The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: Joseph Christopher Clem

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(including county) Hamilton County

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Email Address: [redacted]

Home Address: [redacted] Signal Mountain, Tennessee 37377
(including county) Hamilton County

Home Phone: [redacted] Cellular Phone: [redacted]

INTRODUCTION

The State of Tennessee Executive Order No. 54 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. 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 your original, hard copy (unbound), completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with your electronic or scanned signature. The digital copy may be submitted on a storage device such as a flash drive that is included with your hard-copy application, or the digital copy may be submitted via email to ceesha.lofton@tncourts.gov.

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Samples, Jennings, Clem & Fields, PLLC

Member

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

Licensed in Tennessee 1993 (BPR# 015793)

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.

Georgia 1994 (BPR#129901)

Active

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

No.

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

Samples, Jennings, Clem & Fields, PLLC – Chattanooga, Tennessee

Partner – 2004 to Present

- Law practice consists of 90% litigation and 10% transactional work.
- Represent businesses, government entities, and individuals.
- Litigated several medical malpractice suits, election contests, class action lawsuits, business disputes, contractual disputes, personal injury claims, and appellate work.

Luther-Anderson, PLLP - Chattanooga, Tennessee
Partner – Corporate Litigation and Insurance Defense Firm, 1999-2004

- Defended corporations, individuals and insurance companies in class action suits, fire loss, personal injury, automobile collision, and workers compensation suits, including numerous jury trials, bench trials, and appeals.

Jahn & Clem, P.C. - Chattanooga, Tennessee
Partner – Bankruptcy and Commercial Litigation, 1997-1999

- Represented a bankruptcy trustee and litigated commercial lawsuits.

Lewis-King, P.C. - Knoxville, Tennessee
Associate – Insurance Defense Firm, 1995-1997

- Defended individuals and insurance companies in personal injury, automobile collision, and workers compensation suits.

Weill & Weill, P.C. - Chattanooga, Tennessee
Associate – personal injury firm, 1993-1995.

- Represented both plaintiffs and defendants (insurance companies) in personal injury lawsuits.

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.

None.

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.

Law practice is primarily in litigation with a small amount of transactional work.

- Represent businesses, government entities, and individuals.
- Litigated several medical malpractice suits, election contests, class action lawsuits, business disputes, contractual disputes, personal injury claims, and appellate work.

Business Litigation including trial and appellate: 25%
Government Litigation including trial and appellate: 25%
(Representing Hamilton County, Sewer Authority, Election Commissions)
Personal Injury Litigation including trial and appellate: 20%
Domestic Litigation including trial and appellate: 20%
Transactional/Estate Planning/Contracts: 10%

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.

Lead Counsel in hundreds of lawsuits in State and Federal Courts throughout East Tennessee and North Georgia.

Lead Counsel on over 300 cases in Hamilton County Circuit Court since 1993.

Lead Counsel on nearly 200 cases in Hamilton County Chancery Court since 1993.

Lead Counsel on multiple jury trials in Bradley County, Hamilton County, Knox County, Marion County and North Georgia.

Successful defense of multiple class action lawsuits in Federal Court, North Georgia State Courts and East Tennessee State Courts.

Successful lead counsel in medical malpractice lawsuits.

I have not been involved in representing clients in criminal matters.

I have handled transactional matters (estate planning and contracts) 10% of practice.

I have handled many regulatory matters involving sewer authority and administrative issues withing TN Dept of Human Services and TN Dept of Environment and Conservation.

I usually leave my home on Signal Mountain at 7 a.m. and take a carpool of 4 children to school by 7:30 a.m. I then arrive at the office a little before 8 a.m. most weekdays. I usually work until about 5:30 p.m. on days that I need to attend Boy Scouts or coach a sporting event (2 days a week). I usually work until about 7 p.m. on days that I do not have a sporting event (3 days a week). I work on Saturdays about 1 day a month. I work on Sunday afternoons about one day a month.

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

- *American Heritage Apartments v. The Hamilton County Water and Wastewater Treatment Authority*,
  494 S.W.3d 31 (Tenn. 2016). Successfully represented Hamilton County government by overturning Class Action Certification before Tennessee Supreme Court.

- *Howard-Hill v. Spence*, U.S. District Court for East Tennessee, 1:16 CV 441 (E.D. Tenn. 2016). Successfully litigated a contractual claim in U.S. District Court for East Tennessee.

- *Wright et.al. v. Buchheit*, No. 15-C-1056 (Circuit Court, Hamilton County, Tenn. 2015). Successfully litigated medical malpractice suit.

- *Susan Rich, et. al. v. The City of Chattanooga et. al*, No. E2013-00190-COA-R3-CV (Tenn. App. 2014). Successfully represented Hamilton County Election Commission in defense of an election contest.

- *Gilstrap v. Healthsouth Chattanooga Rehabilitation Hospital*, No. 13C1483 (Circuit Court, Hamilton County, Tenn. 2013). Successfully litigated medical malpractice suit.

- *Ron Littlefield v. The Hamilton County Election Commission et. al*, No. E2010-02410-COA-R3-CV (Tenn. App. 2011). Successfully represented Hamilton County Election Commission in defense of an election contest.

- *Foxworth Enterprises, Inc. v. The Hamilton County Water and Wastewater Treatment Authority*, U.S. District Court for East Tennessee, 1:11 CV 73 (E.D. Tenn. 2011). Successful defense of Sherman Anti-Trust lawsuit in U.S. District Court for East Tennessee.

- *Industrial Boiler & Mechanical Co, Inc. v. Bridgefield Casualty Insurance Company, et. al*, U.S. District Court for East Tennessee, 1:08 CV 180 (E.D. Tenn. 2008). Successfully pursued and obtained insurance coverage against an insurance company related to a serious industrial accident.

- *Ramson v. Deakins*, 601 S.E.2d 838 (Ga. App. 2004). Successfully overturned Georgia trial court regarding sufficiency of evidence necessary to establish damages in a fire loss claim.

- *Goddard v. Goddard*, No. E2011-00777-COA-R3-CV (Tenn. App. 2012). Successfully represented client in application of state relocation statute.

- *Dean Arnold v. The City of Chattanooga et. al*, 19 S.W.3d 779 (Tenn. App. 1999). Successfully represented media in Public Records Act claim.

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.

None.

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

I have served as a conservator over several disabled people in the last 26 years. The chancellors in Hamilton County have frequently appointed me in conservatorships involving complicated business matters when no competent family member could be located. I would usually have to organize a complicated and disorganized list of investments and liabilities. I would streamline the assets and reinvest the assets. I would provide reports to the Chancellor. I would usually then serve as executor when the ward died. I would eventually end my service by distributing the assets of the probate estate.

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

Tri-State Crematory Class Actions Suits. Defended three separate class actions suits arising out of a highly publicized case involving a crematory in Noble, Georgia, which failed to properly cremate several hundred bodies. Defended class actions filed in *Tri-State Crematory*, U.S. District Court for North Georgia, 4:02-CV-168, MDL Docket No. 1467, (N.D. GA. Rome Div. 2002); *Kitchens et. al. v. Tri-State Crematory, Inc. et. al.*, Walker County Superior Court, Georgia, Docket No. 02-CV-59673 (Walker County Superior Court, Georgia, 2002); and *Oden et. al. v. Taylor Funeral Homes of Chattanooga, Inc.*, Hamilton County, Tennessee Docket No. 02C-414, (Circuit Court, Hamilton County, Tenn., 2002).

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 or similar commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

None.

EDUCATION

14. List each college, law school, and other graduate school 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.

The University of Tennessee College of Law – Knoxville, Tennessee
Juris Doctor, Dean's List, Class of 1992. Graduated in 2.5 years.

The University of Tennessee – Knoxville, Tennessee
B.S. in Business Administration & Accounting, graduated with Honors, Class of 1990. Graduated in 3 years.

PERSONAL INFORMATION

15. State your age and date of birth.

51: [redacted]68

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

34 years

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

25 years.

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

Hamilton 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.

None.

20. Have you ever pled guilty or been convicted or placed on diversion for violation of any law, regulation or ordinance other than minor traffic offenses? If so, state the approximate date, charge and disposition of the case.

None.

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

No.

22. Please identify the number of formal complaints you have responded to that were 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. Please provide any relevant details on any such complaint if the complaint was not dismissed by the court or board receiving the complaint.

In the last 26 years I have had 2 complaints filed against me with BD of Prof Resp.

1. About 15 years ago I was defending a lawsuit. It was an insurance defense automobile case. The plaintiff attorney sent a demand letter to the insurance company. The Plaintiff attorney copied my client on the demand letter to the insurance company. The Plaintiff attorney did not copy me on the letter. The Plaintiff attorney informed the insured defendant (my client) that the defendant should join him in demanding that insurance policy limits be paid to the Plaintiff. The Plaintiff attorney successfully created tension between me and my client with his letter. I reported the Plaintiff attorney to the TN BD of Prof Resp for directly contacting my client without my permission. The Plaintiff attorney then filed a claim against me with the BD of Prof Resp claiming that my claim against him was frivolous. The TN BD of Prof promptly dismissed the claim against me. My claim against the Plaintiff attorney was sustained for inappropriately contacting my client.

2. About 5 years ago I successfully represented the Hamilton County sewer authority against two customers who had threatened and harassed the executive director of the sewer authority. The two customers also refused to pay their sewer fees. I successfully obtained a restraining order and a judgment for past due fees. The defendants then filed a claim against me with the BD of Prof Resp. I am unsure what their claim was other than they disapproved of the judgment I obtained against them. The BD of Prof Resp promptly dismissed their claim.

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.

None.

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

None.

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.

I have never been a party to a legal proceeding in my individual capacity.

I did serve on the following three commissions:
Tennessee Judicial Nominating Committee (2009-2013)
Tennessee Judicial Performance Evaluation Committee (2012-2016)
Hamilton County Election Commission (2014-present)

The above 3 commissions were sued several times. I am unsure if I was listed as an individual defendant or not. I never reviewed the lawsuits.

For example, I was informed that John Jay Hooker filed a suit against the Judicial Nominating Committee and the Judicial Performance Evaluation Committee. The TN Attorney General accepted service. The TN Attorney General notified the entire commission of the suit. The suit was eventually dismissed. I believe the commissions were sued several times claiming the mere existence of the commissions were in violation of various constitutional provisions or federal statutes. At no time did any of the suits claim I did anything wrong. All the suits were eventually dismissed.

Likewise, I believe an election contest was filed against the Hamilton County Election Commission. I do not recall if I was listed individually or not.

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.

- Coach of Little League Baseball (boys) 2008 – present
- Coach of grade school and middle school basketball (girls) 2008 – present
- Member Signal Mountain Bible Church

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.

None.

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
Hamilton County Bar Association
Georgia Bar Association
Christian Legal Society
Federalist Society

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.

Rule 31 Certified Family Mediator

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

None.

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

None.

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

Tennessee General Assembly, State House District 27 (R-Lookout Mountain) 2000-2006

- Elected.
- Served in the 102nd, 103rd and 104th General Assembly.
- Member of the Consumer and Employees Affairs Committee.
- Member Health and Human Resources Committee.
- Member Agriculture Committee.
- Chose not to seek re-election.

Tennessee Judicial Nominating Committee, 2009-2013

- Vice Chair 2012-2013.
- Appointed by Lt. Governor Ron Ramsey.
- Committee interviews, submits and nominates panel of 3 judicial applicants to Governor for any and all appellate and trial judicial openings.

Tennessee Judicial Performance Evaluation Committee, 2012-2016

- Appointed by Lt. Governor Ron Ramsey.
- Evaluated the performance of all 24 state appellate court judges and all five Tennessee Supreme Court Justices. Judges that did not pass evaluation were not permitted to stand for re-election.

Hamilton County Election Commission, 2014 – Present

- Appointed by Tennessee Secretary of State.

Tennessee Ethics Commission, in process of being nominated/approved by Tennessee General Assembly. I would be the House Republican appointee.

- Established by the General Assembly to sustain the public's confidence in government by increasing government's integrity and transparency through the regulation of lobbying activities, financial disclosure requirements, and certain other specific types of activities that are within the statutory jurisdiction of the Ethics Commission.

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

No.

34. Attach to this application 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.

ESSAYS/PERSONAL STATEMENTS

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

I have had a passion for public service since graduating from law school. I have been a trial and appellate lawyer for 26 years. During my time in private practice I have taken a considerable amount of time to serve the citizens of this state on various public commissions and committees. However, my passion is reading, writing and the law. This appellate court position would be a perfect blend of public service while allowing me to compose legal opinions to resolve conflicts between parties. I can imagine nothing more exciting and professionally fulfilling than reading a wide variety of legal briefs and crafting well written legal opinions that resolve the conflicts in a timely, succinct and efficient manner.

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)***

My law firm and I represent many of the church denominations (Baptists, Presbyterians, Seventh Day Adventists) as wells as many of the non-profit ministries (adoption agencies and counseling services) in the Chattanooga and North Georgia area. As a bi-product of representing so many ministries I intentionally and deliberately take a number of pro bono cases each year related to domestic relations, landlord/tenant and debtor collection referrals from the ministries and pastors in the Chattanooga area.

There is an overwhelming number of domestic disputes, debtor collection matters, or tenant evictions wherein one side has access to a good attorney due to a friend or a parent paying the legal fees while leaving the other side with no access to an attorney. Many of the counselors, pastors, adoption agencies and ministries in Chattanooga that my law firm represents know that when they see such an inequity that I will take such cases pro bono or at a dramatically reduced fee. I have set up a system wherein a number professional pastors and counselors can recognize a domestic legal dispute wherein one side has access to legal counsel and the other side does not resulting in a gross inequity.

For example, a parent unilaterally moving with the children and obtaining an ex parte temporary parenting plan with no parenting time for the other parent. I recently resolved one such domestic matter after 6 months of rather intense litigation. My client had no resources to pay legal fees. She was a referral from a local ministry.

Another example that occurred in 2019 dealt with a collection matter. A medical provider had filed a $29,000 collection suit against an elderly disabled patient. A local pastor referred the person to me. I filed a slow pay motion and a set of discovery demanding to know how much the provider would have charged had the person had medical insurance or been fully covered under Medicare. The medical treatment was emergency based; however, some of the medical records reflected that the treatment was not necessary. After several discovery motions I was able to have the collection case dismissed with no payments by my client.

Our legal system in the United States and in Tennessee is the best in the world. However, inequities frequently occur when one side (a wealthy domestic partner, a landlord, a creditor) has access to a good attorney and the opposing party can not pay for legal counsel. I accept several such pro bono cases each and every year for the last 20 years. However, the need far outweighs the demand.

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 Tennessee Court of Appeals, Eastern Section, sits regularly in Knoxville. It is the first level of appeal for any civil matter in the state. This appellate court often serves as the final arbiter of justice in a vast majority of civil cases within this state due to the fact that review by the Tennessee Supreme Court is usually discretionary. The Court's analysis of the legal issues and its ruling are particularly important because most appeals do not go beyond this appellate court.

Four appellate judges reside in the Eastern Section. My selection would impact the Court by providing it with additional representation from southeast Tennessee.

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)***

- **Boy Scout Troop 60 Leader**, Treasurer, 2015-Present
  - Led troop on wilderness trip in Boundary Waters on border between Minnesota and Canada for 8 days in summer of 2016. Traveled 3 days into the wilderness by canoe. Camped 2 days then traveled 3 days out of the wilderness. Learned how to catch and clean northern pike.
  - Led troop on an extended camping trip in North Arkansas for 7 days in summer of 2017. Trip involved gun safety and fly fishing.
  - Led troop on 8 day trip at a dude ranch in Colorado in summer of 2018 near Estes Park. Trip involved cattle drive and fly fishing.
  - Led troop on an extended white water canoe and bass fishing trip in North Arkansas for 7 days in summer of 2019.
- Coach of Little League Baseball (boys) 2008 – present
- Coach of grade school and middle school basketball (girls) 2008 – present

I intend to stay heavily involved in youth sports, coaching, refereeing, scouting and my church for as long as physically possible. I would not serve on the State Ethics Commission if I were appointed to the Court of Appeals.

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. ***(150 words or less)***

I grew up in East Tennessee. I graduated from Farragut High School, UT College and the UT School of Law. I have always had a strong work ethic. I worked my way through high school as a produce clerk at Red Food Stores. I worked through college at a computer lab and graduated in 3 years with honors while majoring in accounting. I then worked my way through law school as a law clerk for a corporate attorney while graduating in 2.5 years. My work ethic will help me as an appellate court judge to balance the tension between crafting a well written opinion and finalizing an opinion in a prompt and efficient time frame.

My love of literature, history and writing has given me the passion to focus on crafting a well written appellate opinion.

My 4 years of serving on the Judicial Performance Evaluation Committee has helped me identify and evaluate appellate judges on the traits and character needed to be successful in working with court staff, fellow judges, preparing for oral argument and drafting opinions.

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)***

My experience in the legislature allowed me to see first hand how good legislative intentions can result in a statutory scheme that is poorly drafted and does not work in the real world. There is a proper process for amending and correcting bad laws. That process is the legislative process. As a judge, I am committed to writing opinions that apply the law with which I disagree to the facts of my case. I will resist the natural desire to ignore or not apply laws with which I disagree.

Perhaps the most dramatic example is within the statutory scheme for foster care and terminating parental rights. I have lived through many examples of foster parents who have brought a child into their home for months/years and connected with the child. However, the biological parent(s) actions or conditions have not quite risen to the level to justify termination of parental rights. We want to live in a society that does not terminate parental rights every time a parent commits a crime or has a substance abuse problem. It is always very painful to inform a foster family that the biological parents have succeeded in overcoming the problems that led to the removal of the child from the biological home. Likewise, it is painful to terminate parental rights. I do not always agree with the results in every case.

I have also found that no fault statutory schemes, whether in workers compensation or in divorce, often lead to results that are not equitable. Nevertheless, the law must be applied to the facts.

Antonin Scalia once said "The judge who always likes the results he reaches is a bad judge."

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.

Robin Miller. Past President (2012) of the Chattanooga Bar Association.
Worked with Robin Miller and against her on several cases.
Robin and I have opposite political views.
Hamilton County Clerk & Master
[redacted]
Chattanooga, TN 37401-1401
[redacted] Telephone: [redacted] Fax: [redacted]

Jim Fields. Past President (1998) of the Chattanooga Bar Association.
Worked with Jim Fields on many corporate litigation matters.
[redacted]
Chattanooga, TN 37421
[redacted] Telephone: [redacted] Fax: [redacted]

Bill Young. Former Davidson County Chancellor and Solicitor General for State of Tennessee.
Served with Bill Young on several commissions. Tennis partners.
[redacted]
Nashville, TN 37219
[redacted] Telephone: [redacted]

Frank Brown. Former Chancellor/Judge Hamilton County, Tennessee (1998-2014). *Retired.*
Tried many cases before Chancellor Brown.
[redacted]
Ooltewah, TN 37363
[redacted] Telephone: [redacted]

Bill Dunn. Former legislative colleague/non-lawyer.
Worked with Bill Dunn on many legislative issues.
[redacted]
Nashville, TN 37243
[redacted] Telephone: [redacted]

Bruce Zeiser. Non-Lawyer. Owner and Vice President of Southern Champion Trey, Chattanooga manufacturer with 1,000 employees. We work together on and for several charities and ministries. Our wives, children and families are close. Vacation together, fishing, camping, scouting.
[redacted]
Chattanooga, TN 37405
[redacted] Telephone: [redacted]

AFFIRMATION CONCERNING APPLICATION

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

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the Court of Appeals, Easter Section, 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 application with the Administrative Office of the Courts for distribution to the Council members.

I understand that the information provided in this application 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: Jan. 30, 2020.

Signature

When completed, return this application to Ceesha Lofton, 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.

Joseph Christopher Clem

Type or Print Name

J. Christopher Clem

Signature

1-30-20

Date

TN BPR# 015793

BPR #

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

State Bar of Georgia since 1994: BPR# 129901

Appeal No. E2014-00302-COA-R3-CV

IN THE SUPREME COURT OF TENNESSEE

AMERICAN HERITAGE APARTMENTS, INC.

Plaintiff/Appellee,

vs.

HAMILTON COUNTY WATER AND WASTEWTER TREATMENT AUTHORITY, HAMILTON COUNTY, TENNESSEE

Defendant-Appellant.

Appeal From the Hamilton County Circuit Court, Case No. 11-C-1207

APPLICATION FOR PERMISSION TO APPEAL HAMILTON COUNTY WATER AND WASTEWATER TREATMENT AUTHORITY

J. CHRISTOPHER CLEM, BPR# 015793
SAMPLES, JENNINGS, RAY & CLEM, PLLC
130 Jordan Drive
Chattanooga, TN 37421
(423) 892-2006

Attorneys for Defendant/Appellant
Hamilton County Water and Wastewater Treatment Authority

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Cases:

Statutes and Rules:

Attached as Exhibit A to this Brief is the final opinion of the Court of Appeals for East Tennessee filed on January 30, 2015. No petition for rehearing was filed. The Trial Court's final opinion dismissing plaintiff's complaint is attached as Exhibit B.

I. Questions Presented for Review.

1. Did the Court of Appeals err in overturning the trial court's judgment that Plaintiff was required to exhaust administrative remedies through the Utility Management Review Board as created by T.C.A. §7-82-701?

2. Did the Court of Appeals err in determining that the trial court had properly determined whether a class action could be maintained?

II. Standard of Review.

For actions initiated on or after July 1, 2011, such as the one at bar, the standard of review for summary judgment delineated in Tennessee Code Annotated § 20-16-101 (Supp. 2013) applies. *See Sykes v. Chattanooga Hous. Auth.*, 343 S.W.3d 18, 25 n.2 (Tenn. 2011). The statute provides:

> In motions for summary judgment in any civil action in Tennessee, the moving party who does not bear the burden of proof at trial shall prevail on its motion for summary judgment if it:
>
> (1) Submits affirmative evidence that negates an essential element of the nonmoving party's claim; or
>
> (2) Demonstrates to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim.
>
> Tenn. Code Ann. § 20-16-101.

The grant or denial of a motion for summary judgment is a matter of law; therefore, the standard of review is *de novo* with no presumption of correctness. *Dick Broad. Co., Inc. of Tenn. v. Oak Ridge FM, Inc.*, 395 S.W.3d 653, 671 (Tenn. 2013) (citing *Kinsler v. Berkline, LLC*, 320 S.W.3d 796, 799 (Tenn. 2010)). "A summary judgment is appropriate only when the moving party can demonstrate that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law." *Dick Broad. Co.*, 395 S.W.3d at 671 (citing Tenn. R. Civ. P. 56.04; *Hannan v. Alltell Publ'g Co.*, 270 S.W.3d 1, 5 (Tenn. 2008)).

As to statutory construction, this Court has summarized the principles involved as follows:

> When dealing with statutory interpretation, well-defined precepts apply. Our primary objective is to carry out legislative intent without broadening or restricting the statute beyond its intended scope. *Houghton v. Aramark Educ. Res., Inc.*, 90 S.W.3d 676, 678 (Tenn. 2002). In construing legislative enactments, we presume that every word in a statute has meaning and purpose and should be given full effect if the obvious intention of the General Assembly is not violated by so doing. *In re C.K.G.*, 173 S.W.3d 714, 722 (Tenn. 2005). When a statute is clear, we apply the plain meaning without complicating the task. *Eastman Chem. Co. v. Johnson*, 151 S.W.3d 503, 507 (Tenn. 2004). Our obligation is simply to enforce the written language. *Abels ex rel. Hunt v. Genie Indus., Inc.*, 202 S.W.3d 99, 102 (Tenn. 2006). It is only when a statute is ambiguous that we may reference the broader statutory scheme, the history of the legislation, or other sources. *Parks v. Tenn. Mun. League Risk Mgmt. Pool*, 974 S.W.2d 677, 679 (Tenn. 1998). Further, the language of a statute cannot be considered in a vacuum, but "should be construed, if practicable, so that its component parts are consistent and reasonable." *Marsh v. Henderson*, 221 Tenn. 42, 424 S.W.2d 193, 196 (1968). Any interpretation of the statute that "would render one section of the act repugnant to another" should be avoided. *Tenn. Elec. Power Co. v. City of Chattanooga*, 172 Tenn. 505, 114 S.W.2d 441, 444 (1937). We also must presume that the General Assembly was aware of any prior enactments at the time the legislation passed. *Owens v. State*, 908 S.W.2d 923, 926 (Tenn. 1995).
>
> *In re Estate of Tanner*, 295 S.W.3d 610, 613-14 (Tenn. 2009).

III. Facts Relevant to the Questions Presented.

This case arises out of a rate dispute by plaintiff against a Water and Wastewater Treatment Authority. Plaintiff objects to a flat rate portion of their sewer bill. Plaintiff failed to file a proper administrative appeal or a proper writ of certiorari pursuant to T.C.A. § 27-9-102 within the appropriate statute of limitations. Accordingly, Plaintiff is now seeking a class action to object to a rate increase. (R. 1).

CREATION OF WWTA:

The Hamilton County Water & Wastewater Treatment Authority was formed in accordance with the provisions of T.C.A. Section 68-221-601 through Section 68-221-618, known as the Water & Wastewater Treatment Authority (hereafter referred to as WWTA). Water and wastewater treatment authorities are considered "agencies and instrumentalities of the creating and participating government entities" involved in their formation and operation. T.C.A. Section 68-221-602(a). On May 19, 1993, the Hamilton County Commission created the WWTA with the passage of Resolution #593-60. (R. 623: ¶ 5-7).

The WWTA is responsible for the public sewer system throughout the unincorporated areas of Hamilton County, as well as the surrounding incorporated municipalities of East Ridge, Lakesite, Lookout Mountain, Red Bank, Ridgeside, Signal Mountain, and Soddy Daisy. The City of Chattanooga and City of Collegedale maintain a sewer system separate from the WWTA. (R. 623: ¶ 8-9).

WWTA UNDER STATE ORDER:

On March 20, 2008 the Tennessee Department of Environment and Conservation (hereafter referred to as TDEC) issued an order and assessment against WWTA requiring that the

WWTA (1) develop a Corrective Action Plan (CAP) to optimize and document maximum Infiltration & Inflow (I&I) removal and to (2) prevent the infiltration of storm water throughout the entire WWTA sewage system.1 Inflow & Infiltration (I&I) may also include runoff through roof drains, sump pumps and other prohibited connections. (R. 623: ¶ 10-14).

The following is undisputed:

a. The high influx of storm or rain water prevents the sewage from being effectively treated prior to being discharged into the Tennessee River.

b. The high influx of storm or rain water causes sewage to overflow into neighborhoods storm water ditches, creeks, and streams that result in health issues.

c. The high influx of storm or rain water violates the requirements of TDEC and the Environmental Protection Agency (hereafter referred to as EPA) to prevent overflows that produce harmful pathogens in our creeks and streams.

d. The high influx of storm or rain water reduces the sewer system capacity for new connections and the expansion of existing customers. Diminished capacity of the sewer system causes overflow of raw sewage.

e. The high influx of storm or rain water greatly increases the cost to treat what is mostly clean storm water.

f. The Regional Wastewater Treatment at Moccasin Bend cannot handle the high influx of storm or rain water from our system during major rain events that contributes to overflows and bypasses that are subject to fines, penalties, and consent orders.

(R. 624: ¶15).

Until the problems are adequately addressed, the WWTA will not be allowed to connect new customers to the Signal Mountain collection system. TDEC required that the WWTA develop a program that would address infiltration and inflow (hereafter "I & I") not only on

1 "Infiltration" is water that might originate as ground water leakage or rainfall seepage. "Inflow" are sources that are direct contributions of storm water.

Signal Mountain, but throughout its entire collection system in Hamilton County. (R. 99-100, TDEC Order attached as Exhibit C to Complaint) and (R. 624: ¶ 16-17).

Many homes suffer from lack of maintenance or natural deterioration over time. Many service lateral pipes may have shifted or become blocked due to roots, grease, or misaligned joints. Many homes have illegally connected the gutters, downspouts or sump pumps on their homes to the sewage system. The above problems cause a high flow of relatively clean storm water infiltrating the sewer system and preventing effective treatment prior to discharge in the Tennessee River. (R. 625: ¶ 20-25).

Both the EPA and TDEC are the regulatory agencies which require programs to be developed to make sure the local sewer systems make necessary upgrades and replace all old and broken pipes to comply with the requirements of the Clean Water Act, 22 U.S.C. Section 1251, et seq. The Tennessee Department of Environment and Conservation has approved the procedures and methods for the WWTA to address private sewer laterals. TDEC approved the repairs and time frame of rehabilitation program to prevent the infiltration of storm and rain water into the Signal Mountain Sewage System. This plan was also approved by the Tennessee Attorney General in Opinion 08-143 (September 4, 2008) and Opinion 08-185 (December 12, 2008). (R. 626: ¶ 26-29).

The Tennessee Department of Environment and Conservation essentially ordered the WWTA to start a process that would repair any property under the WWTA system (starting on Signal Mountain) by preventing the storm water from entering or infiltrating the sewer system. The Private Service Lateral Program (PSLP) is one part of the plan that removes the storm water from the WWTA sewer system. The "private service lateral" is the actual piece of pipe that

connects the private property to the WWTA owned main sewer line. (R. 626: ¶ 30-31, 18).

WWTA's normal sewer bill is a variable bill depending on water usage. WWTA charges a customer based upon the water usage reported by the water provider. WWTA is one of the few sewer utilities that must deal with a private water provider. Knoxville, Nashville and Memphis all own their water utilities. (R. 626: ¶ 33-34).

Inflow and infiltration of surface water into broken service laterals has no relationship or correlation with water usage. Accordingly, WWTA charges its customers a flat rate to fund the PSLP program. (R. 626: ¶ 35).

In 2007 Tenn. Code Ann. § 7-35-401(c)(1)(D) was amended to allow sewer systems to perform "rehabilitative maintenance or construction" on private service laterals if the sewer authority "deemed [it] necessary because [of] excessive infiltration and inflow from groundwater or rainwater..." Pursuant to Tenn. Code Ann. § 7-35-401(c)(1)(D) the WWTA determined "rehabilitative maintenance or construction" on private service laterals was "necessary because [of] excessive infiltration and inflow from groundwater or rainwater." (R. 630: ¶ 68, 71).

The PSLP Plan approved by the Tennessee Department of Environment and Conservation in 2009 requires the WWTA to first begin correcting the storm water infiltration in the Signal Mountain area. The WWTA imposed an $8.00 per month fee on all gravity customers in order to pay for such repairs. The $8.00 per month fee on all customers was applied to all gravity customers served by the WWTA because TDEC required the correction of the storm water infiltration not only on Signal Mountain but throughout its entire service area. (R. 627: ¶ 36-39).

Private Service Lateral Program (PSLP):

In 2010 the WWTA implemented the service lateral program after seeking approval from both TDEC and the Tennessee Attorney General.(R.627: ¶70). The WWTA would eventually need to inspect all 26,000 customer service laterals and replace or repair them over the coming decades as needed. As the WWTA discovers a property that improperly infiltrates storm water into the sewer system the WWTA pays for such repairs out of the PSLP program which is funded by the $8.00 monthly fee by the WWTA customers. (R. 627: ¶ 40). The first two phases of the PSLP will include locations or installation of clean-outs, TV inspection and testing of the private property's sewer lateral. The third phase will be to make repairs or replace the existing sewer lateral. The fourth phase will be to digitally locate and record the data associated with the sewer lateral for generations to come. (R. 627: ¶ 41). In early 2012 the WWTA obtained revolving fund loans from TDEC that funded the inspections and repairs. Accordingly, the $8 fee was pledged as collateral to repay the TDEC revolving fund loan. (R.627: ¶88).

Penalties against Hamilton County are severe if WWTA fails to address I&I.

The Clean Water Act ("CWA"), 22 U.S.C. Section 1251, et seq. imposes strict liability upon any violation of CWA. The penalties for failure to address or remedy overflows are many and are severe. The penalties include criminal indictment, federal consent decrees, fines, penalties, moratoriums over small areas such as Signal Mountain and moratoriums over entire counties. (R. 637: ¶ 132-134).

TDEC has placed a moratorium on any new sewer connections and expansion that require additional capacity because of increase in water usage requirements on Signal Mountain. (R. 637: ¶ 135). This moratorium to prevent all new sewer connections and expansion of existing

connects (both commercial and residential) could be extended to all of Hamilton County. Anderson County had a moratorium placed on all of Anderson County. (R. 637: ¶ 136-137). A federal consent decree could be imposed like has been imposed on the following:

> Knoxville in 2004 (US District Court, East TN, Civ. # 3:03-cv-497),
> Nashville in 2007 (US District Court Middle TN, Civ. # 307,1056),
> Memphis in 2010 (US District Court Western TN, Civ. # 2:10-cv-02083) and
> Chattanooga in 2012 (US District Court Eastern TN, Civ. # 1:10-cv-281).
>
> (R. 637: ¶ 138).

Each of these consent decrees require hundreds of millions of dollars in upgrades and imposes tens of millions in penalties if the sewer authority does not comply.[1] (R. 637: ¶ 139).

The consent decree imposed by the EPA against the City of Chattanooga requires the Chattanooga City sewer authority to complete "specific projects that reduce peak flow through removal of I/I (I/I Projects)". (R. 643-644: pages 36 and 41 of consent decree). Likewise, the consent decree imposed by the EPA against the City of Memphis requires the Memphis City sewer authority to implement procedures that "shall include Private Service Lateral investigations to identify sources of I/I". (R. 652: page 31 consent decree).

Accordingly, the TDEC Order required WWTA to develop a program that would address infiltration and inflow (hereafter "I & I") both on Signal Mountain and throughout its entire Collection System in Hamilton County. (R. 99-100: pages 10 and 11 of TDEC Order attached as Exhibit C to Complaint). However, this is merely the first step in a line of possible severe consequences should WWTA not address I&I in service laterals. (R. 638: ¶ 145).

Plaintiff, American Heritage Apartments:

American Heritage Apartments is a 501(c)(3) corporation (R. 1380) that owns a 168 unit apartment complex in East Ridge, Tennessee (R. 1375). The apartment complex was built 27 years ago in 1986. (R. 1375). Plaintiff rents to "very low income families." (R. 1380). Plaintiff has admitted that it is routine for his renters to put "trash, or junk, or unmentionables down" the service laterals. (R. 1380).

Plaintiff has no information or knowledge about where the service laterals on his property are located that service the 168 apartments. (R. 1380). Plaintiff has repeated service lateral and sewer related issues requiring repairs in 2003 (R. 1392), 2005 (R. 1392), 2010 (R. 1380) and 2011 (R. 1391).

Plaintiff admits that the owner of a piece of property should be responsible for maintaining and repairing deficiencies to the service lateral on such property. (R. 1386). Plaintiff had never tested or scoped the service laterals in this 168 unit apartment complex in order to determine if any "inflow or infiltration" of surface water is entering the WWTA sewer system. (R. 1381). Plaintiff strongly argues that he will not allow WWTA to inspect Plaintiff's service laterals and make necessary repairs. (R. 1386). Plaintiff also admits that he will not inspect his own service laterals unless required to so. (R. 1387). Plaintiff argues that if the service laterals passed the East Ridge Building Code when built in 1986 then no further inspection is ever necessary. (R. 1387).

In 2012 Plaintiff filed a class action lawsuit alleging that the flat rate was unfair and that WWTA shouldn't repair private service laterals. (R. 1). When asked to explain why Plaintiff

was alleging the PSLP fee is unjust Plaintiff responded, "Because it just is." (R. 1386). After obtaining a Court Order to inspect the Plaintiff's premises the WWTA determined that the service laterals servicing the 168 apartments were in serious disrepair and requiring an estimated $135,800.00 in repairs. (R. 1329). The evidence submitted (pictures, video and affidavits) show large amounts of I&I entering the WWTA system through the plaintiff's property. (R. 1312).

IV. Summary of the Reasons Supporting Review.

The trial court granted a motion for summary judgment filed by the Defendant based upon a failure to exhaust administrative remedies and failure to establish a private cause of action. The court then denied the motion of Plaintiff for class action certification but stated that if its decision was overturned, then the motion "should be subsequently granted".

The Court of Appeals overruled the trial court on its summary judgment decision holding that the WWTA enabling act created a private right of action in its customers to challenge the classification of customers for the purpose of the assessment of a fee. The WWTA is a Water and Wastewater Treatment Authority created under T.C.A. § 68-221-601. The $8 fee was used first to inspect for and repair storm water infiltration problems throughout the WWTA service area. Subsequently, state loans were obtained to make the repairs and the $8 fee was then designated to repay the loans from the state. The Court of Appeals then treated the trial court's dicta on the class certification as an accomplished fact and thereby certified the class action.

The Trial Court had followed the reasoning of this Tennessee Supreme Court in Brown v. Tennessee Title Loan, Inc. and the Tennessee Court of Appeals in Morrison v. City of Bolivar in dismissing the current action for failure of a valid cause of action.2 Brown v. Tennessee Title Loans, Inc. 328 S.W.3d (Tenn.2010); Morrison vs. City of Bolivar, (2012 TN.App.Lexis 382).

The decision of the Tennessee Supreme Court in Brown v Tennessee Title Loans, Inc. rendered November 29, 2010, has been interpreted in the subsequent cases of Morrison v. City of Bolivar, rendered June 14, 2012 and in this cause of American Heritage Apartments, Inc. v. The

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2 The Tennessee Court of Appeals has held there is no private cause of action with regard to allowing utility customers to file suit for refunding fees. Morrison vs. City of Bolivar, (2012 Tenn. App. Lexis 382).

Hamilton County Water and Wastewater Treatment Authority, rendered January 30, 2015.

In Morrison, the Court of Appeals panel applied the Brown tests to the Revenue Bond Law and found no private right of action created. In this cause, a separate panel of the Court of Appeals applied the Brown tests to the Water and Wastewater Treatment Authority Act, which contains very similar language, context and purpose as the Revenue Bond Law and found that the act did in fact create a private right of action in a utility customer to challenge the rate setting authority of the utility.

The ultimate decision in this cause may jeopardize the ability of WWTA's in the state to repay large loans from the state, made for the purpose of financing the inspection and repair of storm water infiltration into the sewer system in compliance with orders from environmental regulatory agencies at the state and federal levels. The uncertainty created by the decision of the lower court in this cause has also created confusion as to the validity of such state loans and whether the particular entities receiving the loans have authority to fix rates sufficient to repay the loans.

This Supreme Court should accept this appeal for the following reasons:

1. Need to secure uniformity of decision: The differing results of the two panels of the Court of Appeals has resulted in great uncertainty as to the authority of WWTAs and other utility providers in Tennessee to repay state loans.

2. Need to secure settlement of important question of law: Questions as to the ability of utility providers to repay state loans used for environmental cleanup purposes has cast a pall over decisions on whether to apply for such loans and whether existing loans are based upon an erroneous belief that all utility providers in Tennessee have the greatest of latitude in fixing

utility rates, particularly rates which provide funds to repay debt.

3. Need to secure settlement of questions of public interest: The need for utility providers to address the infiltration of storm water into sewer connection lines and thereafter to wastewater treatment facilities causing untreated wastewater to be placed in public waters, is a matter of great public interest in the state.

V. REASONS SUPPORTING REVIEW

1. The Court of Appeals erred in overturning the trial court's judgment that Plaintiff was required to exhaust administrative remedies through the Utility Management Review Board as created by T.C.A. §7-82-701.

1.a. T.C.A. §7-82-701 treats a WWTA (created under T.C.A. 68-221-601) as a utility district for purposes of governance by the Utility Management Review Board.

The Court of Appeals overturned the trial court when it accepted the Plaintiff's argument that this statutory scheme only applies to utility districts and not waste water treatment authorities. The Court of Appeals held, "The record before us contains no indication that the county WWTA has under gone the statutorily proscribed process of becoming a utility district pursuant to UDL."

Two boards govern all utility districts and/or Water & Wastewater Treatment Authorities. The first board which governs utility districts is the Utility Management Review Board created by T.C.A. Section 7-82-701. The second board which governs utility districts is the Water and Waste Water Financing Board established by T.C.A. Sections 68-221-1006(a), 1008 and 1206(a).

The Utility Management Review Board created by T.C.A. § 7-82-701 states under that statute:

> For purposes of this part, "utility district" includes agencies, authorities or instrumentalities of government created by public or private act having the authority to administer a water or wastewater facility, other than those agencies, authorities or instrumentalities of government electing pursuant to § 68-221-1006(a) or § 68-221-1206(a) to come under the jurisdiction of the water and waste water financing board. (emphasis added).

The WWTA is treated as a utility district for the purposes of T.C.A. Section 7-82-701, et. seq. Specifically, the WWTA is "an authority or instrumentality of a government created by private act having the authority to administer a water or wastewater facility". T.C.A. Section 7-82-701.3 The executive director of the WWTA testified that the WWTA has never elected pursuant to T.C.A. § 68-221-1006(a) or § 68-221-1206(a) to come under the jurisdiction of the water and waste water financing board. (R. 1278). The WWTA filed an affidavit from its executive director indicating that the WWTA has not elected and submitted such election in writing to opt out of being governed by the Utility Management Review Board as indicated under T.C.A. § 68-221-1206(a) **(8)**. (R. 1280-1281). Thus, the WWTA remains under the jurisdiction of the Utility Management Review Board as created by T.C.A. Section 7-82-701. The Court of Appeals should therefore be reversed and the trial court's summary judgment should be reinstated.

1.b. T.C.A. § 68-221-1006 and § 68-221-1206 treat a WWTA (created under T.C.A. 68-221-601) as a utility district for purposes of governance by the Utility Management Review Board.

Both T.C.A. Sections § 68-221-1006(a) and 68-221-1206 indicate that all WWTA's automatically fall within jurisdiction of the Utility Management Review Board unless the WWTA opts out. The Hamilton County Water and Wastewater Authority submitted irrefutable evidence that it opted to be governed by the Utility Management Review Board and T.C.A. § 7-82-402. (R. 1278-1281).

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3 TCA 68-221-602 provides that WWTAs shall be public and governmental bodies acting as agencies and instrumentalities of the creating and participating governmental entities, in this case being Hamilton County and several of its cities. Thus, the WWTA is subject to TCA 7-34-101 et seq., referred to as the Revenue Bond Law, which is applicable to municipal governments providing utility services.

T.C.A. § 68-221-1006(a) **(8)** states:

> In the case of local governments with taxing power, agree to be subject to the jurisdiction of the water and waste water financing board established by this part; and, in the case of ***all other local governments***, notwithstanding any charter provisions to the contrary, agree to be subject to the jurisdiction of the utility management review board created by title 7, chapter 82; provided, however, that ***any local government in existence*** on April 11, 2002, and under the terms of this section, subject to the jurisdiction of the utility management review board, other than utility districts formed under the provisions of title 7, chapter 82, at any time after April 11, 2002, may irrevocably elect to come under the jurisdiction of the water and waste water financing board, and any such local government not in existence on April 11, 2002, may make such irrevocable election prior to obtaining a loan from the board. *All such elections shall be submitted in writing to the director, with a copy to the authority. (emphasis added).*

The WWTA has not elected and submitted such election in writing to the director as indicated under T.C.A. § 68-221-1006(a) **(8)**. (R. 1280-1281).

T.C.A. § 68-221-1206(a) **(8)** states the same thing:

> In the case of local governments with taxing power, agree to be subject to the jurisdiction of the water and waste water financing board established by this part; and ***all other local governments***, notwithstanding any charter provision to the contrary, agree to be subject to the jurisdiction of the utility management review board created by title 7, chapter 82; provided, however, that ***any local government in existence*** on April 11, 2002, and under the terms of this section, subject to the jurisdiction of the utility management review board, other than utility districts formed under title 7, chapter 82, at any time after April 11, 2002, may irrevocably elect to come under the jurisdiction of the water and waste water financing board, and any such local government not in existence on April 11, 2002, may make such irrevocable election prior to obtaining a loan from the board. *All such elections shall be submitted in writing to the director, with a copy to the authority.(emphasis added).*

The WWTA filed an affidavit from its executive director indicating that the WWTA has not elected and submitted such election in writing to opt out of being governed by the Utility Management Review Board as indicated under T.C.A. § 68-221-1206(a) **(8)**. (R. 1280-1281).

Plaintiff has not properly pled that the WWTA elected to remove itself from the Utility Management Review Board thereby relieving Plaintiff from the administrative procedures. Accordingly, the WWTA remains under the governance of the Utility Management Review Board as created by T.C.A. Section 7-82-701. The Court of Appeals erred by not treating the WWTA as a utility district as expressly intended by the legislature within T.C.A. Sections 7-82-701, 68-221-1006 and 68-221-1206.

1.c. The rate protest procedures set forth in T.C.A. §7-82-402 apply to a WWTA (created under T.C.A. 68-221-601).

The Court of Appeals erred when it refused to apply an administrative appeals process to utility rate contests and thereby reversed the trial court. The Court of Appeals correctly stated that the WWTA was created under T.C.A. §68-221-601. However, the Court of Appeals then mistakenly jumps to the conclusion that the trial court should not have applied the county utility district law of 1937 found at §7-82-401.4

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4 Tenn. Code 7-82-402 Protest of water rates -- Adjustment of complaints -- Consumer information records -- Fire protection (Tennessee Code (2013 Edition))

(a) (1) Within thirty (30) days of the date on which the statement provided for in § 7-82-401 is published, any water user of the district may file with the commissioners of the district a protest, giving reasons why, in the opinion of the water user, the rates so published are too high or too low. ...
(2) The commissioners shall not be required to receive, consider or act upon any protest filed at any time other than within the thirty-day period provided in this section.
(3) Any protestant feeling aggrieved by the final action of the commissioners under this section may obtain a review of the commissioners' action by simple written request to the utility management review board within thirty (30) days thereafter, with the right to judicial review as provided in § 7-82-702.

Plaintiff alleged in ¶87 of its original complaint that the WWTA failed to comply with the city utility district law of 1933 found at §7-35-401. Plaintiff admitted on page 10 of its reply brief at the Court of Appeals that §7-82-401 which is the county "*Utility District Act of 1937 provision relied on by the Trial Court is on its face an alternative remedy, which offers an alternative complaint procedure that utility district customers 'may' elect to use...*" (p. 10, Plaintiff Reply Brief at Court of Appeals).

Accordingly, the Court of Appeals erred in holding that the trial court should not have applied the county utility district law of 1937 found at §7-82-401.

1.d. T.C.A. §7-82-402 and §7-82-702 establish a mandatory and exclusive method for the review of rates and charges levied by a WWTA created under T.C.A. 68-221-601.

The Tennessee General Assembly created the Utility Management Review Board pursuant to T.C.A. § 7-82-701 to be the exclusive method of adjudicating all rate disputes. "In Tennessee, 'if a statute creates a new right and prescribes a remedy for its enforcement, then the prescribed remedy is exclusive." *Morrison vs. City of Bolivar*, (2012 Tenn. App. Lexis 382). The legislature contemplated the necessity of a state court judge enforcing the restrictions against utility rate challenges.

T.C.A. Section 7-82-104(b) -Exemption from state regulation – Rules of construction:

> It shall be the ***obligation*** of every judge and every public official having occasion to construe §§ 7-82-102 and 7-82-402(b) to so construe them as to accomplish the ends indicated by the findings and policies set forth in the preamble and section 1 of Acts 1973, ch. 249. (emphasis supplied).

This Utility Management Review Statute superseded and preempted all other laws on this subject. T.C.A. Section 7-82-107 -Chapter unaffected by other law – Construction.

> ***This chapter is complete in [and of] itself and shall be controlling***. The provisions of any other law, general, special or local, except as provided in this chapter, shall not apply to a district incorporated under this chapter; provided, that nothing in this chapter shall be construed as impairing the powers and duties of the department of environment and conservation. (emphasis added).

T.C.A. Section 7-82-102(a)(1) states "...there is hereby granted to the utility management review board the authority to review rates charged and services provided by public utility districts. The review provided for in this subsection (a) can only be initiated by a petition signed by at least ten percent (10%) of the users within the authorized area of the public utility district. ..."

The Court of Appeals erroneously held that this statute was for various financing purposes; therefore, the Utility Management Review Board is not really an oversight authority over the WWTA or a valid option for resolving customer complaints. The Court of Appeals incorrectly stated that the Utility Management Review Board as created under T.C.A. § 7-82-701 "includes no administrative recourse for users protesting rates."

Yet, the legislature went far beyond so called "financing purposes" when establishing the power and authority of the Utility Management Review Board to resolve disputes.

> **7-82-702. Powers and duties.** In order to effectuate the purposes of this part, the board has the power and authority to:
>
> (1) Promulgate rules and regulations for the conduct of the affairs of the board;
>
> ...
>
> (7) Review any decision of any utility district under § 7-82-402, regardless of exemptions or exclusions as may be enumerated in § 7-

82-103, *upon simple written request of any utility district customer or any member of the public* within thirty (30) days after such decision, with any judicial review of any decision of the board thereon, to be held by common law certiorari within the county of the utility district's principal office;

...

(9) In the conduct of any hearing upon request or complaint, the board may receive affidavit evidence, in addition to minutes, transcripts, and other evidence of actions by the utility district, and may render its decision thereon or, if it shall deem an open hearing appropriate, may order the interested parties be notified of the date, time and place that such hearing will be held;

...

(11) Exercise all the powers and take all the actions necessary, proper or convenient for the accomplishment of the purposes enumerated in this part;

(12) Issue subpoenas requiring attendance of witnesses and production of such evidence as requested; administer oaths; and take such testimony as the board deems necessary in fulfilling its purpose. If a person or entity refuses to obey a subpoena issued by the board under this part, the chancery court of Davidson County shall have jurisdiction upon application of the board to issue an order requiring such person to appear and testify or produce evidence as the case may require, and any failure to obey such order of the court may be punished by such court as contempt;

...

(19) Review and conduct a hearing of any decision of any utility district ....

Once the legislature expressly included the WWTA under this statutory scheme the Trial Court properly granted summary judgment by holding "under the statutory scheme in T.C.A. § 7-82-402, the procedure for contesting the utility charges is presented with no express right for the plaintiff to recover the charges by private action or any implied intent that there be a right to private action." (R. 1504). The Court of Appeals was therefore in error in overturning the trial court's application of this administrative remedy in dismissing the plaintiff's claim.

2. The Court of Appeals erred in determining that the trial court had properly determined that a class action could be maintained.

Plaintiff is asking the court to hold defendant's flat fee structure illegal and ultra vires. (paragraph 100 of Complaint). Plaintiff is seeking a class action because it waited too long to file for a writ of certiorari T.C.A. § 27-8-101 allows certiorari for "acting illegally." Plaintiff repeatedly claims that its action is based on ultra vires act. When the certiorari is to review the action of a local board or commission, T.C.A. § 27-9-102 sets a time limit in which a complaint for certiorari must be filed. When the certiorari is to review the action of a local board or commission then the certiorari must be filed within 60 days of the date of board minutes reflecting the action complained of.5

If not for plaintiff's failure to file for a writ of certiorari within 60 days of the WWTA's implementation of this fee this class action would have never been filed. Defendant asks this Court to therefore strictly enforce the class action requirements contained within TRCP Rule 23.

Tennessee's Attorney General filed an amicus brief at trial arguing that judicial review of the WWTA's decision is limited to Common Law Writ of Certiorari. This brief was largely ignored by the Trial Court. And, the argument brought on appeal was completely ignored by the Court of Appeals. (TR 1254).

5 Under T.C.A. § 27-9-102 there would be one 60 day statute of limitations for the levying of the initial flat $8 monthly fee to be used to pay for the program which started in 2010. (R.627: ¶70). T.C.A. § 27-9-102 would provide a second 60 day statute of limitations for the second meeting where the $8 fee was converted to payment on the state loan in 2012. (R.627: ¶88). Plaintiff filed this action 18 months after implementation of this fee in 2010. Suit was filed during the phasing out of the pilot problem when TDEC Revolving Loan Funds were used for the repairs, and the $8 fee was designated to repay state loans. (R.627: ¶88).

2.a. Class action certification should not have been granted unless the plaintiff proved compliance with Rule 23.02(3) that the class action is superior to other available methods.

Under TRCP Rule 23.02(3)(2) a Class Action must be the superior method of adjudicating the dispute. The burden of showing that a class action is more efficient or more fair rests with the class certification proponents. *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 689 (Tex. 2002).6

The superior method (as opposed to the exclusivity argument) for adjudicating such a utility rate/fee dispute or complaint about expenditures on inappropriate programs is an administrative appeal to the Utility Management Review Board. 7 The Tennessee General Assembly created the Utility Management Review Board to conduct hearings and hear evidence upon receiving such complaints. Regardless of whether T.C.A. § 7-82-701 is exclusive, the Utility Management Review Board is clearly the superior method. It has authority to address refunds, rates and expenditures of utilities.

Plaintiff candidly conceded this argument on page 10 of its reply brief at the Court of Appeals that §7-82-401 which is the county "*Utility District Act of 1937 provision relied on by the Trial Court is on its face an alternative remedy, which offers an alternative complaint procedure that utility district customers 'may' elect to use...*" (p. 10, Plaintiff Reply Brief at

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6 The test under the superiority requirement is that the class action vehicle must be better than, not merely as good as, other methods of adjudication. *See Perez v. Metabolife Int'l., Inc.*, 218 F.R.D. 262, 273 (S.D. Fla. 2003).

7 "[c]lass actions are specialized types of suits, and as a general rule must be brought and maintained in strict conformity with requirements of [the rule on class actions]." *DeFunis v. Odegaard*, 84 Wn.2d 617, 529 P.2d 438, 441 (Wash. 1974). Because "the granting of class certification considerably expands the dimensions of the lawsuit, and commits the court and the parties to much additional labor over and above that entailed in an ordinary private lawsuit," *Bishop v. Comm. on Prof'l Ethics and Conduct*, 686 F.2d 1278, 1288 (8th Cir. 1982), only those cases that meet the requirements of Rule 23 should be certified.

Court of Appeals).

Even if the Utility Management Review Board is not the exclusive method it is a superior method to requiring 26,000 users to join a class action. Accordingly, a class action is not the superior method for adjudicating this dispute. As such the Court of Appeals should be reversed and the Trial Court's dismissal reinstated.

2.b. Class actions can not be certified until Plaintiff establishes that it has a right of action.

Before the Plaintiff may establish that a class action is warranted, it must meet a fundamental requirement that is not expressly stated in Tennessee Rule of Civil Procedure 23, "but is necessary to comply with it." ROBERT BANKS, JR. ET AL., TENNESSEE CIVIL PROCEDURE § 6-10(d)(2nd ed. 2004). The named plaintiff must itself state a claim against the defendant. Id.

Plaintiff's claims that the flat fee portion of the sewer fee is in violation of T.C.A. Section 68-221-608 does not create a cause of action on which a class action can be certified. Specifically, Plaintiff claims in paragraph 89 of the Complaint that WWTA's billing is discriminatory and violates T.C.A. Section 68-221-608's requirement that the "rates charged must be uniform for the same class of customers of service." A flat rate charged to all customers of a WWTA for the purpose of paying a loan owing to the State of Tennessee made pursuant to T.C.A. § 68-221-1006(a)(8) is not in violation of T.C.A. § 68-221-608 which require that rates as to a "class" of customers must be uniform.

Tennessee statutes do not forbid flat rates.8 The authority may fix the price or charges for its water and waste treatment services rendered to users within and without the service area of the authority. The duty and power of the WWTA with reference to the determination of rates is specifically addressed in T.C.A. § 68-221-608 which provides, in relevant part, as follows:

> 68-221-208. Municipalities to establish and collect sewer user's fees.
>
> (b) ... The municipality shall establish a sewer user's fee and/or such ad valorem taxes as necessary to provide funds sufficient to pay the monthly payments established, plus the costs of operation and maintenance of the sewage treatment work, including depreciation according to generally accepted accounting principles and any other debt service requirements of the system....
>
> T.C.A. § 68-221-608.

Nothing under Tennessee law requires the sewer fees to be variable and based upon water usage.9 In the instant case, a variable portion of the WWTA sewer bills is based upon water

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8 The Tennessee Attorney General has specifically held in AG Opinion 08-143 that WWTA's $8 flat fee was constitutional. Article II, Section 29, of the Tennessee Constitution provides that the General Assembly may authorize counties and municipalities "to impose *taxes* for County and Corporation purposes respectively." (Emphasis supplied). That provision has been construed to prohibit counties and cities from appropriating funds for anything besides county or public purposes. *See Metropolitan Development and Housing Agency v. Leech,* 591 S.W.2d 427, 429 (Tenn. 1979).

> Under the facts presented in this request, the Hamilton County Water and Wastewater Treatment Authority desires to repair and/or replace the lateral sewer lines of its residential and commercial customers that lie on private property and connect to the public wastewater system. According to the request, this project, which is designed to reduce excessive infiltration of storm water into the system that often results in sewer overflows, would be financed through the imposition of a monthly fee on all customers in the service area. Because the charge it seeks to impose on its customers is designed to regulate a specific activity, the repair and/or replacement of sewer lines, we believe it can be properly characterized as a fee, rather than a tax. *Memphis Retail Liquor Dealers' Association v. City of Memphis,* 547 S.W.2d 244, 245-46 (Tenn. 1977). Thus, the provisions of Article II, Section 29, have no application to the facts stated in this request. AG Opinion 08-143.

9 T.C.A. § 68-221-1005(g) (3) specifically gives the WWTA the power to "Fix, levy and collect fees, rents, tolls and other charges in connection with any wastewater facility ..." without any limitations as to how the fees are charged.

usage. The regular sewer bill is directly related to water usage. Other than inappropriate I&I, the water that a customer purchases from the water company is the primary source of sewer flowing into the WWTA system. Accordingly, it is appropriate to charge a variable rate for sewer fees based upon water usage. (R 629: ¶ 60-63 of Grimes Affidavit).

Perhaps, the most pressing problem facing all sewer systems is the massive amount of surface water or rain water entering the sewer system and causing overflows of raw sewage as well as treatment of otherwise clean surface water. The program to diminish or minimize infiltration and inflow ("I&I") of surface water has absolutely no relationship or correlation with water usage.10 "I&I" is related to surface water, run off water and rain water leaking into the service laterals. Accordingly, it would be unreasonable and arbitrary to adopt plaintiff's demands to relate such fees to variable water usage. (R 629: ¶ 64-67 of Grimes Affidavit).

WWTA is charging all customers the same uniform flat $8 fee. (R 629: ¶ 69 of Grimes Affidavit). Plaintiff's claim that the flat fee portion of the sewer fee is in violation of T.C.A. Section 68-221-608 has no statutory authority or case law authority and should be dismissed.

The Tennessee Court of Appeals has held that common law permits flat rates for utilities. *Parsons v. Perryville*, 594 S.W.2d 401; (Tenn. App. 1979) states that with respect to the establishment of rates, the common law is concisely stated in 94 C.J.S. Waters § 297 (1956) at page 202:

> ... it is not of itself unjust discrimination to furnish water ***to some consumers at***

10 In 2007 the Tennessee General Assembly amended T.C.A. Section 7-35-401 to specifically grant sewer authorities the power to construct projects of private service laterals on private property if the "rehabilitative maintenance or construction is deemed necessary by the municipal corporation because of excessive infiltration and inflow from ground water or rainwater is resulting in sanitary sewer overflows..."

> ***flat rates and to others of the same class at meter or quantity rates***, even though the rate by the gallon actually used is ordinarily lower to the former than to the latter; and the imposition on meter-rate consumers of a minimum or "ready to serve" charge, without ***imposing a like charge on flat-rate consumers, is not necessarily unjust discrimination***, since the latter pay a fixed sum whether they use the water or not, and the former may likewise be required to pay for the service of being ready to supply them with such quantity of water as they may desire or need to use. (emphasis added).

When asked to explain why Plaintiff was alleging the PSLP fee is unjust Plaintiff responded, "Because it just is." (R 1373: Weitzel dep. p. 51). The Trial Court correctly stated in the Final Order that "[T]he material facts of the case are undisputed." (R. 1503).

Plaintiff can not point to a single statute or case that supports its position. The only case on point indicates that common law permits flat rates for utilities. Accordingly, Plaintiff's claim that WWTA's $8 monthly rate is unreasonable, unjust, and in violation of common law can not be the basis on which to certify a class action. (paragraphs 88 - 91 and 94-101 of Complaint).

It is undisputed that the legislature has recognized that sewer authorities have a system wide problem with I&I entering through private service laterals. It is also undisputed the $8.00 fee applies equally to all 26,000 WWTA customers. Finally, it is undisputed that all service laterals (new and old) will eventually need repair under the WWTA program.

Tennessee Rule of Civil Procedure 17.01 requires that "[e]very action shall be prosecuted in the name of the real party in interest."[11] In the class action context, this requirement will only be met if the named plaintiff himself has a cause of action against the defendant. See 7A C. WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d § 1751, at 132-133

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11 Before Plaintiff may establish that a class action is warranted, it must meet a fundamental requirement that is not expressly stated in Tennessee Rule of Civil Procedure 23, "but is necessary to comply with it." ROBERT BANKS, JR. ET AL., TENNESSEE CIVIL PROCEDURE § 6-10(d)(2nd ed. 2004). The named plaintiff must itself state a claim against the defendant. Id.

(1986)(collecting cases for this proposition). This requirement is underscored by the language of T.R.C.P. 23.01 which provides that "[o]ne or more members of a class may sue or be sued as representative parties . . . ." Of course, if the named plaintiff lacks a claim against the defendant, he cannot create one through the device of a class action. Bennett v. Stutts, 521 S.W.2d 575, 577-78 (Tenn. 1975)(noting that class actions are governed by procedural rules that "do not create substantive rights"). Id.

In the instant case, neither the Plaintiff, or by extension, the putative class members, have a claim against the WWTA, making the concept of a "class" completely inappropriate. No amount of discovery or future class action or a future trial will shed additional light on these facts or on this cause of action. The legislature has recognized that sewer authorities have a system wide problem with I&I entering through private service laterals. The legislature has authorized sewer authorities to make system wide repairs to service laterals. The WWTA's $8.00 fee applies equally to all 26,000 WWTA customers. All service laterals (new and old) will eventually need repair under the WWTA program. Appellant's entire cause of action rests upon the allegation that it is unfair that some service laterals need to be repaired immediately and some in future years. Plaintiff claims this mere fact somehow creates an unjust treatment of customers.

Accordingly, Plaintiff does not allege a valid cause of action against Defendant. 12

12 Although a court need not make a determination on the merits at the class certification stage, it is required, at this stage and when considering whether "common" issues predominate, to "look beyond the pleadings to understand the claims, defenses, relevant facts, and applicable substantive law." Castano v. Am. Tobacco Co., 84 F.3d 734, 744 (5th Cir. 1996). See also Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 & n. 12 (1978)(noting that evidence relevant to class certification may be intertwined with the merits, and a court's resolution of plaintiff's motion for class certification may involve some consideration of the factual and legal issues underlying his claim).

2.c. T.C.A. § 68-221-601, et. seq. does not create a private cause of action for the Plaintiff or the potential class beneficiaries.

The Court in *Brown v. Tennessee Title Loans, Inc.* 328 S.W.3d (Tenn.2010) held that "[t]he burden ultimately falls on the plaintiff to establish that a private right of action exists under the statute." Brown, 328 S.W.3d at 855-56. The Court of Appeals in Morrison found if a statute does not expressly create a private right of action then the next inquiry is whether the legislature otherwise indicated an intention to imply such a right in the statute. *Morrison vs. City of Bolivar*, (2012 Tenn. App. Lexis 382). In this analysis, the court looks to the statutory structure and legislative history. Appropriate factors to consider include (1) whether the party bringing the cause of action is an intended beneficiary within the protection of the statute, (2) whether there is any indication of legislative intent, express or implied, to create or deny the private right of action, and (3) whether implying such a remedy is consistent with the underlying purposes of the legislation.

T.C.A. § 68-221-601, et. seq. does not create a private right of action in the Plaintiff or potential class beneficiaries.13 The WWTA's enabling Act expressly grants a private right of action and remedies for bondholders, employees and creating and participating governmental entities.

This same act does not expressly grant customers a private cause of action. The Trial Court followed the reasoning of this Tennessee Supreme Court in both Brown v. Tennessee Title

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13 Due to the state loan's taken by the WWTA and T.C.A. §68-221-1003(7)A)(i), the WWTA is also subject to TCA 68-221-1001 et. seq, known as the Wastewater Facilities Act of 1987. Applying the Brown and Morrison reasoning, this Act does not create a private right of action because it contains remedies for a failure to comply with the Act by authorizing a pledge of revenues.

Loan, Inc. and in Morrison v. City of Bolivar in dismissing the current action for failure of a valid cause of action.

The Brown analysis as expanded upon in Morrison reveals the following ***facts in this cause***:

A. No fact alleged or presented as to whether class members are intended to be beneficiaries under the Act.

B. No legislative history cited to indicate a legislative intent to create a private right of action. The Act at TCA 68-221-611, provides a remedy for bondholders and at TCA 68-221-613, provides a remedy for employees in a civil service system. In TCA 68-221-614, the Act grants broad powers in creating and participating governmental entities to further the purposes of the Act, presumably including to remedy violations of the Act. Certainly the legislature was aware of the possibility of creating an additional right of action and did not do so.

C. The enactment by the General Assembly of TCA 1-3-119, although at a time subsequent to the filing of this action but before consideration of the class maintenance issue by the trial court, certainly does not indicate an intent to create a private right of action in the act enabling the creation of WWTAs.

D. No fact alleged or presented as to whether an implied right to private action would be consistent with the underlying purpose of the Act.

E. Act establishes remedy if a Board member violates the Act, through TCA 68-221-605(d)(1) which grants the right to the appointing authority to remove a commissioner. In Morrison, officials who violated the law could be ousted from office.

F. "In Tennessee, 'if a statute creates a new right and prescribes a remedy for its enforcement, then the prescribed remedy is exclusive." Morrison.

In this cause, a separate panel of the Court of Appeals applied the Brown test to the Water and Wastewater Treatment Authority Act, which contains very similar language, context and purpose as the Revenue Bond Law and found that the act did in fact create a private right of

action in a utility customer to challenge the rate setting authority of the utility.

The ultimate decision in this cause may jeopardize the ability of WWTA's in the state to repay a large loan from the state, made for the purpose of financing the inspection and repair of storm water infiltration into the sewer system in compliance with orders from environmental regulatory agencies at the state and federal levels. The uncertainty created by the decision of the lower court in this cause has also created confusion as to the validity of such state loans and whether the particular entities receiving the loans have authority to fix rates sufficient to repay the loans.

2.d. The class action was not certified by the trial court.

This class action was not certified by the trial court. Accordingly, neither party fully briefed the Trial Court's dicta that it would have certified the class had the case not been dismissed. Pursuant to TRCP 23 additional findings of fact needed to be determined by the trial court before certifying a class action.

If this cause is remanded, new information should be considered by trial court prior to any action. The Trial Court needs to determine when the class opened and when it closed. The class likely opened when WWTA adopted an $8 fee provided the statute of limitations had not run. The class may close when the fee was converted to pay the state loan provided the statute of limitations had not run. Further, the class may have closed on July 1, 2012 the effective date of T.C.A. § 1-3-119. The case is not about WWTA's current customers. Instead, this class should be defined by how many customers WWTA had during the period when the enabling act may have created a private right of action.

According to Morrison, footnote 4, during the time that T.C.A. §1-3-119 is applicable, no right of action could be created. Normally, the statue would govern upon the date of the filing of the action. However, a new customer after July 1, 2012 would not have a right of action and should not be included in the class.

A new judge has replaced Judge Bolton in August of 2014 and will need clear direction as to what issues need to be decided if this case is remanded.

Conclusion

> When we study law we are not studying a mystery but a well-known profession. We are studying what we shall want in order to appear before judges, or to advise people in such a way as to keep them out of court.... The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.
>
> - Oliver Wendell Holmes, Jr.14

The trial court properly granted summary judgment based upon a failure to state a cause of action and a failure to exhaust administrative remedies. The Trial Court followed the reasoning of this Tennessee Supreme Court in both Brown v. Tennessee Title Loan, Inc. and in Morrison v. City of Bolivar in dismissing the current action for failure of a valid cause of action. The trial court then properly denied the motion of Plaintiff for class action certification but improperly speculated that if its decision was overturned, then the motion "should be subsequently granted".

The Court of Appeals erred when it overruled the trial court on its summary judgment decision holding that the WWTA enabling act created a private right of action in its customers to

14 Oliver W. Holmes, Jr., *The Path of the Law*, 10 Har. L. Rev. 457 (1987).

challenge the classification of customers for the purpose of the assessment of a fee. The Court of Appeals compounded this error when it treated the trial court's dicta on the class certification as an accomplished fact.

The recent decision by the court of appeals in this instant case stands in clear contrast to the decision of this court in Brown v Tennessee Title Loans, Inc. rendered November 29, 2010, and subsequent case of Morrison v. City of Bolivar, rendered June 14, 2012.

In Morrison, the Court of Appeals panel applied the Brown tests to the Revenue Bond Law and found no private right of action created. In this cause, a separate panel of the Court of Appeals applied the Brown tests to the Water and Wastewater Treatment Authority Act, which contains very similar language, context and purpose as the Revenue Bond Law and found that the act did in fact create a private right of action in a utility customer to challenge the rate setting authority of the utility.15

The ultimate decision in this cause will jeopardize the ability of WWTA's in the state to repay a large loan from the state, made for the purpose of financing the inspection and repair of storm water infiltration into the sewer system in compliance with orders from environmental regulatory agencies at the state and federal levels. The uncertainty created by the decision of the lower court in this cause has also created confusion as to the validity of such state loans and whether the particular entities receiving the loans have authority to fix rates sufficient to repay the loans.

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15 The legislative purpose of subjecting the WWTA to the oversight of the Utility Management Review Board is similar to the purpose quoted in Morrison for the Tennessee Revenue Bond Law. The legislature intended the Tennessee Revenue Bond Law to set out powers of and restrictions upon government entities which choose to finance utility projects. Tenn. Code Ann. §§ 7-34-103 and 7-34-115(a). The remedial scheme, as set out at § 7-34-115, achieves these purposes.

This Court should accept this appeal in order to:

a. to secure uniformity of decisions creating private causes of action within statutory schemes.

b. to secure settlement of important question of law as to the ability of utility providers to repay state loans used for environmental cleanup purposes and whether all utility providers in Tennessee have the greatest of latitude in fixing utility rates, particularly rates which provide funds to repay debt.

c. to secure settlement of questions of public interest. Specifically, the need for utility providers to address the infiltration of storm water into sewer connection lines and thereafter to wastewater treatment facilities causing untreated wastewater to be placed in public waters, is a matter of great public interest in the state.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of this pleading has been served upon counsel for all parties at interest in this case by delivering a true and exact copy of said pleading to the offices of said counsel or by placing a true and exact copy of said pleading in the United States Mail, addressed to said counsel at his office, with sufficient postage thereupon to carry the same to its destination.

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This 26th day of March, 2015.

By: _____
Chris Clem

COURT OF APPEALS OF TENNESSEE
EASTERN SECTION AT KNOXVILLE

RON LITTLEFIELD, *Plaintiff/Appellee,* and CITY OF CHATTANOOGA, *Intervening Plaintiff/Appellee* vs. HAMILTON COUNTY ELECTION COMMISSION, *Defendant-Appellee,* and CHARLES F. WYSONG, JR., JAMES A. FOLKNER, and DARRELL SILVEY, *Intervenors/Appellants,* vs ROBERT E. COOPER, JR., ATTORNEY GENERAL AND REPORTER FOR THE STATE OF TENNESSEE, *Third Party Defendant/Appellee.*	)	Appeal No. E2012-00489-COA-R3-CV Appeal From the Hamilton County Circuit Court, Case No. 11-C-1520

BRIEF OF APPELLEE
Hamilton County Election Commission

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TABLE OF AUTHORITIES

Constitutions, Statutes and Charters:

CITATION NOTE

a. The technical record is 677 pages. References to the technical record are designated (R, [page]).

b. The trial transcript is 154 pages. References to the Trial Transcript are designated (Trial Transcript, [page]).

c. There were 33 trial exhibits. The 1st Exhibit contains the 15,302 signatures on the recall petition (on 3,390 pages) and is bound in exhibit volumes I through XII. Exhibits 2 through 33 are bound in exhibit volumes XII through XVI. References to the trial exhibits are designated (Trial Exhibit [number]).

d. Defendant Hamilton County Election Commission is referred to as "Election Commission" or "this Appellee" or "HCEC".

e. Plaintiff Ron Littlefield is referred to as "Plaintiff."

f. Intervening Defendants James Folkner, Charles Wysong and Darrell Silvey are referred to as "Defendants" or "Appellants".

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the Trial Court err in holding that the referendum vote on August 1, 2002, which restated the entire Chattanooga City Charter did NOT effectively "enact" Section 3.18 of the City Charter?

2. Did the Trial Court err in holding that application of T.C.A. Section 2-5-151 to city council races was not properly before the Trial Court?

3. Did the Trial Court err in failing to hold that T.C.A. Section 2-5-151 can not survive strict scrutiny?

4. Did the Trial Court err in failing to hold that T.C.A. Section 2-5-151 cannot survive a "Rational Basis" Test for unequal application of recall and referendum votes?

5. Did the Trial Court err in applying doctrine of Elision to avoid ruling on the Constitutionality of T.C.A. Section 2-5-151?

6. T.C.A. Section 2-5-151 requires the "question" be voted on if the recall is certified. In what form should the "question" be put on the ballot?

7. May the HCEC accept a recall petition under a substantial compliance standard?

Appellee Hamilton County Election Commission also adopts, incorporates and requests this Court to decide the following issues presented in Appellants' Brief:

APPELLANT ISSUE I:	Whether the Charter of the City of Chattanooga or the State Election Code controls relative to the requisite number of signatures needed for a valid recall of Mayor Ron Littlefield in the instant case?
APPELLANT ISSUE II:	Whether the Honorable W. Jeffrey Hollingsworth should have recused himself in order to avoid any appearance of impropriety and assure Appellants' of their constitutional right to a hearing and trial before a fair and impartial tribunal?

APPELLANT ISSUE III: Whether Appellants are entitled to rely on the advice given by the Hamilton County Election Commission relative to the need for signature dates on the recall petitions at issue before the trial court.

APPELLANT ISSUE IV: Whether the Appellee, Mayor Ron Littlefield, has/had standing to petition the trial court for extraordinary injunctive relief?

STATEMENT OF THE CASE

a. First Administrative Ruling by Hamilton County Election Commission:

On June 16, 2010, the Hamilton County Election Commission (HCEC) met and certified the form of a petition to be circulated concerning the recall of Mayor Littlefield. (R. 5: paragraph 14 of Complaint); (R. 21-29: minutes to HCEC meeting) and Trial Exhibit 2. At this time only the issue before the HCEC was whether the "form" of the petition was correct to recall Chattanooga Mayor Ron Littlefield.

On August 5, 2010, the HCEC met to determine how many signatures would be required to certify a recall petition. (R. 5 paragraph 16 of Complaint), (R.28-42: minutes to HCEC meeting) and Trial Exhibit 4. It is very important to note that 2 additional recall petitions had been filed prior to the August 5, 2010 HCEC meeting. A petition to recall Chattanooga city councilman Jack Benson and Chattanooga city councilman Manuel Rico had been filed. (R. 28-42: minutes to HCEC meeting) and Trial Exhibit 4.

The individuals who had filed the 3 recall petitions (one for Mayor Littlefield, one for councilman Rico, and one for councilman Benson) asked the HCEC to make a formal decision on how many signatures would be required. On August 5, 2010, the HCEC approved the "form" of the recall petitions for both city councilmen. Then the HCEC formally motioned and approve that Chattanooga City Charter Section 3.18 would govern the number of signatures necessary. (R. 5: paragraph 16 of Complaint), (R.28-42: minutes to HCEC meeting) and Trial Exhibit 4.

Chattanooga City Charter Section 3.18 allowed the recall of officials by each respective district. T.C.A. Section 2-5-151 required the entire city to recall a city councilman.

Accordingly, on August 5, 2010, the HCEC made a specific administrative ruling that the

amount of signatures necessary for each of the three recall petitions (Mayor, Councilman Rico and Councilman Benson) would be governed by Section 3.18 of the City Charter and not by T.C.A. Section 2-5-151. (R. 5: paragraph 16 of Complaint); (R.28-42: minutes to HCEC meeting) and Trial Exhibit 4.

b. First Trial Court Decision:

The HCEC was prevented or preempted from making a decision as to accepting and certifying the Littlefield recall petition when over 15,000 signatures were returned to the HCEC in August, 2010. On August 31, 2010, Plaintiff, incumbent Mayor of Chattanooga, filed for declaratory judgment and injunctive relief against the Hamilton County Election Commission to prevent it from making a final decision as to whether to certify a recall petition at a regularly scheduled commission meeting set for September 8, 2010. (R., 68).

Appellant Folkner, the leader of the effort to recall the Mayor, moved to intervene, and that motion was granted on September 3, 2010. On September 8, 2010, the Trial Court enjoined the Election Commission from certifying the recall petition (which was scheduled to be discussed at the commission meeting on September 8, 2010). (R.68). The Trial Court further enjoined the Election Commission from placing the recall question on the November 2, 2010 ballot. (R.68).

c. First Court of Appeals Decision:

Appellant Folkner timely filed a Notice of Appeal on November 16, 2010. (R, 74). On November 3, 2011, the Court of Appeals reversed and voided the action of the trial court for improperly rendering a decision "without allowing the Election Commission to formally decide whether or not to certify the recall petition." Littlefield vs. Hamilton County Election

Commission, No. E2010-02410-COA-R3-CV, 2011 Tenn.App. Lexis 602.

d. Second Administrative Ruling by Hamilton County Election Commission:

On November 17, 2011, the HCEC took the next step and formally voted to accept and certify the approximately 15,000 signatures on the recall petition for Mayor Littlefield. (R. 82).

e. Second Trial Court Decision:

Mayor Littlefield then filed a second Complaint on December 16, 2011, against the HCEC to void the action of the HCEC. (R. 1). The City of Chattanooga intervened as a plaintiff. (R. 321). The Attorney General was brought in as a third party defendant when HCEC alleged in its answer that T.C.A. Section 2-5-151 was unconstitutional. (R. 191). The appellants (individuals who led the recall petition) then intervened. (R.643). The case was tried on February 10, 2012. The trial court entered a final judgment on February 14, 2012. (R. 658). The trial court found that Section 3.18 of the City Charter had not been properly "enacted" even though it passed on a referendum vote. The Trial Court refused to hear any argument on the constitutionality of T.C.A. Section 2-5-151. The appellants filed a notice of appeal on March 6, 2012. (R. 666).

STATEMENT OF THE FACTS

The parties stipulated to most of the relevant facts. (Stipulated Trial Exhibits 1-33). The Plaintiff in this case is the elected Mayor of the City of Chattanooga, whose term end in April of 2013. (R, 110). The Hamilton County Election Commission is the defendant/appellee in this case. Appellants Folkner, Silvey and Wysong are members of a group of residents of the City of Chattanooga who have undertaken to seek the recall and removal of Plaintiff from the office of Mayor. (R, 319).

On June 16, 2010, proposed recall petitions were submitted to and approved by the Election Commission. (Trial Exhibit 2). The petitioners would have 75 days under T.C.A. Section 2-5-151 or until August 31, 2010 in order to submit the correct number of signatures.

After June 16, 2010, and prior to August 5, 2010, a group of people led by Appellants also submitted two additional recall petitions. These two additional recall petitions were to recall two Chattanooga City councilmen: Manuel Rico and Jack Benson. (Trial Exhibit 4).

On August 5, 2010, the Election Commission met at a regularly scheduled meeting and determined that the number of signatures of registered voters of the City of Chattanooga required for such all three recall petitions would be computed according to the provisions of Section 3.18 of the Charter of the City of Chattanooga. (Trial Exhibit 4). This provision requires that a recall petition be signed by "qualified voters equal in number to at least 50 percentum (50%) of the entire vote for all candidates for the office of Mayor cast at the last preceding general election...." (Trial Exhibits 4 and 8).

If Section 3.18 of the Charter governed the minimum number of qualified signatures needed to support the petition was determined by the Election Commission to be 8,957. (R, 64).

If T.C.A. Section 2-5-151 (d) had governed then the Election Commission determined that 14,854 petition signatures would be required. (R, 64).

Likewise, the number of signatures for the city councilman would only be 50% of the vote in the individual city council districts as required by Section 3.18 of the City Charter. If the HCEC had applied T.C.A. Section 2-5-151 then the city council petitions would have required a city wide recall effort to recall an individual city councilman. (Trial Exhibit 8).

The Election Commission had not met prior to the Court's injunction which was dated September 8, 2010. Accordingly, the Election Commission had never addressed the issue of whether undated signatures would be counted. The Election Commission staff had counted a total of 15,315 signatures on recall petitions. R. 64 and see, Littlefield vs. Hamilton County Election Commission, No. E2010-02410-COA-R3-CV, 2011 Tenn.App. Lexis 602. The Election Commission staff had rejected 5,656 signatures for not being properly registered voters within the City limits. R. 64 and see, Littlefield vs. Hamilton County Election Commission, No. E2010-02410-COA-R3-CV, 2011 Tenn.App. Lexis 602. The staff had accepted 9,659 signatures as registered voters within the city limits. However, of the 9,659 signatures of registered voters only 4,220 had dates next to the signature and 5,439 did not have dates next to each signature. R. 64 and see, Littlefield vs. Hamilton County Election Commission, No. E2010-02410-COA-R3-CV, 2011 Tenn.App. Lexis 602. The Election Commission did not have an opportunity to meet and determine whether to accept the undated signatures prior to the Trial Court issuing an injunction. Littlefield vs. Hamilton County Election Commission, No. E2010-02410-COA-R3-CV, 2011 Tenn.App. Lexis 602..

On September 8, 2010, the Trial Court entered an Order and Injunction indicating that

Section 3.18 of the City Charter had not been properly enacted and therefore 14,854 signatures would be required, not 9,718 signatures. (R,64) and see, Littlefield vs. Hamilton County Election Commission, No. E2010-02410-COA-R3-CV, 2011 Tenn.App. Lexis 602.. The Trial Court then determined that insufficient signatures were gathered for the recall petition and preempted and enjoined the Election Commission from evaluating the recall signatures (which had not yet been done by the Election Commission). (R, 68).

Appellant Folkner timely filed a Notice of Appeal on November 16, 2010. On November 3, 2011, the Court of Appeals reversed and voided the action of the trial court for improperly rendering a decision "without allowing the Election Commission to formally decide whether or not to certify the recall petition." Littlefield vs. Hamilton County Election Commission, No. E2010-02410-COA-R3-CV, 2011 Tenn.App. Lexis 602.

On November 17, 2011, the HCEC took the next step and formally voted to accept and certify the approximately 15,000 signatures on the recall petition for Mayor Littlefield. (R. 82).

Mayor Littlefield then filed a second Complaint on December 16, 2011, against the HCEC to void the action of the HCEC. (R. 1). The City of Chattanooga intervened as a plaintiff. (R. 321). The Attorney General was brought in as a third party defendant when HCEC alleged in its answer that T.C.A. Section 2-5-151 was unconstitutional. (R. 191). The appellants (individuals who led the recall petition) then intervened. (R. 643). The case was tried on February 10, 2012. The trial court entered a final judgment on February 14, 2012. The Trial Court found that Section 3.18 of the City Charter has not been properly "enacted" even though it passed a referendum vote of the people. The Trial Court refused to consider any arguments regarding the constitutionality of T.C.A. Section 2-5-151. (R. 658). The appellants filed a notice

of appeal on March 6, 2012. (R. 666).

STANDARD OF REVIEW

On appeal, the factual findings of the trial court are accorded a presumption of correctness, and will not be overturned unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d). In the instant case, the facts were largely stipulated, and none of the parties appear to be questioning the finding of fact.

With respect to legal issues, this appellate court's review is conducted under a pure de novo standard of review. S. Constructors, Inc. v. Loudon County Bd. of Educ., 58 S.W.3d 706, 710 (Tenn. 2001). Mixed questions of law and fact are reviewed de novo with no presumption of correctness, but appellate courts have "great latitude to determine whether findings as to mixed questions of fact and law made by the trial court are sustained by probative evidence on appeal." Aaron v. Aaron, 909 S.W.2d 408, 410 (Tenn. 1995).

LAW AND ARGUMENT

The Hamilton County Election Commission would ask this Appellate Court to take this very rare opportunity to clear up several issues that have arisen when enforcing this poorly worded recall statute. The HCEC asks this Court to uphold its administrative decisions to accept the recall petition and schedule a recall election.

I. The Trial Court erred in holding that the referendum vote on August 1, 2002, which restated the entire Chattanooga City Charter did NOT effectively "enact" Section 3.18 of the City Charter.

T.C.A. Section 2-5-151 (d) requires 15% of registered voters to sign a recall petition (14,854 signatures in this case). T.C.A. Section 2-5-151 (j) allows local municipalities to effectively lower the number of signatures on a recall provision provided the local charter's modification is "enacted after July 1, 1997." Section 3.18 of the City Charter only requires 50% of those voting in the prior election. (8,957 signatures in this case). Section 3.18 of the City Charter predated July 1, 1997.

The HCEC decided on August 5, 2010, that the City of Chattanooga was effectively "enacted after July 1, 1997" when the City of Chattanooga had a referendum vote to restate the entire City Charter on August 1, 2002. In other words, HCEC decided on August 5, 2010 that Section 3.18 of the City Charter governed the required number of signatures on the recall petition. Trial Exhibit 4.

City Orignance No. 11272 was to "Amend and restate the Charter of the City of Chattanooga ***in its entirety***..." (emphasis added) (Trial Exhibit 10). The Election Commission determined that Section 3.18 of the City Charter was effectively "enacted after July 1, 1997" and therefore effectively lowered the number of required signatures from 14,854 signatures to 9,718.

The HCEC not only based its decision to enforce Section 3.18 of the City Charter on a fair reading of the charter, but the HCEC also had a prior decision from a trial court to rely upon. On November 18, 2008, Hamilton County Chancellor Howell Peoples issued an Order against the Hamilton County Election Commission wherein Chancellor Peoples specifically held:

> (d) The City's current charter (the 'Charter') was adopted by the Council pursuant to Ordinance 11272 on April 30, 2002 (the 'Adopting Ordinance'), such that Charter to become effective sixty (60) days after its approval by a majority of the qualified voters of the City voting thereon, as provided by Article XI, Section 9 of the State Constitution.
>
> (e) Pursuant to Section 5 of the Adopting Ordinance, the Charter was submitted for approval by the City's registered voters in connection with a general state election conducted on August 1, 2002 (the 'Adopting Referendum'). The Adopting Ordinance, as required by Section 4 thereof, was published in its entirety in the City's daily newspaper for review by the City's registered voters in advance of the Adopting Referendum so that the City's registered voters would know the precise terms and conditions of the Adopting Ordinance that they were being asked to approve or reject in the Adopting Referendum.
>
> (f) ...
>
> (g) The Adopting Ordinance was approved by a majority of the City's registered voters participating in the Adopting Referendum on August 1, 2002, and became effective on or about October 1, 2002....
>
> Healy v. Knowles, Hamilton County Chancery Court, No. 08-0862 (November 18, 2008) (attached as Exhibit 1 to this Brief).

Accordingly, in 2010 the HCEC was obligated to consider the Chattanooga City Charter properly "enacted" as reflected in Chancellor People's Order from 2008. The Hamilton County Election Commission would ask this Appellate Court to overturn the trial court and uphold the

HCEC decision on applying the City Charter to determine the amount of signatures necessary for a recall petition in Chattanooga.

II. The Trial Court erred in holding that application of T.C.A. Section 2-5-151 to city council races were not properly before the Trial Court.

The Trial Court refused to consider the argument that T.C.A. Section 2-5-151 allows voters from one city council district to recall elected officials from another city council district. The Trial Court found this issue was not properly before the Court. (R. 658).

The fact that T.C.A. Section 2-5-151 allows voters from one city council district to recall voters from another district was before the HCEC on August 5, 2010, when the HCEC made its decision as to number of signatures. On August 5, 2010, the HCEC met to determine how many signatures would be required to certify a recall petition. (R. 5 paragraph 16 of Complaint); (R.28-42: minutes to HCEC meeting) and Trial Exhibit 4. It is very important to note that 2 additional recall petitions had been filed prior to the August 5, 2010 HCEC meeting. A petition to recall Chattanooga city councilman Jack Benson and Chattanooga city councilman Manuel Rico. (R. 28-42: minutes to HCEC meeting) and Trial Exhibit 4. These city council recall issues were stipulated as part of the trial court record on February 10, 2012. Trial Exhibit 4.

The individuals who had filed the 3 recall petitions (one for Mayor Littlefield, one for councilman Rico, and one for councilman Benson) asked the HCEC to make a formal decision on how many signatures would be required. On August 5, 2010, the HCEC approved the "form" of the recall petitions for both city councilmen. Then the HCEC formally motioned and approve that Chattanooga City Charter Section 3.18 would govern the number necessary. (R. 5:

paragraph 16 of Complaint), (R.28-42: minutes to HCEC meeting) and Trial Exhibit 4.

Accordingly, on August 5, 2010, the HCEC made a specific administrative ruling that the amount of signatures necessary for each of the three recall petitions (Mayor, Councilman Rico and Councilman Benson) would be governed by Section 3.18 of the City Charter and not by T.C.A. Section 2-5-151. (R. 5: paragraph 16 of Complaint) and (R.28-42: minutes to HCEC meeting).

Accordingly, the Trial Court erred in refusing to consider the facts before the HCEC when it made its administrative ruling on August 5, 2010. Specifically, it was error for the Trial Court to hold that city council recall issues were not properly before the trial court on February 10, 2012, when those issues were properly before the HCEC when the administrative decision was made on August 5, 2010.

III. The Trial Court erred in failing to hold that T.C.A. Section 2-5-151 can not survive strict scrutiny.

The Trial Court failed to apply strict scrutiny or to even consider the constitutionality of T.C.A. Section 2-5-151. (R. 658). In *Dunn v. Blumstein*, 405 U.S. 330, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972), the United States Supreme Court struck down Tennessee's durational residence statute. Applying strict scrutiny, the Court stated:

> There is no need to repeat now the labors undertaken in earlier cases to analyze this right to vote and to explain in detail the judicial role in reviewing state statutes that selectively distribute the franchise. In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.

Id. at 336 (citations omitted). Thus, the law would be "unconstitutional unless the State can demonstrate that such laws are necessary to promote a compelling governmental interest." *Id.* at 342. Stated another way, "a heavy burden of justification is on the State, and the statute will be closely scrutinized in light of its asserted purposes." *Id.* at 343. The Court further stated that laws "affecting constitutional rights must be drawn with precision . . . and must be tailored to serve their legitimate objectives. And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference." *Dunn v. Blumstein,* 405 U.S. 330, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972).

When determining the merit of equal protection challenges, Tennessee courts have followed the analytical framework developed by the United States Supreme Court and has "utilized three standards of scrutiny, depending upon the right asserted." Id. at 153; Doe v. Norris, 751 S.W.2d 834, 840 (Tenn. 1988)(strict scrutiny); Mitchell v. Mitchell, 594 S.W.2d 699, 701 (Tenn. 1980)(heightened scrutiny); See City of Memphis v. International Brotherhood of Elec. Workers Union, 545 S.W.2d 98, 101 (Tenn. 1976)(reduced scrutiny).

Equal protection analysis requires strict scrutiny of a legislative classification when the classification interferes with the exercise of a "fundamental right" (e.g., ***right to vote***, right of privacy), or operates to the peculiar disadvantage of a "suspect class" (e.g., alienage or race). San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 16, 93 S.Ct. 1278, 36 L. Ed. 2d 16 (1973); Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L. Ed. 2d 663 (1962)(right to vote); Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L. Ed. 2d 510 (1965) [**10] (right to privacy); Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L. Ed. 2d 600 (1969)(right to interstate travel).

In the instant case, T.C.A. Section 2-5-151 is unconstitutional in how it approaches three different situations. First, it increases the burden or decreases the ability of those Tennessee citizens outside of Davidson County to recall an elected official.1 Citizens outside of Davidson County must obtain 15% of registered voters signatures and make sure that each signature is dated. This amounts to over 15,000 signatures in the instant case. If Hamilton County were exempt like Davidson County then less than 9,000 signatures (40% less) and none of the signatures need to be dated. Trial Exhibit 4.

Next, T.C.A. Section 2-5-151 is the only provision in Tennessee law that allows the citizens to force a referendum vote by the people/voters. No other section of Tennessee code allows citizens to petition their government for a referendum vote. Citizens in Hamilton County are being told by the Attorney General and Mayor Ron Littlefield that the right to a referendum vote is justifiably easier in Davidson County simply because they have metro government.

Finally, T.C.A. Section 2-5-151 permits voters outside a political district to recall officials in other districts.

> T.C.A. Section 2-5-151 (d) Petitions shall be signed by at least fifteen percent (15%) of those registered to vote in the municipality or county.

Chattanooga has approximately 100,000 registered voters. Trial Exhibit 4. Chattanooga has 9 city councilman, each representing 11% or 11,000 voters.2 Yet, the state statute does not

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1 The Sixth Circuit Court of Appeals has held that it is irrelevant whether the additional burden is significant or minor. In Stewart v. Blackwell, *444 F.3d 843* (6th Cir. 2006), the Court found that even a minor burden on one county's ability to vote compared to another county is in violation of the equal protection clause.

2 T.C.A. Section 2-5-151 also applies to 9 Hamilton County Commission Districts and 9 school board districts. Accordingly, Harrison residents could recall county commissioner from Alton Park. And, Ooltewah residents could recall school board member from Signal Mountain.

limit the signatures to those residing in each city council district. Instead, 15% of registered voters in the entire "municipality" or 15,000 voters can recall any elected official, including a city councilman. Trial Exhibit 4.

Section 3.18 of the Chattanooga City Charter specifically avoids this problem. Chattanooga Charter Section 3.18 states "...In the case of an elected official elected by district, the petition must be signed by qualified voters equal in number to at least fifty per centum (50%) of the entire vote for all candidates for the office of mayor cast in that district at the last proceeding general election." Trial Exhibit 8.

Accordingly, strict scrutiny should apply when determining whether T.C.A. Section 2-5-151 broadens the rights of certain individuals to recall elected officials outside their districts. Strict scrutiny should also apply when T.C.A. Section 2-5-151 limits or makes it more difficult for citizens outside of Davidson County to have a referendum vote or a recall vote.

T.C.A. Section 2-5-151 is inextricably tied to the right to vote and deserves the same strict scrutiny. The Sixth Circuit recently explained that "the right to have one's vote counted on equal terms is part of the right to vote." Stewart v. Blackwell, *444 F.3d 843* (6th Cir. 2006).3

In the instant case, residents of Hamilton County will have their votes not counted if they fail to date a signature on a petition, while those in Davidson County will have their votes

3 The Sixth Circuit Court of Appeals found that even unequal technology in different counties violates equal protection. Stewart v. Blackwell, *444 F.3d 843* (6th Cir. 2006). The Sixth Circuit reasoned: "Supreme Court precedent and our own *Mixon* framework instructs that if the Ohio statute permitting localities to use deficient voting technology 'infringes on the right to vote,' then strict scrutiny applies; if the statute does not 'infringe on the right to vote,' and merely regulates some tangential aspect of the franchise, then rational basis review applies. *Mixon*, 193 F.3d at 402. This begs the question of what the 'right to vote' encompasses. We easily conclude that the right to have one's vote counted on equal terms is part of the right to vote. No other conclusion is possible from the case law and thus, strict scrutiny applies." The Sixth Circuit then explained that unequal technology would have violated the rational basis test as well as the strict scrutiny test.

counted if the signature is not dated.

HCEC was justified on August 5, 2010, in applying the Charter instead of T.C.A. Section 2-5-151. Conversely, the trial court was in error to overturn the HCEC administrative decision to apply the charter number of signatures.

IV. The Trial Court erred in failing to hold that T.C.A. Section 2-5-151 cannot survive a "Rational Basis" Test for unequal application of recall and referendum votes.

Section 2-5-151 can not overcome a rational basis test, much less a strict scrutiny test.[4] There is no rational basis to allow citizens in a metro government to have an easier time with referendum votes and recalling officials.

T.C.A. Section 2-5-151 violates the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution and Art. XI, Section 8 of the Tennessee Constitution in Two Significant Ways:

IV.A. Metro Government Distinction Has Been Held Insufficient Rational Basis for Equal Protection.

T.C.A. Section 2-5-151 could not pass a "rational basis test" much less a strict scrutiny test. The classification must not be mere arbitrary selection. It must have some basis which bears a natural and reasonable relation to the object sought to be accomplished, and there must be

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4 The "rational basis test" was described in Tennessee Small School Systems v. McWherter, 851 S.W.2d 139, 152 (Tenn. 1993).., as follows: The concept of equal protection espoused by the federal and our state constitutions guarantees that "all persons similarly circumstanced shall be treated alike." Conversely, things which are different in fact or opinion are not required by either constitution to be treated the same. "'The initial discretion to determine what is 'different' and what is 'the same' resides in the legislatures of the States," and legislatures are given considerable latitude in determining what groups are different and what groups are the same. Id. In most instances the judicial inquiry into the legislative choice is limited to whether the classifications have a reasonable relationship

some good and valid reason why the particular individual or class upon whom the benefit is conferred, or who are subject to the burden imposed, not given to or imposed upon others should be so preferred or discriminated against. There must be reasonable and substantial differences in the situation and circumstances of the persons placed in different classes which disclose the propriety and necessity of the classification. State of Tennessee v Tester, 879 S.W.2d 823 (Tenn. 1994).

The Tennessee Supreme Court in State of Tennessee v Tester, 879 S.W.2d 823 (Tenn. 1994), quoted *Sutherland on Statutory Construction*:

> "If legislation arbitrarily confers upon one class benefits, from which others in a like situation are excluded, it is a grant of a special right, privilege, or immunity, prohibited by the Constitution, and a denial of the equal protection of the laws to those not included. . . . The fundamental rule is that all classification must be based upon substantial distinctions which make one class really different from another; and the characteristics which form the basis of the classification must be germane to the purpose of the law. . . . "

In State of Tennessee v Tester, 879 S.W.2d 823 (Tenn. 1994), defendant challenged the constitutionality of Tenn. Code Ann. § 41-2-128(c)(9) (1990 & Supp. 1993), which limited application of the work release statute to Davidson, Moore, and Shelby Counties. The Attorney General in Tester argued that a rational basis existed due to the fact that the 3 counties had overcrowded jails and were metro government. *The trial court, Court of Appeals and Tennessee Supreme Court all rejected the argument that* ***metro government*** *was sufficient rational basis to overcome equal protection requirements*.

The trial court in Tester held that the statute was unconstitutional to the extent that its

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to a legitimate state interest.

applicability was limited to three counties. The trial court elided the unconstitutional portion, held that the remainder of the statute was constitutional, and applied it to defendant, permitting him to serve his sentence in a work release program. On appeal, the court affirmed the holding that the limiting provision was unconstitutional, but reversed the holding that the remainder of the statute was constitutional and could be applied to defendant. The court held that there was no rational basis for distinguishing between three counties and all other state counties. Because the court was unable to conclude that the legislature would have enacted § 41-2-128(c) without the limiting provision, it held that the unconstitutional provision could not be elided.

The Tennessee Supreme Court in Tester held that the State "failed to demonstrate any rational basis for the classification or to advance a hypothetical state of facts to support the classification, nor can we conceive of a reasonable basis for the classification at issue. Accordingly, we affirm the trial court's judgment finding the provision limiting to three counties the applicability of the work release statute, Tenn. Code Ann. § 41-2-128(c)(9), an unconstitutional classification under the equal protection guarantees of both the federal and state constitutions." State of Tennessee v Tester, 879 S.W.2d 823 (Tenn. 1994).

There is no rational basis, much less strict scrutiny, for requiring Hamilton County to comply with § 2-5-151 while exempting Davidson County merely because of the metro form of government. Accordingly, HCEC was justified in applying the lower Charter requirement rather than the stricter T.C.A. Section 2-5-151. Conversely, the trial court was in error to apply T.C.A. Section 2-5-151 instead of Section 3.18 of the Chattanooga Charter.

IV.B. T.C.A. Section 2-5-151 unconstitutionally permits voters outside of a city council district, county commission district and school board district to recall officials they did not elect.

T.C.A. Section 2-5-151 permits voters outside a political district to recall officials in other districts.

> T.C.A. Section 2-5-151 (d) Petitions shall be signed by at least fifteen percent (15%) of those registered to vote in the municipality or county.

Chattanooga has approximately 100,000 registered voters. (Trial Exhibit 4). Chattanooga has 9 city councilman, each representing 11% or about 11,000 voters. Yet, the state statute does not limit the number of signatures to those residing in each city council district. T.C.A. Section 2-5-151. Instead, 15% of registered voters in the entire "municipality" or about 15,000 voters can recall any elected official, including a city councilman. Trial Exhibit 4.

Section 3.18 of the Chattanooga City Charter specifically avoids this problem. Chattanooga Charter Section 3.18 states "...In the case of an elected official elected by district, the petition must be signed by qualified voters equal in number to at least fifty per centum (50%) of the entire vote for all candidates for the office of mayor cast in that district at the last proceeding general election." Trial Exhibit 8.

In 1989 U.S. District Court Judge Allen Edgar issued a landmark decision in Brown vs. Board of Commissioners, 722 F. Supp. 380; (E.D. Tenn. 1989). In Brown, Judge Edgar used the "majority/majority" test along with certain other statistical analysis and determined that there was "racially polarized" voting within the city. Further, the court found that the white majority

"bloc" votes were sufficient to defeat the minority's preferred candidate. The court enjoined the city from holding elections under its charter based largely on the Equal Protection Clause of the Fourteenth Amendment.

Soon thereafter, the City of Chattanooga reinstated its charter in 1990 to include a proper form of electing 9 commissioners. The Chattanooga Charter in 1990 also included the current recall provision which clearly protects each city councilman from being recalled by voters from the entire city. Trial Exhibit 8.

Regardless of race, it is clearly unconstitutional to allow voters in East Brainerd, Hixson and Riverview to recall a city councilman in St. Elmo. At a minimum, the State should demonstrate strict scrutiny why such a system is required in Hamilton County but not in Davidson County. T.C.A. Section 2-5-151 violates the spirit of Brown by allowing residents across the city to recall councilman in one district.

V. The Trial Court erred in applying doctrine of Elision to avoid ruling on the Constitutionality of T.C.A. Section 2-5-151.

Having demonstrated that Tenn. Code Ann. § 2-5-151 is unconstitutional, we must now consider whether the offending portion of the statute can be stricken and the remainder upheld. The result of doing so would give the recall statute statewide effect, including Davidson County (10% of the state's population).5

The doctrine of elision allows a court, under appropriate circumstances when consistent with the expressed legislative intent, to elide an unconstitutional portion of a statute and find the remaining provisions to be constitutional and effective. Lowe's Companies, Inc. v. Cardwell,

5 Davidson County's legislative delegation obviously lobbied to exempt Davidson County from this poorly drafted statute. Davidson County is not a party to this litigation.

813 S.W.2d 428, 430 (Tenn. 1991). Gibson County Special School Dist. V. Palmer, 691 S.W.2d 544 (Tenn. 1985).

The doctrine of elision is not favored. The rule of elision applies if it is made to appear from the face of the statute that the legislature would have enacted it with the objectionable features omitted, and those portions of the statute which are not objectionable will be held valid and enforceable . . . provided, of course, there is left enough of the act for a complete law capable of enforcement and fairly answering the object of its passage. However, a conclusion by the court that the legislature would have enacted the act in question with the objectionable features omitted

ought not to be reached unless such conclusion is made fairly clear of doubt from the face of the statute. Otherwise, its decree may be judicial legislation. State of Tennessee v Tester, 879 S.W.2d 823 (Tenn. 1994) (emphasis added).

The inclusion of a severability clause in the statute has been held by the Tennessee Supreme Court to evidence an intent on the part of the legislature to have the valid parts of the statute enforced if some other portion of the statute has been declared unconstitutional. State of Tennessee v Tester, 879 S.W.2d 823 (Tenn. 1994), The recall/referendum statute does not contain a severability clause. However, the Attorney General contends that we should consider as evidence of legislative intent the general severability clause codified at Tenn. Code Ann. § 1-3-110 (1985), which applies to all parts of the Tennessee Code. The Tennessee Supreme Court soundly rejected this argument in State of Tennessee v Tester, 879 S.W.2d 823 (Tenn. 1994) holding that "the general severability clause is not sufficient to justify eliding the constitutionally impermissible classification that excludes 92 of the 95 counties." "Where a clause is so

interwoven with other portions of an act that we cannot suppose that the legislature would have passed the act with that clause omitted, then if such clause is declared void, it renders the whole act null." Hart v. City of Johnson City, 801 S.W.2d 512, 517 (Tenn. 1990).

It is not clear if the Tennessee General Assembly would have passed this statute without the offending and unconstitutional sections. The Tennessee Supreme Court in State of Tennessee v Tester, 879 S.W.2d 823 (Tenn. 1994) stated, we "cannot conclude that, clear of doubt from the face of the statute, the Legislature would have passed the act with the limitation omitted. If we accepted the invitation to apply the doctrine of elision, we would be applying the work release statute statewide in order to uphold the statute, and thus indulging in judicial legislation. This we decline to do. Elision is not appropriate in this case." Likewise, elision and severability can not properly repair Tenn. Code Ann. § 2-5-151.

VI. T.C.A. Section 2-5-151 requires the "question" be voted on if the recall is certified. In what form should the "question" be put on the ballot?

There are two common methods for complying with the recall statute. The first requires a 3 step process. The first step involves filing a recall petition, gathering signatures and having the local election commission certify the recall. The second step has the local election commission schedule a vote to determine "should the official be recalled: Yes or No." If the people vote "yes", then the official is automatically recalled. The third step is an election to fill the vacant office. The recalled official may not run in the recall election.

The two step process is used by most cities and towns. The two step process has not been challenged since being upheld in 1916. *State ex rel Brown vs. Howell Election Commissioners*, 183 S.W. 517, (1916). The Election Commission is asking this Court to uphold the 2 step recall

process that was approved by the Tennessee Supreme Court in *State ex rel Brown vs. Howell Election Commissioners*, 183 S.W. 517, (1916).

Chattanooga (and many other Tennessee municipalities) have opted for a two step process in order to save election costs by only requiring one election. Trial Exhibit 8. The Chattanooga City Charter still requires the recall petition to be filed and authorized. However, after the petition is completed with the required number of signatures there is not "yes/no" vote for a recall. Instead, the recall is automatic. And, the next election allows candidates to run for the recalled office. The recalled official (in this case Ron Littlefield) may also run for re-election (unlike under the 3 step process where the recalled official may not run). Trial Exhibit 8.

While the 2-step process which eliminates the "yes/no" vote is not expressly authorized by statute, this process has been approved by the Tennessee Supreme Court in *State ex rel Brown vs. Howell Election Commissioners*, 183 S.W. 517, (1916). The reasoning of the court is that the "question" called for in the 3 step process does not expressly say "yes/no" vote therefore it is within reason to allow local cities to shorten the process to rephrase the question by voting for candidates for the recalled office.

VII. HCEC may accept petition under a substantial compliance standard.

Plaintiff alleges the recall petition is invalid for noncompliance with the "requirement of the date for signatures obtained." This allegation is founded upon the assumption that the Court must strictly construe the language of the governing statute and ensure that each requirement, however hyper-technical, has been complied with.

The Supreme Court of Tennessee has long held that even when faced with what the Court

described as 'numerous irregularities' "only a substantial compliance, rather than a strictly literal compliance, with the election laws is required." Lanier v. Revell, 605 S.W.2d 821, 822 (Tenn. 1980). Thus, the proper standard for the Court to employ when construing the statutory language and the action s of the efficacy of the petitions themselves is "substantial compliance" – not "strict compliance." Moreover, only when the General Assembly has provided strict guidance as to its intent have the courts found that the provisions in the election laws must be strictly construed and complied with. Emery v. Robertson County Election Commission, 586 S.W.2d 103 (Tenn. 1979).

T.C.A. Section 2-5-151(e) provides in pertinent part:

(e) Upon filing, each completed petition shall contain the following:
(1) The full text of the question attached to each petition;
(2) The genuine signature and address of registered voters only, pursuant to the requirements of Section 2-1-107;
(3) The printed name of each signatory; and
(4) The date of signature.

Of particular note is the fact that the General Assembly when drafting and passing T.C.A. Section 2-5-151(e) was much more precise when requiring that "each" signature be printed. However, the statute does not indicated that "each" signature must be dated. Accordingly, the HCEC would contend that if the signatures can be proven to have been dated within the 75 day requirement that the signatures are sufficiently and substantially complied with the statute. 6

6 The Chancellor of Davidson County had strong language for describing the requirement of dating each signature on a recall petition: "Section 15.07 [Davidson Metro Charter] only requires that the recall petitions contain the demand for recall, the statement of the reason for removal, and the signatures and addresses of qualified voters. It does not require that the recall petitions contain a date indicating that they were signed subsequent to the filing of the original form, for good reason. Such a requirement would likely prove impractical, burdensome and foment litigation instead of deterring it. The absence of a date on some of the petitions, the Court concludes, does not invalidate them." Murray vs. Davidson County Election Commission, Davidson County Chancery Court, No. 09-

CONCLUSION

Tenn. Code Ann. § 2-5-151 is hopelessly unconstitutional. It can not survive a rational basis test, much less a strict scrutiny test. And, elision can not repair the deeply flawed statute. The facts are uncontroverted. If the recall statute is unconstitutional then the recall petition should be certified and placed on the November 6, 2012, ballot.

The HCEC would contend that even if the recall statute is constitutional that the City Charter did effectively "enact" the recall provisions which effectively lowered the number of required signatures. The HCEC then used its discretion to determine that petition dates substantially complied with the statute. Or in the alternative, that the petitioners justifiably relied upon the Election Administrators' erroneous advice not to date each signature.

Accordingly, HCEC would ask this Court to reverse the trial court and schedule this recall election for November 6, 2012.

Respectfully submitted,

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1798-III, September 28, 2009. (Attached as Exhibit 2 to this Brief).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing motion was forwarded this 3 day of July, 2012, by first class mail, postage prepaid to:

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