule 404(b) by examining individually the "other purposes" articulated by the Rule for which Mr. Sparks' past speeding tickets might be offered.

First, other acts evidence may be used to prove motive. This Court has held that prior incidents of violence, racial slurs, and other prior altercations between a defendant and an assault victim could provide a motive for a subsequent assault, and thus, these prior acts were admissible under Rule 404(b). U.S. v. Lewis, 780 F.2d 1140, 1141-1142 (Fourth Circuit 1986). The Court in Lewis stated that "[r]ising animosity, evidenced by racial slurs, broken glasses, and a recent scuffle, could easily provide the motive for an assault on Jackson . . . . Relevance to an issue other than character was, therefore, established." Id. at 1142.

The Fifth Circuit case of U.S. v. Benton, 637 F.2d 1052 (Fifth Circuit 1981) is illustrative of another aspect of the motive

exception. In Benton, the Court ruled that evidence of other homicides committed by the defendant, of which the deceased victim had knowledge, was properly admitted since the defendant's desire to avoid criminal exposure with respect to these other homicides "constituted a motive for appellant wanting to kill Zambito to obtain his silence". Id. at 1056-1057.

"Motive" has been defined as the "cause or reason that moves the will and induces action". Blacks Law Dictionary, 1164 (Fourth Ed. 1951). It has also been defined as "some inner drive, impulse, intention, et cetera, that causes a person to do something or act in a certain way; an incentive; a goal." Webster's New Universal Unabridged Dictionary, 1173 (Second Ed. 1979). Thus, in order to prove motive, there must be some causal relationship between the prior acts and the act or behavior in question, whereby the prior acts or their results provide an impetus for the subsequent behavior. In the Lewis case, the prior acts had created animosity between the defendant and the victim, thus providing the impetus or motive for the subsequent assault. Lewis at 1142. In the Benton case, the defendant's communication of the prior criminal acts to the deceased victim exposed the defendant to criminal liability, thus impelling the defendant to silence the victim. Benton at 1056-1057.

In the case at bar, in order for the plaintiff's prior acts of speeding, or the convictions for those acts, to be admissible to show motive, those prior acts must, by definition, create some impetus or dynamic which moves the plaintiff to speed in the instant case. This

proposition is illogical. Speeding convictions and their requisite fines or other punishment do not motivate one to commit further acts of speeding. Rather, they deter the violator from further acts of speeding, as should all criminal sanctions. These prior acts clearly establish the plaintiff's propensity to speed, but that is precisely the use of evidence barred by Rule 404(b).

This Court has also interpreted Rule 404(b) to require the extrinsic acts and the purpose for which they are offered to be "necessary". Mark at 447-448 [quoting U.S. v. Rawle, 845 F.2d 1244, 1247 (Fourth Circuit 1988)]; see also U.S. v. DiZenzo, 500 F.2d 263, 266 (Fourth Circuit 1974) (Extrinsic evidence necessary to prove essential elements of knowledge and intent). In the case at bar, neither the prior acts of speeding, the convictions therefor, nor proof of motive are necessary to prove any element of contributory negligence on the plaintiff's part.

Extrinsic evidence of other crimes, wrongs, or acts under Rule 404(b) may also be admitted to show knowledge and intent, usually as essential elements of a criminal offense. With respect to proof of knowledge and intent, this Court has held that in a second degree murder case arising from an auto collision, evidence of defendant's previous convictions for driving while intoxicated was admissible to establish that defendant had grounds to be aware of the risks to others of his drunk driving. U.S. v. Fleming, 739 F.2d 945, 949 (Fourth Circuit 1984). However, Fleming is distinguishable from the case at bar in that Fleming meets the necessity requirement set out in Rawle and

Mark, and the case at bar does not. In Fleming, in order to prove malice aforethought, it was necessary for the prosecution to offer sufficient proof from which the jury could justifiably infer that defendant knew of the serious risks to which he was exposing others. Fleming at 947-948. Additionally, it was necessary for the prosecution to prove that the defendant intended to operate his car recklessly. Id. at 948. The defendant's previous DWI convictions were necessary to show knowledge and intent which were, in turn, essential elements of the crime of second degree murder. See also U.S. v. Loera, 293 F.2d 725,729 (Ninth Circuit 1991) (prior DUI convictions admitted to prove malice, an essential element of the crime of second degree murder); U.S. v. Mark, 943 F.2d 444, 448 (Fourth Circuit 1991) (extrinsic act evidence admitted since necessary to show knowledge and intent which are essential elements of conspiracy); U.S. v. DeLoach, 654 F.2d 763, 769 (D.C. Circuit 1980) (extrinsic act evidence necessary to prove intent "where intent is the only real issue"); U.S. v. Jackson, 761 F.2d 1541, 1543 (Eleventh Circuit 1985) (". . . the government had little evidence on intent, which made this evidence near essential; . . . and the intent and knowledge of the appellant was the critical issue at trial").

With respect to the case at bar, proof of knowledge and/or intent is unnecessary, since knowledge and/or intent are not essential elements of either speeding or negligence. Therefore, pursuant to this Court's prior decisions, admission of Mr. Sparks' prior acts to show

knowledge or intent was improper. DiZenzo at 266; Rawle at 1247; Mark at 447.

Rule 404(b) also allows evidence of prior bad acts if they are part of a larger plan or scheme, of which the act or offense in question is a part, or if they are preparatory to such act or offense.

In order prove the existence of a larger plan or scheme, each act "should be an intregal part of an over-arching plan explicitly conceived and executed by the defendant . . . ." McCormick on Evidence, 800-801 (Fourth Ed. 1992). In U.S. v. Dothard, 666 F.2d 498 (Eleventh Circuit 1982), the Eleventh Circuit, in holding the admission of prior bad acts to be reversible error, examined the issue of extrinsic act evidence as proof of a plan or scheme. Id. at 502. The Dothard court stated that "evidence of the 'other act' is admissible only if it is 'so linked together in point of time and circumstances with the crime charged that one cannot be shown without proving the other'". Id. [quoting U.S. v. Beechum, 582 F.2d 898, 912, n. 15 (Fifth Circuit 1978); U.S. v. Broadway, 477 F.2d 991 (Fifth Circuit 1973)]. See also U. S. v. Masters, 662 F.2d 83, 86 (Fourth Circuit 1980) [quoting Beechum at 912, n. 15.]

In the case at bar, it is clear that the plaintiff's prior acts of speeding are separate, discrete acts and are not "so linked together in point of time and circumstance" with the alleged subsequent act of speeding "that one cannot be shown without proving the other". Dothard at 502. It is equally illogical to conclude that the plaintiff's

prior acts of speeding or the convictions therefor were preparatory acts to the alleged subsequent act of speeding.

The last of the stated purposes for the admission of other crimes, wrongs, or acts under Rule 404(b) are "absence of mistake or accident", "identity" or "opportunity". It is obvious that "absence of mistake or accident" is not a valid purpose for admitting extrinsic evidence in the case at bar since this was not an issue at trial. Plaintiff does not contend that he was accidentally speeding. Nor were identity or opportunity issues at trial. Plaintiff does not deny being involved in the accident that is the subject of this lawsuit, and virtually everyone who drives a car has the opportunity to speed. See generally, Morgan v. Foretich, 846 F.2d 941, 944 (Fourth Circuit 1988) (Extrinsic evidence essential to prove identity and opportunity in sexual abuse case since only the defendants had access to the victims).

The list of "other purposes" articulated in Rule 404(b) is generally thought to be merely illustrative and not exclusive. U.S v. Johnson, 634 F.2d 735,737 (Fourth Circuit 1980). However, it is plaintiff's position that the only purpose for which his past acts of speeding are relevant is to show that he had a character trait for speeding and that he acted in conformity with that trait at the time of the accident. It is nothing more than propensity evidence in a bad disguise.

In two cases, analogous to the one at bar, the Fifth and the First Circuits held that the proffered evidence was inadmissible. In Reyes v. Missouri Pacific Railroad Company, 589 F.2d 791 (Fifth Circuit

1979), a diversity suit for personal injuries sustained by plaintiff when he was run over by defendant's train, the plaintiff alleged negligence on the part of the railroad's employees for not having discovered him and stopped the train as he lay on the tracks. The defendant railroad alleged, among other things, that the plaintiff was contributorily negligent "because he was intoxicated on the night of the accident and passed out on the tracks before the train arrived". Id. at 793. In order to present this defense to the jury, the defendant railroad intended to introduce evidence of four (4) prior misdemeanor convictions of the plaintiff for public intoxication. Id. As in the case at bar, the plaintiff had made a motion in limine to exclude the extrinsic evidence, which motion the District Court refused to grant. Id. Admittedly, the defendant railroad argued at the motion hearing that the "convictions were admissible to show that Reyes was intoxicated on the night of the accident" (Id.) and apparently made no attempt to admit the evidence under the Rule 404(b) "other purposes" route. However, such an attempt would not have altered the Circuit Court's reversal since that Court found that the only purpose for which the extrinsic evidence could be offered was to show that the plaintiff "had a character trait of drinking to excess and that he acted in conformity with his character on the night of the accident by becoming intoxicated . . . ." Id. at 794. The prior convictions were held to be inadmissible under Rule 404(b) and the Fifth Circuit Court ordered a new trial.

In Bonilla v. Yamaha Motors Corp., 955 F.2d 150 (First Circuit 1992), a diversity products liability suit, the plaintiff alleged that he was injured as the result of a design defect in the braking mechanism of Yamaha's FJ1000 Motorcycle. The defendant Yamaha, refuted this claim and undertook to show that the plaintiff's speeding was the sole reason for the crash. In furtherance of this theory, and over the objections of plaintiff's counsel on relevancy and undue prejudice grounds, defense counsel was allowed to question the plaintiff with respect to his prior and subsequent speeding tickets. Id. at 152-153. The Bonilla jury found that a design defect did exist, but that this defect was not the proximate cause of plaintiff's accident. Id. at 151.

On appeal, the plaintiff asserted that the District Court had erred by permitting the defense to introduce evidence of his prior and subsequent speeding tickets. Id. at 151-152. In holding that the plaintiff's speeding tickets were inadmissible, the First Circuit Court stated that the speeding violations clearly were not probative of any of the Rule 404(b) "other purposes", but that they "proved that a person who has twice been caught speeding is likely to have been speeding at the time in question, a connection which legal policy and Rule 404(b) strictly forbid". Id. at 154-155.

In determining whether the wrongful admissions affected a substantial right of the plaintiff, thus constituting reversible error

pursuant to Fed. R. Evid. 103(a)[1], the First Circuit Court stated that "any error is more likely to found, and thus reversible, where the evidence is substantively important, inflamatory, repeated, emphasized, or unfairly self-serving". Bonilla at 155 [citing S. Childress and M. Davis, 1 Standards of Review, 239 (1986)]. The Bonilla court stated further that the admission of the plaintiff's speeding offenses was "substantively important, inflamatory and highly prejudicial". Bonilla at 155. The error "may very well have tipped the scale against Bonilla and in Yamaha's favor, on its theory that speed, not design, was the author of Bonilla's injuries". Id. The Bonilla court ordered a new trial based solely on this error despite the fact that the plaintiff admitted, at the time of the accident, that he had been driving 50 to 60 miles per hour in a 45 mile per hour zone. Id. at 152, n.3. See also, Brown v. Miller, 631, F.2d 408 (Fifth Circuit 1980) (admission of independent illegal act of Mayor of Town was reversible error in a civil

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[1] Rule 103. RULINGS ON EVIDENCE

(a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of records, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

action for deprivation of constitutional rights in removing police chief's paycheck); U.S. v. Fawbush, 900 F.2d 150 (Eighth Circuit 1990) (admission of prior sexual acts by defendant with daughters was an abuse of discretion in a criminal case charging sexual abuse of two children); Monger v. Cessna Aircraft Company, 812 F.2d 402 (Eighth Circuit 1987) (exclusion of letter indicating prior failure to identify service problems of planes held proper in diversity action for wrongful death of air crash victims); U.S. v. Mothershed, 859 F.2d 585 (Eighth Circuit 1988) (admission of prior bank robberies in criminal case charging defendant with aiding and abetting bank robbery held to be reversible error); Cohn v. Papke, 655 F.2d 191 (Ninth Circuit 1981) (admission of evidence of prior sexual preferences of plaintiff held to be reversible error in civil rights suit for police brutality based on illegal arrest for allegedly soliciting homosexual acts).

We contend that Mr. Sparks past speeding violations are relevant to no purpose other than impermissible character evidence. However, even if this evidence were minimally relevant to some other purpose, it should have been excluded since its prejudicial effect substantially outweighs its probative value.[2]

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[2] Rule 403. EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE CONFUSION, OR WASTE OF TIME

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

With respect to the case at bar, this is not a difficult standard to overcome since the legitimate probative value of this evidence is so elusive. It is highly prejudicial in that it is so clearly probative of Mr. Sparks' propensity to act in conformity with those prior acts, that a jury could not help but consider it thus. This is especially true since the Court allowed defense counsel to question Mr. Sparks with respect to these prior acts on three separate occasions during the trial. (App. 92, l. 5 - 99, l. 16; 117, l. 2 - 121, l. 6; 122, l. 16 - 123, l. 8).

Whether the erroneous admission of Mr. Sparks' prior acts warrants reversal depends on whether it affected his "substantial rights". Fed. R. Evid. 103(a). In examining this issue, the United States Supreme Court has stated as follows:

> . . . [I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence.
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> Kotteakos v. U.S., 328 U.S. 750, 765, 66 S. Ct. 1239, 1248, 90 L. Ed. 1557, 1566-1567 (1946).

The erroneous admission of Mr. Sparks' prior acts had a substantial influence on the outcome of his trial for a number of reasons. The most important of these were the closeness of the case with respect to the jury's finding that Mr. Sparks was contributorily negligent, and the centrality of this evidence to that finding.

With respect to the speed issue, Mr. Sparks testified that he was driving 50 to 55 miles per hour (App. 102, l. 25 - 103, l. 1; 229, ll. 10-14). This was corrobrated by his passenger, Todd Allen, who also testified that Mr. Sparks was driving carefully at the time of the accident. (App. 142, ll. 11-14; 145, ll. 11-18; 144, ll. 13-20). The defense called D. K. Doster who testified that he did not see the accident (App. 210, ll. 12-15), nor did he have any scientific basis for making his speed estimate of 70 miles per hour. (App. 217, ll. 10-11).

Plaintiff's expert, Officer Larry Williams, testified that D. K. Doster had not conducted the necessary tests to obtain a reliable speed estimate. (App. 58, ll. 13-21; 59, ll. 1-10; 62, l. 7 - 64, l. 3; 254, l. 13 - 256, l. 20). Officer Williams testified further that, with the information gathered by D. K. Doster, Mr. Sparks' car could just as easily have been going 30 miles per hour as 70 miles per hour at the time of the accident. (App. 53, ll. 9-14; 261, l. 20 - 262, l. 3).

Officer Doster also was the only witness who testified that there were dark skid marks extending completely across the road after the accident. (App. 199, ll. 7-17). Mr. Sparks testified that his Corvette had anti-lock brakes (App. 251, ll. 19-25; 252, ll. 3-24), which, according to Officer Williams, cannot make skid marks. (App. 259, ll. 2-10; 260, ll. 9-11; 263, ll. 2-4; 265, ll. 9-10). Danny Ollis testified that when he inspected the area shortly after the accident, he saw two light skid marks extending diagonally across the road. (App. 237, ll. 11-20; 240, ll. 14-24; 241, ll. 22-25; 242, ll. 8-10). Patrick Yelton testified that from hearing the accident and examining the tire

marks, which had left a "small black mark" on the road, it was not brake skid or a "locked-down skid". (App. 153, ll. 12-16; 161, ll. 16-18; 165, ll. 15-22).

With respect to the alcohol issue, Mr. Sparks testified that he drank a small amount of beer earlier in the day. (App. 78, l. 1 - 79, l. 6). However, based on this testimony, Dr. Kenneth Ferslew testified that Mr. Sparks blood alcohol concentration at the time of the accident would have been zero (0%) percent. (App. 86, l. 2 - 88, l. 14). Additionally, Mr. Sparks' medical records reflected that his blood alcohol concentration approximately two and one-half hours after the accident was zero (0%) percent. (App. 89, ll. 10-20). Patrick Yelton testified that there was absolutely no visual or olfactory evidence of alcohol or marijuana at the accident scene, and that he had been trained as a military policeman to look for such evidence. (App. 154, ll. 17-21; 155, l. 1 - 156, l. 5).

Office Doster's testimony on this issue was somewhat inconsistent. At trial, Officer Doster testified that there was a strong odor of alcohol around the plaintiff's car, and that there were beer cans in the car. (App. 206, ll. 7-11; 218, ll. 13-25). However, in a previous signed statement which he read to the jury, Officer Doster testified that he "found no evidence of drinking in the car". (App. 216, l. 25 - 217, l. 1; 216, l. 6 - 218, l. 25). Officer Doster testified further that he did not preserve this evidence, nor did he order an alcohol test for Mr. Sparks. (App. 219, ll. 1-22). He stated that he "had no intentions of charging him anyhow". (App. 219, ll. 21-22).

In light of the weakness of the alcohol issue for the defense, and the testimony on both sides of the speed issue, it is clear that the extrinsic evidence of Mr. Sparks' prior speeding tickets was central to the defendant's case. In fact, it was the defendant's best evidence of contributory negligence. The jury is presented with a young man of twenty-nine years of age at the time of the accident, driving around with his friends on their day off in his red Corvette. Although less than compelling, there is some mention of alcohol. In this context, it is easy to see why the defense wanted to present this evidence to the jury. It did so not once but three separate times during the course of the trial. (App. 92, l. 5 - 99, l. 16; 117, l. 2 - 121, l. 6; 122, l. 16 - 123, l. 8). This was highly inflammatory and prejudicial.

This Court eloquently stated in U.S. v. Johnson, 634 F.2d 735 (Fourth Circuit 1980), that "[t]he general prohibition contained in the first sentence of Rule 404(b) is designed to prevent prosecutorial over-reaching by a means whose obvious effectiveness has made it an inescapable temptation for advocates over the years". Id. at 737. In the case at bar, the temptation to over-reach was realized and, as a result, one cannot say "that the judgment was not substantially swayed by the error". Kotteakos, 328 U.S. at 765. It is, therefore, "impossible to conclude that substantial rights were not affected". Id. Therefore, the decision to admit this evidence constituted reversible error and a new trial should be ordered.

2. REVERSIBLE ERROR WAS COMMITTED WHEN D. K. DOSTER WAS ALLOWED TO GIVE OPINION TESTIMONY AS TO THE SPEED PLAINTIFF'S AUTOMOBILE WAS TRAVELLING IMMEDIATELY PRIOR TO THE ACCIDENT, SINCE MR. DOSTER HAD NO RELIABLE FACTUAL BASIS FOR SUCH AN OPINION.

As previously set out in the Statement of Facts, Officer D. K. Doster did not witness the accident that is the subject of this law suit. However, we do not contend that Officer Doster's opinion as to speed should not have been admitted because he did not personally observe the accident. It is clear under Fed. R. Evid. 701 and 702[3], that this is not necessary. Rather, it is plaintiff's contention that there was no reliable factual basis for Officer Doster's opinion. As Officer Doster himself testified, he had no scientific basis for an estimate as to the speed of plaintiff's car at the time of the accident. (App. 210, ll. 12-15; 217, ll. 10-11). This is corroborated by the testimony of plaintiff's expert witness, Officer Larry Williams, that a

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[3]RULE 701. OPINION TESTIMONY BY LAY WITNESSES

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

RULE 702. TESTIMONY BY EXPERTS

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 my testify thereto in the form of an opinion or otherwise.

reliable speed estimate is impossible without calculating the coefficients of friction of the various surfaces on which plaintiff's car travelled just prior to impact. (App. 58, ll. 13-21; 62, l. 7 - 63, l. 1). Officer Doster testified that he had never before performed a coefficient of friction test. (App. 212, ll. 3-8).

In addition, Officer Doster never investigated, recorded, or otherwise considered in his speed estimate, what type of braking system plaintiff's car had. (App. 190-205; 210-234). Officer Williams testified at the motion hearing that this was necessary information for a speed estimate. (App. 61, ll. 7-10). The plaintiff testified that the Corvette he was driving at the time of the accident had anti-lock brakes, which, according to plaintiff's expert, could not leave skid marks. (App., 251, ll. 19-25; 252, ll. 1-24; 260, ll. 9-11; 263, ll. 2-4). This was corroborated by Patrick Yelton who testified as to a "small black mark" on the road, and characterized the sound of the accident as not being a "locked-down skid". (App. 153, ll. 12-16; 158, ll. 12-15). Consistent with this, Danny Ollis testified that he observed "light skid marks" across the road immediately after the accident. (App. 237, l. 13).

However, contrary to the other testimony in this regard, Officer Doster testified that there were dark skid marks extending all the way across the road, and that he based his speed estimate on this fact. (App. 199-203). This is clearly impossible with anti-lock brakes.

In Horton v. W. T. Grant Company, 537 F.2d 1215 (Fourth Circuit 1976), this Court upheld the District Court's exclusion of expert testimony because the factual basis for the expert's opinion was

inadequate. In that case, the Court stated that "relevant testimony from a qualified expert may be received if and only if he is in possession of such facts as would enable him to express a reasonably accurate conclusion as distinquished from mere conjecture". Id. at 1218. The Horton court went on to say that "there must be an adequate basis for his testimony". Id.

Consistent with Horton and with D. K. Doster's own statement that there was no scientific basis for his estimate as to plaintiff's speed, plaintiff asserts that such opinion is an unsupported and speculative assumption which should not have been admitted. See Eastern Auto Distributors, Inc. v. Peugeot Motors of America, 795 F.2d 329, 338 (Fourth Circuit 1986) ("[i]n light of the unsupported and speculative assumptions underlying Doctor French's calculations and the expremely sensitive nature of his figures, we cannot say that the District Court abused its discretion in excluding his testimony . . ."); See also Coleman Motor Company v. Chrysler Corp., 525 F.2d 1338, 1353 (Third Circuit 1975) (damages testimony improper where plaintiff's expert witnesses failed to account for significant factors bearing upon its market share).

Evidence of excessive speed was the determinative factor on which the jury based its finding of contributory negligence on the plaintiff's part. Without this evidence the jury would not have found Mr. Sparks contributorily negligent. Therefore, the admission of D. K. Doster's opinion as to speed constitutes reversible error and a new trial should be ordered.

3. REVERSIBLE ERROR WAS COMMITTED WHEN THE COURT REFUSED TO ALLOW THE JURY TO HEAR THE REBUTTAL TESTIMONY OF MR. EARL STREET.

Plaintiff requested that he be permitted to present, for purposes of rebuttal, the testimony of Mr. Earl Street, whose existence as a potential witness was unknown to plaintiff's counsel until the day prior to making the request. (App. 269, ll. 22-25; 283, ll. 9-10). Mr. Street owned a store and gas station on Highway 226, approximately two and one-half to three miles from the accident scene. (App. 270, ll. 7-9; 275, ll. 2-5). Mr. Street testified, outside the presence of the jury, that Mr. Sparks stopped at his place of business on the afternoon of the accident. (App. 272, ll. 20-23; 273, l. 25 - 274, l. 7). Approximately 4 to 5 minutes after plaintiff left his place of business, Gilley's logging truck pulled in and "a guy come in the store and asked to call the ambulance, there was an accident up on the mountain". (App. 270, l. 23 - 271, l. 1; 274, l. 22 - 275, l. 1). Although Mr. Street was unable to identify Lawrence Fox as the driver of the truck (App. 275, ll. 19-21), he was able to identify the Gilley logging truck from its unique markings and the frequency with which this truck passed by his place of business. When cross-examined as to his identification of the truck, Mr. Street testified that other logging trucks pass through the area, but none "of that particular type". (App. 275, l. 22 - 276, l. 8). Mr. Street's description of the Gilley logging truck was consistent with that of Mr. Sparks and Mr. Ollis. (App. 84, l. 24 - 85, l. 16; 246, l. 20 - 248, l. 14; 239, ll. 16-20). Mr. Sparks had previously testified that he had lived in the area for

years and had "seen that truck come through there hundreds of times". (App. 85, ll. 11-13).

Mr. Street testified that he saw the Gilley logging truck that day and that no other logging trucks of that particular type passed through the area. (App. 276, ll. 4-8). He testified further that the Gilley logging truck stopped approximately 4 to 5 minutes after the plaintiff left his place of business, which is two and one half to three miles from the accident scene. To say that this evidence was relevant is an understatement. If believed by the jury, Mr. Street's testimony would call into question Mr. Fox's testimony that he did not know that an accident had occurred, and that he did not stop to call an ambulance. (App. 178, ll. 22-24; 170, ll. 4-5; 172, ll. 24-25). It follows that it would also call into question Mr. Fox's version of the accident.

We fully acknowledge that Fed. R. Evid. 611(a)[4] gives the District Court discretionary control over the presentation of testimony. That rule gives the Trial Court "the ultimate authority to see that a trial accomplishes its fundamental truth-seeking purpose". Oberlin v. Marlin American Corp., 596 F.2d 1322, 1329 (Seventh Circuit 1979).

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[4]RULE 611. MODE AND ORDER OF INTERROGATION AND PRESENTATION

(a) Control by Court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harrassment or undue embarrassment.

However, as the Seventh Circuit Court also stated in U.S. v. Roman, the question of the credibility of witnesses "is left to the trier of fact". U.S. v. Roman, 728 F.2d 846, 856 (Seventh Circuit), cert. denied, 466 U.S. 977, 104 S.Ct. 2360, 80 L.Ed.2 832 (1984).

It is plaintiff's contention in this respect, that in excluding this witness, the Trial Court deprived the jury of its right to hear all of the evidence and determine for itself whom to believe. Throughout this trial, the District Court leaned toward the admission of evidence. That Court did so erronously in some instances, and each time to the plaintiff's detriment. The exclusion of Mr. Street's testimony was prejudicial to the plaintiff, and, if allowed, would certainly have affected the outcome of the trial to plaintiff's benefit. It was an abuse of the Trial Court's discretion not to allow the jury to hear this relevant and legitimate testimony and the plaintiff should receive a new trial as a result.

VIII. CONCLUSION

The Trial Court committed prejudicial error in allowing inadmissible evidence of plaintiff's prior speeding tickets to be presented to the jury on three (3) separate occasions during the trial. This error was compounded by the admission into evidence of Mr. D. K. Doster's opinion as to plaintiff's speed at the time of the accident, which opinion was purely speculative. These errors were further compounded by the Trial Court's refusal to allow the jury to hear the rebuttal testimony of Mr. Earl Street, which testimony would have been offered solely on the issue of witness Lawrence Fox's credibility. Without these errors the jury would not have found the plaintiff contributorily negligent. Plaintiff/appellant, Mr. Sparks, should be granted a new trial.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the within pleadings have been furnished Hon. Frank P. Graham, Attorney for Gilley Trucking Company, Inc., by placing same in the United States Mail, first class postage prepaid, addressed to his offices as follows:

Hon. Frank P. Graham
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Asheville, NC 28802

This the 5th day of November, 1992.

J. Collins Landstreet II

J. COLLINS LANDSTREET II