The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

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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.

Senior Judicial Law Clerk to Tennessee Supreme Court Justice Sharon G. Lee

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

1999 – BPR # 020296

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

Tennessee – BPR # 020296 – Date of Licensure October 22, 1999 – currently active

Kentucky – Bar # 92995 – Date of Licensure May 12, 2009 – currently active

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

No.

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

Tennessee Supreme Court – Senior Judicial Law Clerk to Justice Sharon G. Lee (2018 to present)

Baker, Donelson, Bearman, Caldwell & Berkowitz (2011 to 2018)

London & Amburn (2007 to 2011)

Lewis, King, Krieg & Waldrop (2002 to 2007)

Paine, Tarwater, Bickers & Tillman (1999 to 2002)

Prior to law school:

Visiting Assistant Professor, Denison University, Granville, OH (1995-1996)

Graduate teaching assistant, Ohio State University (1990-1995)

Secretary/Receptionist, The Landmark Group, Knoxville, TN (1989-90)

Graduate teaching assistant, University of Georgia (1987-1989)

Retail store and fast food jobs during college at the University of Tennessee (1983-1987)

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

I have been employed continuously since completion of my legal education.

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.

Since April 2018 I have been employed as Senior Judicial Law Clerk to Justice Sharon G. Lee. During that time, around 90% of my work has involved researching and preparing draft opinions on civil cases decided by the Court of Appeals. These cases include personal injury and wrongful death tort cases, business disputes, and workers compensation, as well as attorney disciplinary matters.

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.

From 1999 to 2018 as a litigator in private practice, I handled a wide variety of civil matters in state and federal courts at the trial court and appellate levels in Tennessee and Kentucky, as well as in arbitration.

I have experience with both jury and bench trials before state and federal courts representing individuals and companies, primarily as defendants, but on occasion as plaintiffs. I have been lead counsel as well as co-counsel at trial, and have had primary responsibility for discovery,

motion practice, brief writing, and overall case management.

100% of my practice involved civil litigation. My areas of experience are wide-ranging, and include:

Product liability, defending corporate manufacturers – primarily manufacturers of automotive and motorcycle products, but also a variety of other products over the years, including bicycle components, industrial equipment, adaptive equipment for disabled drivers, and pharmaceuticals.

Automobile warranty and "lemon law" litigation;

Employment law, defending employer against age discrimination claim;

Commercial law, representing banks, mortgage companies, and finance companies in collection and foreclosure matters, business tort matters, and bankruptcy proceedings;

Healthcare liability, representing healthcare providers (hospitals, nursing homes, assisted living facilities, physicians, dentists, nurses, mid-level practitioners, therapists) in healthcare liability actions, which on occasion involved dealing with regulatory or licensing agencies as well;

Defense of attorneys in professional liability and malicious prosecution matters;

Workers compensation, representing employers in resolving claims;

General insurance defense, including automobile accidents, trucking accidents, and premises liability;

Adoptions.

I have handled approximately 17 appeals either as lead counsel or co-counsel and I have appeared as counsel of record in the Tennessee Court of Appeals, Tennessee Supreme Court, Kentucky Court of Appeals, and the United States Court of Appeals for the Sixth Circuit. I therefore have had considerable experience in researching and writing appellate briefs.

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

I had primary responsibility for handling a multi-district litigation (MDL) representing a large pharmaceutical company based in California. The MDL was assigned to the federal district court for the Eastern District of Kentucky and involved claims by hundreds of individual plaintiffs in 68 cases filed against numerous different pharmaceutical manufacturers. I also served as national coordinating counsel for claims against my client that were filed in other jurisdictions but not joined in the MDL. The case went on for approximately three years, and was litigated on different fronts, including federal courts in California involving cases in which plaintiffs were resisting transfer into the MDL. My client was dismissed on summary judgment along with several of the other manufacturers on the basis that the claims against the makers of generic formulations of the drug were preempted by the United States Supreme Court's ruling in *PLIVA, Inc. v. Mensing*, 564 U.S. 604 (2011). *In re Darvocet, Darvon and Propoxyphene Products Liability Litigation*, No. 2:11-md-2226-DCR, 2012 WL 718618 (E.D. Ky. Mar. 5, 2012). The United States Court of Appeals for the Sixth Circuit affirmed the dismissal, *In re Darvocet, Darvon, and Propoxyphene Products Liability Litigation*, 756 F.3d 917 (6th Cir.

2014), and I was admitted to practice in the United States Supreme Court in anticipation of the plaintiffs filing a writ of certiorari, but they ultimately chose not to seek Supreme Court review.

In addition to the above, I have appeared as counsel of record in the following reported cases:

Elm Children's Trust v. Wells Fargo Bank, N.A., 468 S.W.3d 529 (Tenn. Ct. App. 2014)

In re Reed, 492 B.R. 261 (Bankr. E.D. Tenn. 2013)

Estate of Turner ex rel. Turner v. Globe Indemnity Co., 223 S.W.3d 840 (Ky. Ct. App. 2007)

Parrish v. Marquis, 172 S.W.3d 526 (Tenn. 2005)

Parrish v. Marquis, 137 S.W.3d 621 (Tenn. 2004)

In re Adoption of A.K.S.R., 71 S.W.3d 715 (Tenn. Ct. App. 2001)

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

Not applicable.

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

I have served only once as a guardian ad litem. I do not recall the date of the case, but I believe it would have been in the early 2000s. I was appointed guardian ad litem for a man in hospice care whose wife was seeking a conservatorship.

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

None.

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.

I submitted an application for Tennessee Claims Commissioner in 2017. I was one of ten applicants selected for an interview, but I was not selected for the position.

I submitted an application to the United States District Court for the Eastern District of Tennessee for the position of Magistrate Judge in 2017. I was not selected as a finalist for that position.

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.

University of Tennessee at Knoxville, 1983-1987, Bachelor of Arts degree (cum laude), Latin major, English minor

University of Georgia, 1987-1989, Master of Arts degree in Classical Studies

Ohio State University, 1990-1995, Doctor of Philosophy in Classics

University of Tennessee College of Law, 1996-1999, Doctor of Jurisprudence (magna cum laude)

PERSONAL INFORMATION

15. State your age and date of birth.

53; [redacted]1966

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

I have lived continuously in Tennessee since 1996. I was born in Tennessee and left the state to attend college and graduate school, and to work in Ohio for one year before returning to attend law school in Tennessee.

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

I have lived in Knox County continuously since 1996.

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

Knox County.

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

Not applicable.

20. Have you ever pled guilty or been convicted or 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.

No.

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

No.

22. Please 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.

Not applicable

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

No.

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

No.

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

Yes.

Knox County Chancery Court No. M-06-166418

Divorce. Filed and resolved on grounds of irreconcilable differences in 2006.

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.

Blount Mansion Association Board of Directors (2014 to present), Site Committee Co-Chair. The mission of the Blount Mansion Association is "to preserve and protect the unique historical value of the Blount Mansion," home of William Blount, who was a signer of the United States Constitution and was instrumental in making Tennessee the sixteenth state.

Since 2008 I have participated in building several homes with Habitat for Humanity.

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.

No.

ACHIEVEMENTS

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

American Inns of Court, Hamilton Burnett Chapter (2011-present)

American Bar Association (2002-2018), including participation in Tort, Trial and Insurance Practice Section Trial College in 2005.

Tennessee Bar Association (1999-2018; 2019-present)

Kentucky Bar Association (2009-present)

Knoxville Bar Association (1999-present) –Member of Publications Committee (2018-present); Member of Continuing Legal Education Committee (2018-present); Previously at varying times (dates uncertain) I was a member of the Judicial Committee, the Archives Committee, and the Functions Committee.

East Tennessee Lawyers Association for Women (2018-present)

Defense Research Institute (2002-2018)

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

I was selected for the inaugural class of the Tennessee Bar Association Leadership Law program (2004).

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

"Whose Burden is It, Anyway? Defendant's Burden of Production on Causation" *For the Defense*, January 2005

"Phantom Damages: Collateral Source Benefits or Windfall for Plaintiffs?" *For the Defense*, November 2006

"Significant Ruling by Mississippi Supreme Court Addresses Liability of Nursing Home Administrators and Licensees" *The Voice*, November 2006

"Who Needs an Expert? Ordinary Negligence Claims in Medical Cases" *For the Defense*, October 2011

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.

"Make Your Best Case: Building the Record on Appeal," Knoxville Bar Association, Nov. 2019

"Taking the Plaintiff's Deposition," Inns of Court, Hamilton Burnett Chapter, Nov. 2019

"Ethics Bowl" Participant, Knoxville Bar Association, Dec. 2015

"Discussion of Apology Laws and Setting Realistic Expectations," Webinar presented by Baker, Donelson, Bearman, Caldwell & Berkowitz, July 2014

"Arbitration Agreements in the Health Care Industry," Webinar presented by Baker, Donelson, Bearman, Caldwell & Berkowitz to Association of Corporate Counsel, Dec. 2012

"Avoiding Litigation in Your Facility: Setting Reasonable Expectations and Implementing Your Arbitration Agreement," Kentucky Association of Health Care Facilities, April 2012

In the Fall semester of 2014, I was asked to teach an upper level seminar on health care law at the University of Tennessee College of Law. The class had approximately 20 students (mostly third-year students) and required a legal research paper that satisfied their expository writing requirement.

I also taught courses in legal writing and pretrial litigation at the University of Tennessee College of Law as an adjunct professor early in my career (early 2000s), but was forced to give up teaching when my travel schedule for work affected my ability to attend every class.

Additionally, although the students did not receive law school credit, for many years I was involved in coaching mock trial teams at the University of Tennessee College of Law, accompanying them to mock trial competitions sponsored by the American Association for Justice (formerly the American Trial Lawyers Association). Most recently, in 2016, I coached a team of four young women in a trial competition at the American University Washington College of Law.

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.

Not applicable.

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.

See attached writing samples, all of which are my own work.

ESSAYS/PERSONAL STATEMENTS

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

My career as a lawyer was interesting and challenging, handling cases that involved everything from complex product engineering issues to simple rear-end car accidents, but after nearly 20 years I was ready for a new challenge. I always enjoyed researching and analyzing legal issues and producing well written briefs in both the trial and appellate courts. My current work as a judicial law clerk – reviewing the arguments presented by both sides, researching and analyzing the issues, and drafting opinions that resolve them in the manner decided by the Court (or, occasionally, in dissent) – is the most interesting and satisfying work I have ever done. I would like to take my affinity and zeal for this work to the next level by becoming an appellate judge. I believe that my scholarly background, wide-ranging practice of law, and my appellate court experience make me uniquely qualified for the position.

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

I have in the past provided pro bono services through Legal Aid of East Tennessee. My current position does not permit me to represent clients or make any appearance in court, so I provide pro bono legal advice through the ABA's Free Legal Answers website.

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)***

I am seeking the position of judge on the Tennessee Court of Appeals in the Eastern Section. The Court of Appeals is comprised of twelve judges, with four in each section of the state – East, Middle, and West Tennessee. The Court of Appeals handles direct appeals of civil cases from the circuit and chancery courts as well as certain other tribunals such as the Tennessee Claims Commission. If selected, I would contribute to the court an extensive and wide-ranging background in civil litigation, unique scholarly credentials grounded in research and writing, and experience not only in appellate advocacy but in researching and analyzing issues presented to the Tennessee Supreme Court and drafting opinions that resolve those issues in the manner decided by the Court.

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

I plan to continue to participate in building houses for Habitat for Humanity.

I will continue my involvement with preserving the important history of the Blount Mansion by serving on its Board of Directors.

I will also look for new additional opportunities to serve.

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

I originally planned on a career as a professor of Classical Studies (Latin, Greek, and ancient history and literature) – teaching, researching, and writing. Toward that goal, I earned a Ph.D. in that field. The job market was not in my favor, however, and after spending a year as Visiting Assistant Professor at Denison University in Granville, Ohio, and learning that many of my colleagues spent years traveling around the country to take temporary positions before finding a permanent job, I decided that I needed a new professional goal – one that would provide more stability for me and for my family.

My major concentration in graduate school had been the study of rhetoric in the law courts of ancient Rome. A career in law seemed like a natural direction in which to take my prior academic and writing experience from graduate school. It was a good decision. I found that I enjoyed analyzing the issues presented by the case law, and I had always enjoyed research and writing.

I have often been asked whether I regret spending years working toward graduate degrees that I ultimately did not "use." But I do not. I believe that my unique scholarly experience – grounded in research, language, critical analysis, and writing – laid a strong foundation for law school, for the work I currently do for the Tennessee Supreme Court, and for the work I aspire to do as a judge on the Tennessee Court of Appeals.

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

Yes, of course. I can cite as an example my experience as an attorney with Tennessee Code Annotated section 29-26-121(f). The statute required the trial court, on a defendant's motion, to grant a qualified protective order allowing ex parte interviews with a plaintiff's treating healthcare providers. In most cases, plaintiffs vehemently objected to the entry of such an order as being an unconstitutional invasion of privacy, and the Tennessee Supreme Court eventually accepted review of a case that would decide the issue. While that case was pending on appeal, some courts continued to enter the orders as the statute directed, but some courts refused to enter these orders while the case was pending on appeal (for about three years), leaving the parties in limbo. During one hearing on a petition for qualified protective order that I had filed, the judge said "I don't like this statute, but the law says I have to grant the order," and she did. That is the approach that I would take. The law is the law whether the judge agrees with the substance of it or not. Unless and until the higher court declared it unconstitutional, the statute was presumed to be valid and the trial court had a duty to do what the law required regardless of the judge's personal opinion about it.

REFERENCES

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

A. Justice Sharon G. Lee, Tennessee Supreme Court, [redacted] Knoxville, TN 37902, [redacted]
B. Judge D. Michael Swiney, Chief Judge of the Tennessee Court of Appeals, [redacted] Knoxville, TN 37902, [redacted]
C. R. Dale Bay, Esq., Lewis, Thomason, King, Krieg & Waldrop, P.C., [redacted] Nashville, TN 37210 [redacted]
D. Cynthia Hatcher, Tennessee Republican Party District 2 Committeewoman, Blount County Republican Party Female Vice Chairman, Enterprise Account Manager, Comcast Enterprise, [redacted] Knoxville, TN 38924, [redacted]
E. William F. ("Buddy") Burkhardt, Knox County Republican Party Immediate Past Chair; Powell Republican Club President; Halls Republican Club Vice President; Technical Support Supervisor, Knox County Sheriff's Department, [redacted] Knoxville, TN 37918 [redacted]

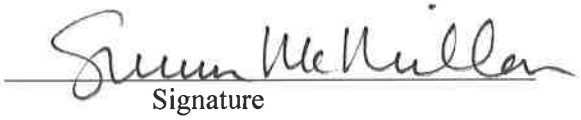
AFFIRMATION CONCERNING APPLICATION

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 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: January 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.

Summer H. McMillan
Type or Print Name

Summer McMillan
Signature

January 30, 2020
Date

020296
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 Kentucky, Bar No. 92995

Who Needs an Expert?

Ordinary Negligence Claims in Medical Cases

By Summer H. McMillan

We should endeavor to demonstrate to courts those matters in our cases that lie beyond the knowledge and everyday experience of juries, in an effort to keep those cases properly within the realm of medical malpractice.

To say that a fine line often exists between ordinary negligence and medical malpractice would be a vast understatement underscored by the fact that courts all across the country have struggled with the distinction for years, primarily in cases involving nursing homes and hospitals. The obvious distinction between ordinary negligence and medical malpractice lies in the distinction between medical treatment and ministerial or custodial care. It sounds simple and makes sense. If a claim involves care and treatment rendered by a medical professional, it is a medical malpractice claim, and a plaintiff must comply with the medical malpractice laws of the jurisdiction and prove through expert medical testimony the applicable standard of care and a deviation from that standard of care. If, on the other hand, a claim does not arise from medical treatment involving professional skills and judgment but instead arises from an injury caused by the simple negligence of a medical professional in the course of routine interaction with a patient, it is an ordinary negligence claim. These claims may proceed without expert testimony on the standard of care, and a jury may decide whether the professional or medical care providing facility met the standard of ordinary care, based on the everyday experiences of the jurors. Where to draw the line between these two types of claims is critical to defending health care professionals and the facilities in which they work.

Basic Principles—Simple Negligence vs. Medical Malpractice

Earlier in 2011, the Tennessee Supreme Court ruled that plaintiffs are permitted to sue health care providers in a single action for both ordinary negligence and medical malpractice, noting that

> the distinction between ordinary negligence and malpractice turns on whether the acts or omissions complained of involve a matter of medical science or art requiring specialized skills not ordinarily possessed by lay persons or whether the conduct complained of can instead be assessed on the basis of common everyday experience of the trier of fact.

Estate of French v. Stratford House, 2011 WL 238819, at *6 (Tenn. 2011) (quoting *Peete v. Shelby County Health Care Corp.*, 938 S.W.2d 693, 696 (Tenn. Ct. App. 1996)). This decision is consistent with the opin-

■ Summer H. McMillan is of counsel with the law firm of Baker, Donelson, Bearman, Caldwell & Berkowitz PC in Knoxville, Tennessee. Her areas of practice include medical malpractice and nursing home defense. She is a member of DRI's Medical Liability and Health Care Law and Trial Tactics Committees.

ions of courts in other jurisdictions across the country that have addressed, and in many cases struggled with, the issue. Often, applying the distinguishing principles is straightforward. *Quintanilla v. Coral Gables Hosp.*, 941 So. 2d 468 (Fla. Dist. Ct. App. 2006) (nurse negligently spilled hot tea on a patient); *Pullins v. Fentress County Gen. Hosp.*, 594 S.W.2d 663 (Tenn. 1979) (failure of hospital to keep building free of spiders and insects); *Peete*, 938 S.W.2d 693 (patient struck in the head when nurse was attempting to dismantle an orthopedic suspension bar hanging over the bed).

On the other hand, in other cases, it isn't so clear. For instance, in *Rode v. Hurley Medical Center Board of Hospital Managers*, the patient alleged that that her arm was negligently burned by a "Bovie," a common piece of electrical medical equipment, during hysterectomy surgery, and the court found that the claim sounded in medical malpractice because

> the potential causes of the burn, the methods of its prevention, and whether it may have occurred in the absence of negligence entail professional judgments beyond the scope of a jury's common knowledge and experience. Assuming that a Bovie caused the injury, the risks associated with use of a Bovie, and whether a burn may result with appropriate Bovie use, comprise subjects beyond the ken of lay people.

2010 WL 4977915, at *3 (Mich. Ct. App. Dec. 7, 2010).

Inherent Difficulties in Distinguishing Between Medical Malpractice and Ordinary Negligence

In more cases than not, the line between medical care and routine or custodial care is not clear. For instance, in a 2011 Pennsylvania Supreme Court case, which addressed this issue for the first time, the court categorized a claim involving an elderly stroke victim's fall from her hospital bed after she was left unrestrained and unattended as ordinary negligence rather than as medical malpractice because "this question is not one of great technical complexity, but, rather, involves a matter of nonmedical, administrative, ministerial, or routine service" that did "not raise questions of medical judgment at all." *Ditch v. Waynesboro Hospital*, 2010 WL 5591868 (Pa. Jan. 18, 2011). The court went on, however, to acknowledge that "in certain circumstances not present here, allegations regarding a lack of restraints, leaving the victim unattended, and failing to use necessary safety devices may sound in professional negligence, allowing an 85-year-old stroke victim to fall from a bed raises only questions of ordinary negligence." *Id.* What the *Ditch* court failed to do was to explain how it concluded that determining whether this patient, or indeed, any particular patient, needed restraints, a particular level of supervision, and safety devices, did not involve medical judgments. What circumstances would implicate professional judgment? Certainly 85-year-old patients differ, as do stroke patients, which seems to suggest that someone would need to exercise professional judgment to decide if a particular patient needed restraints and supervision, and that professional would consider the severity of the patient's stroke, the resulting deficits, and the patient's physical and mental functioning levels.

Supervision of Psychiatric Patients

Forty years ago in *Kastler v. Iowa Methodist Hospital*, 193 N.W.2d 98 (Iowa 1971), the Iowa Supreme Court determined that a case involving a psychiatric patient's unmet need for supervision in the shower was an ordinary negligence case. The defendant, a hospital, admitted a 25-year-old patient for "spells" of headaches, rapid heartbeat, difficult breathing, and dizziness. She was admitted under a psychiatrist's standing orders until he could examine her and write orders specific to her. Those standing orders did not mention shower supervision. The day after her admission, the plaintiff was too ill to participate in activities or to eat, but she repeatedly told the hospital staff that she just wanted to lie down and rest because she had these "spells." When it was time for the plaintiff's shower that evening, an aide followed the normal protocol and waited just outside the shower room while the patient went in to shower alone. The plaintiff lost consciousness in the shower and fell, hitting her face on the shower floor. The aide admitted in her trial testimony that she had known that the plaintiff was not feeling well and that she took the plaintiff to have her shower early for that reason. The court ruled that a patient's shower constituted routine care, and for that reason this was a case of "nonmedical, administrative, ministerial, or routine care" so "the standard [was] such reasonable care for patients as their known physical and mental condition may require." *Id.* at 102.

The aide in *Kastler*, however, without a physician's order or direction had exercised independent judgment, presumably based on her training and experience as a caregiver in a hospital setting to patients, such as the plaintiff, in deciding whether to supervise the plaintiff in the shower. While every jury member probably will have crossed a street, driven a car, or encountered a spill or other "dangerous condition" in a public place, it seems unlikely that most jurors will have experience caring for patients in a psychiatric ward or assessing the supervision and care levels required for a particular patient based on what they know about the patient's physical and mental conditions. *See Dorris v. Detroit Osteopathic Hosp. Corp.*, 594 N.W.2d 455, 466–67 (Mich. 1999) (claim involving monitoring of psychiatric patients sounds in medical malpractice because "knowing how to correctly monitor psychiatric patients requires a specialized knowledge of the complex diseases of the mind that may affect psychiatric patients and how those diseases might influence their behavior, and such knowledge is simply not within the realm of 'common knowledge.'").

> In medical cases, negligence per se would require a jury to interpret the statutes and regulations governing medical providers... and to determine compliance with those statutes and regulations.

Supervision of Nursing Home Residents

The Superior Court of Connecticut recently articulated the distinction between medical malpractice and ordinary negligence in a way that seems both entirely sensible and relatively easy to apply:

> Nevertheless, to sound in negligence, the plaintiff's complaint truly must not challenge the medical judgment as to whether the patient should be supervised. A complaint alleging that a medical judgment for supervision had been made, but negligently followed does not sound in malpractice. On the other hand, where a complaint alleges that a medical judgment requiring supervision should have been made but was not, the action sounds in medical malpractice.

Kelly v. Bridgeport Health Care Center, Inc., 2010 WL 3788059, at *5 (Conn. Super. Ct. Sept. 2, 2010). In *Kelly*, the plaintiff's decedent had a history of eloping from and attempting to elope from the facility, and for that reason the facility had placed the staff on heightened awareness and instituted a policy to prevent the decedent from leaving the facility.

> Consequently, the complaint [did] not allege that a different medical judgment should have been made, but merely that the nursing home breached its duty by failing to prevent the decedent from leaving its facility and placing himself in harm's way. The plaintiff's specific allegations... include the failure to monitor the front door, the failure to secure the front door, the failure to prevent [the decedent] from leaving his room, and the failure to stop him in the hallway also do not require any specialized medical knowledge or involve medical judgment. Consequently, the court finds that [the] plaintiff's complaint sounds in ordinary negligence and not medical malpractice.

Id.

Determining compliance with the federal regulations governing resident care in large part belongs within the realm of expert testimony.

The Texas Court of Appeals reached a similar conclusion in *Golden Villa Nursing Home, Inc. v. Smith*, 674 S.W.2d 343 (Tex. Ct. App. 1984). There, the nursing home staff knew that the resident tended to wander away from the facility, and her care plan specifically stated that because she was confused at times and wandered outside, the staff was to supervise her when she was outside so that she did not wander to the busy highway adjacent to the facility. The plaintiff's complaint alleged that the facility staff left the resident, last seen on the porch of the facility, unattended for approximately an hour, during which time she wandered onto the highway. The court held that the plaintiff had stated a claim for ordinary negligence because supervising the patient was custodial care. The court relied on the theory, however, that hospitals and nursing homes have a duty to provide care for their patients or residents in accordance with a reasonable standard of care as required by the individual's known mental and physical condition. Overruling the facility's attorney's argument that expert testimony should establish the applicable standard of care for supervising nursing home residents, the court held that the jury could competently determine the reasonable standard of care and apply it to decide if the supervision that this resident received met that reasonable care standard. The claim sounded in ordinary negligence, so it did not require expert testimony.

As articulated by the *Golden Villa* court, the principles differentiating negligence from malpractice are much less clear than the principles as articulated by the Connecticut Superior Court in *Kelly*, but the reasoning seems similar. Neither case involved failures of medical judgment to recognize the needs of the residents. In both cases facility staff failed to implement the supervision level established for the residents through previously exercised medical judgments.

On the other hand, in *Bryant v. Oakpointe Villa Nursing Centre, Inc.*, 684 N.W.2d 864 (Mich. 2004), the deposition testimony of the plaintiff's own expert convinced the court that "the assessment of whether a bed rail creates a risk of entrapment for a patient requires knowledge of that patient's medical history and behavior," and "the ability to assess the risk of positional asphyxia and, thus, the training of employees to properly assess that risk, involves the exercise of professional judgment." So claims of that kind would sound in medical malpractice and require expert testimony because "the risk assessment [of a patient's bedding arrangements]... is beyond the ken of common knowledge, because such an assessment require[s] understanding and consideration of a particular set of restraints in light of a patient's medical history and treatment goals." But once the nursing assistants found the resident "tangled in her bedding and dangerously close to asphyxiating herself in the bed rails" and informed their supervising nurses of this risk, the nurses' failure to take action to prevent future harm sounded in ordinary negligence because the question was not whether the nurses took *appropriate* action given the resident's medical history and condition, which would require professional judgment, but whether they should have taken some action, any action, to attempt to avoid the harm that sounded in ordinary negligence. *Id.* at 875–76.

Negligence Per Se

Negligence per se, of course is an extension of ordinary negligence. In medical cases, negligence per se would require a jury to interpret the statutes and regulations governing medical providers, which are generally complex and which often require assessing professional judgment, and to determine compliance with those statutes and regulations. When statutes and regulations are introduced in a case involving medical malpractice, expert testimony is desirable to assist a jury in interpreting the statutes and regulations and to explain how they apply to the facts and circumstances of the case. Under the principles of negligence per se, however, as an extension of ordinary negligence, a plaintiff's attorney may present the applicable statutes and regulations to a jury without expert testimony, leaving the jury alone with the daunting task of interpreting and applying the statutes and regulations to the case at hand.

Negligence Per Se Based on Federal Nursing Home Regulations

The court in *Estate of French* specifically

held that "a plaintiff pursuing a claim of ordinary negligence against a nursing home may prove negligence per se by offering proof that the nursing home violated relevant federal and state regulations." *Estate of French*, 2011 WL 238819, at *12. The court reasoned that allowing claims for negligence per se would only serve to support and supplement the ordinary negligence action already permissible for matters of routine or custodial care. Although the regulations may not be used to prove a deviation from the standard of care with respect to a plaintiff's medical malpractice claims in derogation of the Tennessee Medical Malpractice Act, the court held that proof of negligence per se based on a violation of the regulations was a natural extension of its holding on ordinary negligence claims.

> Requiring the finder of fact to parse through voluminous regulations to determine the standard of care in an ordinary negligence action against a nursing home may not always be the most direct approach toward the establishment of a nursing home's negligence. Nevertheless, proof of violation of federal and state nursing home regulations is relevant in determining whether a defendant nursing home has breached the standard of care.

In an earlier nursing home case that determined that the plaintiff's claims sounded in medical malpractice, the Tennessee Court of Appeals soundly rejected the plaintiff's claim of negligence per se based on the federal regulations governing nursing homes on the grounds that "[t]he federal regulations are simply too vague and general to constitute a standard of care by which a jury, or for that matter a court, can effectively judge the acts or omissions of health care providers and nursing home operators." *Conley v. Life Care Centers of America, Inc.*, 236 S.W.3d 713, 733 (Tenn. Ct. App. 2007). The *Conley* court went on to quote *Estate of Smith v. Bowen*, 656 F. Supp. 1093, 1097 (D. Colo. 1987): "There is no legislative definition of 'quality health care' and there can be none.... federal nursing home regulations are so vague that enforcement arguably violates 'commonly accepted principles of fundamental fairness' and gives rise to 'a procedural due process concern.'"

The regulations at issue in *Conley* were federal nursing home regulations contained in 42 C.F.R. §483. The court reasonably and correctly concluded that a jury, or even a judge, could not possibly determine whether a nursing home had violated the regulations. Looking at some of those regulations, this conclusion is obvious. While ordinary jurors may have the capacity to determine whether a facility had met the federal requirements without consulting expert testimony, determining compliance with the federal regulations governing resident care in large part belongs within the realm of expert testimony. While jurors could probably determine whether a nursing home had employed individuals listed on the abuse registry, prevented by 42 C.F.R. §483.13(c)(ii)(B), employed a registered nurse for eight hours every day, as required by 42 C.F.R. §483.30(a)(ii)(b), or offered snacks at bedtime, as required by 42 C.F.R. §483.35(f)(3), without the assistance of expert testimony, it seems inconceivable that jurors' everyday experience would equip them to determine whether a facility had complied with 42 C.F.R. §483.25, "Quality of Care":

> Each resident must receive and the facility must provide the necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being, in accordance with the comprehensive assessment and plan of care.
>
> (a) Activities of daily living. Based on the comprehensive assessment of a resident, the facility must ensure that
>
> (1) A resident's abilities in activities of daily living do not diminish *unless circumstances of the individual's clinical condition demonstrate that diminution was unavoidable.*
>
> (c) Pressure sores. Based on the comprehensive assessment of a resident, the facility must ensure that
>
> (1) a resident who enters the facility without pressure sores does not develop pressure sores *unless the individual's clinical condition demonstrates that they were unavoidable*; and
>
> (2) A resident having pressure sores receives necessary treatment and services to promote healing, prevent infection and prevent new sores from developing.
>
> (f) Mental and Psychosocial functioning. Based on the comprehensive assessment of a resident, the facility must ensure that
>
> (1) A resident who displays mental or psychosocial adjustment difficulty receives *appropriate treatment and services* to correct the assessed problem, and
>
> (2) A resident whose assessment did not reveal a mental or psychosocial adjustment difficulty does not display a pattern of decreased social interaction and/or increased withdrawn, angry, or depressive behaviors, *unless the resident's clinical condition demonstrates that such a pattern was unavoidable.*
>
> (g) Naso-gastric tubes. Based on the comprehensive assessment of a resident, the facility must ensure that
>
> (1) A resident who has been able to eat enough alone or with assistance is not fed by naso-gastric tube *unless the resident's clinical condition demonstrates that use of a naso-gastric tube was unavoidable*; and
>
> (2) A resident who is fed by a naso-gastric tube receives the *appropriate treatment and services to prevent aspiration pneumonia, diarrhea, vomiting, dehydration, metabolic abnormalities, and nasal-pharyngeal ulcers and to restore, if possible, normal eating skills.*
>
> (i) Nutrition. Based on a resident's comprehensive assessment, the facility must ensure that a resident
>
> (1) *Maintains acceptable parameters of nutritional status, such as body weight and protein levels, unless the resident's clinical condition demonstrates that this is not possible...*

By necessity, how these regulations apply depends on the individual circumstances and clinical needs of a particular resident as determined by that individual's medical conditions, cognitive functioning level, and myriad other factors. These are not "did the defendant run the red light or not" or "should the store manager have cleaned up that spill" types of inquiries.

They are multifaceted and medically complex, and they would seem to require expert testimony addressing all of the relevant factors as applicable to the individual at the heart of a dispute. It is simply not likely that the everyday experience of the average juror would equip him or her to determine whether a nursing home could have prevented a diminution in activities of daily living, patterns of mental or psychosocial behaviors, naso-gastric tubes, or poor nutritional status given the medical condition of an individual resident, or whether the nursing home provided the appropriate treatment and services to address any or all of these conditions.

The plaintiff's claims in *Estate of French* were based upon a common scenario presented by plaintiffs in nursing home cases: the facility was understaffed, resulting in failure to turn and reposition the resident as necessary, resulting in the development of pressure sores that were inadequately treated, became infected, led to sepsis, and killed the resident. *Estate of French*, 2011 WL 238819, at *20. The dissenting justice in that case identified the problems encountered by a jury relying on its own knowledge and everyday experience without expert testimony assistance, especially regarding causation:

> I cannot envision how lay persons, using only their common, everyday experience without the assistance of expert medical proof, could determine (1) whether [the defendant facility] was properly staffed, (2) whether [decedent's] pressure sores were caused by inadequate care, (3) whether [decedent's] medical condition would have caused her to develop pressure sores notwithstanding the care she received, (4) whether [decedent's] pressure sores would have failed to heal and would have worsened despite the care she received, and (5) whether [decedent's] pressure sores caused the sepsis that resulted in her death.

Id.; *see also Sunbridge Helathcare Corp. v. Penny*, 160 S.W.3d 230, 246–7 (Tex. Ct. App. 2005) ("this case involves corporate funding, nursing home budgets, and staffing level standards—issues not within the common knowledge or experience of the jury. Without some guidance as to how much money a reasonable parent corporation in the business of operating nursing homes should have allocated to its subsidiary for staffing of the subsidiary's nursing home facilities, the jury has no basis to establish a standard of care for [defendant].")

By the same token, how can a jury, without expert testimony assistance, accurately determine the extent to which a nursing home resident's co-morbid conditions contributed to, for example, a decline in nutritional status or mental or psychosocial problems as opposed to alleged negligence on the part of the facility staff? These are questions that only expert witnesses can appropriately and adequately address.

Courts in other jurisdictions have also held that plaintiffs may pursue actions against nursing homes under a theory of negligence per se. The Georgia Court of Appeals held in the 2006 case of *McLain v. Mariner Health Care, Inc.*, 631 S.E.2d 435, 437 (Ga. Ct. App. 2006), that the federal regulations and state statutes governing nursing homes will support claims both of ordinary negligence and negligence per se:

> It is obvious that as a resident of the nursing home owned by Mariner, [plaintiff's] father belonged to the class of persons for [sic] whom these statutes and regulations were intended to protect, and that the injuries set forth in the complaint... were among those these same statutes and regulations were designed to prevent. Likewise, the complaint's allegations of violations of the same statutes and regulations would be competent evidence of Mariner's breach of duty under a traditional negligence action.

Similarly, the California Court of Appeals held that the trial court in a nursing home case should have granted a jury instruction on negligence per se based on the state regulations governing nursing home care to the plaintiff because "there [was] substantial evidence to support a finding that LifeCare's alleged violations of the regulations in question 'proximately caused death or injury to' [plaintiff's decedent]." *Norman v. Life Care Centers of America, Inc.*, 132 Cal. Rptr. 2d 765, 778 (Cal. App. 2003); *see also, Conservatorship of Gregory v. Beverly Enterprise*, 95 Cal. Rptr. 2d 336, 80 Cal. App. 4th 514, 523 (Cal. App. 2000) (trial court appropriately included federal and state nursing home regulations in jury instructions because those regulations "were designed to protect nursing home residents by defining the care that was due" and "[l]ike statutes, applicable regulations are a 'factor to be considered by the jury in determining the reasonableness of the conduct in question.'").

Several courts have, however, declined to start down this path. In *Satterwhite v. Reilly*, 817 So. 2d 407, 412 (La. Ct. App. 2002), the Louisiana Court of Appeals held, in a case against the medical director of a nursing home, that the federal nursing home regulations neither set forth a standard of care nor provided a basis for negligence per se:

> At the outset, we note that 42 C.F.R. §483.75(i) sets forth standards for certifying long term care facilities to participate in the Medicare and Medicaid programs. If a nursing home fails to meet these standards, the government may terminate its participation.... Nothing in the regulations sets forth a standard of care for medical directors; the purpose is plainly to qualify providers for the Medicare and Medicaid programs.... we decline to hold that 42 C.F.R. §483.75(i) grants a private cause of action against a medical director of a nursing home or establishes the standard of care or duty that a nursing home medical director owes to the patients of the nursing home he serves, or that a violation of the regulation is negligence per se.

See also, Mariner Health Care v. Edwards, 964 So. 2d 1138, 1155 (Miss. 2007) ("We caution against the use of jury instructions reciting regulations as potentially being vague and abstract as there is no connection relating the facts to the elements of standard of care and causation."); *Stogsdill v. Manor Convalescent Home, Inc.*, 343 N.E.2d 589, 664 (Ill. App. Ct. 1976) (state regulations governing nursing homes are "too vague to be sufficient indicators of the standard of due care required of nursing homes by themselves" and "[s]ince the regulations do not clearly set forth the standard of care required, expert testimony was still required").

Conclusion

Although they are well settled as basic principles that cases involving medical judgment fall under the rubric of med-

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ical malpractice requiring expert testimony and cases involving routine care fall under the rubric of ordinary negligence, the application of these basic principles to the facts and circumstances of particular cases can become problematic, especially as courts extend the principles of ordinary negligence to negligence per se based on federal regulations. Consequently, courts continue to struggle with and refine the underlying and inherently difficult distinctions. As defense counsel, we should endeavor to demonstrate to courts which matters in our cases lie beyond the knowledge and everyday experience of juries in an effort to keep those cases properly within the realm of medical malpractice. We should also continue to proffer defense expert testimony when appropriate, even in cases in which courts permit plaintiffs to proceed on a theory of ordinary negligence, negligence per se, or both, just as we would present an accident reconstruction expert in a motor vehicle case even though the cases may not strictly require this type of expert testimony. In short, we should make every effort to keep medical malpractice cases within the realm of expert testimony.

CASE NO.: 15-6092

United States Court of Appeals for the Sixth Circuit

Brackfield & Associates Partnership a/k/a Brackfield & Associates, G.P., and Eugene Brackfield vs. Branch Banking and Trust Company

On Appeal from the United States District Court
for the Eastern District of Tennessee at Knoxville (Reeves, J.)

RESPONSE BRIEF OF DEFENDANT-APPELLEE

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ORAL ARGUMENT REQUESTED

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Sixth Circuit Case No.: 15-6092

Case Name:

Brackfield & Associates Partnership a/k/a Brackfield & Associates, G.P., *et al.*
v.
Branch Banking and Trust Company

Name of counsel: Richard B. Gossett and Summer H. McMillan

Pursuant to 6th Circuit Rule 26.1, Branch Banking and Trust Company makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

   Yes. Branch Banking and Trust Company is a wholly owned subsidiary of BB&T Corporation, a publicly traded company.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest.

   No.

This 15th day of January, 2016.

/s/ Summer H. McMillan
Attorney for Defendant/Appellee,
Branch Banking and Trust Company

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Defendant respectfully submits that, in light of the complex issue of statutory interpretation raised by this appeal, oral argument will aid the Court in its determination of these matters. Plaintiffs are urging the Court to interpret the meaning of the term "access" in the Right to Financial Privacy Act ("RFPA"), 12 U.S.C. § 3403(a), to extend to a hypothetical opportunity for a Government authority to obtain Plaintiffs' financial information. Such an interpretation would be entirely inconsistent with existing case law on the issue, inasmuch as there has never been, insofar as Defendant has been able to find, a case finding a violation of the RFPA in which the Government authority did not actually obtain the financial information at issue. The interpretation urged by Plaintiffs here, as Plaintiffs point out in their Statement in Support of Oral Argument, has never been adopted or even examined by any court, and it would require this Court to extend the meaning of the RFPA and the word "access" therein to an utterly speculative, hypothetical occurrence. Thus, Defendant agrees that this Court should conduct oral argument and respectfully requests same.

JURISDICTIONAL STATEMENT

Defendant does not contest Plaintiffs' Jurisdictional Statement.

STATEMENT OF THE ISSUE

Whether the District Court properly dismissed Plaintiffs' claim for violation of the Right to Financial Privacy Act pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure on the ground that Plaintiff's Complaint did not allege a concrete and particularized injury but was premised upon conjecture and speculation.

STATEMENT OF THE CASE

Plaintiffs filed their Complaint on November 4, 2014, premised upon allegations that in March 2011 and in March 2013 Defendant, Branch Banking and Trust Company ("BB&T"), filed with the Tennessee Secretary of State and recorded in the Office of the Register of Deeds for Knox County, Tennessee Uniform Commercial Code financing statements (the "2011 UCC" and the "2013 UCC") containing information gleaned from "financial statements" provided to BB&T by Plaintiffs in connection with applying for and/or maintaining a line of credit with BB&T. [Complaint, RE 1, Page ID # 1-14]. Plaintiffs alleged that by filing and recording the 2011 UCC and the 2013 UCC, BB&T wrongfully disclosed Plaintiffs' financial information in violation of various federal statutes -- the Right to Financial Privacy Act, 12 U.S.C. § 3401, *et seq*; the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.*; and the Gramm-Leach-Billey Act, 15 U.S.C. § 6801, *et seq.* -- in addition to violations of Tennessee statutory and common law, specifically including violation of the Tennessee Financial Records Privacy Act and breach of contract. [Complaint, RE 1, Page ID # 1-14].

BB&T filed a Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) on December 12, 2014. [Motion to Dismiss, RE 14, Page ID # 105-106]. Plaintiffs conceded in response to Defendant's Motion to Dismiss that, even taking all of their factual allegations as true, they could not state

causes of action pursuant to the Fair Credit Reporting Act, the Gramm-Leach-Billey Act, or the Tennessee Financial Records Privacy Act. [Brief of Law in Opposition to Motion to Dismiss, RE 18, Page ID # 124]. Thus, the only remaining claims for the District Court to address were Plaintiffs' RFPA claim and state law claim for breach of contract.

The District Court dismissed Plaintiffs' RFPA claim with prejudice on the ground that Plaintiffs did not allege "a concrete and particularized injury" and that their Complaint was "premised upon conjecture and require[d] the kind of speculation that the Supreme Court has prohibited." [Memorandum Opinion, RE 28, Page ID # 199-201]. The District Court dismissed Plaintiffs' state law claim without prejudice. [Memorandum Opinion, RE 28, Page ID # 201]. Plaintiffs timely filed a Notice of Appeal on October 2, 2015. [Notice of Appeal, RE 30, Page ID # 203].

SUMMARY OF ARGUMENT

Plaintiffs' claim that there is a hypothetical possibility that a Government authority, as part of the "entire world," might someday for some reason look at the 2011 UCC and/or the 2013 UCC statement filed and recorded by BB&T does not meet the requirement of an injury in fact to establish standing to sue for violation of the RFPA because there is no actual or imminent threat of a Government authority obtaining Plaintiffs' financial information. Plaintiffs have alleged nothing more than a conjectural and hypothetical possibility of an unspecified occurrence at some point in the future, and therefore they have not, as a matter of law, pled facts sufficient to establish standing to bring a claim for violation of the RFPA or to state a claim against BB&T for any alleged violation of the RFPA. Consequently, Plaintiffs' RFPA claim was properly dismissed by the District Court pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

STANDARD OF REVIEW

This Court is to "review de novo a district court's decision to grant a motion to dismiss for failure to state a claim." *Laborers' Local 265 Pension Fund v. iShares Trust*, 769 F.3d 399, 402-03 (6th Cir. 2014) (citing *Lambert v. Hartman*, 517 F.3d 433, 438-39 (6th Cir. 2009)). Although the Complaint must be construed in the light most favorable to Plaintiffs and its factual allegations accepted as true, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* at 403 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), in turn quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

The factual allegations "must be enough to raise a right to relief above the speculative level," *Twombly*, 550 U.S. 544, 555, and the District Court correctly held that Plaintiffs' Complaint fails in this respect because "it is premised upon conjecture and requires the kind of speculation that the Supreme Court has prohibited." [Doc. 28, Mem. Op., Page ID 200]. "The court need not...accept unsupported legal allegations, legal conclusions couched as factual allegations, or conclusory factual allegations devoid of any reference to actual events. Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged, but it has not shown that the pleader is

entitled to relief." *Gyamfi v. Wells Fargo-Wachovia Bank*, Civil Action No. DKC 09-3001, 2010 WL 5173318, *3 (D. Md. Dec. 14, 2010) (citations omitted).

"Thus, determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* In this case, BB&T submits that a common-sense reading of the factual allegations of Plaintiffs' Complaint and of the RFPA calls for the District Court's dismissal of Plaintiffs' RFPA claim to be affirmed.

ARGUMENT

I. BB&T did not disclose any of Plaintiffs' financial information to a "Government authority" as that term is defined in the RFPA.

Plaintiffs allege in the Complaint that BB&T violated the RFPA by recording the 2011 UCC and the 2013 UCC in the office of the Register of Deeds for Knox County, Tennessee and filing them with the Tennessee Secretary of State. [Complaint, RE 1, Page ID # 1-14]. The RFPA provides that "[n]o financial institution ... may provide to any Government authority access to or copies of, or the information contained in, the financial records of any customer except in accordance with the provisions of this chapter." 12 U.S.C. § 3403(a). "Government authority" for purposes of the RFPA "means any agency or department of the United States, or any officer, employee, or agent thereof." 12 U.S.C. § 3401(3). Neither the Knox County Register of Deeds nor the Tennessee Secretary of State is, therefore, a "Government authority." For that reason, the allegations of Plaintiffs' Complaint do not state a claim for violation of the RFPA because it is undisputed that BB&T has not furnished or produced Plaintiffs' financial records to a Government authority.

II. Plaintiffs' Complaint does not allege an injury in fact that would provide them with standing to bring an action against BB&T under the RFPA, and therefore they have failed to state a claim for which relief can be granted under the RFPA.

Plaintiffs' sole basis for their RFPA claim is that upon filing and recording the 2011 UCC and the 2013 UCC, those documents "became public record to which the entire world had free and open access" and "[t]he entire world includes government authorities, as such term is defined by 12 U.S.C. § 3401(3)." [Complaint, RE 1, Page ID # 6, 11]. There is no allegation whatsoever in the Complaint that any "Government authority" has accessed or intends to access the 2011 UCC and/or the 2013 UCC in the office of the Knox County Register of Deeds or in the office of the Tennessee Secretary of State. The Complaint merely contains the speculative and hypothetical allegation that "the entire world" to which the 2011 UCC and 2013 UCC are available as public records would include some unidentified Government authority. Consequently, Plaintiffs do not even have standing to bring an action for violation of the RFPA:

> The 'irreducible constitutional minimum of standing' requires that three elements be satisfied:
>
> > First, the plaintiff must have suffered an **injury in fact -- an invasion of a legally protected interest which is (a) concrete and particularized, [and] (b) actual or imminent, not conjectural or hypothetical.** Second, there must be a causal connection between the injury and the conduct complained of -- the injury has to be fairly traceable to the challenged action of the defendant, and

> not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Stein v. Bank of America Corporation, 887 F.Supp.2d 126, 129-30 (D.D.C. 2012) (aff'd. 540 Fed. Appx. 10 (D.C. Cir. 2013)) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)) (emphasis added). In this case, there is no injury in fact because Plaintiffs do not allege that there is an actual or imminent invasion of their legally protected interest under the RFPA.

Plaintiffs' alleged injury is nothing more than conjectural and hypothetical -- i.e. the federal government is part of the "entire world" to whom their financial information is available to be sought out as a public record, and therefore the information might possibly at some unknown point in the future be obtained by some unspecified Government authority. This type of hypothetical and conjectural claim has been soundly rejected by the United States Supreme Court. *Clapper v. Amnesty International USA*, 133 S.Ct. 1138, 1143, 185 L.Ed.2d 264 (2013) (Plaintiffs' claim of a "reasonable likelihood" that their communications would be intercepted under the Foreign Intelligence Surveillance Act at some point in the future was too speculative to state a claim because this "...theory of *future* injury [was] too speculative to satisfy the well-established requirement that threatened

injury must be **'certainly impending,'"** and "[a]llegations of **possible** future injury are not sufficient." (quoting *Whitmore v. Arkansas,* 495 U.S. 149, 158, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990)) (emphasis in original).

Amidax Trading Group v. S.W.I.F.T., 607 F.Supp.2d 500, 508 (S.D.N.Y. 2009), is directly on point. There, the court dismissed the plaintiff's claim against SWIFT, a cooperative of banks that routes money among financial institutions worldwide, which in the wake of September 11, 2001 turned over certain financial information to the U.S. Treasury Department pursuant to subpoena. Subsequently, a newspaper article reported that the government had obtained the entire SWIFT database. *Id.* at 508. However, as the court noted, "plaintiff ha[d] not made any showing that the government...ever was in possession of its financial information." *Id.* Accordingly, the court held that "Plaintiff's complaint does not allege a concrete and particularized injury. It is premised upon conjecture and the kind of speculation that the Supreme Court has prohibited. It would be purely 'hypothetical' to surmise that plaintiff's financial information was among the tens of thousands (or perhaps hundreds of thousands) of SWIFT transactions obtained or reviewed by the government...." *Id.*

Similarly, in *Stein*, 887 F.Supp.2d 126, the court held that the plaintiffs had failed to plead sufficient facts to establish standing to bring a claim for violation of the RFPA, and therefore their complaint had properly been dismissed under Rule

12(b)(1).[1] In *Stein*, the plaintiffs' RFPA claims were based on the allegation that the defendant bank routed customer service calls overseas, thus providing "foreign nationals" in an overseas call center with the caller's financial records. They claimed that the National Security Agency "NSA" could potentially obtain the information because the RFPA would not extend to foreign nationals, and therefore "'United States Government authorities **may access** such financial records [without any legal impediment].'" *Id.* (emphasis added). The plaintiffs therefore asserted that the defendant bank had violated the RFPA because "by 'routing financial records to foreign nationals overseas...[defendant bank] provide[d] the U.S. [with] **access to** such financial records' in direct contravention of 12 U.S.C. § 3403(a). *Id.* (emphasis added).

The *Stein* court acknowledged that "'[p]laintiffs have standing if they have alleged facts sufficient to support a reasonable inference that the statute was violated," but also noted that "'the 'injury in fact' test requires ... that the party seeking review be himself among the injured.'" *Id.* (quoting *Sierra Club v. Morton*, 405 U.S. 727, 734-35, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972)). The complaint in *Stein* alleged that "...Defendants, by transmitting financial records to overseas locales where U.S. authorities can act...without the constraint of U.S. law

[1] The motion to dismiss was also based upon Rule 12(b)(6) in the alternative, but the court treated it as a Rule 12(b)(1) motion and dismissed it for lack of standing, and therefore did not need to reach Rule 12(b)(6) to address the plaintiffs' claims.

or the United States Constitution, are providing U.S. Government authorities with **access to** financial records that such authorities would not have were Plaintiffs' financial records husbanded within the United States." *Id.* at 132 (emphasis added). These allegations were insufficient to establish an injury in fact because they "...fail[ed] to show that the defendants ha[d] 'released' or 'provided' the government with 'access to' or 'copies of' the financial records of [defendant bank's] customers," and Plaintiffs had alleged no facts to show that the defendants had released the financial records of the plaintiffs themselves. The court concluded, therefore, that

> [t]he plaintiffs' allegations are literally rooted in belief and suspicion.... And belief and suspicion are quite far from the 'concrete and particularized,' and 'actual or imminent, not conjectural' or 'hypothetical' requirements of standing set forth in *Lujan*. Accordingly, the plaintiffs have failed to establish an injury under the RFPA and, as such, have failed to demonstrate their standing to bring suit.

Id.

Such is the case here. Plaintiffs cannot establish an injury in fact under the RFPA because their alleged "injury" is not actual or imminent, but is entirely conjectural and speculative, based on the hypothetical possibility that a Government authority, as part of the "entire world," might seek out and obtain Plaintiffs' financial information from the 2011 and 2013 UCC statements. They do not allege that it has happened, but merely speculate that it possibly could at some

point occur. Such speculation, as the courts have repeatedly held, is not sufficient to establish standing or to state a claim under the RFPA. *Clapper*, 133 S.Ct. 1138, 1148 ("...respondents' theory of standing, which relies on a highly attenuated chain of possibilities, does not satisfy the requirement that threatened injury must be certainly impending.") (citing *Summers v. Earth Island Institute*, 555 U.S. 488, 496, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009) and *Whitmore*, 495 U.S. at 157-160).

Finally, the *Gyamfi* case, 2010 WL 5173318, is also squarely on point. In *Gyamfi*, the plaintiff alleged in his complaint that the defendant bank had responded to interrogatories attached to a "bogus" writ of attachment submitted to the bank by "scammers." *Id.* at *1. Because information contained in the responses to interrogatories revealed the names and addresses of the joint account holders as well as an account balance, the court found that it could constitute a "financial record" under the RFPA, and therefore that it "at least facially implicate[d] the RFPA." *Id.* at *4. However, the responses to interrogatories were sent by the bank not to any government office or "Government authority" as defined in the RFPA, "but to unknown third-party 'scammers' instead." *Id.* Because the plaintiff "ha[d] not alleged that the interrogatories were submitted to a 'Government authority' such that [the bank] could be liable under the RFPA," the court directed the plaintiff to show cause why the RFPA claim should not be dismissed because the allegations of their complaint were insufficient to state a claim. *Id.*

Likewise, in the instant case, Plaintiffs have not alleged that BB&T submitted their financial information to any Government authority such that BB&T could be liable under the RFPA. Under the definition of "access" suggested by Plaintiffs, a government employee (or another person or entity fitting the definition of "Government authority") could hypothetically have been among the "scammers" to which the information in the interrogatories in *Gyamfi* was provided, and, as alleged in the instant case, that information was "out there" for the entire world (including a "Government authority") to see. Clearly, under the law as articulated by every court that Defendant has found to have addressed the issue, including *Gyamfi* under very analogous facts, such a hypothetical scenario does not suffice to establish standing or to state a claim for violation of the RFPA.

III. The statutory interpretation of the word "access" in 12 U.S.C. § 3403(a) suggested by Plaintiffs would lead to an absurd result.

A. General principles of statutory interpretation allow for, and indeed in many instances require, an examination of the language at issue in the context of the statute as a whole and in the context of its legislative history.

While it is axiomatic that statutory interpretation begins with the plain language of the statute, it does not necessarily end there. The text of the statute is to be reviewed "...considering the ordinary or natural meaning of the words chosen by Congress, as well as the placement and purpose of those words in the statutory scheme...." *Simonoff v. Kaplan*, No. 10 Civ. 2923 (LMM), 2010 WL 4823597, *4

(S.D.N.Y. Nov. 29, 2010) (citing *Dobrova v. Holder,* 607 F.3d 297, 301 (2d Cir. 2010), in turn citing *United States v. Aguilar,* 585 F.3d 652, 657 (2d Cir. 2009)). See also, *Schlahtichman v. 1-800 Contacts, Inc.*, 615 F.3d 794, 798 (7th Cir. 2010) ("But we must also look to the statute as a whole in discerning a term's meaning rather than examining it in isolation.") (citing, *inter alia, Samantar v. Yousuf,* 560 U.S. 305, 319, 130 S.Ct. 2278, 176 L.Ed.2d 1047 (2010)).

The plain language of the statute is to be considered "in 'the specific context in which that language is used, and the broader context of the statute as a whole. We turn to the legislative history only when 'the plain statutory language is ambiguous **or would lead to an absurd result**.'" *In re Ames Department Stores*, 582 F.3d 422, 427 (2d Cir. 2009) (emphasis added) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997) and *Universal Church v. Geltzer*, 463 F.3d 218, 223 (2d Cir. 2006)). In the instant case, the reading of the word "access" in 12 U.S.C. § 3403(a) suggested by Plaintiffs is not consistent with the broader context of the statute as a whole and its legislative history, and Plaintiffs' proposed interpretation would lead to an absurd result.

B. The definition of "access" quoted by Plaintiffs in their Brief is utterly inapposite to the context of the RFPA.

Plaintiffs cite the court to a definition of "access" quoted in *EJS Properties, LLC v. City of Toledo*, 698 F.3d 845, 864 (6th Cir. 2012). [Plaintiffs' Brief, Doc.

21, p. 10]. *EJS Properties* is a case about access to the courts for the purpose of the First Amendment right to petition. Contrary to Plaintiffs' assertion, this Court in *EJS Properties* did not "adopt ... verbatim" but merely referred to the definition of "access" provided by Black's Law Dictionary as the way "access" is "generally defined." *Id.* at 864. Furthermore, the context of the term "access" in *EJS Properties* is not in any way similar to that of the term "access" within the framework of the RFPA, and *EJS Properties* is, therefore, utterly inapposite to the inquiry here.

The definition of "access" quoted by Plaintiffs from *EJS Properties* is: "'[a]n opportunity or ability to enter, approach, pass to and from, or communicate with.'" *Id.* This definition would be nonsensical if applied to a Government authority and financial information. To establish an injury in fact under the RFPA, the Government authority must obtain the financial information, not "enter," "approach," "pass to and from," or "communicate with" the financial information. Furthermore, Plaintiffs' statement that "[i]n the RFPA context, [this definition] only requires that, for a RFPA violation to occur, the Bank provide the government with the *means* to obtain the Customers' financial records, without regard to whether the government took advantage of that opportunity," [Plaintiffs' Brief, Doc. 21, p. 10 (emphasis in original)] is utterly unsupported by authority and in no way reflects the Black's Law Dictionary definition cited by Plaintiffs.

Additionally, and most importantly, Plaintiffs' self-serving and unsupported definition would fly in the face of the way in which "access" has been interpreted in the context of the RFPA by every court that Defendant has found to have addressed the issue.

C. The examples given by Plaintiffs as possible violations of the RFPA involve direct communication with and/or provision of documents to a Government authority by a financial institution.

Plaintiffs go on to provide examples, with no citation to any authority for those examples, of possible violations of the RFPA -- *i.e.* a financial institution providing information to a Government authority about the content of financial records over the phone or providing a Government authority with copies of financial records "in some unintelligible form" such as encrypted or in a foreign language. [Plaintiffs' Brief, Doc 21, pp. 22-23]. They categorize these examples as possible violations of the RFPA "without actual communication of the information in the financial records or the provision of access to the records." [Plaintiffs' Brief, Doc. 21, p. 23]. Significantly and tellingly, however, both of these examples involve direct communication with and/or provision of documents to the Government authority by the financial institution. Thus, even Plaintiffs' own examples seem to acknowledge that direct communication and/or provision of documents is required to show "access" to the Plaintiffs' financial information for purposes of an RFPA claim.

D. The District Court in this case properly examined the context of the RFPA, its legislative history, and rulings by other courts in its analysis of Plaintiffs' RFPA claim and the meaning of the word "access" in the context of the RFPA.

Plaintiffs themselves have put the meaning of the word "access" as used in 12 U.S.C. § 3403(a) at issue, and the District Court properly looked to the legislative history of the RFPA to discern the meaning of the term in the context of the statute, noting that "[t]he RFPA seeks to strike a balance between the customers' right of privacy and the need of law enforcement agencies to **obtain** financial records pursuant to legitimate investigations." (citing *Neece v. IRS*, 922 F.2d 573, 575 (10th Cir. 1990)). [Memorandum Opinion, RE 28, Page ID # 198 (emphasis added)]. The *Neece* opinion cited by the District Court goes on to state that "12 U.S.C. § 3402 of the RFPA specifies the only means by which federal agencies can **obtain** an individual's records in the possession of a third-party recordkeepers such as financial institutions." *Id.* at 575 (emphasis added).

After examining the language of 12 U.S.C. § 3403(a) in the context of the statute as a whole, its legislative history, and rulings by other courts that had addressed the issue, the District Court found that "[t]he problem for Plaintiffs is that taken in its totality, their Complaint does not allege that any of their financial information was disclosed to the Government. ... Plaintiffs have not made any showing that the Government is now, or ever was, in possession of their financial

information." [Memorandum Opinion, RE 28, Page ID #199]. The meaning of the word "access" suggested by Plaintiffs would lead to the absurd result of holding a financial institution liable for a purely hypothetical occurrence that has not happened and likely never will happen. As the District Court properly concluded, Plaintiffs' RFPA claim is "premised upon conjecture and requires the kind of speculation that the Supreme Court has prohibited," [Memorandum Opinion, RE 28, Page ID # 200] and therefore warranted dismissal pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

CONCLUSION

For the reasons set forth above, BB&T respectfully submits that the District Court's dismissal of Plaintiff's Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) should be affirmed in all respects.

This 15th day of January, 2016.

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(A)(7)

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because:

   this brief contains 4,210 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(b)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 37(a)(5) because:

   this brief has been prepared in a proportionately spaced typeface using Microsoft Word version 2010 in 14 point Times New Roman.

This 15th day of January, 2016.

/s/ Summer H. McMillan
Attorney for Defendant/Appellee,
Branch Banking and Trust Company

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of January, 2016 I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all CM/ECF participants in this matter through the Sixth Circuit ECF system.

/s/ Summer H. McMillan
Summer H. McMillan

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Doc. 1	Complaint [Page ID # 1-52 (including exhibits)]
Doc. 14	Motion to Dismiss [Page ID # 105-107]
Doc. 15	Memorandum of Law in Support of Motion to Dismiss [Page ID# 108-115]
Doc. 18	Brief of Law in Opposition to Motion to Dismiss [Page ID # 121-55]
Doc. 19	Reply to Plaintiffs' Brief of Law in Opposition to Motion to Dismiss [Page ID# 156-59]
Doc. 28	Memorandum Opinion [Page ID# 194-201]
Doc. 29	Judgment [Page ID# 202]
Doc. 30	Notice of Appeal [Page ID# 203-04]

IN THE COURT OF APPEALS FOR THE STATE OF TENNESSEE
FOR THE MIDDLE SECTION
AT NASHVILLE

Patricia Wilkins, Successor Administratrix Ad Litem of Estate of Sarah Margaret Wilkins, Deceased, and on behalf of the wrongful death beneficiaries of Sarah Margaret Wilkins	)	
Plaintiff,	)	
v.	)	**Appeal No. _____**
GGNSC Springfield, LLC d/b/a Golden LivingCenter-Springifield; GGNSC Administrative Services, LLC d/b/a Golden Ventures; GGNSC Clinical Services, LLC; GGNSC Holdings, LLC d/b/a Golden Horizons; Golden Gate National Senior Care, LLC d/b/a Golden Living; GGNSC Equity Holdings, LLC; Golden Gate Ancillary, LLC d/b/a Golden Innovations; and Lori Ann Chambers in her capacity as Administrator of Golden LivingCenter-Springfield	)	**Robertson County Circuit Court No. 74CC1-2012-CV-446**
Defendants	)	

APPLICATION OF DEFENDANTS FOR PERMISSION TO FILE AN INTERLOCUTORY APPEAL FROM THE CIRCUIT COURT'S SEPTEMBER 28, 2017 ORDER DENYING MOTION FOR PROTECTIVE ORDER REGARDING PUNITIVE DISCOVERY

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IN THE COURT OF APPEALS FOR THE STATE OF TENNESSEE
FOR THE MIDDLE SECTION
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Patricia Wilkins, Successor Administratrix Ad Litem of Estate of Sarah Margaret Wilkins, Deceased, and on behalf of the wrongful death beneficiaries of Sarah Margaret Wilkins	)	
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Defendants	)	

APPLICATION OF DEFENDANTS FOR PERMISSION TO FILE AN INTERLOCUTORY APPEAL FROM THE CIRCUIT COURT'S SEPTEMBER 28, 2017 ORDER DENYING MOTION FOR PROTECTIVE ORDER REGARDING PUNITIVE DISCOVERY

I. STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether the Circuit Court erred in denying Defendants' Motion for Protective Order Regarding Punitive Discovery Propounded by Plaintiff, thereby compelling the unprotected, virtually unlimited disclosure of three years of documents totaling in excess of 8,600 pages of highly sensitive and confidential financial information. The production would include disclosing

the day-to-day banking transactions reflected on bank statements, the parties to those transactions, profit and loss statements, balance sheets, and federal income tax returns of each of the seven separate corporate entities that are Defendants in this case. Because of the administrative and operational support services provided by some of the Defendants to companies other than the Springfield nursing facility, the proposed production would result in disclosure of the information of a separate hospice company, therapy company, companies that are not parties to this lawsuit, financial information that is subject to contractual confidentiality agreements, negotiated contract pricing with vendors, and payments to employees of the Defendants.

II. STATEMENT OF THE FACTS NECESSARY TO AN UNDERSTANDING WHY AN APPEAL BY PERMISSION LIES.

This case has been set for trial to begin on May 14, 2018. The parties have exchanged written discovery and expert disclosures, but to date Plaintiff has taken only one substantive deposition. On January 9, 2018 the trial court determined that interlocutory review of the wholesale denial of the protective order was necessary and appropriate in its Order and Statement of Reasons. (Appendix, No. 2). All of the claims in this case relate to care and treatment received by Sarah Margaret Wilkins at Golden LivingCenter-Springfield from July 26, 2010 to December 4, 2011. (Complaint, Appendix, No. 6, at ¶ 2). At all relevant times, only one of the Defendants, GGNSC Springfield, LLC, held the license to operate Golden LivingCenter-Springfield, and in fact operated that facility, including employing facility personnel and making staffing decisions. Employees of Defendant GGNSC Springfield, LLC, and not of any of the other Defendants, made individualized decisions about and provided care to the residents of the Springfield facility, including Ms. Wilkins. Budget documents as well as profit and loss statements for Golden LivingCenter-Springfield, as well as federal income tax return documents

for the operating entity, GGNSC Springfield, LLC, have already been provided to Plaintiff in the course of discovery in this case. Although Plaintiff has included a claim for punitive damages in the Complaint, Defendants submit that she has developed no proof in this case that would provide a basis for punitive damages against any of the Defendants, and certainly not against the Defendants that did not employ the individuals who were responsible for the day-to-day operations of the facility.

On May 3, 2017, Plaintiff propounded Punitive Discovery on Defendants consisting of requests for voluminous amounts of highly sensitive and confidential financial information for each and every one of the Defendants. In response, Defendants filed a Motion for Protective Order Regarding Punitive Discovery (Appendix, No. 3) seeking relief from the Court from the undue burden of responding to the Punitive Discovery propounded by Plaintiff on the grounds that Plaintiff has not been able to show through discovery in this case that a factual basis for punitive damages exists and that Plaintiff has not made the requisite showing for the Court to pierce the corporate veil and order production of sensitive financial information by the Defendants who did not operate the facility.

Specifically, despite having no evidence to support her theory, Plaintiff claimed in support of her argument that she is entitled to the discovery of the financial information of each of the seven corporate Defendants in this case that various Defendants are alter egos of each other, and that she should be permitted to pierce the corporate veil in order to hold each Defendant liable. However, piercing the corporate veil is an extreme remedy, and Tennessee courts have continually and adamantly urged that such a relief should "be applied with great caution and not precipitately, since there is a presumption of corporate regularity" and that "Tennessee law strongly disfavors piercing the corporate veil." *Schlater v. Haynie*, 833 S.W.2d

919, 925 (Tenn. Ct. App. 1991); *Prof'l Staffing Co., Inc. v. Cal W. Packaging Corp.*, 2015 WL 13102006, at *3 (W.D. Tenn. July 31, 2015); see also *F & M Mktg. Servs., Inc. v. Christenberry Trucking & Farm, Inc.*, 2017 WL 417223 (Tenn. Ct. App. Jan. 31, 2017). In fact, in order to show that a corporate veil should be pierced, a plaintiff will be required to prove that the corporation is nothing more than "a sham or dummy," and the court should act "with great caution and not precipitately, since there is a presumption of corporate regularity." *Schlater,* 833 S.W. 2d at 925; see also, *CAO Holdings, Inc. v. Trost,* 333 S.W.3d 73, 89 (Tenn. 2010) ("In this analysis, it is not necessary that all factors weigh in favor of piercing the corporate veil. It is necessary, however, that the equities substantially favor the party requesting the court to disregard the corporate status."). There is not a shred of evidence in the record in this case that any of the corporate entities named as Defendants in this lawsuit are "sham" or "dummy" entities or that there has been any fraud or similar misconduct present in the operation of the various corporate entities named as Defendants. Instead, Plaintiff merely makes the conclusory assertion that "[h]ere, the evidence obtained thus far shows that Defendants were acting as a single entity in the overall management, ownership, and operation of the Facility, and used the various LLCs, including the Facility, as mere instrumentalities." (Plaintiff's Response to Defendants' Motion for Protective Order Regarding Punitive Discovery, Appendix, No. 4, at p. 7). The actual evidence in the record in this case, however, clearly shows just the opposite.

Although only one substantive deposition has been taken in this lawsuit, thousands of pages of documents have been produced, and Defendants have responded to multiple interrogatories propounded by Plaintiff. With respect to GGNSC Springfield, LLC, the operator of the facility at all times relevant to this lawsuit, Defendants have produced: (1) the Facility's Operating Agreement, (2) the Administrative Services Agreement, (3) the Billing and Collection

Agreement, (4) the Clinical Services Agreement, (5) the Therapy Services Agreement, (6) the Facility's Certificate of Formation, and (7) the Facility's Certificate of Foreign Qualification. Additionally, Defendants' responses to Plaintiff's Interrogatories fully outline the relationship between each of the various Defendants, and detailed financial information regarding Golden LivingCenter-Springfield. Despite the voluminous discovery described above, Plaintiff is incapable of providing any factual basis that any Defendant corporation is a "sham" or a "dummy," or that any Defendant has been used to accomplish "a fraud or injustice in contravention of public policy."

Plaintiff has pointed to a portion of the Facility's Medicaid Level One Cost Report, out of context, claiming that it shows Defendants "diverting" payments made to the Facility for resident care to other Defendant LLCs. (Plaintiff's Response to Defendants' Motion for Protective Order Regarding Punitive Discovery, Appendix, No. 4, at pp. 7-8 and Exhibit H thereto). What that report shows, however, is not that Defendants "diverted" any funds, but that payments were made to two of the other Defendant LLCs (along with payments made to other entities that are not parties to this lawsuit) for services rendered -- quality assurance and consulting services, as well as administrative services including but not limited to payroll, bookkeeping, and accounting pursuant to contracts between those other Defendant LLCs and the Facility. Copies of the contracts between the entities for provision of these services have been provided to Plaintiff in discovery. The payment of affiliated companies for providing goods and services is presumptively legitimate given the fact that it is regulated by and reported to the Centers for Medicare and Medicaid Services. Plaintiff has failed to state how payments made to other entities for services rendered pursuant to contract constitutes any one of the enumerated factors

for piercing the corporate veil or demonstrates in any way that Golden LivingCenter-Springfield was a "sham" or a "dummy" or as a mere instrumentality of one of the other corporate entities.

Similarly, Plaintiff has attempted to use the Operating Agreements for the various Defendants to show that some of the LLCs have members in common. Again, however, she has not made any showing whatsoever of how some commonality of members and/or initial manager as listed in the Operating Agreements constitutes any one of the enumerated factors for piercing the corporate veil or demonstrates in any way that GGNSC Springfield, LLC was a "sham" or a "dummy" or was a mere instrumentality of one of the other corporate entities.

Finally, Plaintiff has misstated and mischaracterized the deposition testimony of a former nurse consultant and a former Regional Director of Operations in an attempt to show "how connected the companies really are." (Plaintiff's Response to Defendants' Motion for Protective Order Regarding Punitive Discovery, Appendix No. 4, at p. 9). Jill Raymer, the former nurse consultant, did not, as Plaintiff claimed, testify that "she believed her boss was Bruce DiBernardo, who was a director of operations...." (*Id*). To the contrary, Ms. Raymer testified that as a regional nurse consultant she was part of a "regional team" along with a regional director of operations and a regional dietician. (Excerpts from Deposition of Jill Raymer, attached to Defendants' Reply to Plaintiff's Response to Motion for Protective Order Regarding Punitive Discovery, Appendix, No. 5, as Exhibit D, at 17). She did not even remember to a certainty whether Bruce DiBernardo was the regional director of operations on that team in 2010, and she testified that as regional nurse consultant she reported to a "divisional clinical person" -- not Bruce DiBernardo. (*Id.* at 27). Furthermore, in the deposition of Bruce DiBernardo from another case, cited by Plaintiff in her Response, Mr. DiBernardo testified that he was not Ms. Raymer's boss, but (consistent with Ms. Raymer's deposition testimony cited above) that "[s]he

reported to a member of the clinical support team...." (Excerpts from Deposition of Bruce DiBernardo, attached to Defendants' Motion for Protective Order Regarding Punitive Discovery, Appendix No. 3, as Exhibit E, at 36-37). Plaintiff in her Response to Defendants' Motion for Protective Order Regarding Punitive Discovery clearly misstated and mischaracterized the deposition testimony of these individuals in a futile attempt to make some showing that would constitute a basis for piercing the corporate veil. The evidence that Plaintiff has attempted to use for that purpose simply does not exist.

Plaintiff's attempt to pierce the corporate veil in this case is utterly meritless, and that meritless argument is Plaintiff's only articulable basis for her claim that she is entitled to discovery of the highly sensitive and confidential financial information of each and every one of the seven corporate Defendants in this case. She cannot make the requisite showing of any of the factors set forth in the applicable case law, and she has failed to make any showing whatsoever that GGNSC Springfield, LLC d/b/a Golden LivingCenter-Springfield was a "sham" or a "dummy" or a mere instrumentality of one of the other corporate entities. In the absence of such a showing, the extreme remedy of piercing the corporate veil is unwarranted as a matter of law.

Despite the lack of evidence in the record to support piercing the corporate veil between and among the corporate Defendants in this case, the trial court entered an Order on September 28, 2017 denying Defendants' Motion for Protective Order in its entirety and requiring Defendants to respond to Plaintiff's Punitive Discovery and produce their highly sensitive and confidential financial information by November 15, 2017.

The trial court's September 28, 2017 Order would require the production of detailed and voluminous information relating to financial transactions of other non-party companies. The parent companies used an administrative company, GGNSC Administrative Services, LLC d/b/a

Golden Ventures, to achieve cost savings in providing collection, treasury, payable, purchasing, payroll, and other services to this single Defendant business unit GGNSC Springfield, LLC—one of a collection of 300 in a similar business. There are literally thousands of transactions per day that involve receipts for services, payments for goods and services bought from third parties and intra-company providers that are recorded in books and records kept by GGNSC Administrative Services, LLC d/b/a Golden Ventures. The Order issued by the trial court on September 28, 2017 makes no effort to winnow that enormous load of information down to something that will inform Plaintiff about the issues in this case, or even about the structure of the companies and assignment of management responsibility. A single document, the balance sheet and the Profit and Loss Statement of GGNSC Springfield, LLC d/b/a Golden LivingCenter-Springfield, would tell Plaintiff whether money was being made. A single document, the Profit and Loss Statement at the GGNSC Holdings, LLC d/b/a Golden Horizons level, would tell Plaintiff whether the company made any money on skilled nursing facility services at all. Thus, the September 28, 2017 Order issued by the trial court was grossly and unnecessarily broad in its scope.

Defendants then moved the trial court for permission to file an application for interlocutory appeal in this Court, which the trial court granted in its Order and Statement of Reasons entered on January 9, 2018.

Defendants now submit this Application for Permission to File an Interlocutory Appeal from the trial court's September 28, 2017 Order Denying Motion for Protective Order Regarding Punitive Discovery.

III. STATEMENT OF REASONS SUPPORTING AN IMMEDIATE APPEAL

Rule 9 of the Tennessee Rules of Appellate Procedure sets forth the standard for granting permission to file an interlocutory appeal. Under Rule 9, the following factors are relevant in assessing whether an interlocutory appeal is appropriate:

> (1) the need to prevent irreparable injury, giving consideration to the severity of the potential injury, the probability of its occurrence, and the probability that review upon entry of final judgment will be ineffective;
>
> (2) the need to prevent needless, expensive, and protracted litigation, giving consideration to whether the challenged order would be a basis for reversal upon entry of a final judgment, the probability of reversal, and whether an interlocutory appeal will result in a net reduction in the duration and expense of the litigation if the challenged order is reversed;
>
> and
>
> (3) the need to develop a uniform body of law, giving consideration to the existence of inconsistent orders of other courts and whether the question presented by the challenged order will not otherwise be reviewable upon entry of final judgment.

Tenn. R. App. P. 9(a). These factors are discretionary, and a court may consider any other factors that the court believes weigh in favor of an interlocutory appeal. Tenn. R. App. P. 9(a) ("the following, while neither controlling nor fully measuring the court's discretion, indicate the character of the reasons that will be considered."). These considerations neither control nor fully measure the court's discretion, and it is not necessary that they all be present in order to grant permission for interlocutory appeal. *Id.*; see, e.g., *Comm. to Oppose the Annexation of Topside and Louisville Road v. City of Alcoa*, 881 S.W.2d 269 (Tenn. 1994) (interlocutory appeal granted where only one of the considerations was present).

The trial court determined that interlocutory review of this matter was necessary and appropriate for at least two of these reasons in its January 9, 2018 Order and Statement of

Reasons (Appendix, No. 2). The same factors, set forth more specifically below, that led the trial court to conclude that interlocutory review of this issue was appropriate should lead this Court to the same conclusion. Defendants submit that this Court should grant their Application for Permission to Appeal because there is a need to prevent irreparable injury to Defendants and there is a need to develop a uniform body of law regarding the scope of discovery allowable under circumstances such as those presented in this case.

A. Defendants will suffer irreparable injury if this appeal is not granted.

The trial court found, as set forth in its Statement of Reasons pursuant to Rule 9(b), that Defendants will suffer irreparable injury if this interlocutory appeal is not granted:

> Defendants have satisfied legal criterial under T.R.A.P. 9(a)(1), making this Court's Order of September 28, 2017 denying Defendants' Motion for Protective Order [R]egarding Punitive Discovery Propounded by Plaintiff appealable, in that granting this interlocutory appeal will prevent irreparable injury, giving consideration to the severity of the potential injury, the probability of its occurrence, and the probability that review upon entry of final judgment will be ineffective. The production of documents and information responsive to the Punitive Discovery propounded by Plaintiff in this case will impose an enormous burden upon Defendants in terms of accumulating the thousands of pages [of] information requested, reviewing the documents, determining whether those documents are responsive and/or privileged, and redacting and producing the documents. **The information that this Court has ordered to be produced is of a highly sensitive and confidential nature, consisting of the bank statements, profit and loss statements, balance sheets, and federal income tax returns of each of the seven separate corporate entities that are Defendants in this case. Once these documents have been produced to Plaintiff, the disclosure of the highly sensitive and confidential financial information cannot be undone should an appellate court determine on appeal from a final judgment in this case that this Court's denial of a protective order preventing the disclosure of the financial information was in error.**

(January 9, 2018 Order, Appendix, No. 2) (emphasis added).

Defendants are asking for the opportunity to present the proof in the record to this Court on interlocutory appeal for a determination as to whether the trial court's September 28, 2017 Order was in error. If the trial Court's Order should be deemed erroneous on appeal after final

judgment has been entered in this case, and therefore after the production to Plaintiff of the bank statements, tax returns, profit and loss statements, and balance sheets of seven separate corporate entities, six of which did not operate the facility, there will be no remedy for Defendants. Their highly sensitive and confidential information will already be in the hands of Plaintiff and Plaintiff's counsel, and that compelled disclosure is a harm that cannot be undone on appeal after the fact.

The compelled production of any documents later ruled erroneous by the Court of Appeals is the paradigm of irreparable harm because it is not able to be repaired or undone once the information has been placed into the hands of the other side. This situation is precisely the harm that an interlocutory appeal is designed to prevent. *State v. Harrison*, 270 S.W.3d 21, 30 (Tenn. 2008); see also, *Loveall v. Am. Honda Motor Co.*, 694 S.W.2d 937, 939 (Tenn. 1985) (accepting an application for appeal that the Tennessee Court of Appeals denied and holding that "irreparable injury would be done to the defendants if the information was released and it was held on appeal that the protective order should have issued"). Defendants submit that the compelled production of sensitive and confidential financial information is directly analogous to the compelled production of privileged information in that if it is later determined by an appellate court that Plaintiff did not make the requisite showing of a factual basis for punitive damages and/or a factual basis for piercing the corporate veil between and among the corporate defendants, there will be no recourse for Defendants once the information has already been disclosed to Plaintiff and Plaintiff's counsel.

Numerous other jurisdictions have likewise held that a party is irreparably injured when it is ordered to produce documents that are later determined to be privileged or otherwise non-discoverable, and an interlocutory appeal is, thus, necessary. *Bank of Am., N.A. v. Superior*

Court of Orange Cnty., 151 Cal. Rptr. 3d 526, 545 (2013) (holding that an "[a]ppeal from a final judgment is not an adequate remedy when a court orders production of privileged materials because, once the privileged materials have been disclosed, the harm has occurred and cannot be undone"); *McDonald's Restaurants of Florida, Inc. v. Doe,* 87 So. 3d 791, 794 (Fla. Dist. Ct. App. 2012) (holding that "[a]n order requiring disclosure of trade secrets may cause irreparable injury that cannot be corrected on appeal; the disclosure lets the 'cat out of the bag'") (internal citation omitted); *Heartland Express, Inc., of Iowa v. Torres*, 90 So. 3d 365, 367 (Fla. Dist. Ct. App. 2012) (holding that "[a]n order erroneously compelling discovery of privileged information is reviewable by certiorari because an order requiring disclosure of privileged information may cause irreparable injury") (internal citation omitted); *Progressive Am. Ins. Co. v. Lanier*, 800 So. 2d 689, 691 (Fla. Dist. Ct. App. 2001) (holding that "requiring . . . erroneous production of these privileged and/or protected documents cannot be remedied on appeal, and thus may result in a miscarriage of justice"); *The St. Luke Hospitals, Inc. v. Kopowski*, 160 S.W.3d 771, 775 (Ky. 2005) (holding that "extraordinary relief is warranted to prevent disclosure of privileged documents[because t]here is no adequate remedy on appeal because privileged information cannot be recalled once it has been disclosed"); *Haynes v. Anderson*, 597 So. 2d 615, 617-18 (Miss. 1992) (holding, "[i]f the matter thought privileged is ordered disclosed and is in fact disclosed, our later reversal would be founded on the Humpty Dumpty syndrome[, and o]ne can easily see how Humpty Dumpty, once broken, could not be put back together again") (internal citation omitted); *Ebony Lake Healthcare Ctr. v. Texas Dep't of Human Servs.*, 62 S.W.3d 867, 874 (Tex. App. 2001) (holding that the healthcare provider would suffer "irreparable harm" and "noncompensable injury" if it was required to produce peer review documents that were later determined to be privileged); *O'Connell v. Cowan*, No. 2013-SC-000445-MR, 2014 WL 702309,

at *3 (Ky. Feb. 20, 2014) (holding that, "[b]ased on the mere claim that privileged documents may be disclosed, Appellants have proven the threshold showing of a lack of an adequate remedy by appeal, and that they will suffer great and irreparable injury").

As stated above, just as with the compelled disclosure of privileged or otherwise non-discoverable information, the injury sustained by Defendants by the compelling them to disclose their confidential financial information would be inevitable and irreparable because once these documents are disclosed to Plaintiff's counsel (who have numerous other lawsuits pending against these same Defendants in this jurisdiction and others) there is no remedy available if this Court later determines that the trial court's order was in error and the documents should have been protected from disclosure. If the trial court's September 28, 2017 Order should be deemed erroneous after the trial of this matter and therefore after the production to Plaintiff of the bank statements, tax returns, profit and loss statements, and balance sheets of six separate corporate entities, there will be no remedy for Defendants. Their highly sensitive and confidential information will already be in the hands of Plaintiff and Plaintiff's counsel, and that is a harm that cannot be undone on appeal after the fact.

B. An interlocutory appeal would aid further development of the law.

The trial court further found, as set forth in its statement of reasons pursuant to Rule 9(b), that an interlocutory appeal would aid further development of the law:

> Defendants have satisfied legal criteria under T.R.A.P. 9(a)(3), making this Court's Order of September 28, 2017 denying Defendants' Motion for Protective Order [R]egarding Punitive Discovery Propounded by Plaintiff appealable, in that granting this interlocutory appeal will help to develop a uniform body of law, giving consideration to the existence of inconsistent orders of other courts and whether the question presented by the challenged order will not otherwise be reviewable upon entry of final judgment. **This Court finds that there is a dearth of appellate court guidance on this issue, and this Court deems it important to have appellate court guidance on the scope of discovery allowable under the present circumstances. Additionally, this Court notes**

> **that there are numerous other pending cases in this Court and other courts across the state and in other jurisdictions where these issues need to be resolved, hence the need for a uniform body of law on this issue.**

(January 9, 2018 Order, Appendix, No. 2) (emphasis added).

The leading case, and indeed the only published opinion of this Court regarding the scope of discovery and the standard for compelling discovery of financial information in a case alleging punitive damages, is the 1980 case of *Breault v. Friedli*, 610 S.W.2d 134, 139 (Tenn. Ct. App. 1980):

> ...under certain circumstances **the privacy interests of the defendant outweigh the discovery rights of the plaintiff.** It is difficult to justify compelled disclosure of personal finances when the allegations of conduct supporting punitive damages have no basis in fact.

(emphasis added).

In *Breault*, the Tennessee Court of Appeals ultimately adopted the approach set forth in *Cobb v. Superior Court for Los Angeles County*, 99 Cal. App. 3d 543, 160 Cal. Rptr. 561 (1980), noting that "[t]he procedures necessary to the adoption of the Cobb approach are well established in Tennessee law." *Breault*, 610 S.W.2d at 139. *Cobb* requires that a plaintiff must be able to prove from discovery on the merits that a factual basis for punitive damages exists before being permitted to discover the defendants' financial condition. *Id.* "If the plaintiff is unable to show through discovery that a factual basis for punitive damages exists, the trial court can prohibit discovery of the defendant's financial condition under TRCP 26.03(1)." *Id.* at 139-40.

The burden of establishing some basis for punitive damages is a difficult one to meet in most cases, and courts that have addressed this issue in the wake of *Breault* regularly deny discovery requests for financial information. *See, e.g., Auston v. Home Realty Co. of Memphis, Inc.*, 2011 WL 13162043, at *2 (W.D. Tenn. Feb. 22, 2011) (granting motion for protective order and prohibiting discovery of financial information because plaintiff had not shown "a factual

basis for punitive damages"); *Wells v. Epes Transp. Sys., Inc.*, 2006 WL 1050670, at *2 (E.D. Tenn. Apr. 20, 2006) (denying motion to compel financial information because plaintiff failed to prove "a sufficient factual and legal basis for her punitive damages claim"); *Treace v. UNUM Life Ins. Co.*, 2004 WL 3142215, at *8 (W.D. Tenn. Aug. 10, 2004) (denying discovery of financial information because "[plaintiff] has made no showing at this point through discovery in this case that a factual basis for punitive damages exist."); *Cook v. Caywood*, 2004 WL 3142221, at *2 (W.D. Tenn. Dec. 15, 2004) (granting motion for protective order and denying discovery of tax returns until plaintiff can show "a factual basis for punitives"); *Kibbler v. Richards Med. Co.*, 1992 WL 233027, at *5 (Tenn. Ct. App. Sept. 23, 1992) (finding that trial court acted properly when it "prohibit[ed] discovery of the defendant's financial position" because plaintiff did not prove a factual basis for punitive damages).

Plaintiff was able to locate and cite to the trial court two unpublished cases in which federal district courts in Tennessee did order the discovery of certain financial information. In *Westbrook v. Charlie Sciara & Son Produce Co*, 70 Fed. R. Serv.3d 261, 2008 WL 839745, (W.D. Tenn. Mar. 27, 2008), the court found that a sufficient factual basis for punitive damages had been established against the one named corporate defendant, a family owned produce company, and allowed discovery of bank account statements, federal tax returns, financial reports, profit and loss statements, and balance sheets. However, that case does not stand for the proposition that seven separate corporate defendants should be compelled to produce all such documents, totaling thousands of pages. Similarly, the other unreported federal case cited by Plaintiff, *Zielke v. Vision Hospitality Group, Inc.*, 2015 WL 9876950 (E.D. Tenn. Nov. 3, 2015), merely stands for the proposition that a plaintiff is entitled to discovery of certain financial information indicative of a defendant's net worth prior to trial. It does not hold that a request for

all the monthly statements for all checking, savings, and investment accounts, federal tax returns, financial reports, profit and loss statements, and balance sheets requested by Plaintiff in this case from seven different corporate entities (only one of which was the operator of the facility) is reasonable in its scope. In fact, the *Zielke* court clearly states that "...there are ultimate and necessary bounds to discovery" and that "[i]t is well established that the scope of discovery is within the sound discretion of the trial court." 2015 WL 9876950 at *1 (citing *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 361 (1987) and quoting *Coleman v. Am. Red Cross*, 23 F.3d 1091, 1096 (6th Cir. 1994) (in turn quoting *United States v. Guy,* 978 F.2d 934, 938 (6th Cir. 1992)).

As the trial court pointed out in its Order and Statement of Reasons (Appendix, No. 2), the existence of inconsistent orders of other trial courts on the scope of discovery allowable under these circumstances, the paucity of appellate court guidance, and the numerous other pending cases in Robertson County and other jurisdictions involving the same issues all indicate that there is a need for further development of a uniform body of law on these important issues.

IV. CONCLUSION

The trial court's September 28, 2017 Order Denying Defendants' Motion for Protective Order Regarding Punitive Discovery Propounded by Plaintiff involves serious legal issues impacting the privacy rights of Defendants over their sensitive and confidential financial information, the disclosure of which cannot be remedied or undone with an appeal as of right after a final judgment in this case. These issues affect not only the Defendants in this case, but also in other cases in the same jurisdiction and in jurisdictions across the state involving similar allegations and the same discovery issues. Thus, an interlocutory appeal under these circumstances has the potential to prevent irreparable harm to Defendants and to provide the

Tennessee Court of Appeals and/or the Tennessee Supreme Court with an opportunity to develop a uniform body of law regarding the scope of discovery in cases such as this one alleging punitive damages. Therefore, Defendants respectfully request that this Court grant their Application for Permission to File an Interlocutory Appeal.

Respectfully submitted this 18th day of January, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of January, 2018, a copy of the foregoing has been served by e-mail and United States mail, postage prepaid, to:

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APPENDIX

1. Order Appealed from:
   Order Denying Motion for Protective Order Regarding Punitive Discovery Propounded by Plaintiff

2. Trial Court's Order Granting Motion for Interlocutory Appeal and Statement of Reasons

3. Defendants' Motion for Protective Order Regarding Punitive Discovery Propounded by Plaintiff

4. Plaintiff's Response to Defendants' Motion for Protective Order Regarding Punitive Discovery Propounded by Plaintiff and Cross Motion to Compel

5. Defendants' Reply to Plaintiff's Response to Defendants' Motion for Protective Order Regarding Punitive Discovery Propounded by Plaintiff and Response to Cross Motion to Compel

6. Complaint[1]

7. Certification of Record[2]

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[1] Voluminous copies of attachments to the Complaint required by Tenn. Code Ann. § 29-26-101, *et seq.* have been removed from the copy of the Complaint contained in this Appendix for the sake of brevity.

[2] A facsimile copy of the certified Order Granting Interlocutory Appeal and Statement of Reasons has been included in this Appendix because Defendants were unable to obtain the original in time for the filing of this Application due to the closing of the Robertson County Circuit Court for inclement weather and the Martin Luther King holiday. Should this Court deem it necessary, Defendants will supplement this Appendix with an original of the certified Order Granting Interlocutory Appeal and Statement of Reasons.