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.

Associate General Counsel, University of Tennessee

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

Licensed 2003, Board No. 023073

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.

No states other than Tennessee. Admitted in the U.S. District Courts for the Eastern, Middle, and Western Districts of Tennessee.

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).

- University of Tennessee, Associate General Counsel, April, 2015 – present
  Assistant General Counsel, November, 2011 – April, 2015
- Paine, Tarwater, and Bickers, LLP, Partner, January, 2011 – November, 2011
  Associate, October, 2004 – January, 2011
- Law Office of J.D. Lee, Associate, October, 2003 – October, 2004
  Law clerk, June, 2001 – October, 2003
- Knoxville Symphony Orchestra, Second trombone/associate principal trombone, 1997 - present

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

N/A

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

I represent the University of Tennessee System/State of Tennessee in tort and workers' compensation claims before the Tennessee Claims Commission, in Circuit Court, and on appeal; I represent the University in Uniform Administrative Procedure Act contested cases at the administrative level, Chancery Court judicial review, and any appeal from Chancery Court; and I advise various University individuals and groups regarding risk, potential liability, workers' compensation, HIPAA, FERPA, Public Record Act requests, and other compliance issues. My litigation primarily originates from the Knoxville or Chattanooga campuses, although I have matters from the other campuses from time to time. I estimate that my practice breaks down as follows:

- Health care liability – 30%
- Premises liability – 15%
- Auto liability – 15%
- Workers' compensation – 5%
- Defamation – rare
- Other negligence claims – 10%
- UAPA contested cases – 10%
- Appeals – less than 5%
- Advising – 10%

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

My legal career has been entirely in civil law and almost entirely in litigation. My current

practice areas are described in the preceding response. I am the only UT lawyer on the eastern side of the state with tort and workers' compensation responsibilities, so I am responsible for all pleadings, motion practice, discovery, expert witnesses, trial, and any appeals in those cases. In representation of the state, I coordinate with the Attorney General's Office on issues of state-wide application and on any appeals. In my various responsibilities, I have tried cases in the Claims Commission, tried UAPA contested cases before administrative judges, litigated judicial review of UAPA contested cases in Chancery Court, and have represented the state in appeals before the Court of Appeals.

When practicing with Paine, Tarwater, I represented individual and corporate clients, primarily defendants, in all aspects of pre-trial, trial, and appellate litigation. My practice areas included products liability, toxic torts, health care liability, personal injury, real property disputes, commercial litigation, estate-related litigation, and contract disputes. I litigated in both state and federal courts, primarily state courts. I was responsible for pleadings, motions, discovery, expert witnesses, and trials. I tried cases in state Session, Circuit, and Chancery courts and briefed appeals.

When practicing with the Law Offices of J.D. Lee, my practice consisted almost entirely of plaintiffs' personal injury in state and federal courts. I represented individuals in state and federal courts. I was responsible for pleadings, discovery, and motions.

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

If I asked any client about a matter of special note, he or she would of course identify his or her case. With that in mind, I will describe the case and result of which I am most proud. I represented three family members who had invested in ENRON bonds and lost the investment due to ENRON's fraud and subsequent bankruptcy. The amount of money at stake was not that large, especially when compared to other cases, but it was a significant sum to my clients. By strategically avoiding various class settlements and engaging in negotiations with individual defendants, my clients were able to recover the amount of their initial investment. Sadly, I think they were part of a very small group of individuals able substantially to recover their losses from that debacle. Although the amount of money at stake was not particularly noteworthy, I have always felt like I accomplished something good for my clients.

Additionally, I have been attorney of record in the following reported decisions:

- *DeBakkar v. Hanger Prosthetics & Orthotics East, Inc.*, 688 F. Supp. 2d 789 (E.D. Tenn. 2010)
- *Northeast Knox Utility Dist. v. Stanfort Const. Co.*, 206 S.W.3d 454 (Tenn. Ct. App. 2006) *app. denied* (Oct. 2, 2006)

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.

N/A

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.

My only experience in such a capacity was serving as executor of my father's estate.

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

I completed the 2008 International Association of Defense Counsel Trial Academy.

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 applied to be Tennessee Claims Commissioner for the Eastern Grand Division in the spring of 2017. If I recall correctly, a portion of the Trial Court Vacancy Commission held a series of candidate interviews on April 21, 2017. My name was not submitted to the Governor.

Also in the spring of 2017, I applied to be a federal magistrate in the Eastern District of Tennessee. I do not recall any type of hearing or committee interview, and I was not selected for the 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 College of Law, J.D., *summa cum laude* (3.93/4.3 GPA; class standing 2/144), May, 2003

- Named a top graduate of the 2003 class; Order of the Coif; Dean's List each semester; recipient, John W. Green Scholarship (2001-02 and 2002-03 academic years)

University of Tennessee, Knoxville, B.M., *summa cum laude* (3.87/4.0 GPA), May, 1998

- Tennessee Scholars Scholarship (Honors Program); Theodore Presser Musical and Academic Achievement Award
- United States Army Band Eastern Trombone Workshop National Classical Solo Competition, runner-up, 1998, semifinalist, 1997

PERSONAL INFORMATION

15. State your age and date of birth.

45; [redacted] 1974

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

45 years

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

20 years

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.

N/A

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.

None

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:

- *Joshua R. Walker, as Executor of the Estate of Joe H. Walker, v. Willard C. Kincannon, et. al.*, Roane County Chancery Court No. 2016-43, filed April, 2016. Before my father died, he had owned his home and used the same driveway for over 39 years. After his death, his neighbors claimed that they owned part of the driveway and that it could no longer be used. I could not convince the neighbors that my father had acquired a prescriptive easement to cross the driveway after 20 years of use, so I had to file suit on behalf of the Estate to enforce the prescriptive easement my father had acquired. The claim was settled and dismissed when the neighbors agreed to recognize the necessary

easement. I do not believe I was a nominal party because I had an interest in the subject property as a beneficiary of the Estate.

- *Joshua R. Walker v. Greg Black Mouthpieces*, New Jersey Small Claims Court, I cannot recall the docket number, filed in the spring of 2013. I ordered and prepaid for several trombone mouthpieces from Greg Black in 2012. The time for delivery was long past, and Greg would not respond to calls or emails. I filed suit after I learned that filing and effecting service in New Jersey Small Claims Court only cost $25 - $30. Shortly after filing suit, I received my mouthpieces, and the case was dismissed.

- *Randall E. Pearson, M.D., et. al. v. Paul Koczera, et. al.*, Anderson County Circuit Court No. B2LA0060, filed May, 2012. I, along with several others, was named as a third-party defendant in a malicious prosecution case. The third-party plaintiff was an attorney who had been my opposing counsel representing the plaintiffs in the case that was the basis of the malicious prosecution suit. The third-party claim was dismissed in December, 2012.

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.

Middlebrook Pike United Methodist Church

- Staff-Parish Relations Committee, 2004 – 05; 2014 – 16 (Chair 2015 – 16)
- Visioning Committee, 2006 – 09 (Chair, 2008 – 09)
- Church Leadership Council, 2008 – 09; 2015 – 16
- Youth counselor and Sunday school teacher, 2002 – present

FISH (Food In Service of Humanity) of Knox County, Board member, 2013 – present

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.

In middle and high school, I was a member of the Boy Scouts of America. At the time, they did not allow female members. I am no longer a member of the Boy Scouts.

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.

Knoxville Bar Association, 2003 – 2018, 2020 - present (I let my membership lapse by oversight last year – I have corrected that oversight)

- Former member, Judicial Committee
- Barristers Mobile Meals route coordinator for UT Office of General Counsel

National Association of College and University Attorneys, 2011 – present

I was previously a member of the Tennessee Bar Association but do not recall the exact dates. It was primarily while I practiced at Paine, Tarwater.

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.

N/A

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

- *To Party or Not to Party: Mann v. Alpha Tau Omega Fraternity*, DICTA, Vol. 39, Issue 9 (Oct. 2012)
- *The Tennessee Civil Justice Act of 2011: What a Difference a Day Made*, 47-Aug. Tenn. B.J. 20 (2011) (coauthored with John W. Elder) (cited in *In re New England Compounding Pharmacy, Inc. Products Liab. Litig.*, No. MDL 13-02419-RWZ, 2014 WL 4322409 at *5 (D. Mass. Aug. 29, 2014))

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.

I have taught multiple continuing legal education seminars for National Business Institute on damages, evidence, lay and expert witnesses, motion practice, statutes affecting liability, ethical issues, discovery issues, and other civil litigation issues. I cannot recall the exact dates or the exact number.

A few years ago, I participated on one of the teams for Knoxville Bar Association's Ethics Bowl.

A few years ago, I taught on ethics in settlement negotiations for Tennessee Attorney Memo's Medical Malpractice Conference.

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

None

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

No

34. Attach to this 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:

- Appellate brief in *Brown, et. al. v. Samples, et. al.* (at least 95%)
- Motion to dismiss and supporting memorandum in *Pluta, et. al. v. McElroy et. al.* (100%)
- Motion for summary judgment, supporting memorandum, and statement of undisputed material facts in *Cright v. State* (100%)

ESSAYS/PERSONAL STATEMENTS

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

I seek this position because I believe my best legal skills are particularly well suited to serve as an appellate judge, and I desire to serve the State and bar in the best way that I can. After impartiality, any judge should have superior knowledge of the law and the ability to apply that law to the facts of a case as efficiently as possible. My best legal skills are researching and analyzing the law, applying that law to the facts, and expressing the result cogently in writing. Because my best legal skills line up well with the core responsibilities of an appellate judge, I believe that this position would provide me the best opportunity to use my skillset to help serve the administration of justice in Tennessee.

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 not participated in any activities, such as a committee or task force, related to equal justice

under the law. In my daily practice of law, I attempt to achieve equal justice under the law by being firm in representation of my client while at the same time being as fair as possible to the opposing party, within the confines of my duties to my client.

Unfortunately, a downside to representing the University is that pro bono opportunities are limited because University attorneys cannot work on non-University matters except outside our working hours or while taking annual leave. This limitation makes pro bono representation very difficult. While in private practice, I attempted to accept pro bono appointments when I could, and, while at Paine, Tarwater, Don Paine would sometimes direct particular pro bono clients or issues to me and other attorneys at the firm.

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 seek appointment to the Eastern Section of the Tennessee Court of Appeals. The Court of Appeals consists of twelve judges and exercises state-wide appellate jurisdiction of all civil matters in Tennessee, except for worker's compensation claims. The position is based in East Tennessee but may hear cases any Grand Division.

If selected, I would have two main goals. First, I would work to continue the excellent work that the Court currently performs. Second, I would strive always to remember that, no matter how "important" a case may be from a precedential or similar standpoint, it is primarily important to the lives of the litigants involved. Because any decision I would make would have the most significant effect on the litigants involved, my goal would be to write opinions as accurately and promptly as possible.

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)***

My participation in community services is primarily through the various ministries of my church. I try to participate in these ministries as often as I can. Work with my church's FISH pantry is what led to me being on the board for FISH of Knox County. I believe community service should be more doing and less talking, so I tend to participate in things like FISH pantry food deliveries or Habitat for Humanity blitz days.

I enjoy working with children and youth in some type of educational settings. I have taught Sunday school (currently middle school) and have been a youth counselor since I began attending my current church 20 years ago. I particularly enjoy youth mission trips. Mission trips give one a set period of time, away from everyday distractions, to focus on serving where needed, and teenagers always bring an added energy and excitement to the work that adults sometimes lack.

If appointed, I intend to keep doing the same things I have been doing unless prohibited by a rule applicable to the judiciary. I would also be interested in educational or mentoring opportunities for new or aspiring lawyers.

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)***

Apart from my legal experience, I think my service on church committees well help me serve as a judge. Any disagreements within a church tend to be more difficult because of the emotional and spiritual investment people have in their church and because of the familial-like relationships between members of a church. Church issue can quickly become amplified because people are dealing with issues about which they are very powerful.

During my last stint as a member and then chair of my church's Staff-Parish Relations Committee, we had three pastoral changes in two years. This was a difficult period in which good, well-intentioned people that I had known and worshipped with for years fell passionately on opposite sides of various issues related to these changes. Addressing these different viewpoints was difficult knowing that any particular action would hurt people who advocated a different action. Eventually, as families do, my church got through the situation, unfortunately with some bumps and bruises along the way.

I hope that through this situation with my church, I learned to be a better listener, learned to be more open to different points of view, and learned more empathy, especially in a situation where a decision I am going to make will disappointing or even hurtful to someone. Such situations are virtually unavoidable for a judge, but hopefully I have learned to the "losing side" of an issue with appropriate respect and compassion.

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. In my personal opinion, the four-year statute of repose for improvements to real property, set forth at Tenn. Code Ann. §§ 28-3-201 *et. seq.*, is too short, at least for buildings or similar structures that should have anticipated lives of 30 – 50 years. For example, an architect could be negligent in designing an office building that collapses six years after substantial completion, killing and injuring multiple people. Because the injury occurs more than four years after substantial completion, no recovery is available. To me, the four-year repose period is too short in comparison to the reasonable anticipated life of such a building.

With that being said, I would apply this statute as written if serving as a judge. In my practice, I have asserted this statute of repose as a defense multiple times, despite my personal disagreement with the statute. As an attorney, I do not have the option to avoid asserting valid legal positions that benefit my clients because I may personally disagree with the substance of a particular law. As a judge, I would likewise be required to apply the law as written despite any personal disagreement I might have.

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. William O. Shults, retired Commissioner, Tennessee Claims Commission
B. Andrew R. Tillman, Arbitration and Complex Litigation Section Chair, London Amburn; former Chancellor, Tennessee Eighth Judicial District
C. Matthew M. Scoggins, Chief of Staff to Chancellor Donde Plowman, University of Tennessee, Knoxville
D. Deb Holly, Chairperson of Christian Education, Middlebrook Pike United Methodist Church
E. Don Hough, Emeritus Professor of Trombone, University of Tennessee

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: February 3, 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.

Joshua R. Walker
Type or Print Name

[signature]
Signature

2/3/2020
Date

TN 023073
BPR #

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

N/A

OVER THE COUNTER

COURT OF APPEALS FOR THE STATE OF TENNESSEE
EASTERN SECTION

FELISHA BROWN, et. al.

Claimants/Appellees,

No. E2013-00799-COA-R9-CV

v.

Rule 9 Appeal of Interlocutory Order
Tennessee Claims Commission No. T20120091

KAREN SAMPLES, M.D., et. al.

Defendants/Appellants.

FILED
2013 SEP 11 AM 10:42
KNOXVILLE

BRIEF OF DEFENDANT/APPELLANT STATE OF TENNESSEE

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COUNSEL FOR APPELLANT

ORAL ARGUMENT REQUESTED
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4. Hinkle v. Kindred Hosp., Public Case History 42

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6. Unreported Cases (arranged alphabetically) 46

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Cases

Cole v. State, No. 02A01-9801-BC-00004, 1998 WL 397374,
(Tenn. Ct. App. Jul. 16, 1998) no perm. app. filed 27

DePue v. Schroeder, No. E2010-00504-COA-R9-CV,
2011 WL 538865 (Tenn. Ct. App. Feb. 15, 2011)
perm. to app. denied Aug. 31, 2011 20,28

Foster v. Chiles, No. E2012-01780- COA-R3-CV,
2013 WL 3306594 (Tenn. Ct. App. June 27, 2013)
perm. to app. filed Aug. 26, 2013 6,7,11

Haley v. State, Tennessee Claims Commission No. T20120071, ... 4-5,16-18,21

Hinkle v. Kindred Hosp., No. M2010-02499-COA-R3-CV,
2012 WL 3799215 (Tenn. Ct. App. Aug. 31, 2012)
perm. to app. filed Oct. 29, 2012 13-16

Lee Med., Inc. v. Beecher, 312 S.W.3d 515, 527 (Tenn. 2010) 6,14

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I. STATEMENT OF THE ISSUES

Defendant/Appellant, the State of Tennessee ("Defendant"), by and through counsel, pursuant to Tenn. R. App. P. 27(a)(4) and as specifically articulated in the Court's April 16, 2013, Order identifying the issues, respectfully submits the following issues for the Court's consideration:

1. Whether Claimants/Appellees ("Claimants") complied with the pre-suit notice requirements set forth in Tenn. Code Ann. § 29-26-121, as to the State, when they provided pre-suit notice to all of the individual health care providers, and corporate and business entities involved in the delivery of Silas Brown, as well as the administrator[1] of the University of Tennessee Medical Center ("UTMC") and The University of Tennessee Graduate School of Medicine ("UTGSM")?

2. Whether any failure on Claimants' part to comply with the pre-suit notice requirements set forth in Tenn. Code Ann. § 29-26-121 was properly excused for "extraordinary cause shown" pursuant to the terms of the statute?

II. STATEMENT OF THE CASE/STATEMENT OF FACTS

Defendant, pursuant to Tenn. R. App. P. 27(a)(5), respectfully submits the following Statement of the Case:[2]

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[1] Respectfully, the UTMC was not served pre-suit notice via its administrator. Claimants' pre-suit notice sent to the UTMC was addressed simply as "University of Tennessee Medical Center[,] 1924 Alcoa Highway[,] Knoxville, Tennessee[,] 37920;" no specific recipient was identified. (R., Vol. I, pp. 39 – 41, 45, 46, 47 – 48.) Bennett L. Cox, the registered agent for University Health System, Inc. d/b/a UTMC was also served. (R., Vol. I, pp. 50 – 58.) Citations to the Technical Record shall be as R., Vol. __, p. __. Citations to the Transcript shall be as Tr., p. __. Citations to Exhibits shall be as Ex. __.

[2] As this Appeal turns on Claimants' failure to properly serve pre-suit notice on Defendant before commencement, the allegations pertaining to negligence in Claimant's Written Notice of Claim are irrelevant except that they sound in medical malpractice, making Tenn. Code Ann. § 29-26-121 applicable. For this reason, Defendant presents the Statement of the Case simultaneously as the relevant facts.

Claimant Felisha Brown gave birth to her son, Silas Brown, at the UTMC on October 13, 2010. (R., Vol. I, pp. 5 – 8.) Believing the medical care associated with this delivery to be negligent, on or about April 25, 2011, Claimants attempted by U.S. Mail pre-suit notice required by Tenn. Code Ann. § 29-26-121 on multiple individuals and entities:

- Karen L. Samples, M.D. ("Samples") (R., Vol. I, pp. 14 – 22.)
- the UTGSM (R., Vol. I, pp. 26 – 34.)
- the UTMC (R., Vol. I, pp. 38 – 46.)
- University Health System, Inc. ("UHS") d/b/a the UTMC c/o Registered Agent Bennett L. Cox (R., Vol. I, pp. 50 – 58.)
- Nirmala B. Upadhyaya, M.D. ("Upadhyaya") (R., Vol. II, p. 222.)
- University Obstetrics and Gynecology ("UOG") (R. Vol. II, pp. 223 – 230.)

Each of these letters referenced a potential medical malpractice claim based upon the October 13, 2010, delivery of Silas Brown.

Following the April 25, 2011, letters, Claimants received a letter dated April 29, 2011, from Michael Keating, Vice President, Risk Management for UHS. ("Keating letter") (R. Vol. III, p. 320.) In this letter, Keating responded on behalf of UHS and/or the UTMC to Claimants' pre-suit notice. (Id.) The Keating letter informed Claimants that Samples was a resident physician and therefore an employee of the State of Tennessee. (Id.) Thus, Claimants received information that one of the potential defendants was a State employee, and that the State would therefore necessarily be a defendant, over five (5) months before the statute of limitation expired on October 13, 2011.

On or about July 19, 2011, Claimants sent pre-suit notice as required by Tenn. Code Ann. § 29-26-121 to additional recipients:

- Mark D. Hennessy, M.D. ("Hennessy") (R., Vol. II, pp. 282 – 292.)
- High Risk Obstetrical Consultants, LLC ("HROC") (R., Vol. II, p. 293 – Vol. III, p. 303.)
- HROC c/o Registered Agent Jason P. Lambert (R. Vol. III, pp. 304 – 314.)

Also on or about July 19, 2011, Claimants sent a second letter to each of the April 25, 2011, recipients indicating that the July 19, 2011, recipients had also been provided pre-suit notice and enclosing a medical records release applicable to the records of the additional recipients. (R., Vol. I, pp. 23 – 25; 35 – 37; 47 – 49; 59 – 61; Vol. II, pp. 231 – 233.)

Following these various notice letters, Claimants, on January 31, 2012, filed in Knox County Circuit Court, docket no. 1-42-12, a complaint for medical malpractice[3] against Upadhyaya, UOG, Samples, UHS d/b/a UTMC, Hennessy, and HROC. (R., Vol. III, pp. 340 – 353.) This complaint alleged that Samples was a medical resident and/or fellow, that UHS does business as UTMC, and that UHS operated and managed UTMC at all material times. (R., Vol. III, pp. 343- 344.) This complaint was accompanied by a certificate of good faith. (R., Vol. III, pp. 316 – 318.) As this filing was made more than three (3) months after the one-year anniversary of the alleged negligence, Claimants relied upon the 120-day extension of the statute of limitation provided by Tenn. Code Ann. § 29-26-121(c) if pre-suit notice is given as provided in Tenn. Code Ann. § 29-26-121(a).

On February 9, 2012, pursuant to Tenn. Code Ann. § 9-8-402(a), Claimants filed with the Division of Claims Administration ("DCA") their Written Notice of Claim, listing Samples, the UTGSM, and the State of Tennessee as defendants. (R., Vol. I, pp. 3 – 12.) Just as in their Circuit Court complaint, Claimants alleged in their Written Notice of Claim that Samples was a

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[3] As of April 23, 2012, the General Assembly replaced the term "medical malpractice" with "health care liability" throughout the Tennessee Code. Defendant uses the term "medical malpractice" throughout this Brief as that term was effective when this Claim accrued and was commenced.

medical resident and/or fellow, including allegations that Samples's actions were imputed to the State of Tennessee/University of Tennessee. (R., Vol. I, pp. 4 – 5.) Claimants alleged their compliance with Tenn. Code Ann. § 29-26-121(a) and expressly stated their reliance on the 120-day extension of the statute of limitation[4] in Tenn. Code Ann. § 29-26-121(c). (R., Vol. I, p. 5.) A Tenn. Code Ann. § 29-26-122 certificate of good faith accompanied Claimants' Written Notice of Claim filed with the DCA. (R., Vol. I, pp. 63 – 65.)

Pursuant to Tenn. Code Ann. § 9-8-402(c), the Claim was transferred from the DCA to the Tennessee Claims Commission ("Commission") on May 9, 2012. (R., Vol. I, p. 1.) Following this transfer, Defendant filed on July 12, 2012, a Motion to Dismiss on the grounds (1) that Claimants had not provided pre-suit notice to Defendant as required by Tenn. Code Ann. § 29-26-121 and (2) that Claimants were therefore not entitled to the 120-day extension of the statute of limitation provided by Tenn. Code Ann. § 29-26-121(c), making their Written Notice of Claim untimely. (R., Vol. I, pp. 131 – 133.) The Commission denied Defendant's Motion to Dismiss by Order entered February 7, 2013, (R., Vol. IV, p. 529 – Vol. V, p. 682),[5] which Order was amended by an Order entered February 25, 2013. (R., Vol. V, pp. 686 – 688.) The Commission granted Defendant permission to seek interlocutory appeal by Order entered March 20, 2013, (R., Vol. V, pp. 689 – 691), and this Court granted interlocutory appeal by Order entered April 16, 2013.

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[4] February 9, 2012, was one year and 119 days after the date of alleged negligence, October 13, 2010.

[5] Attached as exhibits (R., Vol. IV, pp. 540, 554 – 555.) to the Commission's February 7, 2013, Order denying Defendant's Motion to Dismiss are the Commission's Orders addressing pre-suit notice and certificate of good faith issues in four other medical malpractice cases: Mize v. Haynes, Commission No. T20111820 (Mize I) and Mize v. State, Commission No. T20120569 (Mize II) (single Order for both Claims) (R., Vol. IV, p. 559 – Vol. V, p. 615); Haley v. State, Commission No. T20120071, Court of Appeals No. E2012-02484-COA-R3-CV (R., Vol. V, pp. 616 – 645); and Stinson v. State, Commission No. T20120397, Court of Appeals No. E2013-00358-COA-R9-CV. (R., Vol. V, pp. 646 – 679.)

III. ARGUMENT

Respectfully, the Commission erred when it found that Claimants had complied with the requirements of Tenn. Code Ann. § 29-26-121, were entitled to a 120-day extension of the statute of limitation, and demonstrated extraordinary cause to the extent they had not complied with the statute. The Claimants failed to comply with Tenn. Code Ann. § 29-26-121 because they did not provide pre-suit notice to the State as required by that unambiguous statute. Because Claimants did not comply with the pre-suit notice requirement, they were not entitled to the 120-day extension of the statute of limitation, making the commencement of their Claim untimely. Finally, the Claimants failed to establish extraordinary cause, and therefore failure to comply with the pre-suit notice requirement cannot be excused. For these reasons, the Court should reverse the Commission's denial of Defendant's Motion to Dismiss and remand this Claim for dismissal.

A. The Commission erred when it denied Defendant's Motion to Dismiss due to Claimants' failure to comply with Tenn. Code Ann. § 29-26-121 and resultant untimely commencement of their Claim.[6]

The Supreme Court recently announced the standard for deciding a motion such as Defendant's:

> The proper way for a defendant to challenge a complaint's compliance with Tennessee Code Annotated section 29–26–121 and Tennessee Code Annotated section 29–26–122 is to file a Tennessee Rule of Procedure 12.02 motion to dismiss. In the motion, the defendant should state how the plaintiff has failed to comply with the statutory requirements by referencing specific omissions in the complaint and/or by submitting affidavits or other proof. Once the defendant makes a properly supported motion under this rule, the burden shifts to the plaintiff to show either that it complied with the statutes or that it had

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[6] In this Claim, Claimants allege that Tenn. Code Ann. § 29-26-121 applies to claims against Defendant and that they satisfied the statute's requirements. (R., Vol. I, p. 5.) Defendant agrees that the statute applies but denies that Claimants complied with it. In Haley v. State, No. E2012-02484-COA-R3-CV, argued August 8, 2013, the appellant/claimant asserted that Tenn. Code Ann. § 29-26-121 does not apply to claims against the State. If the Court finds in favor of the Haley appellant and concludes that the statute is not applicable to the State, then the instant Claim must be dismissed as untimely because it was filed more than one year after the alleged malpractice.

extraordinary cause for failing to do so. Based on the complaint and any other relevant evidence submitted by the parties, the trial court must determine whether the plaintiff has complied with the statutes. If the trial court determines that the plaintiff has not complied with the statutes, then the trial court may consider whether the plaintiff has demonstrated extraordinary cause for its noncompliance.

Myers v. Amisub (SFH), Inc., 382 S.W.3d 300, 307 (Tenn. 2012).

1. The language of Tenn. Code Ann. § 29-26-121 is unambiguous, and the Commission improperly considered information outside the text of the statute.

The Eastern Section of this Court has determined that Tenn. Code Ann. § 29-26-121 is unambiguous. Foster v. Chiles, No. E2012–01780–COA–R3–CV, 2013 WL 3306594 at *4 and *5 (Tenn. Ct. App. June 27, 2013) perm. to app. filed Aug. 26, 2013[7] (App. p. 63) ("The clear and unambiguous language of section 121, as parsed above, supports this conclusion....Looking only at the words used in this clear and unambiguous statute, there is no support for the trial court's conclusion."). As stated in Foster, "[w]hen the import of a statute is unambiguous, [the Court] discern[s] legislative intent 'from the natural and ordinary meaning of the statutory language within the context of the entire statute without any forced or subtle construction that would extend or limit the statute's meaning.'" Id. at *2. See also Lee Med., Inc. v. Beecher, 312 S.W.3d 515, 527 (Tenn. 2010) ("When a statute's text is clear and unambiguous, the courts need not look beyond the statute itself to ascertain its meaning."). Because Tenn. Code Ann. § 29-26-121 is unambiguous, nothing beyond the text of the statute should be considered.

The Commission, in its Order denying Defendant's Motion to Dismiss, recognized this same principle of statutory construction: "if the language is not ambiguous...the plain and ordinary meaning of the statute must be given effect." (R., Vol. IV, p. 532.) The Commission then relied upon a related principle of statutory construction: "***when necessary to resolve a***

[7] Copies of all unreported opinions are included in the Appendix ("App.") to this Brief beginning at p. 46. The opinions are arranged alphabetically.

statutory ambiguity or conflict, courts may consider matters beyond the statutory text, including public policy, historical facts relevant to the enactment of the statute, the background and purpose of the statute, and the entire statutory scheme." (R., Vol. IV, pp. 532 – 533 (emphasis added).) Without specifically stating that Tenn. Code Ann. § 29-26-121 is ambiguous, the Commission, which did not have the benefit of the Foster decision, obviously found ambiguity because it considered multiple things beyond the text of the statute: portions of other statutes relating to post-commencement procedure in the DCA (R., Vol. IV, pp. 540 and 546 - 547); attempted pre-suit notice on UHS d/b/a UTMC, a separate entity from The University of Tennessee/State of Tennessee (R., Vol. IV, pp. 541 – 542 and 546); defenses raised by individual defendants in the related Knox County Circuit Court action (R., Vol. IV, pp. 541 and 546); and the so-called Civil Justice Act of 2011 ("CJA"). (R., Vol. IV, pp. 549 – 550 and 552.)

Because Tenn. Code Ann. § 29-26-121 is unambiguous, Defendant submits that the Commission's consideration of these extraneous matters was error. Further, Defendant submits that the "confusion" found by the Commission (R., Vol. IV, pp. 549, 552 – 553, and 556 - 557) simply does not exist in the statute itself but, as discussed in Section IV.B.2. below, is created by the injection of these extraneous matters. As stated by the Supreme Court, "[t]he requirements of these statutes [Tenn. Code Ann. §§ 29-26-121 and -122] are precisely stated. The statutes provide clear guidance and detailed instruction for meeting those requirements, and it is not [the Commission's] prerogative to rewrite the statutes." Myers, 382 S.W.3d at 310. Defendant submits that the Commission did exactly that: it rewrote the statute. Such action is reversible error.

2. The unambiguous language of Tenn. Code Ann. § 29-26-121 required Claimants to provide pre-suit notice to Defendant's agent for service of process; pre-suit notice to other employees of Defendant does not satisfy the statutory requirements.

Tennessee Code Ann. § 29-26-121(a)(1)[8] requires that pre-suit notice be given to each potential medical malpractice defendant in every medical malpractice claim filed in Tennessee:

> ***[a]ny person***, or that person's authorized agent, asserting a potential claim for medical malpractice shall give written notice of the potential claim to each health care provider that will be a ***named defendant*** at least sixty (60) days before the filing of a complaint based upon medical malpractice in any court of this state.

Id. (emphasis added). This unambiguous statute creates three straightforward requirements. First, "any person" asserting a potential medical malpractice claim must give pre-suit notice. Because Claimants fall in the category of "any persons," they were required to provide pre-suit notice. Second, notice of the potential claim must be provided to each health care provider that will be a named defendant. Because the State of Tennessee is the health care provider named as the defendant in this Claim, Claimants were required to provide Defendant pre-suit notice. Third, the pre-suit notice must be given at least sixty days before the claim is commenced. Putting these straightforward requirements together, Claimants were required to give notice of their potential medical malpractice claim to the State of Tennessee at least sixty days before the Claim was commenced.

Tennessee Code Ann. § 29-26-121(a)(3) gives clear instructions on how pre-suit notice is to be provided to the potential named defendants. Because Claimants attempted their various pre-suit notices by mail, Tenn. Code Ann. § 29-26-121(a)(3)(B)(ii) required that the pre-suit notice to Defendant be mailed

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[8] All citations in the Brief to Tenn. Code Ann. § 29-26-121 are to the 2009 version in effect both when this claim accrued October 13, 2010, and when it was commenced on February 9, 2012. A complete copy of the 2009 version of this statute is included in the Appendix at pp. 31 – 33.

> [t]o a health care provider that is a corporation or other business entity at both ***the address for the agent for service of process***, and the provider's current business address, if different from that of the agent for service of process; provided, that, if the mailings are returned undelivered from both addresses, then, within five (5) business days after receipt of the second undelivered letter, the notice shall be mailed in the specified manner to the provider's office or business address at the location where the provider last provided a medical service to the patient.

Id. (emphasis added). This subsection makes clear that, at a minimum, an entity's agent for service of process must receive the pre-suit notice for that entity.

For the State, two agents for service of process exist, and either is sufficient to satisfy the requirements of the statute. Rule 4.04(6) of the Tennessee Rules of Civil Procedure appoints the Attorney General or any Assistant Attorney General as the individual upon whom any plaintiff serves a summons and complaint against the State, i.e., an agent for service of process. The Rules of the Commission, Tenn. Comp. R. & Regs. 0310-01-01-.01(3),[9] eliminates the use of a summons as to the State for claims before the Commission. Filing a written notice of claim with the DCA acts as service of process on the State for claims before the Commission. As a result, the DCA is a de facto agent for service of process, at least for claims before the Commission. Because the Rules of Civil Procedure and the Commission's Rules make both the Attorney General and the DCA agents for service of process for the State for claims before the Commission, then both the State and all potential claimants must accept that at least one of these two agents is the proper recipient of pre-suit notice. If pre-suit notice is not mailed to one of these agents for service of process, the absolute minimum requirements of Tenn. Code Ann. § 29-26-121 have not been satisfied.

The Commission erroneously found that the State was on notice of the potential claim, despite Claimants' noncompliance with the plain terms of Tenn. Code Ann. § 29-26-

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[9] The Commission's rules are promulgated by the Commission pursuant to authority granted by Tenn. Code Ann. §§ 9-8-306 and 9-8-403(a). A complete copy of Tenn. Comp. R. & Regs. 0310-01-01-.01 is included in the Appendix at pp. 37 – 41.

121(a)(3)(B)(ii), for two reasons. First, the Commission stated that "[t]he State has identified no statutory or administrative regulation identifying either of those offices as the required recipient of pre-suit notice at the time this claim was instituted" (R., Vol. IV, p. 547), and that "any claimant seeking to find such a directive in April or July 2011 would have been unsuccessful since it simply did not exist." (R., Vol. IV, p. 553.) Second, the Commission referenced pre-suit notices sent to various entities and individuals, some of whom were employees of The University of Tennessee, and found that Defendant's position that pre-suit notice should have been sent "to non-medical professionals in the Office of the Attorney General and Reporter and/or the Department of Treasury's Division of Claims Administration...does not comport with the intent behind the procedures in Tenn. Code Ann. § 29-26-121...." (R., Vol. IV, pp. 541 – 542.)

The Commission's first statement, that no such directive existed, is simply wrong for the reasons set forth in the preceding paragraphs: Tenn. Code Ann. § 29-26-121(a)(1) requires all potential medical malpractice plaintiffs to provide pre-suit notice to all potential medical malpractice defendants; Tenn. Code Ann. § 29-26-121(a)(3)(B)(ii) requires that mailed pre-suit notice to an entity defendant must at a minimum go to its agent for service of process, regardless of whether the agent is a medical professional;[10] and Tenn. R. Civ. P. 4.04(6) and Tenn. Comp. R. & Regs. 0310-01-01-.01(3) respectively designate the Attorney General and the DCA as the State's agents for service of process for claims before the Commission. These statutes and rules existed when this Claim accrued and was commenced, and they were public record.

The Commission's second reason, that some University employees received pre-suit notice and that this satisfied the intent of the statute, is incorrect for three reasons. First, because

[10] Claimants served pre-suit notice on agents for service of process for related Knox County Circuit Court entity defendants, UHS d/b/a UTMC via Bennett L. Cox (R., Vol. I, pp. 50 – 58) and HROC via Jason P. Lambert. (R., Vol. III, pp. 304 – 314.) Both of these individuals are lawyers who are "non-medical professionals." The same procedure should apply to pre-suit notice to the State.

Tenn. Code Ann. § 29-26-121 is not ambiguous, Foster, 2013 WL 3306594 at *4 and *5, the Commission should only have considered the plain language of the statute and not attempted to interpret the intent behind it. Second, the Commission's finding of satisfaction of the "intent" of the statute smacks of substantial compliance, which the Supreme Court has ruled is insufficient to satisfy Tenn. Code Ann. § 29-26-121. Myers, 382 S.W.3d at 310 ("Because these requirements are mandatory, they are not subject to satisfaction by substantial compliance. Substantial compliance is sufficient only when the statute's requirements are directory, not mandatory."). Third, and most importantly, providing pre-suit notice to an entity's employees other than an agent for service of process does not satisfy Tenn. Code Ann. § 29-26-121 "for one very simple reason: this is not what section 121 says." Foster, 2013 WL 3306594 at *5. The statute says what it means and means what it says: an entity must receive pre-suit notice via its agent for service of process or the pre-suit notice is deficient.

Accordingly, Claimants' pre-suit notices to Dr. Samples, Dr. Upadhyaya, and Dr. Hennessy individually[11] and to the UTGSM did not strictly comply with the requirements of Tenn. Code Ann. § 29-26-121 as to the State. While Drs. Samples, Upadhyaya, and Hennessy may be State employees, none is the State's agent for service of process, and none was so identified in their individual pre-suit notice letters.[12] Likewise, the UTGSM is only one division of one agency of the State of Tennessee; it can in no way be the State's agent for service of process. Agents for service of process are deliberately appointed; they are not created by a mere

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[11] Drs. Samples, Upadhyaya, and Hennessy were each named as individual defendants in the related Knox County Circuit Court action. (R., Vol. III, pp. 340 – 353.) Pre-suit notice to an individual who is then sued individually in Circuit Court is not pre-suit notice to the State, which must be sued in the Commission.

[12] The error of the Commission's position that pre-suit notice to individual University employees equates to pre-suit notice to the State is shown by analogy to UHS, one of the entity defendants in the related Circuit Court action. UHS is a large medical center with many employees. Claimants would not argue and no Court would accept that pre-suit notice provided to a UHS employee (other than those specified in Tenn. Code Ann. § 29-26-121) would be pre-suit notice to UHS. The same rationale should apply to the State.

association with an entity. The statute requires at a minimum that an entity be provided pre-suit notice via its agent for service of process. Because none of these individuals or entities is the State's agent for service of process, pre-suit notice to them is ineffectual as to the State, and this Claim must be dismissed.

3. University Health System, Inc./University of Tennessee Medical Center is a separate entity from Defendant; pre-suit notice to UHS/UTMC is not pre-suit notice to Defendant.

The Commission found that pre-suit notice to UHS and/or UTMC served as pre-suit notice to the State, apparently upon the misconception that The University of Tennessee owns and operates UTMC. (R., Vol. IV, pp. 541 and 546.) While this was true many years ago, in 1999, operation of the hospital was transferred from the University to UHS. Special legislation was passed to allow this transfer. Tenn. Code Ann. §§ 49-9-1301 – 1309. Tennessee Code Ann. § 49-9-1301(a)(1) allowed the University's board of trustees to

> [t]ake all steps necessary for the creation of a private nonprofit corporation under the Tennessee Nonprofit Corporation Act, compiled in title 48, chapters 51-68, for the purpose of operating the University of Tennessee Memorial Research Center and Hospital. Except as provided in subdivision (b)(2), the corporation shall have all the rights and powers of a nonprofit corporation under the Tennessee Nonprofit Corporation Act. ***The corporation shall not be an agency, department or political subdivision of the state.*** The charter of the nonprofit corporation shall include that its purpose is to operate the University of Tennessee Memorial Research Center and Hospital in a manner that will fulfill the hospital's mission statement of dedication to its continuation as the premier center to offer medical care to the underserved population of the thirteen-county area served by the hospital. The corporation shall not be subject to any law affecting only governmental or public entities;

Id. (emphasis added). This statute makes clear that the nonprofit corporation that assumed operation of The University of Tennessee Memorial Research Center and Hospital, UHS, Inc., is not an agency, department, or political subdivision of the State. See also Womble v. State, No. E2012–01711–COA–R3–CV, 2013 WL 3421925 at *1 (Tenn. Ct. App. July 3, 2013) no perm. to

app. filed (App. p. 92) (Discussion of the July, 1999, Lease and Transfer Agreement by which the University transferred the medical center to UHS and the statutory authority behind the transfer.)

The distinction between the University and UHS d/b/a UTMC was known to Claimants when they commenced their Claim. Claimants sued UHS d/b/a UTMC in the Knox County Circuit Court, alleged that UHS operated and managed UTMC at all times material, and demanded judgment against UHS and others in excess of $12,000,000.00. (R., Vol. III, pp. 340, 343, 351.) Claimants did not sue UHS d/b/a UTMC in the Commission, nor would Claimants agree that UHS's liability is capped at $300,000.00 as are tort claims against the State. Tenn. Code Ann. § 9-8-307(e). In the HIPAA releases that accompanied Claimants' pre-suit notices to UHS and UTMC, the entities are listed as one, "U.T. Med. Ctr./Univ. Health System." (R. Vol. I, pp. 42 – 44, 49, 54 – 56, and 61.) All of Claimants' submissions correctly identify UHS and UTMC as the same entity, and none asserts that the University and UHS d/b/a UTMC are the same legal entity.

Simply put, both the statute allowing the transfer of the hospital to UHS and Claimants' actions make clear that UHS d/b/a UTMC is not an agency, department, or political subdivision of the State. UHS and the University/State are separate entities, and Claimants knew it. Because UHS is a separate entity that operates UTMC, pre-suit notice to UHS and/or UTMC is meaningless as to the State. The Commission erred in finding that pre-suit notice to UHS and/or UTMC served as pre-suit notice to the State.

4. The Commission's reliance on Hinkle was misplaced.

The Commission's reliance on Hinkle v. Kindred Hosp., No. M2010-02499-COA-R3-

CV, 2012 WL 3799215 (Tenn. Ct. App. Aug. 31, 2012) perm. to app. filed Oct. 29, 2012[13] (App. p. 70), (R., Vol. IV, pp. 547 – 549) was misplaced for two reasons. First, Hinkle stands for the proposition that technical defects in pre-suit notice are not fatal if the claimant substantially complied with the statutory requirements and the defendant cannot show prejudice. Id. at *15. Respectfully, Defendant submits that this proposition is contrary to the Supreme Court's ruling that strict, rather than substantial, compliance with Tenn. Code Ann. § 29-26-121 is required. Myers, 382 S.W.3d at 309 – 311. Likewise, Defendant respectfully submits that strict compliance with the pre-suit notice requirement cannot exist without sanction for a failure strictly to comply. Without a sanction for a failure strictly to comply, potential claimants would be at liberty to ignore the requirements of Tenn. Code Ann. § 29-26-121. See Lee Med., 312 S.W.3d at 527 ("The courts may also presume that the General Assembly did not intend to enact a useless statute and that the General Assembly 'did not intend an absurdity.'" (citations omitted).).

Second, the Hinkle defendants voluntarily cured the defects in the Hinkle plaintiffs' pre-suit notices. Although the only positive duties imposed by Tenn. Code Ann. § 29-26-121(a) are on the potential claimant,[14] the Hinkle defendants chose to ask for the medical records and enter

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[13] An application for permission to appeal was filed in Hinkle on October 29, 2012. By notice dated January 8, 2013, the Hinkle application is being held pending the Supreme Court's decision in Stevens v. Hickman Comm. Health Care Servs., No. M2012-00582-SC-S09-CV. (Public Case History included in App. at pp. 42 – 43.) Although no Court of Appeals opinion was written in Stevens (the Supreme Court accepted Tenn. R. App. P. 9 appeal after the Court of Appeals denied), the recording of its oral argument held May 30, 2013, and available at http://www.tsc.state.tn.us/courts/supreme-court/arguments/2013/05/30/christine-stevens-et-al-v-hickman-community-health-care, indicates that the Court probably will answer the questions of whether a claimant must strictly comply with Tenn. Code Ann. § 29-26-121(a)(2) setting forth the required contents of a pre-suit notice and whether a failure strictly to comply results in dismissal.

[14] See Vaughn v. Mountain States Health Alliance, E2012-01042-COA-R3-CV, 2013 WL 817032 at *4 (Tenn. Ct. App. Mar. 5, 2013) perm. to app. filed May 3, 2013 (App. p. 85) ("Husband argues, however, that the Providers should have contacted his counsel prior to an action being filed against them in order to inform Husband's counsel that the requirements of Tennessee Code Annotated section 29–26–121 had not been met. We find that Husband's contention is without merit, as no provision in the Act requires potential defendants to assist a claimant with

negotiations. Hinkle, 2012 WL 3799215 at *2-3. Those defendants were fully informed by the medical records, and settlement negotiations lasted until the complaint was filed, a time period of seven months in the case of the hospital defendant. Id. at *3, *6, and *7. In the view of the Hinkle Court, the voluntary actions by those defendants eliminated any deficiencies in those plaintiffs' pre-suit notices, and the Court would hear no complaints about failure to comply with pre-suit notice requirements in light of these voluntary actions. Id. at *6, *7, and *14-15. Defendant did not act to cure the Claimants' failure to provide pre-suit notice to the State, so the rationale of Hinkle is inapplicable.

5. Even if dismissal is not required solely for Claimants' failure to strictly comply with Tenn. Code Ann. § 29-26-121, Claimants are not entitled to the 120-day extension of the statute of limitation without strict compliance, making their Claim untimely.

The Commission erred in not dismissing Claimant's Written Notice of Claim as untimely. Tennessee Code Ann. § 29-26-116 establishes a one-year statute of limitation for medical malpractice claims. Tennessee Code Ann. § 29-26-121(c) can extend that statute of limitation for 120 days, but only if pre-suit notice is given "as provided in this section." Tenn. Code Ann. § 29-26-121(c). The language of section -121(c) does not allow for wiggle room via substantial compliance. "Subsection (c) of Tennessee Code Annotated section 29–26–121 provides that a claimant only gets the benefit of the extension of the applicable statute of limitations if the requirements of the section are given as directed." Vaughn, 2013 WL 817032 at *5. As set forth above, because section -121 is unambiguous, the determination of whether pre-suit notice is given "as provided in this section" is made by looking solely to the text of Tenn. Code Ann. § 29-26-121. Because pre-suit notice was not provided to Defendant's agent

compliance."). Permission to appeal was filed in Vaughn on May 3, 2013, and it too is being held for the Supreme Court's decision in Stevens. (Public Case History in included in App. at pp. 44 – 45.)

for service of process at least sixty days before commencement, pre-suit notice was not given "as provided in this section," and Claimants were not entitled to the 120-day extension of the statute of limitation. As a result, Claimants' February 9, 2012, commencement, some 119 days after the one-year statute of limitation expired on October 13, 2011, was untimely, and this Claim should be dismissed.

On this issue, neither Myers's unanswered question as to noncompliance nor Hinkle's acceptance of substantial compliance can save this Claim because neither of those cases dealt with the extension of the statute of limitation. In Myers, the claim was originally filed January 5, 2007, was voluntarily dismissed on October 21, 2008, and was re-filed September 30, 2009. Myers, 382 S.W.3d at 304. Because Myers was re-filed within the one-year saving statute, no 120-day extension was necessary, and the Court did not address in any way, shape or form the application of Tenn. Code Ann. § 29-26-121(c). In Hinkle, the alleged malpractice occurred June 29, 2009, and the complaint was filed June 28, 2010. Hinkle, 2012 WL 3799215 at *1 and *3. Because Hinkle was filed within the original one-year statute of limitation, no 120-extension was necessary, and the Court did not address application of Tenn. Code Ann. § 29-26-121(c). The Court is left with the plain text of section -121(c) and its interpretation in Vaughn, which make this Claim untimely and subject to dismissal.

6. Even if Claimants were entitled to the 120-day extension of the statute of limitation, the Commission should have found the Claim untimely under the Commission's previous definition of commencement of a claim before the Commission.

Claimants filed their Written Notice of Claim with the DCA one year and 119 days after the alleged negligence. (R., Vol. I, pp. 3 – 12.) If the Commission had followed its rulings in Haley and Mize, which are incorporated into the instant Order (R., Vol. IV, pp. 540 and 554), that a claim is not commenced until transferred to the Commission some ninety days after filing

with the DCA, the Commission would have found that this Claim commenced approximately one year and 209 days after the alleged negligence. The Commission should have dismissed this Claim as untimely because, under the Commission's previous definitions of commencement, this Claim commenced approximately 89 days late even if Claimants were entitled to the 120-day extension of the statute of limitation.

Contrary to the Commission's own Rule, issued pursuant to the Tennessee Administrative Procedures Act, that "[a]ll other [non-tax] actions are commenced by filing a written notice of claim (see T.C.A. §9-8-402 for requirements) with the Division of Claims Administration," Tenn. Comp. R. & Regs. 0310-01-01-.01(2)(b), the Commission ruled in Haley and Mize that those claims commenced not when the written notices of claim were filed with the DCA but at a later time after those claims had transferred to the Commission. (R., Vol. V, pp. 604 – 607 and 611 – 614; R. Vol. V, pp. 637 – 641.) Following the releases of Haley on September 17, 2012, and Mize on October 8, 2012, Defendant supplemented its Motion to Dismiss to point out that the instant Claim was untimely under the Commission's definition of commencement in Haley and Mize. (R., Vol. III, pp. 332 – 334; R. Vol. IV, pp. 475 – 495.) Although the commencing event of the instant Claim is not directly addressed by the Commission's February 7, 2013, Order in this Claim, the Commission must have determined, contrary to Haley and Mize, that this Claim commenced upon filing the written notice of claim with the DCA because the Claim was considered timely. (R., Vol. IV, pp. 542 and 544 – 545.) By incorporating Haley and Mize in the instant Order, the Commission has produced a written opinion in this Claim that internally contradicts itself as to when a claim against the State is commenced.

Defendant respectfully submits that the definition of commencement simply cannot change from claim to claim and that the same commencement rule should apply in Haley, Mize, and the instant Claim. Defendant posits that the Commission's Rule 0310-01-01-.01(2)(b) should govern the commencement of all non-tax claims before the Commission, but, if transfer to the Commission is truly the determinative factor as to commencement, the same should occur in every claim. Analogous facts should produce analogous results under the same law, especially with a bright-line event such as commencement. If the definition of commencement is not the same for all non-tax claims before the Commission, then litigation involving the State will be chaotic and unworkable. The Commission's self-contradictory Order must be error, at least in terms of commencement.

B. The Commission erred when it determined that Claimants' failure to comply with Tenn. Code Ann. § 29-26-121 was excused for extraordinary cause shown.

"The question of whether [Claimant] has demonstrated extraordinary cause that would excuse compliance with the statutes is a mixed question of law and fact, and...review of that determination is de novo with a presumption of correctness applying only to the [Commission's] findings of fact and not to the legal effect of those findings." Myers, 382 S.W.3d at 307 (citations omitted). "[The Court] reviews the [Commission's] decision to excuse compliance under an abuse of discretion standard." Id. at 308. "A court abuses its discretion when it applies an incorrect legal standard or its decision is illogical or unreasonable, is based on a clearly erroneous assessment of the evidence, or utilizes reasoning that results in an injustice to the complaining party." Id. (citations omitted).

In Myers, the Supreme Court discussed the extraordinary cause standard:

> The statute does not define "extraordinary cause," and the statute's legislative history does not indicate that the legislature intended to assign a meaning to that

> phrase other than its plain and ordinary meaning. "Extraordinary" is commonly defined as "going far beyond the ordinary degree, measure, limit, etc.; very unusual; exceptional; remarkable." One legal scholar, commenting on Tennessee Code Annotated sections 29–26–121 and 122, has noted that possible examples of "extraordinary cause" might include "illness of the plaintiff's lawyer, a death in that lawyer's immediate family, [or] illness or death of the plaintiff's expert in the days before the filing became necessary."

Myers, 382 S.W.3d at 310 – 11 (citations omitted).

In finding extraordinary cause, the Commission applied three incorrect legal standards such that an abuse of discretion occurred. First, the Commission found substantial compliance in that pre-suit notice provided individually to various University employees (who were sued individually in the Circuit Court) satisfied the "intent" of the statute as to the State. (R,, Vol. IV, pp. 542, 546, 547 – 549, and 555.) Second, the Commission found that "[t]he State has suffered no prejudice." (R. Vol. IV, p. 557.) Third, the Commission found that confusion or uncertainty as to the law provided extraordinary cause. (R., Vol. IV, pp. 549 – 551, 552 – 553, and 556 – 557.)

None of these findings fits Myers's definition of extraordinary cause; to the contrary, these are each quite common. Likewise, none of these findings come close to the possible examples listed in Myers. Because they do not fit the definition of extraordinary or the given examples, reliance on them to establish extraordinary cause was error.

1. Substantial compliance and lack of prejudice to Defendant are not extraordinary causes.

In addition to the Supreme Court's ruling that substantial compliance is insufficient to satisfy the requirements of Tenn. Code Ann. § 29-26-121, Myers, 382 S.W.3d at 309 – 311, the Court of Appeals has expressly rejected both substantial compliance and lack of prejudice to a defendant as extraordinary causes:

> [u]pon review of the Trial Court's Order, it is clear that the Trial Court applied an incorrect legal standard, as the Trial Court based its decision to grant the waiver on its finding that there was "substantial compliance" with the statute and "no prejudice resulted to defendants" from the premature filing of the complaint. This is improper based on the plain language of the statute, which requires a showing of "extraordinary cause", something obviously much greater than "substantial compliance" or lack of prejudice, as shown by the cases herein cited. The Trial Court's decision was an abuse of discretion and is reversed. Plaintiffs' counsel's action in filing the complaint before expiration of the required notice period was not shown to be the result of any "extraordinary cause" other than pure oversight/misunderstanding on her part.

DePue v. Schroeder, No. E2010-00504-COA-R9-CV, 2011 WL 538865 at *8 (Tenn. Ct. App. Feb. 15, 2011) perm. to app. denied Aug. 31, 2011 (App. p. 55).

Because the Court of Appeals had rejected both substantial compliance and lack of prejudice to a defendant as establishing extraordinary cause nearly two years before the Commission entered its Order, the Commission's contrary findings were erroneous and should be reversed.

2. Application of Tenn. Code Ann. § 29-26-121 to this Claim was not confusing.

Defendant submits that application of Tenn. Code Ann. § 29-26-121 to claims against the State was not and is not confusing. Claimants were informed by the Keating letter on or about May 3, 2011, that one of the potential defendants was a resident physician employed by the State (R., Vol. III, p. 320), which raised the issue of the State as a defendant at that time. See Tenn. Code Ann. § 9-8-307(a)(1)(D) (Identifying medical malpractice (now health care liability) by a State employee as giving rise to a claim against the State.). Tennessee Code Ann. § 29-26-121(a)(1) makes clear that Claimants had to provide pre-suit notice to the State as a potential defendant, and section -121(a)(3)(B)(ii) makes clear that an entity, at a minimum, must receive pre-suit notice via its agent for service of process. The Rules of Civil Procedure and the Commission's Rules establish either the Attorney General or the DCA as agents for service of

process for the State. Provision of pre-suit notice to the State required reference to two statutes, Tenn. Code Ann. §§ 9-8-307(a)(1)(D) and 29-26-121, and one of two procedural rules, Tenn. R. Civ. P. 4.04(6) or Tenn. Comp. R. & Regs. 0310-01-01-.01(3). Defendant submits that this simply was not an "unsettled, uncharted, and evolving state of the law" as found by the Commission. (R., Vol. IV, p. 553.) To the contrary, the statutes and rules are straightforward in their application.

Empirical evidence supports that compliance is straightforward. In its offer of proof made to the Commission, Defendant submitted seventeen examples of the DCA's responses to potential medical malpractice claimants who provided pre-suit notice to either the Attorney General or the DCA, the oldest one of which is dated October 21, 2009.[15] (R., Vol. IV, pp. 501 – 521.) Approximately two years before the instant Claim accrued, potential medical malpractice claimants were successfully providing pre-suit notice to the Attorney General, the DCA, or both. This fact belies the Commission's finding of confusion.

a. The Commission, in its inconsistent applications of Tenn. Code Ann. § 29-26-121 to medical malpractice claims against Defendant, has created confusion where none existed.

Defendant submits that application of Tenn. Code Ann. § 29-26-121 to claims against the State is not confusing. With all due respect to the Commission, however, Defendant respectfully contends that the Commission's Order is confusing, especially when one attempts to reconcile the Order in the instant case with the three previous Orders from Haley, Mize, and Stinson that the Commission exhibited to and incorporated into its Order in the instant Claim. (R., Vol. IV,

[15] Defendant submitted these letters in response to materials the Commission acquired on its own, admitted into evidence, and relied upon in making its decision. (R., Vol. IV, pp. 501 – 502; Vol. IV, pp. 542 – 544; Tr. at p. 6, l. 17 – p. 27, l. 23.) Defendant objected to these materials (R., Vol. IV, pp. 497 – 500), but that objection was overruled. (R., Vol. IV, p. 543.) If the Court agrees with Defendant's position that these other materials should not have been admitted and considered, Defendant would withdraw the letters offered in response. If the Court agrees with the Commission that the other materials were properly admitted and considered, Defendant would respectfully request to rely on its proof offered in response.

pp. 540 and 554.) Defendant respectfully submits that any confusion present in the Commission's Order has been created by the Commission's tortuous misconstructions of the Medical Malpractice Act, the Claims Commission Act, and the Commission's Rules as well as the Commission's interjection of extraneous and/or irrelevant issues.

Defendant also respectfully submits that the Commission's rulings with respect to the application of Tenn. Code Ann. §§ 29-26-121 and -122 may stem from the Commission's personal views as to the wisdom of the statute. In the Mize opinion, the Commission compared vigorous assertion of these statutes to the race to the courthouse that sometimes occurs in workers' compensation cases following a failed benefit review conference and described it as "unseemly." (R., Vol. V, pp. 591 – 592 ("The jockeying for position by both parties with regard to whether the requirements of Tenn. Code Ann. §§ 29-26-121 and 122 have been complied with is disturbingly reminiscent of practices that developed in this state following amendments to the Tennessee Workers' Compensation Law in June 2004.").) The Commission concluded this section of its opinion as follows:

> [t]he Commission understands fully that both parties are attempting to zealously represent their clients and in fact they have done so in a professional manner. However, the Commission would borrow Justice Holder's language in Vought and can only describe what has gone on in this medical malpractice case as well as others as "unseemly." The byzantine requirements of the Medical Malpractice Act only become more complicated when they are superimposed on the Claims Commission Act. The amalgamated requirements have made it too difficult, in our opinion, for injured plaintiffs and confused medical providers to have their cases decided on the merits. This is truly a sad situation for all relevant parties before the Commission.

(R., Vol. V, p. 592.)

i. Conflation of time periods in Tenn. Code Ann. §§ 9-8-402(c) and 29-26-121(a)(1).

Confusion arises from the Commission's consistent and erroneous conflation of the sixty-day pre-suit notice period established by Tenn. Code Ann. § 29-26-121 with the ninety-day settlement period set forth in Tenn. Code Ann. § 9-8-402(c).[16] (R., Vol. IV, pp. 540 and 546 – 547.) Contrary to the Commission's findings that these two time periods are in essence the same, they are established by different statutes and exist at different stages of litigation, with the former occurring ***before*** commencement and the latter occurring ***after*** commencement. As a result, they cannot be combined or substituted for one another as the Commission has held; in a medical malpractice action, each time period must exist separately.

Because the sixty-day period established by Tenn. Code Ann. § 29-26-121(a)(1) must occur before commencement of a claim, the pre-suit period ends, along with any opportunity to provide pre-suit notice, when a claim is commenced. See Tenn. Code Ann. § 29-26-121(a)(1) ("Any person, or that person's authorized agent, asserting a ***potential*** claim for medical malpractice shall give written notice…."); Myers, 382 S.W.3d at 309 ("The essence of Tennessee Code Annotated section 29–26–121 is that a defendant be given notice of a medical malpractice claim ***before*** suit is filed.") (emphases added). In the Claims Commission, a claim is commenced upon filing a written notice of claim with the DCA. Tenn. Code Ann. § 9-8-402(a)(1) ("The claimant must give written notice of the claimant's claim to the division of claims administration as a condition precedent to recovery…."); Tenn. Code Ann. § 9-8-402(b) ("The claim is barred unless the notice is given within the time provided by statutes of limitations applicable by the courts for similar occurrences from which the claim arises…."); Tenn. Comp. R. & Regs. 0310-01-01-.01(2)(b) ("All other [non-tax] actions are commenced by

[16] A complete copy of Tenn. Code Ann. § 9-8-402 is included in the Appendix at pp. 34 – 36.

filing a written notice of claim (see T.C.A. §9-8-402 for requirements) with the Division of Claims Administration."). Once a medical malpractice claim is commenced by filing a written notice of claim with the DCA, a pending claim exists, and the pre-suit period has ended.

After any non-tax claim, medical malpractice or otherwise, is commenced by filing a written notice of claim with the DCA, the claim resides with the DCA for a period of up to ninety days. Tenn. Code Ann. § 9-8-402(c). During this period, the DCA has three options: honor the claim, deny the claim, or, if unable to honor or deny the claim within the ninety days, transfer the claim to the Commission. Id. Because this ninety-day period involves the mandatory investigation and possible payment and/or denial of a pending claim, it is not the same as the optional opportunity offered by Tenn. Code Ann. § 29-26-121 to settle a potential claim "before suit is filed." The two time periods are created by different statutes and exist on opposite sides of commencement. Tennessee Code Ann. § 9-8-402(c)'s ninety-day period applies to many more classes of claims, not just medical malpractice, and the potential resolution during this period has more finality to it, at least in the case of a denial. Upon commencement, the pre-suit period ends, and no post-commencement action or procedure can retroactively cure a failure to provide pre-suit notice. The Commission's attempt to mash together the time periods established by Tenn. Code Ann. §§ 29-26-121(a)(1) and 9-8-402(c) into a generic, one-size-fits-all "conferral" period (R., Vol. IV, p. 547) is contrary to law.

The Commission, as part of its conflation, improperly undertook its own investigation of how commenced claims are addressed by the DCA and the Attorney General's Office, admitted the emails it received in response into evidence, and considered these materials in rendering its opinion. (R., Vol. IV, pp. 501 – 502; Vol. IV, pp. 542 – 544; Tr. at p. 6, l. 17 – p. 27, l. 23.) Based on these materials, the Commission concluded that the DCA is ignoring its duty to

investigate and attempt to resolve medical malpractice claims ***after*** they are commenced and chided the Attorney General's office because it knows about a claim ***after*** it is commenced and receives a copy of the DCA's file. (Id.) In essence, the Commission found it unfair that the State would insist on strict compliance with Tenn. Code Ann. § 29-26-121 by potential claimants when the State, in the Commission's view, was shirking its duty under Tenn. Code Ann. § 9-8-402(c). (Id.)

These findings are incorrect for several reasons. First, these issues focused on by the Commission all happen after commencement and have no bearing on whether Claimants met a pre-commencement requirement. Second, the adjusters in the DCA, although they investigate and pay and/or deny many claims brought against the State, are not equipped to investigate and resolve the many complexities involved in a medical malpractice action in a mere ninety days. Third, if Claimants did not provide the required contents of a pre-suit notice, including a list of all involved medical providers and HIPAA-compliant release, to the Attorney General or DCA, these individuals would be unable to investigate a medical malpractice claim. Fourth, in a Claim such as this that is procedurally defective because pre-suit notice was not provided, the DCA should not honor or pay a defective claim. If the DCA cannot honor or deny a claim within ninety days, its only option is to transfer the claim to the Commission. Tenn. Code Ann. § 9-8-402(c). Even if this conundrum is recognized on day one of the ninety-day period, the DCA must wait the full time because the statute gives it no option to transfer earlier than ninety days. Id. Finally, if the DCA fails to honor or deny a claim within ninety days, transfer to the Commission is proper. Id. The State does not suffer a penalty or lose defenses if the DCA fails to resolve a claim within ninety days. To the contrary, "[t]he state may assert any or all available defenses." Tenn. Code Ann. § 9-8-403(f). While the situation may not be ideal, the DCA's

hands are tied by the procedural failings of Claimants and the express terms of Tenn. Code Ann. § 9-8-402(c); the Commission's views about the actions of the DCA and Attorney General's Office are not warranted.

Defendant submits that commencement is and must be a bright-line event that clearly delineates when a claim becomes pending and ends any pre-suit period. The Commission's decision refuses to recognize this bright line and instead conflates pre- and post-commencement events. Affirming the Commissions' Order potentially would inject unnecessary confusion into the construction and application of an unambiguous statute. The pre-suit notice requirements of Tennessee Code Ann. § 29-26-121 must be satisfied at least sixty days before commencement, not on the date of commencement or afterwards. Anything that occurs upon commencement or later has no bearing on whether Claimants satisfied the pre-suit notice requirement, and it was error for the Commission to consider such after-the-fact things. When the Commission's blurred line of commencement is combined with its moving target of commencement described in Section IV.A.6. above, the situation is untenable.

ii. Consideration of the so-called Civil Justice Act of 2011.

In support of its finding of extraordinary cause, the Commission found two sources of confusion in pre-CJA law: (1) that potential claimants did not know that resident physicians were health care providers before passage of the CJA and (2) that potential claimants did not know that the Medical Malpractice Act applied to claims against the State before passage of the CJA. (R., Vol. IV, pp. 549 – 551, 552, and 556 – 557.) The primary reason the Commission should not have considered the CJA is that it only applies to claims that accrued on or after October 1, 2011. 2011 Tennessee Laws Pub. Ch. 510 § 24 (H.B. 2008) ("This act shall take effect October 1, 2011, the public welfare requiring it and shall apply to all liability actions for

injuries, deaths and losses covered by this act which accrue on or after such date."). As this Claim accrued October 13, 2010, the CJA is inapplicable.

To the extent the CJA was properly considered, no one was confused prior to its passage that resident physicians were health care providers or were subject to the Medical Malpractice Act. This Court has recognized since at least 1998 that the Medical Malpractice Act applies to claims against the State, specifically including claims based on the actions of a resident physician. See McConkey v. State, 128 S.W.3d 656, 659 (Tenn. Ct. App. 2003) (Claim before the Commission for medical negligence governed by Tenn. Code Ann. § 29-26-115.); Cole v. State, No. 02A01-9801-BC-00004, 1998 WL 397374 at *1 and *9 (Tenn. Ct. App. Jul. 16, 1998) no perm. app. filed (App. p. 47) (Tennessee Code Ann. § 29-26-115(a) governed burden of proof in claim before Commission based on alleged negligence of medical resident.). This clear application announced by the Court directly contradicts the Commission's finding of confusion.

In accord with the clearly established proposition that the Medical Malpractice Act applies to claims against the State due to alleged negligence of resident physicians, multiple claimants, including the instant Claimants, have demonstrated their same understanding of the law. The DCA responses to pre-suit notices submitted by Defendant (R., Vol. IV, pp. 505 – 521) show that, at least as early as 2009, potential claimants intended to assert claims against the State for medical negligence of its employees associated with the University of Tennessee, the vast majority of which were resident physicians. In this very Claim, Samples was identified as "the primary resident providing care for Felisha G. Brown" in Claimants' April 25, 2011, letter to Samples. (R., Vol. I, p. 15.) Claimants knew that Samples was a resident, provided her individually with pre-suit notice, and sued her individually in Circuit Court under the auspices of the Medical Malpractice Act. The Commission's suggestion that either Claimants specifically or

other claimants generically were unclear that resident physicians were health care providers subject to the Medical Malpractice Act before passage of the CJA is unfounded: potential claimants were providing the State notice of potential medical malpractice claims at least as early as 2009, and Claimants applied the Medical Malpractice Act to known resident physician Samples. Both of these propositions by the Commission inject unnecessary confusion to a simple matter of statutory construction.

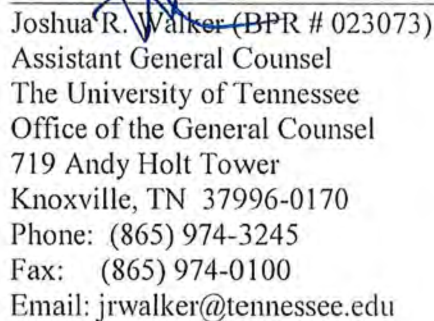
3. Even if application of Tenn. Code Ann. § 29-26-121 to this Claim were confusing, a misunderstanding of the law is not extraordinary cause.

Assuming arguendo that application of Tenn. Code Ann. § 29-26-121 to claims against the State were confusing, confusion or a misunderstanding of the law is not sufficient to establish extraordinary cause. DePue, 2011 WL 538865 at *8 ("Plaintiffs' counsel's action in filing the complaint before expiration of the required notice period was not shown to be the result of any 'extraordinary cause' other than pure oversight/misunderstanding on her part."). As such, it was error for the Commission to base a finding of extraordinary cause on confusion or a misunderstanding of the law.

IV. CONCLUSION

Based upon the foregoing, Defendant respectfully requests that the Court reverse the Commission's denial of Defendant's Motion to Dismiss and remand this Claim for dismissal.

Respectfully submitted this 11th day of September, 2013.



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CERTIFICATE OF SERVICE

I certify that the original of the foregoing was hand-delivered to **Joanne Newsome, Chief Deputy Clerk,** Appellate Court Clerk's Office, Court of Appeals, Eastern Division, P.O. 444, 505 Main Street, Suite 200, Knoxville, Tennessee 37901-0444, and a copy of the foregoing was mailed to Claimants' attorneys, **Robert E. Pryor, Esq.** and **Robert E. Pryor, Jr., Esq.**, Pryor, Flynn, Priest & Harber, Two Centre Square, Suite 600, 625 South Gay Street, P.O. Box 870, Knoxville, Tennessee 37901; postage prepaid this 11th day of September, 2013.

Joshua R. Walker

IN THE CLAIMS COMMISSION FOR THE STATE OF TENNESSEE
MIDDLE DIVISION

CATHERINE CRIGHT as surviving Spouse of DENNIS BENARD CRIGHT, SR. DECEASED Both Individually and as Representative,	)	
Claimant,	)	
v.	)	**Claim No. T20100688** **Regular Docket**
STATE OF TENNESSEE,	)	
Defendant.	)	

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant, State of Tennessee, by and through counsel, pursuant to Tenn. Code Ann. §§ 9-8-402(b), 28-3-104(a)(1), 29-26-116(a), and 29-26-121(a)(3) and -121(c) (2009);[1] the doctrine of equitable estoppel as set forth in Cracker Barrel Old Country Store, Inc. v. Epperson, 284 S.W.3d 303 (Tenn. 2009); Tenn. Comp. R. & Regs. 0310-1-1-.01; and Rule 56.02 of the Tennessee Rules of Civil Procedure, respectfully moves the Commission to grant summary judgment dismissing this Claim for two overarching reasons, equitable estoppel and statute of limitation. As grounds for this Motion, Defendant would show as follows:

Equitable Estoppel

1. Multiple abeyances of this Claim agreed to by Defendant and granted by the Commission were for a limited, express reason: determination of whether the defendants in the related Circuit Court matter would allege the comparative fault of any State employee, the absence of which would result in voluntary dismissal of the Claim against the State. (Orders of Abeyance numbers 3 – 7, dated July 15, 2013, February 26, 2014, August 1, 2014, June 1, 2015,

[1] The 2009 version of Tenn. Code Ann. § 29-26-121 (Exhibit A) is applicable because Claimant's pre-suit notice (Exhibit G) was attempted by mail August 3, 2009. All references to Tenn. Code Ann. § 29-26-121 in this Motion are to the 2009 version of the statute.

and June 30, 2016, attached as collective Exhibit B.) This same representation is included in the sixth and seventh Orders of Abeyance, which were respectively entered after dismissal of the Circuit Court action and during pendency of the appeal of that dismissal. No mention was made in any of the Orders of Abeyance, two of them entered after the Circuit Court case had been dismissed, that Claimant would pursue the Claim against the State in the event the Circuit Court case was unsuccessful for any reason. Since July 15, 2013, Claimant has consistently represented in these Orders that she would only pursue a Claim against the State if a Circuit Court defendant alleged the comparative fault of a State employee. The Orders themselves express that the abeyances were not agreed to by the State or granted by the Commission as a stopgap or safety valve in the event claims against other parties were unsuccessful.

2. Additionally, Claimant has represented to Defendant since April, 2011, that Claimant would not pursue her Claim against the State if on Circuit Court defendant made a comparative fault allegation against a State employee. (Declaration of Rebecca P. Tuttle, with Exhibits 1 – 2, attached as Exhibit C.) The State did not agree and never would have agreed to an abeyance for the purpose of preserving the Claim against the State in the event the Circuit Court action was unsuccessful. (Exhibit C.) If Defendant had known that Claimant intended to pursue her Claim against the State, Defendant would have moved to transfer the Claim to Circuit Court for consolidation with that action or would have insisted that this Claim participate in coordinated discovery with the Circuit Court parties. (Exhibit C.)

3. The Circuit Court action has been dismissed, and that dismissal has been affirmed, Cright v. Overly, No. E2015-01215-COA-R3-CV, 2016 WL 6078563 (Tenn. Ct. App. Oct. 17, 2016) appeal denied (Feb. 21, 2017), so no allegations of comparative fault against any

State employee will or can be made. The Claimant should now be required to abide by her representations in the Orders of Abeyance. No comparative fault allegation against a State employee has been or can be made by a Circuit Court defendant, so the Claim against the State should be dismissed, voluntarily or otherwise.

4. In the absence of a comparative fault allegation in the Circuit Court case, Claimant should be equitably estopped from now asserting a Claim against the State after representing in multiple orders that the Claim would be voluntarily dismissed if no comparative fault allegation was made. Claimant's representations in the Orders of Abeyance were at least calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which Claimant are now attempting to assert. Claimant at least expected that the State would rely on representations that the case would be voluntarily dismissed in absence of a comparative fault allegation. The State, in agreeing to the abeyances, relied upon Claimant's representations that the Claim would be voluntarily dismissed in the absence of a comparative fault allegation. (Exhibit C.) Claimant knew or should have known, at least by the time the sixth and seventh Orders of Abeyance were entered, whether she would pursue a Claim against the State if the appeal of the Circuit Court dismissal were unsuccessful. The results of Claimant now pursuing a Claim against the State more than seven years after the Claim was filed and contrary to the representations regarding a voluntary dismissal are unquestionably prejudicial to the State. The State was excluded from expert discovery in the Circuit Court matter after April, 2011, before the first Order of Abeyance was entered on March 30, 2012. (Exhibit C.) As a result, the State missed the opportunity to participate in such discovery, missed the opportunity potentially to share expert witnesses with Circuit Court defendants, and missed the opportunity to develop its

case in a normal progression of litigation. (Exhibit C.) Resident physicians at the time have completed their programs and moved to other states,[2] memories of witnesses still in Knoxville have dulled over the past seven years, the State has not been "in the loop" for the past six years as Claimant progressed in the Circuit Court case while this matter was in abeyance, and the State is now "under the gun" to work up this Claim for trial as quickly as possible after sitting dormant for six years. The State will have to incur these hardships because Claimant has not abided by her representations to the Commission and to the Defendant in Orders of Abeyance three through seven and has not voluntarily dismissed this Claim in the absence of a comparative fault allegation. These elements satisfy the requirements to equitably estop an inconsistent position in litigation set forth by the Supreme Court. Epperson, 284 S.W.3d at 315 – 316. The Commission should dismiss this Claim pursuant to the doctrine of equitable estoppel.

5. Additionally, the limited scope of the Orders of Abeyance invoke application of the last sentence of Tenn. Code Ann. § 402(b) ("Absent prior written consent of the commission, it is mandatory that any claim filed with the claims commission upon which no action is taken by the claimant to advance the case to disposition within any one-year period of time be dismissed with prejudice."). Prior written consent was given by the Commission, but only for the limited purpose of preserving the Claim in the event a Circuit Court defendant made a comparative fault allegation against a State employee. The Abeyances were expressly not for any and all purposes and were not a safety valve in the event the Circuit Court action was eventually unsuccessful.

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[2] Four resident physicians were deposed by Claimant's counsel on March 2, 2011, March 24, 2011, April 19, 2011, and April 21, 2011. While the State asked some questions, it did not undertake a direct examination for presentation at trial. Each of these resident physicians may need to be brought toKnoxville for trial or have testimony recorded by a deposition for presentation at trialnearly ten years after the events at issue occurred.

Because pursuit of this Claim now is beyond the scope of the abeyances granted by the Commission, no action has been taken by Claimant to advance this Claim to disposition within any one-year period for Claimant's present purposes. Accordingly, this Claim should be dismissed for failure to prosecute.

Statute of Limitation[3]

6. Claimant testified to her knowledge of Mr. Cright's condition and Claimant's understanding of the alleged negligence of any State employee by Interrogatory response dated September 29, 2010, and by deposition testimony dated November 15, 2010. In her Interrogatory responses, Claimant testified that she was informed on July 30, 2008, by surgical tech Paul "Dusty" McKenzie that vascular surgeon Dr. Michael Freeman expressed dissatisfaction with doctors and nurses that Dr. Freeman was not called to treat Mr. Cright sooner. (Exhibit D at Responses to Interrogatory Nos. 5 and 7 at pp. 3 – 5.) In her deposition, Claimant testified that (1) Mr. Cright was not discharged on July 29, 2008, as they had originally been informed; (2) beginning on July 29, 2008, Mr. Cright developed pain so intense that it caused him to cry out and that the pain continued to increase into July 30, 2008; (3) Claimant was constantly paging the nurses to do something for Mr. Cright's increased pain; (4) Claimant was paging the nurses to request that a doctor perform a test or otherwise act to relieve Mr. Cright's worsening condition; (5) after two tests were performed, a cystoscopy and a CT scan, Claimant repeatedly paged the nurses seeking the results of the tests but did not receive the results; (6) on the morning of July 30, 2008, Mr. Cright's blood pressure dropped to a level Claimant considered abnormal, and

[3] By asserting the statute of limitation defense, Defendant is in no way admitting negligence on the part of any employee. Defendant is only asserting that, to the extent Claimant has a cause of action for medical malpractice, it accrued, at the latest, by July 30, 2008, and that Claimant's pre-suit notice and Complaint were untimely.

Claimant paged and informed the nurses of this change; (7) before the morning of July 30, 2008, Mr. Cright's abdomen had become swollen, which was abnormal for him; (8) Claimant confirmed the conversation with Mr. McKenzie and the statements of Dr. Freeman regarding delay in contacting Dr. Freeman; and (9) Claimant described her understanding of the claim against Defendant as being based on a lack of communication among the various doctors pertaining to Mr. Cright's medical tests. (November 15, 2010, deposition of Catherine Cright at pp. 41 – 68, 77 – 80, 93 – 94, and 121 (excerpts attached as Exhibit E).)[4] These are the same allegations of negligence set forth in the Complaint. (Complaint at ¶¶ 5 – 8.) Any resident physicians involved in Mr. Cright's care during this time, including, but not limited to, those who performed the cystoscopy and read the CT scan, are identified in Mr. Cright's medical records. As a result, Claimant's Claim accrued, at the latest, by the time of her conversation with Mr. McKenzie on July 30, 2008. Young v. Kennedy, 429 S.W.3d 536 (Tenn. Ct. App. 2013) appeal denied (Feb. 11, 2014).

7. Claimant attempted to provide mandatory pre-suit notice by mail on August 3, 2009. (Exhibit F.) Claimant's cause of action, however, accrued July 30, 2008, at the latest, meaning the one-year statute of limitation expired July 30, 2009. Tenn. Code Ann. §§ 9-8-402(b), 28-3-104(a)(1), and 29-26-116(a). Claimant's pre-suit notice was not mailed "within the statutes of limitations and statutes of repose applicable to" Defendant, Tenn. Code Ann. § 29-26-121(a)(3) (2009), so Claimant is not entitled to the 120-day extension of the statute of limitation.

[4] These excerpts of Claimant's deposition are the same portions relied upon by Defendant in its contemporaneously filed Motion to Amend Answer. The references to the specific pages of Claimant's deposition testimony are more specific in Defendant's Statement of Undisputed Material Facts in support of Defendant's Motion for Summary Judgment. Defendant alerts the Commission to the duplication to avoid the Commission unnecessarily reading the same materials twice.

Tenn. Code Ann. § 29-26-121(c) (2009). Claimant's Claim was not commenced with the Division of Claims Administration ("DCA") until December 1, 2009,[5] (Exhibit G), making it untimely. Assuming for the sake of argument that the 120-day extension could somehow apply despite the late pre-suit notice, 120 days from July 30, 2009, expired November 27, 2009. December 1, 2009, was untimely even if the 120-day extension could apply.

8. In support of this Motion, Defendant relies upon the attached Exhibits A – G and the contemporaneously filed Statement of Undisputed Material Facts and supporting Memorandum of Law.

9. Based upon the foregoing, Defendant respectfully requests that the Commission dismiss this action on the grounds that (1) Claimant should be equitably estopped from proceeding with this action in the face of multiple representations that the Claim would be voluntarily dismissed if no Circuit Court defendant alleged the comparative fault of a State employee and in the absence of any such allegation; (2) Claimant failed to prosecute this action pursuant to the requirements of the Claims Commission Act for any purpose other than the purpose represented to Defendant and the Commission as basis for the multiple abeyances – the abeyances simply are not valid to sustain this Claim for any reason other than that contained in the Orders; and (3) Claimant's Claim accrued at the latest on July 30, 2008, and Claimant did not provide mandatory pre-suit notice within the one-year statute of limitation, instead waiting until

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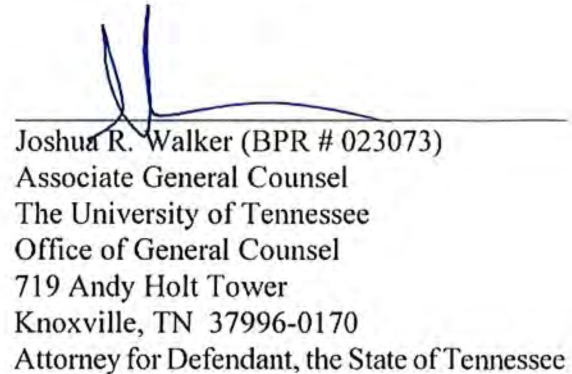
[5] The Complaint was faxed and mailed to the DCA. The faxed copy was stamped November 25, 2009, and the mailed copy was stamped December 1, 2009. The Commission, however, follows the Rules ofCivil Procedure except where specifically amended by Commission Rule. Tenn. Comp. R. & Regs. 03101-1-.01. The Rules of Civil Procedure do not allow the facsimile filing of a complaint. Tenn. R. Civ. P. 5A.02(4)(a). Rule 5A has not been altered in any way by the Commission's Rules. Tenn. Comp. R. & Regs. 03101-1-.01. As a result, the November 25, 2009, facsimile filing is a nullity.

August 3, 2009, to attempt pre-suit notice, such that Claimant is not entitled to the 120-day extension of the statute of limitation, making her December 1, 2009, filing of this action untimely.

10. Pursuant to Tenn. Comp. R. & Regs. 0310-1-1.01(5)(a), Defendant respectfully requests oral argument of this Motion.

Respectfully submitted this 8th day of June, 2017.



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Attorney for Defendant, the State of Tennessee

CERTIFICATE OF SERVICE

I certify that the original of the foregoing was mailed to **Paula Merrifield**, Clerk, Tennessee Claims Commission, Andrew Jackson Building, 9th Floor, 502 Deaderick Street, Nashville, Tennessee 37243; a copy of the foregoing was mailed to Claimant's attorneys, **Donna Keene Holt, Esq.**, 1525 McCroskey Avenue, Knoxville, Tennessee 37917-4752 and **Paul Emmett Kaufman, Esq.**, 520 Spenders Trace, Sandy Springs, GA 30350; and to **Robert N. Hibbett,** Commissioner, Tennessee Claims Commission, Middle Division, Clover Bottom Center, 309A Stewarts Ferry Pike, Fir Building, Nashville, Tennessee 37214; postage prepaid.

This 8th day of June, 2017.

Joshua R. Walker

IN THE CLAIMS COMMISSION FOR THE STATE OF TENNESSEE
MIDDLE DIVISION

CATHERINE CRIGHT as surviving Spouse of DENNIS BENARD CRIGHT, SR. DECEASED Both Individually and as Representative,	)	
Claimant,	)	
v.	)	**Claim No. T20100688 Regular Docket**
STATE OF TENNESSEE,	)	
Defendant.	)	

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Defendant, State of Tennessee, by and through counsel, respectfully submits this Memorandum of Law in order to assist the Commission in deciding the issues raised by Defendant's Motion for Summary Judgment.

I. INTRODUCTION

The Commission should grant summary judgment dismissing this Claim for two overarching reasons. First, Claimant has represented to the Commission and Defendant multiple times that the abeyances were only to determine whether the defendants in the related Circuit Court case would allege the comparative fault of any State employee, and, if no such allegation occurred, that the Claim against the State would be voluntarily dismissed. Two of these representations came in Agreed Orders entered by the Commission after the Circuit Court matter was dismissed. Defendant relied on these representations and agreed to forgo the opportunity to participate in consolidated discovery and otherwise prepare its defense in a timely fashion on the basis that the Claim against the State would be dismissed if no comparative fault allegation was made. The Circuit Court matter has been dismissed, so no comparative fault allegation has been or can be made. Claimant should be required to abide by her multiple representations regarding

the status of this Claim, and Claimant should be equitably estopped from pursuing this Claim for any purpose other than the one represented to the Commission and Defendant multiple times. By the same token, the abeyances were only for the limited purpose stated in the Orders. Claimant did not seek and was not entitled to abeyances for a different purpose that represented to the Commission; as a result, Claimant has failed to take action to advance this Claim to disposition within a one-year period for her current basis for pursuing her Claim against the State. As a result, this Claim should be dismissed for failure to prosecute.

Second, this Claim was untimely filed. Following Mr. Cright's stent placement on July 28, 2008, and by July 30, 2008, Claimant knew Mr. Cright was not discharged as planned, witnessed Mr. Cright's condition deteriorate, and believed that the doctors were not performing the necessary tests and were not reading and interpreting the test that had been performed quickly enough. After Mr. Cright was taken for vascular surgery, Claimant was told, on July 30, 2008, by a surgical tech who participated in Mr. Cright's vascular surgery that the vascular surgeon was upset that he had not been contacted earlier to treat Mr. Cright. Due to Claimant's knowledge, her cause of action accrued on July 30, 2008, at the latest. As a result, she was required to provide pre-suit notice within one year of accrual, on or before July 30, 2009. Claimant did not provide pre-suit notice until August 3, 2009, four days too late. As a result, Claimant was not entitled to the 120-day extension of the statute of limitation, making her December 1, 2009, filing untimely. This claim should be dismissed for being filed outside the statute of limitation.

II. FACTS

The facts in this Memorandum are taken from the materials exhibited to Defendant's contemporaneously filed Motion for Summary Judgment or contained in the record.

Equitable Estoppel

This Claim has been placed in abeyance seven times. (See, generally, Orders of Abeyance in record.) Beginning with the third abeyance, the abeyances agreed to by Defendant and granted by the Commission were for a limited, express reason: determination of whether the defendants in the related Circuit Court matter would allege the comparative fault of any State employee, the absence of which would result in voluntary dismissal of the Claim against the State. (Orders of Abeyance numbers 3 – 7, dated July 15, 2013, February 26, 2014, August 1, 2014, June 1, 2015, and June 30, 2016, collective Exhibit B.) The sixth and seventh Orders of Abeyance, dated June 1, 2015, and June 30, 2016, containing the same language regarding comparative fault allegations by Circuit Court defendants and a voluntary dismissal of the Claim against the State if no such allegation were made, were entered after dismissal of the Circuit Court action and during pendency of appeal of that dismissal. (collective Exhibit B.) None of the Orders of Abeyance, even those entered after dismissal of the Circuit Court action, set forth that Claimant will pursue a Claim against the State if the Circuit Court Claim is unsuccessful for any reason. (collective Exhibit B.)

Claimant has represented to Defendant since April, 2011, that Claimant would not pursue her Claim against the State if on Circuit Court defendant made a comparative fault allegation against a State employee. (Declaration of Rebecca P. Tuttle, Exhibit C.) This Claim has been dormant from April, 2011, until the Commission's Order of March 31, 2017. (Exhibit C.) The State did not agree to place this Claim in abeyance for any reason other than resolution of the Circuit Court comparative fault issue as recited in Orders three through seven. (Exhibit C.) The State relied on Claimant's representations to Defendant and in the Orders of Abeyance that the

abeyances were only for the purpose of resolving the Circuit Court comparative fault issue and that the Claim would be voluntarily dismissed if no such comparative fault allegation was made. (Exhibit C.) The State did not agree and never would have agreed to an abeyance for the purpose of preserving the Claim against the State in the event the Circuit Court action was unsuccessful. (Exhibit C.) The State was excluded from expert discovery in the Circuit Court matter before this Claim was placed in abeyance on March 30, 2012. (Exhibit C.) If the State had known that Claimant intended to pursue her Claim against the State in the absence of a comparative fault allegation by a Circuit Court defendant, the State would have moved to transfer the Claim to Circuit Court for consolidation with that action or would have insisted that this Claim participate in coordinated discovery with the Circuit Court parties. (Exhibit C.)

The Circuit Court action has been dismissed, and that dismissal has been affirmed. Cright v. Overly, No. E2015-01215-COA-R3-CV, 2016 WL 6078563 (Tenn. Ct. App. Oct. 17, 2016). As a result, no Circuit Court defendant can or will allege the fault of a State employee.

Statute of Limitation

Mr. Cright underwent a stent placement procedure on July 28, 2008, at the University of Tennessee Medical Center. Claimant understood that Mr. Cright would stay in the hospital one night following his stent placement and would be discharged the following morning. (November 15, 2010, deposition of Catherine Cright (Exhibit E) at p. 41:12 – 19.) On the morning of July 29, 2008, the morning following the stent placement, Claimant first spoke to Mr. Cright via telephone around 8:30 or 9:00 a.m. and was informed that he was not coming home that morning because he could not use the restroom and his blood pressure was up. (Id. at pp. 43:23 – 44:13.) That same morning, Claimant spoke to Mr. Cright via telephone around 11:00 a.m., and Mr.

Cright was hollering and screaming in pain and could not talk. (Id. at pp. 45:12 – 46:4; 47:21 – 48:11.)

On the evening of July 29, 2008, around 5:00 p.m. when Claimant returned to the hospital, Mr. Cright was in severe pain, to the point he said that he would have shot himself if he could have done so. (Id. at pp. 47:5 – 14; 48:16 – 23.) Around that same time, Mr. Cright had swelling in the bottom of his stomach. (Id. at pp. 48:16 – 49:7.) That evening, Claimant spoke to the nurses about Mr. Cright's pain and asked whether a doctor had seen Mr. Cright. (Id. at p. 49:9 – 14.) Claimant paged the nurse to ask about Mr. Cright's pain and whether anyone could run a test to determine the cause of his problems. (Id. at p. 50:3 – 15.)

On the evening of July 29, 2008, sometime after 5:00 p.m. when Claimant returned to the hospital, the "cath doctor" came in Mr. Cright's room to do something regarding Mr. Cright's catheter. (Id. at pp. 50:16 – 51:14.) At the time the "cath doctor" came to Mr. Cright's room, Claimant was concerned because she saw blood in the bag from Mr. Cright's catheter. (Id. at p. 52:2 – 3.)

After the "cath doctor's" visit to Mr. Cright, Claimant paged the nurse and begged for someone to take an x-ray or perform some sort of test to find the cause of Mr. Cright's pain. (Id. at p. 52:4 – 11.) Around 11:00 p.m. on July 29, 2008, Mr. Cright was taken to radiology for an imaging exam. (Id. at p. 52:12 – 22.) Throughout the remainder of the night of July 29, 2008 and the early morning of July 30, 2008, Claimant paged the nurse several times to ask about the results of the radiology test due to the time that had passed following the test. (Id. at pp. 52:12 – 53:14.) During the night of July 29 – 30, 2008, no one informed Claimant or Mr. Cright of the results of his radiology test despite Claimant paging the nurse and asking multiple times. (Id. at

pp. 59:7 – 60:12.) After Mr. Cright returned from the radiology test, his pain got worse through the night. (Id. at p. 53:15 – 24.)

On the morning of July 30, 2008, Claimant's first interaction with a nurse was when Claimant saw Mr. Cright's blood pressure dropping and paged a nurse to come check his blood pressure. (Id. at pp. 55:16 – 56:11.) The change in Mr. Cright's blood pressure that morning was significant to Claimant. (Id. at pp. 56:16 – 57:6.) When Mr. Cright was taken to surgery on the morning of July 30, 2008, he could not talk and began gasping for breath. (Id. at pp. 61:19 – 62:16.)

Following Mr. Cright's July 30, 2008, surgery, the surgeon, Dr. Freeman, told Claimant that Mr. Cright had bled internally and that Dr. Freeman had performed a repair on Mr. Cright. (Id. at pp. 63:5 – 16 and 66:1 – 8.) When Claimant spoke to Dr. Overly following Mr. Cright's July 30, 2008, surgery, she asked him why it took so long for someone to give any help to Mr. Cright. (Id. at p. 68:14 – 24.)

On July 30, 2008, following Mr. Cright's surgery, Claimant had a conversation with a surgical tech, Paul "Dusty" McKenzie, who had participated in Mr. Cright's surgery. (Exhibit E at p. 77:3 – 24; Claimant's Responses to Interrogatory Nos. 5 and 7 (Exhibit D) at pp. 3 – 5.) During this conversation, Mr. McKenzie told Claimant that the vascular surgeon who performed Mr. Cright's surgery, Dr. Freeman, was upset with the doctors and other providers for not contacting Dr. Freeman sooner. (Exhibit E at pp. 77:25 – 78:18 and 78:22 – 79:11; Exhibit D at pp. 3 – 5.)

Claimant's understanding of her Claim is that someone did not pass along or communicate the results of Mr. Cright's radiology test. (Exhibit E at pp. 93:16 – 94:2.)

Claimant's understanding of her Claim against the State is that there was not communication between doctors. (Id. at p. 121:19 – 24.)

Claimant attempted pre-suit notice on Defendant by mail on August 3, 2009. (Exhibit F.) Claimant filed her Complaint with the Division of Claims Administration on December 1, 2009.[1] (Exhibit G.)

III. LAW AND ARGUMENT

To achieve summary judgment, Defendant "has the burden of demonstrating to the court that there are no disputed, material facts creating a genuine issue for trial . . . and that [it] is entitled to judgment as a matter of law." Byrd v. Hall, 847 S.W.2d 208, 215 (Tenn. 1993). A defendant who bears the burden of proof at trial to establish an affirmative defense must introduce undisputed facts showing the existence of the affirmative defense to satisfy the burden of production for summary judgment. Davis v. McGuigan, 325 S.W.3d 149, 161 (Tenn. 2010).

"'[W]hen a motion for summary judgment is made [and] ... supported as provided in [Tennessee Rule 56],' to survive summary judgment, the nonmoving party 'may not rest upon the mere allegations or denials of [its] pleading,' but must respond, and by affidavits or one of the other means provided in Tennessee Rule 56, 'set forth specific facts' *at the summary judgment stage* 'showing that there is a genuine issue for trial.'" Rye v. Women's Care Center of Memphis, MPLLC, 477 S.W.3d 235, 265 (Tenn. 2015) (emphasis in original; citation omitted).

[1] The Complaint was faxed and mailed to the Division. The faxed copy was stamped November 25, 2009, and the mailed copy was stamped December 1, 2009. The Commission, however, follows the Rules of Civil Procedure except where specifically amended by Commission Rule. Tenn. Comp. R. & Regs. 0310-1-1-.01. The Rules of Civil Procedure do not allow the facsimile filing of a complaint. Tenn. R. Civ. P. 5A.02(4)(a). Rule 5A has not been altered in any way by the Commission's Rules. Tenn. Comp. R. & Regs.0310-1-1-.01. As a result, the November 25, 2009, facsimile filing is a nullity.

"The nonmoving party 'must do more than simply show that there is some metaphysical doubt as to the material facts.'" Id. (citation omitted). "The nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party." Id. "If a summary judgment motion is filed before adequate time for discovery has been provided, the nonmoving party may seek a continuance to engage in additional discovery as provided in Tennessee Rule 56.07." Id. "However, after adequate time for discovery has been provided, summary judgment should be granted if the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the existence of a genuine issue of material fact for trial." Id. (emphasis in original; citation omitted). "The focus is on the evidence the nonmoving party comes forward with at the summary judgment stage, not on hypothetical evidence that theoretically could be adduced, despite the passage of discovery deadlines, at a future trial." Id.

Equitable Estoppel

Claimant represented to the Commission and Defendant multiple times that this Claim was being held in abeyance while Claimant determined whether the defendants in the related Circuit Court case would allege the comparative fault of a State employee. Claimant represented multiple times that, if no such allegation was made, she would voluntarily dismiss this Claim. The Orders of Abeyance speak for themselves; no factual dispute can possibly exist. Claimant should now be equitably estopped from pursuing this Claim on a basis different from that represented multiple times to the Commission and Defendant, two of those times coming after the Circuit Court case was dismissed.

"[T]he doctrine of judicial estoppel is applied to prohibit a party from taking 'a position that is directly contrary to or inconsistent with a position previously taken by the party'…." Cracker Barrel Old Country Store, Inc. v. Epperson, 284 S.W.3d 303, 314 (Tenn. 2009) (citation omitted). Although an oath is usually required, judicial estoppel "is frequently applied, where no oath is involved, to one who undertakes to maintain inconsistent positions in a judicial proceeding." Id. at 314 – 315. "There are two distinct branches of judicial estoppel: estoppel by oath and estoppel by inconsistent position." Id. at 315. "The second branch[, in which no oath is required,] is 'founded on the administration of justice and seek[s] to prevent litigants from unfairly benefitting from a strategic shift in legal position.'" Id. (citation omitted). "Both branches of judicial estoppel aim to prevent parties from 'play[ing] fast-and-loose with the courts.'" Id. (citation omitted). The Tennessee Supreme Court has determined that "[i]n those instances where no oath is involved but the party is attempting to gain an unfair advantage by maintaining inconsistent legal positions, the doctrine of *equitable* estoppel should be applied." Id. (emphasis in original).

"The essential elements of an equitable estoppel as related to the party estopped are said to be[:] (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) Intention, or at least expectation that such conduct shall be acted upon by the other party; [and] (3) Knowledge, actual or constructive[,] of the real facts." Id. at 315 – 316.

These elements are satisfied here. No allegation of comparative fault against a State employee was made or can be made in the Circuit Court, but Claimant has not voluntarily

dismissed her Claim, instead pursuing it. Claimant knew or should have known, at least by the time the sixth and seventh Orders of Abeyance were entered after the Circuit Court action had been dismissed, whether she would pursue a Claim against the State if the appeal of the Circuit Court dismissal were unsuccessful, but the same representations were repeated in the sixth and seventh Orders. Claimant's representations in the Orders of Abeyance were at least calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which Claimant are now attempting to assert.

The State, in agreeing to the abeyances, relied upon Claimant's representations that the Claim would be voluntarily dismissed in the absence of a comparative fault allegation. The State never would have agreed to an abeyance for the purpose of preserving the Claim against the State in the event the Circuit Court action was unsuccessful. Claimant, at the very least, had to expect that the State would rely on the representations made; in fact, the State did act in reliance on the representations because that is why the State agreed to the abeyances.

Finally, the State is prejudiced by Claimant's change of course. The State was excluded from expert discovery in the Circuit Court matter before the first Order of Abeyance was entered on March 30, 2012. As a result, the State missed the opportunity to participate in such discovery, missed the opportunity potentially to share expert witnesses with Circuit Court defendants, and missed the opportunity to develop its case in a normal progression of litigation. Resident physicians at the time have completed their programs and moved to other states,[2] memories of

[2] Four resident physicians were deposed by Claimant's counsel on March 2, 2011, March 24, 2011, April 19, 2011, and April 21, 2011. While the State asked some questions, it did not undertake a direct examination for presentation at trial. Each of these resident physicians may need to be brought to Knoxville for trial or have testimony recorded by a deposition for presentation at trial nearly ten years after the events a issue occurred.

witnesses still in Knoxville have dulled over the past seven years, the State has not been "in the loop" as Claimant progressed in the Circuit Court case while this matter was in abeyance, and the State is now "under the gun" to work up this Claim for trial as quickly as possible after sitting dormant for five years. The State will have to incur these hardships because Claimant has not abided her representations in Orders of Abeyance three through seven and has not voluntarily dismissed this Claim in the absence of a comparative fault allegation.

As a result, the Commission should equitably estop Claimant from acting contrary to her representations to the Commission and to Defendant. This Claim should be dismissed pursuant to the doctrine of equitable estoppel. Epperson, 284 S.W.3d at 315 – 316.

Statute of Limitation

"Defenses based on a statute of limitations are particularly amenable to summary judgment motions." Young v. Kennedy, 429 S.W.3d 536, 558 (Tenn. Ct. App. 2013) appeal denied (Feb. 11, 2014) (citations omitted). "Most often the facts material to a statute of limitations defense are not in dispute." Id. "When the facts and the inferences reasonably drawn from the facts are not disputed, the courts themselves can bring to bear the applicable legal principles to determine whether the moving party is entitled to a judgment as a matter of law." Id. "[W]here the undisputed facts demonstrate that no reasonable trier of fact could conclude that a plaintiff did not know, or in the exercise of reasonable care and diligence should not have known, that he or she was injured as a result of the defendant's wrongful conduct, Tennessee case law has established that judgment on the pleadings or dismissal of the complaint is appropriate." Id. at 557 – 558.

In Kennedy, the decedent, who was in remission from lymphoma but was experiencing radiation pneumonitis and a pulmonary infection, was admitted to the hospital March 27, 2001, where he was seen by Dr. Kennedy. Id. at 538. Decedent was discharged on April 3, 2001, but presented to his primary care physician on April 18, 2001, complaining of a worsening condition. Id. Decedent was sent to the emergency room that same day and was admitted into the intensive care unit. Id. at 539. He was transferred out of the intensive care unit but was transferred back on May 9, 2001, because he condition began to deteriorate. Id. Despite being placed on a ventilator, decedent's condition continued to worsen, and he was heavily medicated and sedated. Id.

Decedent's wife described his change in condition on May 9, 2001, following the development of a high fever, very red face, and vomiting. Id. Decedent's wife questioned Dr. Kennedy twice regarding decedent's treatment, confronting Dr. Kennedy on June 6, 2001, about decedent's course of treatment, and decedent's wife told the hospital staff decedent was being prescribed too much medication, affecting his blood pressure. Id. at 539 – 540. Decedent slipped into a coma on June 6, 2001, and died June 12, 2001. Id. at 540.

Decedent's wife filed a wrongful death action against Dr. Kennedy and others on June 11, 2002. Id. at 541. In dismissing the case on statute of limitation grounds, the trial court found that decedent's wife had notice that the injury occurred on May 9, 2001, and June 6, 2001, and that the complaint was filed outside the one-year statute of limitation. Id. at 542.

The Court of Appeals affirmed the dismissal. The Court first recited the standard for accrual of a medical malpractice cause of action:

> [A] medical malpractice cause of action accrues when one discovers, or in the exercise of reasonable diligence should have discovered, both (1) that he or she has been injured by wrongful or tortious conduct and (2) the identity of the person or persons whose wrongful conduct caused the injury. A claimant need not actually know of the commission of a wrongful action in order for the limitations period to begin, but need only be aware of facts sufficient to place a reasonable person on notice that the injury was the result of the wrongful conduct of another. If enough information exists for discovery of the wrongful act through reasonable care and diligence, then the cause of action accrues and the tolling of the limitations period ceases.

Id. at 557. The Court then determined that decedent's wife's notice of the injury was determinative: "in a wrongful death medical malpractice action, [the Court] will 'consider [] whether the plaintiff bringing the suit, rather than the [d]ecedent, had notice of an actionable wrong.'" Id. at 559. The determinative question was "when [decedent's wife] discovered, or in the exercise of reasonable care, should have discovered, that decedent had been injured as a result of Dr. Kennedy's negligence." Id.

In considering decedent's wife's testimony regarding her knowledge of decedent's problems and her confrontations with Dr. Kennedy, that Court noted that "'[n]either actual knowledge of a breach of the relevant legal standard **nor diagnosis of the injury by another medical professional** is a prerequisite to the accrual of a medical malpractice cause of action.'" Id. (emphasis added by Court of Appeals; citation omitted). "In addition, 'mere ignorance ... is not sufficient to toll the running of the statute of limitations.'" Id. (citation omitted). "'The plaintiff may not...delay filing suit until all the injurious effects and consequences of the alleged wrong are actually known to the plaintiff.'" Id. (citations omitted). "Similarly, the statute of limitations is not tolled until the plaintiff actually knows the 'specific type of legal claim he or she has,' or that 'the injury constitute[d] a breach of the appropriate legal standard.'" Id.

(citations omitted). "Accordingly, the fact that [decedent's wife] was not informed of [decedent's] actual diagnosis until after his death is not fatal to Dr. Kennedy's claim that [decedent's wife] discovered the injury prior to [decedent's] death." Id. The Court rejected the argument that the date of death is the date of accrual of a medical malpractice wrongful death cause of action: "'[t]he date of [d]ecedent's death is the latest, rather than only, date from which the one-year limitation runs.'" Id. at 560 (citation omitted).

In applying these legal standards to decedent's wife's knowledge, the Court found:

> From our review of the record, we conclude that the undisputed facts support the trial court's finding that [decedent's wife] had sufficient notice that [decedent] may have suffered an injury due to Dr. Kennedy's negligence, at the latest, on June 6, 2001. With regard to the hospital acquired infection, [decedent's wife] admits in her deposition that she was aware that [decedent] had acquired an infection at the time he was readmitted to the Intensive Care Unit on May 9, 2001. Specifically, [decedent's wife] stated that the fact that he had acquired an infection was obvious from his condition and the fact that [decedent] was placed in isolation at that time. While there is a dispute regarding when [decedent's wife] learned that the infection was a hospital acquired staph infection, we must conclude that the undisputed facts in the record support the trial court's finding that [decedent's wife's] knowledge of the infection would have put a reasonable person on notice that [decedent] suffered an injury as a result of Dr. Kennedy's alleged negligence. Accordingly, by May 9, 2001, [decedent's wife] had "facts sufficient to place a reasonable person on notice that the injury was the result of the wrongful conduct of another," regarding the alleged hospital infection.

Id. at 560 – 561. As a result of decedent's wife's knowledge, the Court of Appeals held that the trial court was correct finding that the statute of limitation began to run on June 6, 2001, at the latest and that the complaint filed June 11, 2002, was untimely and subject to dismissal. Id. at 561.

Just as in Kennedy, Claimant was aware of many alleged problems that Mr. Cright suffered and was told that the vascular surgeon had criticized the delay in his being called to treat

Mr. Cright. Claimant became aware on July 29, 2008, that Mr. Cright would not be discharged that day as originally informed, knew that Mr. Cright's blood pressure was up, knew that Mr. Cright could not go to the restroom, knew that Mr. Cright was experiencing extreme pain, and knew that Mr. Cright had swelling in the bottom of his stomach. Through the evening and night of July 29, 2008, and continuing in to the morning of July 30, 2008, Claimant knew that Mr. Cright's pain increased, Claimant repeatedly paged the nurses about doing something for Mr. Cright's pain and to see whether any test could be done to determine the cause, Claimant knew that a "cath doctor" performed and exam or test related to Mr. Cright's catheter, Claimant knew that Mr. Cright's bedside urine bag was filled with blood and was concerned with this, Claimant knew that Mr. Cright was taken for a radiology test, Claimant knew that neither she nor Mr. Cright had received the results of the radiology test, Claimant believed the delay in receiving the test results was improper, and Claimant repeatedly paged the nurses to try to find out the results of the test. On the morning of July 30, 2008, Claimant saw Mr. Cright's blood pressure drop to an abnormal level, Claimant considered this change significant, and Claimant called the nurse to come take Mr. Cright's blood pressure. When Mr. Cright was taken to surgery that morning, he could not talk and was gasping for breath. Also on July 30, 2008, Dr. Freeman told Claimant he had performed a repair on Mr. Cright, and Claimant asked Dr. Overly why it took so long for anyone to help Mr. Cright. Most importantly, on July 30, 2008, Claimant had a conversation with Mr. Mckenzie in which he stated that he saw and heard that Dr. Freeman was upset with the doctors and other providers for not contacting Dr. Freeman sooner.

Based on all of this information, Claimant understood that some problem had arisen and that the doctors, including the resident physicians, had allegedly not communicated sufficiently

or acted quickly enough to help Mr. Cright. Claimant's knowledge satisfies the standard for accrual in Kennedy, and Claimant had the benefit of information that the vascular surgeon had been critical of delay. The identities of both the "cath doctor" and the radiologist who read Mr. Cright's radiology test were in the medical records, as were the identities of any other resident physician who care for or treated Mr. Cright July 28 – 30, 2008. This was sufficient information to put Claimant on notice of a potential claim. At the very least, Claimant should have known that she had a potential claim as of July 30, 2008. As a result, Claimant's medical malpractice cause of action accrued, at the latest, July 30, 2008.

Because Claimant's cause of action accrued July 30, 2008, she was required to provide mandatory pre-suit notice on or before July 30, 2009. Tenn. Code Ann. § 29-26-121(a) (2009).[3] Because Claimant attempted pre-suit notice by mail, she was required to mail the notice within the statute of limitation, on or before July 30, 2009. Tenn. Code Ann. § 29-26-121(a)(3) (2009). Claimant did not mail pre-suit notice to Defendant until August 3, 2009, which was four days too late. Because Claimant did not mail the pre-suit notice within the statute of limitation, Claimant could not take advantage of the 120-day extension of the statute of limitation. Tenn. Code Ann. § 29-26-121(c) (2009). See also Byrge v. Parkwest Medical Ctr., 442 S.W.3d 245, 249 – 250 (Tenn. Ct. App. 2014) ("It is uncontroverted that Plaintiff did not file his First Complaint within the general one year statute of limitations for health care liability actions. It was filed within the one year plus 120 days. However, in order for Plaintiff's First Complaint to have been timely filed, Plaintiff must have complied with Tenn. Code Ann. § 29–26–121 in order to receive the

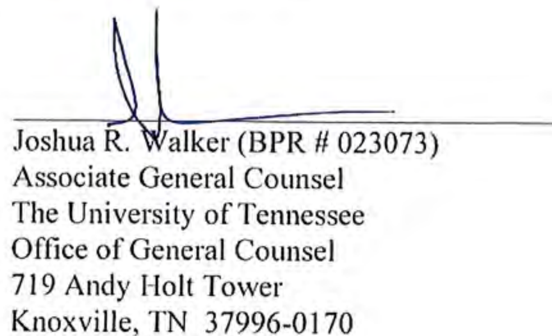
[3] The 2009 version of Tenn. Code Ann. § 29-26-121 (Exhibit A to Motion for Summary Judgment) is applicable because Claimant's pre-suit notice (Exhibit G to Motion for Summary Judgment) was attempted by mail August 3, 2009. All references to Tenn. Code Ann. § 29-26-121 in this Memorandum are to the 2009 version of the statute.

additional 120 day extension of the statute of limitations. It is undisputed that Plaintiff did not comply with Tenn. Code Ann. § 29–26–121 in his first suit. Because Plaintiff failed to comply with Tenn. Code Ann. § 29–26–121, Plaintiff did not receive the 120 day extension, and, therefore, his first complaint was not timely filed."). Because Claimant could not take advantage of the 120-day extension of the statute of limitation, her December 1, 2009, filing is far outside July 30, 2009, and therefore untimely. As a result, the Commission should dismiss this Claim for being filed outside the statute of limitation.

IV. CONCLUSION

This Claim should be dismissed for two reasons. First, Claimant should be required to abide her multiple representations to the Commission and to Defendant that this action would be voluntarily dismissed if no comparative fault allegation was made against a State employee in the related Circuit Court action. No such allegation was or can be made, so this Claim should now be dismissed, voluntarily or otherwise. Second, this Claim was filed outside the statute of limitation. This Claim accrued, at the latest, on July 30, 2008. Claimant did not send mandatory pre-suit notice to the State until August 3, 2009, four days after the statute of limitation expired. As a result, Claimant cannot take advantage of the 120-day extension of the statute of limitation, making her December 1, 2009, filing untimely and subject to dismissal. For these and the foregoing reasons, Defendant respectfully requests that the Commission grant summary judgment dismissing this Claim.

Respectfully submitted this 8th day of June, 2017.



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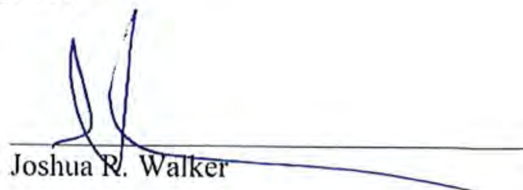
Attorney for Defendant, the State of Tennessee

CERTIFICATE OF SERVICE

I certify that the original of the foregoing was mailed to **Paula Merrifield**, Clerk, Tennessee Claims Commission, Andrew Jackson Building, 9th Floor, 502 Deaderick Street, Nashville, Tennessee 37243; a copy of the foregoing was mailed to Claimant's attorneys, **Donna Keene Holt, Esq.**, 1525 McCroskey Avenue, Knoxville, Tennessee 37917-4752 and **Paul Emmett Kaufman, Esq.**, 520 Spenders Trace, Sandy Springs, GA 30350; and to **Robert N. Hibbett,** Commissioner, Tennessee Claims Commission, Middle Division, Clover Bottom Center, 309A Stewarts Ferry Pike, Fir Building, Nashville, Tennessee 37214; postage prepaid.

This 8th day of June, 2017.



Joshua R. Walker

IN THE CLAIMS COMMISSION FOR THE STATE OF TENNESSEE
MIDDLE DIVISION

CATHERINE CRIGHT as surviving Spouse of DENNIS BENARD CRIGHT, SR. DECEASED Both Individually and as Representative,	)	
Claimant,	)	
v.	)	**Claim No. T20100688**
	)	**Regular Docket**
STATE OF TENNESSEE,	)	
Defendant.	)	

DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Defendant, State of Tennessee, by and through counsel, pursuant to Tenn. Comp. R. & Regs. 0310-1-1-.01; and Rule 56.03 of the Tennessee Rules of Civil Procedure, respectfully submits that the following material facts are undisputed such that Defendant is entitled to summary judgment dismissing this Claim:

1. This Claim has been placed in abeyance seven times. (See, generally, Orders of Abeyance in record.)

2. Beginning with the third abeyance, the abeyances agreed to by Defendant and granted by the Commission were for a limited, express reason: determination of whether the defendants in the related Circuit Court matter would allege the comparative fault of any State employee, the absence of which would result in voluntary dismissal of the Claim against the State. (Orders of Abeyance numbers 3 – 7, dated July 15, 2013, February 26, 2014, August 1, 2014, June 1, 2015, and June 30, 2016, attached as collective Exhibit B.)[1]

[1] All Exhibits referenced in this Statement of Undisputed Material Facts are attached to Defendant's contemporaneously filed Motion for Summary Judgmentor are in the record as the Commission's Orders.

3. The sixth and seventh Orders of Abeyance, dated June 1, 2015, and June 30, 2016, containing the same language regarding comparative fault allegations by Circuit Court defendants and a voluntary dismissal of the Claim against the State if no such allegation were made, were entered after dismissal of the Circuit Court action and during pendency of appeal of that dismissal. (collective Exhibit B.)

4. None of the Orders of Abeyance, even those entered after dismissal of the Circuit Court action, set forth that Claimant will pursue a Claim against the State if the Circuit Court Claim is unsuccessful for any reason. (collective Exhibit B.)

5. Claimant has represented to Defendant since April, 2011, that Claimant would not pursue her Claim against the State if on Circuit Court defendant made a comparative fault allegation against a State employee. (Declaration of Rebecca P. Tuttle attached as Exhibit C.)

6. This Claim has been dormant from April, 2011, until the Commission's Order of March 31, 2017. (Exhibit C.)

7. The State did not agree to place this Claim in abeyance for any reason other than resolution of the Circuit Court comparative fault issue as recited in Orders three through seven. (Exhibit C.)

8. The State relied on Claimant's representations to Defendant and in the Orders of Abeyance that the abeyances were only for the purpose of resolving the Circuit Court comparative fault issue and that the Claim would be voluntarily dismissed if no such comparative fault allegation was made. (Exhibit C.)

9. The State did not agree and never would have agreed to an abeyance for the purpose of preserving the Claim against the State in the event the Circuit Court action was unsuccessful. (Exhibit C.)

10. The State was excluded from expert discovery in the Circuit Court matter before this Claim was placed in abeyance on March 30, 2012. (Exhibit C.)

11. If the State had known that Claimant intended to pursue her Claim against the State in the absence of a comparative fault allegation by a Circuit Court defendant, the State would have moved to transfer the Claim to Circuit Court for consolidation with that action or would have insisted that this Claim participate in coordinated discovery with the Circuit Court parties. (Exhibit C.)

12. The Circuit Court action has been dismissed, and that dismissal has been affirmed. Cright v. Overly, No. E2015-01215-COA-R3-CV, 2016 WL 6078563 (Tenn. Ct. App. Oct. 17, 2016) appeal denied (Feb. 21, 2017).

13. Claimant understood that Mr. Cright would stay in the hospital one night following his stent placement and would be discharged the following morning. (November 15, 2010, deposition of Catherine Cright (Exhibit E) at p. 41:12 – 19.)

14. On the morning of July 29, 2008, the morning following the stent placement, Claimant first spoke to Mr. Cright via telephone around 8:30 or 9:00 a.m. and was informed that he was not coming home that morning because he could not use the restroom and his blood pressure was up. (Id. at pp. 43:23 – 44:13.)

15. On the morning of July 29, 2008, Claimant spoke to Mr. Cright via telephone around 11:00 a.m., and Mr. Cright was hollering and screaming in pain and could not talk. (Id. at pp. 45:12 – 46:4; 47:21 – 48:11.)

16. On the evening of July 29, 2008, around 5:00 p.m. when Claimant returned to the hospital, Mr. Cright was in severe pain, to the point he said that he would have shot himself if he could have done so. (Id. at pp. 47:5 – 14; 48:16 – 23.)

17. On the evening of July 29, 2008, around 5:00 p.m. when Claimant returned to the hospital, Mr. Cright had swelling in the bottom of his stomach. (Id. at pp. 48:16 – 49:7.)

18. On the evening of July 29, 2008, around 5:00 p.m. when Claimant returned to the hospital, Claimant spoke to the nurses about Mr. Cright's pain and asked whether a doctor had seen Mr. Cright. (Id. at p. 49:9 – 14.)

19. On the evening of July 29, 2008, around 5:00 p.m. when Claimant returned to the hospital, Claimant paged the nurse to ask about Mr. Cright's pain and whether anyone could run a test to determine the cause of his problems. (Id. at p. 50:3 – 15.)

20. On the evening of July 29, 2008, sometime after 5:00 p.m. when Claimant returned to the hospital, the "cath doctor" came in Mr. Cright's room to do something regarding Mr. Cright's catheter. (Id. at pp. 50:16 – 51:14.)

21. At the time the "cath doctor" came to Mr. Cright's room, Claimant was concerned because she saw blood in the bag from Mr. Cright's catheter. (Id. at p. 52:2 – 3.)

22. After the "cath doctor's" visit to Mr. Cright, Claimant paged the nurse and begged for someone to take an x-ray or perform some sort of test to find the cause of Mr. Cright's pain. (Id. at p. 52:4 – 11.)

23. Around 11:00 p.m. on July 29, 2008, Mr. Cright was taken to radiology for an imaging exam. (Id. at p. 52:12 – 22.)

24. Throughout the remainder of the night of July 29, 2008 and the early morning of July 30, 2008, Claimant paged the nurse several times to ask about the results of the radiology test due to the time that had passed following the test. (Id. at pp. 52:12 – 53:14.)

25. After Mr. Cright returned from the radiology test, his pain got worse through the night. (Id. at p. 53:15 – 24.)

26. On the morning of July 30, 2008, Claimant's first interaction with a nurse was when Claimant saw Mr. Cright's blood pressure dropping and paged a nurse to come check his blood pressure. (Id. at pp. 55:16 – 56:11.)

27. The change in Mr. Cright's blood pressure on the morning of July 30, 2008, was significant to Claimant. (Id. at pp. 56:16 – 57:6.)

28. During the night of July 29 – 30, 2008, no one informed Claimant or Mr. Cright of the results of his radiology test despite Claimant paging the nurse and asking multiple times. (Id. at pp. 59:7 – 60:12.)

29. When Mr. Cright was taken to surgery on the morning of July 30, 2008, he could not talk and began gasping for breath. (Id. at pp. 61:19 – 62:16.)

30. Following Mr. Cright's July 30, 2008, surgery, the surgeon, Dr. Freeman, told Claimant that Mr. Cright had bled internally and that Dr. Freeman had performed a repair on Mr. Cright. (Id. at pp. 63:5 – 16 and 66:1 – 8.)

31. When Claimant spoke to Dr. Overly following Mr. Cright's July 30, 2008, surgery, she asked him why it took so long for someone to give any help to Mr. Cright. (Id. at p. 68:14 – 24.)

32. On July 30, 2008, following Mr. Cright's surgery, Claimant had a conversation with a surgical tech, Paul "Dusty" McKenzie, who had participated in Mr. Cright's surgery. (Exhibit E at p. 77:3 – 24; Claimant's Responses to Interrogatory Nos. 5 and 7 (Exhibit D) at pp. 3 – 5.)

33. During this July 30, 2008 conversation, Mr. McKenzie told Claimant that the vascular surgeon who performed Mr. Cright's surgery, Dr. Freeman, was upset with the doctors and other providers for not contacting Dr. Freeman sooner. (Exhibit E at pp. 77:25 – 78:18 and 78:22 – 79:11; Exhibit D at pp. 3 – 5.)

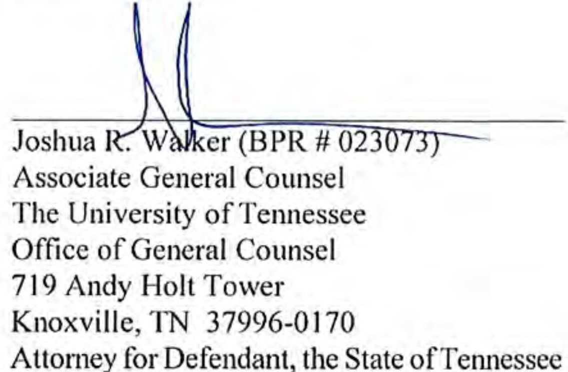
34. Claimant's understanding of her Claim is that someone did not pass along or communicate the results of Mr. Cright's radiology test. (Exhibit E at pp. 93:16 – 94:2.)

35. Claimant's understanding of her Claim against the State is that there was not communication between doctors. (Id. at p. 121:19 – 24.)

36. Claimant attempted pre-suit notice on Defendant by mail on August 3, 2009. (Exhibit F.)

37. Claimant filed her Complaint with the Division of Claims Administration on December 1, 2009.[2] (Exhibit G.)

Respectfully submitted this 8th day of June, 2017.



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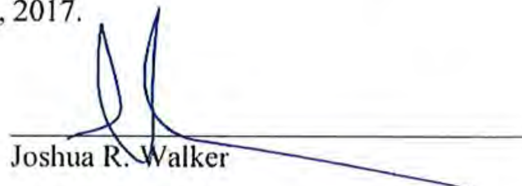
This 8th day of June, 2017.



Joshua R. Walker

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[2] The Complaint was faxed and mailed to the Division. The faxed copy was stamped November 25, 2009, and the mailed copy was stamped December 1, 2009. The Commission, however, follows the Rules of Civil Procedure except where specifically amended by Commission Rule. Tenn. Comp. R. & Regs. 0310-1-1-.01. The Rules of Civil Procedure do not allow the facsimile filing of a complaint. Tenn. R. Civ. P. 5A.02(4)(a). Rule 5A has not been altered in any way by the Commission's Rules. Tenn. Comp. R. & Regs.0310-1-1-.01. As a result, the November 25, 2009, facsimile filing is a nullity.

IN THE CIRCUIT COURT FOR KNOX COUNTY, TENNESSEE
AT KNOXVILLE

WALTER A. PLUTA and wife, PATRICIA PLUTA, Plaintiffs, v. RYAN PICKENS, M.D.; UNIVERSITY HEALTH SYSTEM, INC. d/b/a UNIVERSITY OF TENNESSEE MEDICAL CENTER; STEVEN P. KNIGHT, M.D., and ASSOCIATION OF UNIVERSITY RADIOLOGISTS, PC d/b/a UNIVERSITY RADIOLOGY, Defendants.	)	Docket No. 1-394-18 Jury Demanded

and,

WALTER A. PLUTA and wife, PATRICIA PLUTA, Plaintiffs, v. SCOTT THOMAS MCELROY, UNIVERSITY OF TENNESSEE GRADUATE SCHOOL OF MEDICINE, and STATE OF TENNESSEE, Defendants.	)	Docket No. 1-107-19 (Consolidated)

STATE OF TENNESSEE'S MOTION TO DISMISS

Defendant, State of Tennessee, pursuant to Tenn. Code Ann. §§ 9-8-402(b), 29-26-116(a)(1) and -116(a)(2), and 29-26-121(a) and -121(c), and Rule 12.02(6) of the Tennessee

Rules of Civil Procedure, respectfully moves the Court to dismiss the claim in docket no. 1-107-19 because pre-suit notice was not timely provided and because the claim was filed outside the applicable statute of limitation. In support of this motion, Defendant would show as follows:

1. The medical procedure at issue occurred July 12, 2017. (Complaint in docket no. 1-107-19 at ¶¶ 11 – 13.)

2. Claimant discovered the alleged injury no later than September 6, 2017, when a CT allegedly "revealed a retained Lap sponge from the second July 12, 2017 surgery." (Complaint in docket no. 1-107-19 at ¶ 15.) This discovery of the alleged injury occurred well within the one-year period following July 12, 2017.

3. The statute of limitation applicable to this claim is one year. Tenn. Code Ann. § 9-8-402(b) ("The claim is barred unless the notice [required by Tenn. Code Ann. § 9-8-402(a)(1)] is given within the time provided by statutes of limitations applicable by the courts for similar occurrences from which the claim arises…."); Tenn. Code Ann. § 29-26-116(a)(1) ("The statute of limitations in health care liability actions shall be one (1) year as set forth in § 28-3-104.").

4. The common law discovery rule does not apply to health care liability claims when the alleged injury is discovered within the one-year statute of limitation. Tenn. Code Ann. § 29-26-116(a)(2) ("In the event the alleged injury is not discovered within such one-year period, the period of limitation shall be one (1) year from the date of such discovery."); Jones v. Behrman, No. W2016-00643-COA-R3-CV, 2017 WL 2791172 at *4 (Tenn. Ct. App. June 27, 2017) ("Plaintiffs discovered their cause of action within the one-year period of limitation as evidenced by their filing of pre-suit notice…Accordingly, Plaintiffs could not rely upon the

discovery rule and were required to file suit not later than June 20, 2012, within 1 year and 120 days of the date of the surgery on February 20, 2011.").

5. Because Claimant discovered the alleged injury at the absolute latest by September 6, 2017, well within the one-year period following the July 12, 2017 procedure, Claimant may not use the discovery rule to toll the one-year statute of limitation. Tenn. Code Ann. § 29-26-116(a)(2). As a result, the statute of limitation applicable to this claim expired on July 12, 2018.

6. Claimant was therefore required to provide pre-suit notice on or before July 12, 2018. Tenn. Code Ann. § 29-26-121(a)(3) ("The requirement of service of written notice prior to suit is deemed satisfied if, within the statutes of limitations and statutes of repose applicable to the provider, one of the following occurs....."). Claimant did not provide pre-suit notice to the State of Tennessee until September 5, 2018 (complaint in docket no. 1-107-19 at ¶ 7), so he did not satisfy the pre-suit notice requirements of Tenn. Code Ann. § 29-26-121(a). Myers v. AMISUB (SFH), Inc., 382 S.W.3d 300, 308 – 310 (Tenn. 2012) (Tennessee Code Ann. § 29-26-121's requirement of pre-suit notice is mandatory and may not be satisfied by substantial compliance.) Accordingly, this claim should be dismissed. Foster v. Chiles, 467 S.W.3d 911, 916 (Tenn. 2015) ("[W]e hold that dismissal without prejudice is the proper sanction for noncompliance with Tenn. Code Ann. § 29-26-121(a)(1).").

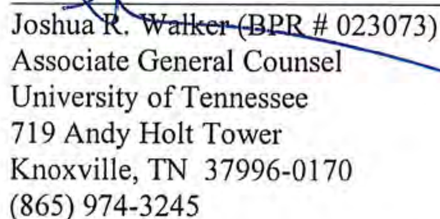
7. Because Claimant did not satisfy the pre-suit notice requirement of Tenn. Code Ann. § 29-26-121(a), he is not entitled to the 120-day extension of the statute of limitation pursuant to Tenn. Code Ann. § 29-26-121(c). Byrge v. Parkwest Medical Center, 442 S.W.3d 245, 250 (Tenn. Ct. App. 2014) ("Because Plaintiff filed to comply with Tenn. Code Ann. § 29-

26-121, Plaintiff did not receive the 120 day extension, and therefore, his first complaint was not timely filed."). Accordingly, the statute of limitation for this matter expired on July 12, 2018. Claimant did not file his complaint in docket no. 1-107-19 until November 7, 2018, well beyond the expiration of the statute of limitation on July 12, 2018. As a result, this claim is untimely and should be dismissed for failure to state a claim upon which relief can be granted. Tenn. Code Ann. §§ 9-8-402(b), 29-26-116(a)(1) and -116(a)(2), and 29-26-121(a)(3) and -121(c); Tenn. R. Civ. P. 12.02(6).

8. In support of this motion, Defendant relies upon the complaint in docket no. 1-107-19 and the contemporaneously filed memorandum of law.

9. Based upon the foregoing, Defendant respectfully requests that the Court dismiss this claim for failure to state a claim upon which relief can be granted.

Respectfully submitted this 23d day of May, 2019.



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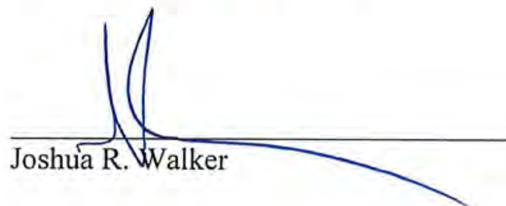
Attorney for Defendant, the State of Tennessee

CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing has been mailed to **Charles D. Susano, III**, Clerk, Knox County Circuit Court Clerk's Office, City County Building, Suite M-30, 400 Main Street, Knoxville, Tennessee 37902; a copy to Claimant's attorney, **Gary E. Brewer, Esq.**, Brewer & Terry, P.C., 1702 W. Andrew Johnson Hwy., Morristown, Tennessee 37816-2046; and copies to Defendants' attorneys, **Joshua J. Bond, Esq.**, Hodges, Doughty & Carson, PLLC 617 Main Street, P.O. Box 869, Knoxville, Tennessee 37901-0869, **Jeffrey R. Thompson, Esq.**, O'Neil, Parker & Williamson, PLLC, 7610 Gleason Drive, Suite 200, Knoxville, TN 37919-6842, and **J. Spencer Fair, Esq.**, London & Amburn, P.C., 607 Market Street, Suite 900, Knoxville, TN 37902; postage pre-paid, this 23d day of May, 2019.



Joshua R. Walker

IN THE CIRCUIT COURT FOR KNOX COUNTY, TENNESSEE
AT KNOXVILLE

WALTER A. PLUTA and wife, PATRICIA PLUTA, Plaintiffs, v. RYAN PICKENS, M.D.; UNIVERSITY HEALTH SYSTEM, INC. d/b/a UNIVERSITY OF TENNESSEE MEDICAL CENTER; STEVEN P. KNIGHT, M.D., and ASSOCIATION OF UNIVERSITY RADIOLOGISTS, PC d/b/a UNIVERSITY RADIOLOGY, Defendants.	)	Docket No. 1-394-18 Jury Demanded

and,

WALTER A. PLUTA and wife, PATRICIA PLUTA, Plaintiffs, v. SCOTT THOMAS MCELROY, UNIVERSITY OF TENNESSEE GRADUATE SCHOOL OF MEDICINE, and STATE OF TENNESSEE, Defendants.	)	Docket No. 1-107-19 (Consolidated)

STATE OF TENNESSEE'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS

Defendant, State of Tennessee, respectfully submits this memorandum of law in order to

assist the Court in deciding Defendant's motion to dismiss.

I. Facts

The medical procedure at issue occurred July 12, 2017. (Complaint in docket no. 1-107-19 at ¶¶ 11 – 13.) Claimant discovered, or should have discovered, the alleged injury no later than September 6, 2017, when a CT allegedly "revealed a retained Lap sponge from the second July 12, 2017 surgery." (Complaint in docket no. 1-107-19 at ¶ 15.) This discovery of the alleged injury occurred well within the one-year period following July 12, 2017.

Because Claimant discovered the alleged injury at the absolute latest by September 6, 2017, well within the one-year period following the July 12, 2017 procedure, Claimant may not use the discovery rule to toll the one-year statute of limitation. As a result, the statute of limitation applicable to this claim expired on July 12, 2018.

Claimant was therefore required to provide pre-suit notice on or before July 12, 2018. Claimant did not provide pre-suit notice to the State of Tennessee until September 5, 2018 (complaint in docket no. 1-107-19 at ¶ 7), so he did not satisfy the pre-suit notice requirements of Tenn. Code Ann. § 29-26-121(a), and he is not entitled to the 120-day extension of the statute of limitation pursuant to Tenn. Code Ann. § 29-26-121(c). Accordingly, the statute of limitation for this matter expired on July 12, 2018. Claimant did not file his complaint in docket no. 1-107-19 until November 7, 2018, well beyond the expiration of the statute of limitation on July 12, 2018.

II. Law and Argument

"The proper way for a defendant to challenge a complaint's compliance with Tennessee Code Annotated section 29–26–121 and Tennessee Code Annotated section 29–26–122 is to file a Tennessee Rule of Procedure 12.02 motion to dismiss." Myers v. AMISUB (SFH), Inc., 382

S.W.3d 300, 307 (Tenn. 2012). "In the motion, the defendant should state how the plaintiff has failed to comply with the statutory requirements by referencing specific omissions in the complaint and/or by submitting affidavits or other proof." Id. "Once the defendant makes a properly supported motion under this rule, the burden shifts to the plaintiff to show either that it complied with the statutes or that it had extraordinary cause for failing to do so." Id. "Based on the complaint and any other relevant evidence submitted by the parties, the trial court must determine whether the plaintiff has complied with the statutes." Id. "If the trial court determines that the plaintiff has not complied with the statutes, then the trial court may consider whether the plaintiff has demonstrated extraordinary cause for its noncompliance." Id.

"A Rule 12.02(6) motion challenges only the legal sufficiency of the complaint, not the strength of the plaintiff's proof or evidence." Webb v. Nashville Area Habitat for Humanity, Inc., 346 S.W.3d 422, 426 (Tenn. 2011). "The resolution of a 12.02(6) motion to dismiss is determined by an examination of the pleadings alone." Id. "A defendant who files a motion to dismiss 'admits the truth of all of the relevant and material allegations contained in the complaint, but ... asserts that the allegations fail to establish a cause of action.'" Id. "In considering a motion to dismiss, courts 'must construe the complaint liberally, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences.'" Id. "A trial court should grant a motion to dismiss 'only when it appears that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief.'" Id.

A. The common law discovery rule does not apply in health care liability actions because it is altered by Tenn. Code Ann. § 29-26-116(a)(2), so the statute of limitation applicable to this claim expired July 12, 2018.

In health care liability actions, the common law "discovery rule" and its interplay with the statute of limitation is specifically defined by statute. "The statute of limitations in health care liability actions shall be one (1) year as set forth in § 28-3-104." Tenn. Code Ann. § 29-26-116(a)(1). "**In the event the alleged injury is not discovered within such one-year period,** the period of limitation shall be one (1) year from the date of such discovery." Tenn. Code Ann. § 29-26-116(a)(2) (emphasis added). A health care liability claimant only gets additional time beyond one year if the alleged injury is not discovered within the original one-year period. If the alleged injury is discovered within the original one-year period, the common law "discovery rule" does not apply.

In Jones v. Behrman, No. W2016-00643-COA-R3-CV, 2017 WL 2791172 (Tenn. Ct. App. June 27, 2017), the decedent underwent various 2006 procedures that promoted the formation of pelvic adhesions and fibrosis. Id. at *1. Due to these and other problems, decedent underwent a capsule endoscopy procedure[1] on February 14, 2011. Id. Two days later, on February 16, 2011, an x-ray revealed that the capsule was still present. Id. Decedent's physician prescribed a laxative and advised decedent to report to the emergency room if certain symptoms occurred. Id. The next day, February 17, 2011, further tests were ordered that showed that the capsule remained in the right lower quadrant. Id.

1 The capsule endoscopy procedure involved swallowing a hard capsule with a mini video camera that allowed the physician to examine decedent's small intestines. Jones, 2017 WL 2791172 at *1 n.3.

On February 20, 2011, decedent was admitted to the hospital, and imaging showed an abdominal obstruction. Id. An exploratory laparotomy was performed, and, at some point, the surgeons lacerated or penetrated the small bowel. Id. Despite an attempted repair of the small bowel, it or some other injured site leaked the contents of decedent's bowel into her abdomen, causing an abscess and fistulas. Id. Decedent developed peritonitis and sepsis as a result of the leaking bowel and abscess and died on April 21, 2011. Id.

On January 24, 2012, decedent's family members provided notice of a potential health care liability claim that Dr. Leal negligently performed the capsule endoscopy and that Dr. Behrman, among others, injured decedent during the exploratory laparotomy. Id. at *2. On August 13, 2012, decedent's family members filed suit. Id. The suit was voluntarily dismissed on September 27, 2012, and following a second notice of a potential health care liability claim, the suit was re-filed pursuant to the saving statute on September 26, 2013. Id. The defendants moved to dismiss on the basis that the saving statute could not apply because the original suit was not filed within the statute of limitation, arguing that the cause of action accrued on February 20, 2011 and that initial suit was required to have been filed no later than June 20, 2012. Id. The trial court granted the defendants summary judgment, and the decedent's family members appealed. Id. at *3.

On appeal, the Court of Appeals reviewed the health care liability statute of limitation and emphasized the requirement of Tenn. Code Ann. § 29-26-116(a)(2). Jones, 2017 WL 2791172 at *4. On the basis of this statute, the Court held the following:

> Plaintiffs discovered their cause of action within the one-year period of limitation as evidenced by their filing of pre-suit notice that alleged, in pertinent part, as follows:

> 1. Dr. Leal negligently performed capsule endoscopy on [Decedent], causing a small bowel obstruction; and
>
> 2. Dr. Behrman, Dr. Reynolds, and Dr. Therrien burned, lacerated, cut, or otherwise injured [Decedent's] small intestine, resulting in [a] small bowel fistula, peritonitis, sepsis, and death on April 21, 2011.
>
> Accordingly, Plaintiffs could not rely upon the discovery rule and were required to file suit no later than June 20, 2012, within 1 year and 120 days of the date of the surgery on February 20, 2011.

Id. As a result, the trial court's dismissal for failure to file within the statute of limitation was affirmed. Id. at *5.

The same result should occur in the instant claim. Claimant clearly discovered the alleged injury at the absolute latest by September 6, 2017, well within the one-year period following the July 12, 2017 surgery, when a CT allegedly revealed a retained Lap sponge from the second July 12, 2017 surgery. Because Claimant knew of the alleged injury within the initial year after the allegedly negligent medical care, pursuant to Tenn. Code Ann. § 29-26-116(a)(2) and Jones, Claimant may not rely upon the common law discovery rule to toll the one-year statute of limitation until the date of discovery of the alleged injury. According to the express terms of Tenn. Code Ann. §§ 29-26-116(a)(1) and -116(a)(2), the statute of limitation applicable to this claim expired on July 12, 2018, one year after the allegedly negligent medical care.

B. Because Claimant did not provide pre-suit notice on or before July 12, 2018, this claim should be dismissed.

Claimant was required to provide Defendant pre-suit notice of this health care liability claim on or before the July 12, 2018 expiration of the statute of limitation. Tenn. Code Ann. § 29-26-121(a)(3) ("The requirement of service of written notice prior to suit is deemed satisfied if,

within the statutes of limitations and statutes of repose applicable to the provider, one of the following occurs....”). Tennessee Code Ann. § 29-26-121's requirement of pre-suit notice is mandatory and may not be satisfied by substantial compliance. Myers v. AMISUB (SFH), Inc., 382 S.W.3d 300, 308 – 310 (Tenn. 2012). “[D]ismissal without prejudice is the proper sanction for noncompliance with Tenn. Code Ann. § 29-26-121(a)(1).” Foster v. Chiles, 467 S.W.3d 911, 916 (Tenn. 2015).

Claimant did not provide pre-suit notice to Defendant until September 5, 2018, long after the deadline of July 12, 2018. As a result, Claimant did not strictly comply with the pre-suit notice requirement of Tenn. Code Ann. § 29-26-121(a), so this claim should be dismissed.

C. Because Claimant did not provide pre-suit notice on or before July 12, 2018, he is not entitled to the 120-day extension of the statute of limitation, making his November 7, 2018 complaint untimely.

Because Claimant did not comply with the pre-suit notice requirement on or before July 12, 2018, he is not entitled to the 120-day extension of the statute of limitation in Tenn. Code Ann. § 29-26-121(c) (“When notice is given to a provider as provided in this section, the applicable statutes of limitations and repose shall be extended for a period of one hundred twenty (120) days from the date of expiration of the statute of limitations and statute of repose applicable to that provider.”). See also Byrge v. Parkwest Medical Center, 442 S.W.3d 245, 250 (Tenn. Ct. App. 2014) (“Because Plaintiff filed to comply with Tenn. Code Ann. § 29-26-121, Plaintiff did not receive the 120 day extension, and therefore, his first complaint was not timely filed.”).

Because Claimant is not entitled to the 120-day extension of the statute of limitation, he was required to file his complaint on or before July 12, 2018. Claimant did not file his complaint

until November 7, 2018, well past the deadline. As a result, this claim should be dismissed.

D. The "foreign object exception" in Tenn. Code Ann. § 29-26-116(a)(4) applies only to the statute of repose, not the statute of limitation.

The "foreign object exception" in Tenn. Code Ann. § 29-26-116(a)(4) applies on to the statute of repose in Tenn. Code Ann. § 29-26-116(a)(3), not the statute of limitation in Tenn. Code Ann. § 29-26-116(a)(1), for two reasons. The grammar and structure of the statute and rules of statutory construction lead to this result.

First, the grammar and structure of the statute demonstrates the limited application of the "foreign object exception." The complete text of Tenn. Code Ann. § 29-26-116(a) is as follows:

> (a)(1) The statute of limitations in health care liability actions shall be one (1) year as set forth in § 28-3-104.
>
> (2) In the event the alleged injury is not discovered within such one-year period, the period of limitation shall be one (1) year from the date of such discovery.
>
> (3) In no event shall any such action be brought more than three (3) years after the date on which the negligent act or omission occurred except where there is fraudulent concealment on the part of the defendant, in which case the action shall be commenced within one (1) year after discovery that the cause of action exists.
>
> (4) The time limitation herein set forth shall not apply in cases where a foreign object has been negligently left in a patient's body, in which case the action shall be commenced within one (1) year after the alleged injury or wrongful act is discovered or should have been discovered.

The legislature chose the singular "time limitation" in subsection -116(a)(4). The statute as a whole, however, contains two time limitations: a one-year statute of limitation in subsection -116(a)(1) and a three-year statute of repose in subsection -116(a)(3). Grammatically, the singular "time limitation" in subsection -116(a)(4) can only apply to one of the two time limitations in the statute, and application to the statute of repose, which immediately precedes subsection

-116(a)(4), is grammatically correct.

Structurally, section 29-26-116 consists of a time limit in subsection -116(a)(1), followed by a "safety valve" in subsection -116(a)(2), and (2) a second time limit in subsection -116(a)(3), followed by a more limited "safety valve" in subsection -116(a)(4). This statutory structure of time limit, safety valve, and time limit, safety valve indicates that each "safety valve" applies to the time limit immediately preceding it. The Tennessee Supreme Court described this very structural relationship in Hoffman v. Hospital Affiliates, Inc., 652 S.W.2d 341 (Tenn. 1983):

> The statute of limitations' provisions of the Act has several key elements. Section 1 provides a plaintiff one year after the cause of action accrued to bring suit. Section 2 states that in the event that an alleged injury is not discovered within the one year period, the statute of limitations shall be one year from the date of discovery.[2] However, **section 3 provides a three year ceiling to the date of discovery rule...Sections (a)3 and 4 provide, however, that this ceiling is not effective in two limited circumstances**. If there is fraudulent concealment on the part of the defendant or if a foreign object has been negligently left in a patient's body by the defendant physician...the plaintiff is entitled to commence his lawsuit within one year after such a discovery.

Id. at 343 (emphasis added; citations omitted). Accordingly, subsection -116(a)(4) applies only to subsection -116(a)(3).

Second, applying subsection -116(a)(4) to subsection -116(a)(1) would render subsection -116(a)(2) meaningless or superfluous in contravention of rules of statutory construction. Culbreath v. First Tennessee Bank Nat. Ass'n, 44 S.W.3d 518, 524 (Tenn. 2001) (The Court "must interpret the statute as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous."). Subsection -116(a)(1) already has its "safety valve" in subsection

[2] In Hoffman, however, the Tennessee Supreme Court did not actually apply Tenn. Code Ann. § 29-26-116(a)(2) according to its text cited in this passage. See section II.E. below.

-116(a)(2) that applies in the event of discovery of an injury, including a foreign object left in the patient's body. Therefore, subsection -116(a)(1) has no need of subsection -116(a)(4), and application of subsection -116(a)(4) to subsection -116(a)(1) would make subsection -116(a)(2) meaningless, which is improper construction of the statute. Construing the statute as a whole and giving each word in the statute meaning, subsection -116(a)(2) is a "safety valve" only for subsection -116(a)(1), and subsection -116(a)(4) is a "safety valve" only for subsection -116(a)(3). The "foreign body exception" cannot apply to the statute of limitation without deleting another part of the statute.

As evidence of this limitation on application of the "foreign body exception," every opinion construing it that Defendant could find only applies it to the statute of repose. In Hall v. Ervin, 642 S.W.2d 724 (Tenn. 1982), the action was not filed until May 29, 1980 but alleged negligent acts between September, 1975 and June, 1976. Id. at 725. Burris v. Hosp. Corp. of Amer., 773 S.W.2d 932 (Tenn. Ct. App. 1989) and Burris v. Ikard, 798 S.W.2d 246 (Tenn. Ct. App. 1990)[3] involved surgery on September 19, 1978, death due to alleged complications on December 11, 1987, and suit filed on December 31, 1987. Burris, 773 S.W.2d at 933. In Bloomer v. Wellmont Holston Valley Med. Ctr., 299 F.Supp.2d 810 (E.D. Tenn. 2004), the complaint, filed December 3, 2003, alleged negligence at the conclusion of an operation on December 26, 1997 and not discovered until January 30, 2003. Id. at 811. In Chambers v. Semmer, 197 S.W.3d 730 (Tenn. 2006), the complaint was filed January 6, 2003 alleging that a hemoclip was negligently left in a patient following a December 18, 1997 surgery. Id. at 732.

3 These two opinions involved the same surgery but somehow ended up as separate lawsuits in different sections of the Court of Appeals. For ease of reference, Defendant will cite only to Burris v. Hosp. Corp. of Amer. The facts of the cases are the same.

Each of these cases involved a lawsuit filed more than three years after the allegedly negligent medical care, which invokes the statute of repose, not the statute of limitation.

This distinction, that subsection -116(a)(2) applies only to subsection -116(a)(1) and that subsection -116(a)(4) applies only to subsection -116(a)(3), explains the result in Jones v. Berhman. Jones involved a capsule endoscopy procedure in which the patient swallowed a hard capsule with a mini video camera that allowed the doctor to examine the small intestine. Jones, 2017 WL 2791172 at *1 and *1 n.3. Even though the endoscopy capsule was a foreign object placed in the patient's body that became lodged in the patient's intestines contrary to the doctor's intent, id. at *1, the Court of Appeals did not apply or even discuss the "foreign body exception." See generally, Jones. The medical care at issue in Jones occurred in February, 2011, id. at *1, and the first lawsuit was filed in August, 2012, id. at *2, well within the three-year statute of repose. Because the statute of repose was not at issue, the Court of Appeals never even considered application of subsection -116(a)(4). The Court appropriately considered and applied the only two parts of the statute that were implicated, the statute of limitation in subsection -116(a)(1) and its "safety valve" in subsection -116(a)(2).

The same result should occur in this matter. The allegedly negligent medical care occurred July 12, 2017, and suit was filed November 7, 2018, well within the three-year statue of repose. Accordingly, neither the statute of repose in subsection -116(a)(3) or its "safety valve" in subsection -116(a)(4) apply to this case, just as they did not apply in Jones.

E. Hoffman's holding as to Tenn. Code Ann. § 29-26-116(a)(2) does not prevent dismissal of this claim.

Defendant is aware of the Tennessee Supreme Court's Hoffman opinion, in which the Court applied the common law discovery rule to a medical malpractice claim instead of the statutory version at Tenn. Code Ann. § 29-26-116(a)(2). Hoffman, 652 S.W.2d at 344. Defendant submits that Hoffman is no longer applicable because the Tennessee Supreme Court has rejected Hoffman's underlying rationale and method of statutory construction in the much more recent opinion of Calaway v. Schucker, 193 S.W.3d 509 (Tenn. 2005), in which the Court construed part of the same statute, the medical malpractice statute of repose at Tenn. Code Ann. § 29-26-116(a)(3).

First, the Hoffman Court was expressly concerned with what it considered an inequitable result: "[t]his interpretation eliminates the possibility of the inequitable result that a plaintiff who discovers an alleged malpractice on the 364th day following his injury would be allowed one day to file his suit, whereas, a plaintiff who discovers his injury on the 366th day would be allowed one year to file." Hoffman, 652 S.W.2d at 344. In Calaway, however, the Tennessee Supreme Court rejected interpreting statutes based on perceived inequity: "[w]e cannot, under the guise of judicial interpretation of the statute, in effect rewrite the law and thus substitute our own policy preferences for the Legislature's." Calaway, 193 S.W.3d at 517. The Calaway Court appended the following footnote to the preceding sentence:

> [t]he dissent asserts that minority tolling is appropriate because the claim of a young minor could be eliminated before the minor has a meaningful opportunity to assert that claim or lose his or her cause of action through the neglect of others. However, it is not the role of this Court to rewrite the statute in order to remedy any perceived unfairness. The dissent's argument is best addressed to the Legislature.

Id. at 517 n.2. The Calaway Court expressly rejected the exact rationale applied by the Hoffman Court, and Defendant submits that the more recent Calaway opinion controls.

Second, Defendant submits that Calaway also rejects Hoffman's method of statutory construction. In Hoffman, the Court found, based in large part on the possible inequity it perceived in the statute, that Tenn. Code Ann. § 29-26-116(a)(2) "did not...specifically address what the appropriate period of limitations would be if the alleged negligent act is discovered within the one year period but after the date of injury," and then looked to legislative history and "to the common law to fill in the crack left by the legislature's silence." Hoffman, 652 S.W.2d at 344. Calaway, on the other hand, stated that

> [o]ur approach to statutory construction begins with the statute's language, and if it can end there – with our finding of a clear meaning of the Legislature's intent— then we must stop. "Our search for a statute's purpose begins with the words of the statute itself. If the statute is unambiguous, we need only enforce the statute as written[,]" with no recourse to the broader statutory scheme, legislative history, historical background, or other external sources of the Legislature's purpose. The statute of repose itself – by its words "[i]n no event shall any such action be brought more than three years after the date on which the negligent act or omission occurred" – expresses a clear intent by the Legislature to absolutely limit to three years the time within which malpractice actions can be brought.

Calaway, 193 S.W.3d at 514. Defendant submits that Calaway's more recent instruction as to statutory construction controls. Tennessee Code Ann. § 29-26-116(a)(2) says what it means and means what it says, and, according to Calaway, no one is at liberty to ignore the plain language of the statute. The statutory discovery rule applies only if the alleged negligence is not discovered in the initial one-year statute of limitation. If the alleged injury is discovered within the initial one-year period, as occurred here, then there is no tolling and the statute of limitation is still one year from the allegedly negligent act. According to Calaway, this statutory framework of the

discovery rule applies pursuant to the statute's plain language even if perceived to be unfair. As a result, this claim is untimely and should be dismissed.

III. Conclusion

Based on the foregoing, Defendant respectfully requests that the Court dismiss this claim for failure to provide pre-suit notice within the applicable statute of limitation and because this claim was filed outside the statute of limitation.

Respectfully submitted this 23d day of May, 2019.

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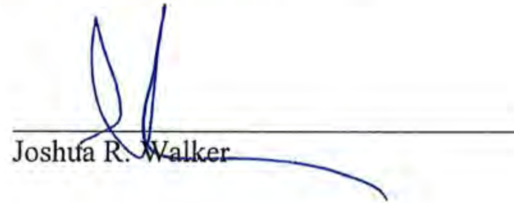

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