The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

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(including county)

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(including county)

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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.

State of Tennessee, Administrative Offices of the Courts

Knox County Circuit Court Div. 2 Judge

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

1989 BPR # 013695

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

Tennessee BPR # 013695 October, 1989 Active

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

No

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

1. Private Practice of Law 1989 – 2014: Practiced law with my father for 11 years before he passed away. Also had a 4 attorney law firm that I started and had office sharing arrangements with other attorneys. My practice included both civil and criminal trial experience in state and federal courts. I represented juvenile criminal defendants incarcerated in juvenile detention facilities in civil rights violations cases.
2. Administrative Law Judge for the State of Tennessee Special Education Department 1990 – 2007: For 17 years during that time, I also was an Administrative Law Judge for the State Department of Education Special Education Department presiding over trials across

the state dealing with children with special needs whose parents sued the local school system. The cases involved complex issues that incorporated both state and federal law concerning how state agencies incorporated federal law that affect children with special needs.

3. Mediator for the State of Tennessee Department of Education Special Education Division 1993 – 2007: Mediated disputes between families and the Local Education Agencies (Local School Systems). Met with the parties together and found out what the issues were. Then met with them individually to determine if there were issues that they did not want to share while the other side was in the same room. After spending time with each side, then attempted to help the parties fashion a remedy to the concerns of all that would take care of the child's educational needs and was in the best interest of the child.
4. Mediator for the State of Tennessee Department of Vocation Rehabilitation 1998 – 2005: Mediated disputes between employees who have physical, mental or sensory impairment and employers and help determine eligibility for services and help fashion a resolution to help a person with limitations remain a productive member of society and retain their dignity.
5. Circuit Court Judge Knox County Circuit Court Div. II 2014 – Present: Presided over both jury and bench trials, motion hearings, discovery disputes on issues including car wrecks, slip and falls, medical malpractice, wrongful death, rail road cases, asbestosis cases, property, orders of protection, child custody, termination of parental rights and neighbor disputes. I have taken cases from judges in Anderson, Blount, Jefferson and Sevier County judges who had recused themselves and requested another judge take the case. I have formalized adoptions of children to good homes with caring parents who will love, care for and protect them.

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.

Currently Circuit Court Judge in Knox County – Presiding over both jury and bench trials, motion hearings, discovery disputes on issues including car wrecks, slip and falls, workers compensation, medical malpractice, wrongful death, rail road cases, asbestosis cases, neighbor disputes, property disputes, real estate matters, estate and probate matters, land use, planning and zoning matters, law suits against the city, county and state, constitutional issues, orders of protection, child custody, termination of parental rights. I have voluntarily taken cases from judges in Anderson, Blount, Jefferson, Hamblen and Sevier County who had recused themselves and requested another judge take the case. I have formalized adoptions of children to good homes with caring parents who will love, care for and protect them.

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.

1. During my twenty-five plus years in private practice, I represented clients in Juvenile, Municipal, State and Federal Courts as well as Administrative Agency hearings. I have only argued one case before the appellate courts. I was fortunate enough to practice with my father for 11 years before he passed away; I practiced in a firm and in office sharing arrangements and as a solo practitioner. In each of the matters that I describe herein, I was the fully involved as the primary attorney handling all matters and if anyone else was involved I directed their efforts. I have been in both solo practices, office sharing arrangements and small private practices with partners.

2. I have represented numerous clients in personal injury cases. Including several car wreck cases as well as a medical battery case where my client is in his twenties and went to a heart doctor for corrective heart surgery after extensive research. He researched the doctors who performed the surgery that he wanted to have and contacted the one who he determined to be the best. That doctor was unavailable for several months. In the interim, his condition worsened and he consulted another heart surgeon who agreed to do the surgery but when the patient was in surgery, the doctor performed a different surgery. In most cases, I conducted my

own research and writing and have argued all motions, taking depositions of parties, physicians and expert witnesses.

3. I have represented both plaintiffs and defendants in worker's comp cases.

4. I have represented both plaintiffs and defendants debt collections cases

5. Bankruptcy cases representing both creditor and debtor preparing all filings and attending all hearings

6. Breach of Contract cases requiring detailed evaluation of accounting information.

7. I have represented clients in both contested and uncontested Guardianships, Conservatorships. In the contested matters, it was necessary to take the deposition of the treating physician and put on proof of the potential ward's mental state. In one contested Conservatorship, four children agreed to file the petition to appoint a conservator for their father with their mother contesting the petition. It was necessary to have a guardian ad litem appointed as well as an attorney ad litem. During the pendency of the litigation, one of the children decided to change her allegiance which created a difficult situation for the parties. The court ultimately granted our petition and appointed a conservator.

8. I represented incarcerated juvenile clients in civil rights cases in federal court against a private contractor that ran juvenile detention facilities. The contractor hired college football players as guards which created a volatile situation that resulted in injuries to the juveniles. I took depositions of all of the guards and facility employees and appeared in hearings.

9. I have represented clients in Social Security disability cases

10. Real estate research, preparation of deeds and conducting closings

11. Real estate partition suit

12. Real estate condemnation case

13. Business entity formations forming C-corporations, S-corporations, LLC's and partnerships as well as litigation concerning business entities

14. Estate and probate administration, including estate tax preparation. Representing personal representatives throughout the entire process of estate administration including estate contests. I have prepared inventories and accountings for all estates as needed. I have presented all related matters to the court.

15. Preparation of wills and trusts for clients.

16. Representation of criminal defendants in misdemeanor and felony cases and post-conviction proceedings. Interviewed witnesses for the state and defendant, research and writing and presented case to the court.

17. Representation of a client before the administrative law judge in establishing a limousine service. Filed the initial petition for the certificate of convenience and necessity. Preparation of witnesses and present case to the ALJ for final determination and issuance of certificate.

18. ALJ for 17 years hearing matters where either a school system or a parent of a special needs child allegedly did not follow the law and a complaint was filed. Dealing with a combination of both state and federal law. Held pretrial conference with counsel, reviewed all motions filed by counsel and ruled on motions. Conducted all hearing, ruling on all evidentiary objections, viewing each witness, determining their credibility and ruling on the law and the facts. Writing an opinion on each case analyzing the law and the evidence and making a ruling based on the analysis. None of the cases that I ruled on were ever overturned by the appellate courts.

19. Mediator for 14 years for the State of Tennessee Department of Education. Mediated matters involving a special needs child when a school system or a parent was accused of not following the law concerning special needs children. I met with the parents and the school system representatives initially and explained the mediation process. Then I would have each side explain their position and see what the parties could agree on. Based on happened, I would meet with the parties either separately or together to attempt see if an agreement could be reached. If it could, the agreement would be written up for the parties to review and sign.

20. Mediator for State of Tennessee Department of Vocational Rehabilitation Services. Mediated matters involving someone who claimed to be eligible for rehabilitation services. I would meet with the parties and find out what the claimant's history was and what each side's position was with regard to the eligibility and attempt to reach a mutually agreeable resolution.

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

During one of my jury panels, I had one jury deliberating and started another jury trial in another court room while the jury completed their deliberations to a verdict.

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.

1. I was appointed by successive governors to be an Administrative Law Judge for the State of Tennessee Department of Education from 1990 through 2007 and heard cases from the East end of the State to the West end of the State. Each case dealt with a child with special needs and whether the child was receiving the appropriate services and/or education based on his or her particular disabling

condition and circumstances. I would conduct pre-trial conferences and would rule on all pre-trial and trial motions, conduct the trial and issue an opinion based on the law and the evidence after a review of the trial transcript, all briefs and exhibits. Some of the trials were multi-day trials. In each case, the outcome could have a profound impact on a child with special needs.

2. Additionally, during the 25 plus years of my practice, I was a special judge for Knoxville Municipal Court on an as requested basis hearing municipal violation cases and conducting trials on contested matters. Further, through the years I was a special judge in the Knox County General Sessions Court on an as requested basis hearing both civil and misdemeanor, felony criminal matters and arraignments. The civil matters, I heard different kinds of cases including but not limited to personal injury cases, breach of contract and debt collection cases

3. As a mediator for the State Department of Education, I mediated disputes between parents of a student with special needs and school systems dealing with the child's education. I would meet with the parties and conduct the mediation taking whatever time was necessary to exhaust all possible avenues to reach an agreed upon resolution.

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.

1. I have been appointed as a guardian ad litem and conservator for several wards during my 25 plus years of practice. As guardian ad litem, I have represented the interests of both elderly and incompetent individuals investigating their medical history, interviewing the family and potential witnesses to make a determination as to the necessity of a conservator being appointed. My responsibility was to determine what was in the best interest of the ward and make recommendations to the courts about the best interest of the ward. I was required to file annual accountings with the court of all income and expenses.

2. As conservator, it was my obligation to handle both financial and personal matters for clients. I maintained checking accounts and paid all valid bills when due.

3. In one specific conservatorship, I was appointed by the court as conservator of an elderly couple from 1995-2005. The wife had Alzheimer's and the husband did not believe that he was capable of managing his affairs as a result of his advanced age and medical conditions. I paid all bills and monitored all investments during the conservatorship and maintained contact with the wards to make sure they had everything that they needed. I did not request a fee until the ward passed away to make sure that he had sufficient funds to take care of his needs.

4. I have been the conservator of the person only and not the property of an adult who was in a motor vehicle accident and suffered a traumatic brain injury. This required me to review all proposed medical treatment, and personal contracts including insurance contracts and other personal matters for the ward.

5. I have been the trustee for trust funds for individuals whose parents were killed when the ward was

a minor and a trust had been established for the minor during the parents' lives. This required me to monitor the trust funds and make distributions when necessary as well as make sure the trust was protected.

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

1. In 1984, I worked as a paralegal for Womble, Carlyle, Sandridge & Rice, Winston-Salem, NC representing RJ Reynolds Tobacco Co. in the Smoking & Health Litigation. Our section reviewed all advertising materials that the company generated from its inception to determine if the company knew that smoking was hazardous to a person's health. We reviewed every document that the company had to determine if there was anything responsive to the issues being tried by the court and created a repository of information for the attorneys.

2. From 1985-1986 I was the sole paralegal for Ortale, Kelley, Herbert & Crawford working on subrogation interests for businesses clients and insurance companies such as State Farm, The Home Insurance and others, preparing clients and expert witnesses for trials, conducting real estate investigation including title searches for real estate closings, preparing documents for 11 different attorneys.

3. From 1986-1989 while I was in law school, I worked full time as the Deputy Clerk and Court Officer for Chancellor Irvin H. Kilcrease preparing files for the Chancellor's review of motions and documents for trials. I was in court for motion dockets and trials. The Chancellor and I discussed the briefs, the motions, the witnesses' testimony and how he made his rulings. I regularly interacted with attorneys who had matters in our court. Additionally, incarcerated criminals would file habeas corpus petitions and other petitions which I would process for the court.

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.

In 2012, I submitted an application for the position of Knox County Circuit Court Judge Div. 3 when Judge Rosenbalm retired.

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

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.

1. University of Tennessee 1975-1980, BA with a double major Political Science/Religious Studies with a minor in Anthropology

2. University of Tennessee 1980-1982, continuing studies in Computer Science, did not receive a degree because I determined that I did not want to sit behind a computer screen for the rest of my life.

3. National Center for Paralegal Training 1983 Paralegal Certificate

4. Nashville School of Law 1985-1989, JD

5. University of Tennessee Culinary Institute 2007 – 2008 Certificate

6. National Judicial College: 2015 General Jurisdiction Training
2016 Financial Statements in the Courtroom
2017 Enhancing Judicial Bench Skills – was a group facilitator

7. EVAWA International Conf. 2019 Sexual Assault Intimate Partners Conference

PERSONAL INFORMATION

15. State your age and date of birth.

63 Born [redacted] 1956

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

From 1956 - 1983 (27 years) and from 1984 – Present (35 years)

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

30 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.

1 Board of Professional Responsibility – I was the attorney for an estate which was being probated and one of the potential heirs filed a complaint alleging that I was using the funds of the estate for personal use. I filed a response advising the BPR that I had no access to the funds and the complaint was dismissed. The complainant later became a client of mine.

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, as a member of an LLC that sued the contractors who performed the work.

In July 1986, I was a plaintiff in a personal injury case as a result of a car wreck in Davidson County. It was filed in Davidson County Circuit Court and was settled before trial. I was stopped behind a car that was turning and was rear ended in rush hour traffic going home from work.

In 2014, I was a plaintiff in a personal injury case as a result of a car wreck in Knoxville. I filed suit in Knox County General Sessions Court Docket # 44604H and settled with defendant's insurance carrier.

In August 2014, I was sued by the former judicial assistant of the previous Circuit Court Judge in Knox County Circuit Court Docket # 3-565-14 for alleged violations of the Tennessee Human Rights Act, tortious interference with employment contract, procurement of breach of contract, official misconduct, and official oppression. The case went to the state Supreme Court and was dismissed in 2017.

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.

University of Tennessee Knox County Alumni Association Board Member (including Vice President and President) 1990 - 1997

The Chairman's Club – Board of Directors 2018 – Present

LBJ & T, Inc. – Director 2017- Present

Whiteaker Family Properties, LLC. – Member 2017 - Present

Holston Methodist Federal Credit Union – Board of Director Vice Chair – 2010 - 2017

Smoky Mountain Service Dogs – Legal Counsel for organization 2011 - 2015

Tennessee State Bowling Proprietors Association Board Member 2019 - 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.

The Chairman's Club – Membership pursuant to the charter is one hundred men interested in changing the lives of underprivileged youth locally and across Eastern Tennessee by committing to contribute $1,000.00/year for 10 years. The Chairman's Club provides grants to youth sports organizations, youth arts and culture clubs, youth education groups, youth health care associations, and more. Our overarching goal continues to be to support activities that empower one of East Tennessee's greatest resources: our young people. Women attend the events that are put on by The Chairman's Club but are not asked to contribute to the donations. If it is determined that this would be inappropriate for me to continue as a member, I would resign.

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.

The Tennessee Bar Association 2014 - 2018, 2019 - 2020

The Knoxville Bar Association 2014 - present

The Tennessee Trial Judges Association – 2014 – present Member of The Legislative Committee and The Technology Committee

The American Trial judges Association 2018 – 2019

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.

Certificate of Appreciation from the Department of Children's Services for commitment to permanency and adoptions 2015

Certificate of Appreciation from the Department of Children's Services for commitment to the children and families of Knox County 2018

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

None

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

Knoxville Bar Assn. CLE 2015 Circuit Court Bench Bar Conference

Knoxville Bar Assn. CLE 2016 "Ain't Behavin": What Not To Do from the Bench"

Knoxville Bar Assn. CLE 2018 Circuit Court Bench Bar Conference

Knoxville Bar Assn. CLE 2019 In Chambers

Smoky Mountain Paralegal Assn. CLE 2019 the Local Rules

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.

Circuit Court Judge 2014 - Present

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.

All of the examples reflect my work entirely

ESSAYS/PERSONAL STATEMENTS

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

I believe that the thirty (30) years of varied experience that I have as both an attorney in private practice in various courts around the state, the 17 years of experience as an administrative law judge, 14 years as a mediator, as well as the past 5 years as a trial court judge presiding over both jury and bench trials has prepared me to be on the appellate court. I want to bring the trial court experience to the appellate court. Trial court experience is invaluable in the court of appeals and we need more judges on that court who have such experience. I believe that my overall

experience has uniquely qualified me for that position.

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

Throughout my practice, I provided pro bono services in both civil and criminal matters to individuals who were unable to afford to pay an attorney and I could assist in matters that they were involved in. I was brought up to believe that one of the most important things anyone can do is give back - not only financially but also with time and abilities.

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

The judges on the Court of Appeals hear civil cases across the state. The court decides every kind of civil dispute including but not limited to personal injury, wrongful death, contract, estate, probate, property disputes, family matters, constitutional issues, law suits against municipalities and more. I have presided over most of these kinds of cases and would bring the trial court experience to the court. There are several judges on the Court of Appeals who do not have this experience. I believe my experience would enhance the court.

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

1. I have been on the board of directors for the University of Tennessee Alumni board for 7 years including holding the positions of vice president and president. As a board we discussed community events that the board would sponsor and put on.

2. I have volunteered time to pro bono representation on a regular basis throughout my years of practice.

3. I have volunteered on the board of directors of a faith based credit union and was the vice chair. We had to review the balance sheet, financial statements and credit union policies along with any loan applications and make sure that the credit union is providing valuable services to the members of the credit union.

4. I have been involved in the jail for bail muscular dystrophy several years.

5. My wife and I have been involved in the Goodwill Industries for the past 9 years, Looks for Literacy and Scarecrow Foundation fundraisers.

6. I intend to continue to be involved in community service organizations as a judge.

I have been involved community organizations such as The Chairman's Club, New Life Gathering, a Wednesday morning Bible study, Horse Haven, Fellowship of Christian Athletes, Smoky Mountain Service Dogs and others to give back to my community and intend to continue to participate in those and other organizations.

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

I was born into a legal family. Our great, great grandfather, J. Rufus Ailor, was the first Country Squire of the First Quarterly Court for Knox County in 1822. My grandfather was a graduate of the University of Tennessee 1913 class and served as a Chancellor and was appointed to the Court of Appeals Eastern Section in 1934 and continued to serve through 1942 followed by private practice into the 1970's. My uncle was an attorney until being killed in the South Pacific in World War II. My father was an attorney for over 50 years until he passed away in 1999. During the 1950's and '60's he was the county solicitor, now known as County Law Director. As a result, I grew up hearing about the law during family times at the table. I would go with my father to his office downtown and listen to him as he spoke with clients and other attorneys. I was fortunate enough to work with my father for 11 years before he passed away.

As a paralegal I gained valuable experience as a foundation for my pursuit of my legal career. Then for three (3) years as a deputy clerk and court officer for Chancellor Kilcrease, I continued to acquire more experience and mentoring from a great legal mind and his compassionate soul.

Then, I had the privilege of serving at the pleasure of several governors as an ALJ and mediator for the state department of education which has given me a keen awareness of the process of being a judge and deciding complicated cases that required analysis of both federal and state law.

My last five (5) years as a trial court judge has given me further valuable experience that would enhance the court of appeals.

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

Absolutely. The Oath to uphold and defend the constitution and the laws taken by a judge is sacred and must be followed.

As an administrative law judge, I was required on numerous occasions to follow the law and rule in favor of a party that I did not want to because the law was in their favor even though I wanted to rule differently.
One case that I heard involved a child who was a quadriplegic in a wheel chair as a result of a vehicle accident which killed her mother. Her grandmother who had custody of her filed an action against the school system alleging that the school system had not provided the appropriate compensatory services for her. After a review of the evidence presented in the case, I determined that the school

system had complied with the law and ruled in their favor even though I wished that the law could provide more services for the child.

Hearing special education cases at times was difficult as there were several times when a child had a severe impairment and may have benefited from additional services but the law was not if the child's favor and I knew my job was to rule on the evidence and the law regardless of the emotional issues that were present.

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. J. Laurens Tullock
President Tullock Consulting
[redacted]
Knoxville, TN. 37902

B. Chris Baker
President/CEO Tennessee Assn. of Broadcasters
[redacted]
Nashville, TN. 37217
[redacted]

C. Robert A. Crawford, Atty.
Kramer Rayson, LLP
[redacted]
Knoxville, TN. 37929-9702
[redacted]

D. Doug Campbell, Atty.
General Counsel Covenant Health
[redacted]
Knoxville, TN. 37922

E. District Attorney General Russell Johnson
Ninth Judicial District
[redacted]
Kingston, TN. 37763
[redacted]

F. Nicole Henrich
Sr. VP of Development

Pie Town Productions
[redacted]
Valley Village CA. 91607
[redacted]

AFFIRMATION CONCERNING APPLICATION

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

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the [Court] Court of Appeals for the Eastern District of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended 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: Feb. 3, 2020.

William T. Ailor

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

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William T. Ailor
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BEFORE THE TENNESSEE STATE DEPARTMENT OF EDUCATION

IN THE MATTER OF:

J.C.

vs. **NO. 00-61**

STATE OF TENNESSEE DEPARTMENT OF EDUCATION

ORDER

WILLIAM T. AILOR
Administrative Law Judge
AILOR, HOUSE & BURNETTE
606 Main Avenue, Suite 202
(865) 525-9326
Knoxville, TN 37902

May 17, 2001

ORDER

This matter came on to be heard on the 20th day of February 2001 and continued on February 21st and concluded on March 8, 2001 before this Court on the Petition of Joseph Claybough, an adult, who had been committed to the Department of Children Services (DCS) while a minor on his Petition for a Due Process Hearing with the issues to be tried as set forth in the amended Pre-Hearing Order dated December 22, 2000 being as follows:

1. Whether or not DCS failed to assign a surrogate parent to the Petitioner from March 1998.
2. Whether or not DCS failed to use methods to insure that the Petitioner's parent could participate in the August 11, 1999 IEP team meeting.
3. Whether or not DCS failed to provide adequate prior written notice before the August 11, 1999 IEP team meeting.
4. Whether or not DCS failed to provide a copy of the procedural safe guards available to the parent of the Petitioner upon notification of the August 11, 1999 IEP team meeting.
5. Whether or not DCS failed to provide a free appropriate public education (FAPE) to the Petitioner from the time that he entered DCS custody in March of 1998 by failing to annually convene and IEP team meeting to review the Petitioner's IEP.
6. Whether or not DCS failed to provide the procedural safe guards required by State and Federal law thus denying the Petitioner a free appropriate public education by denying him Special Education and related services from March 1998 until his IEP team meeting at Taft Youth Development Center.

7. Whether or not DCS failed to re-evaluate the Petitioner's eligibility for Special Education Services upon his request.

Upon the case being called, the Petitioner, Joseph Claybough, an adult person, appeared along with his counsel, Mr. Lenny L. Croce and Ms. Theresa-Vay Smith, attorneys. Mr. Jeff Finney, DCS Education Consultant, appeared as the representative of the local educational agency (LEA), DCS, along with their attorney, Ms. Laura Levy, area legal counsel for the Legal Division of the Tennessee Department of Children Services.

FACTS

Joseph Claybough at the time of this Hearing was a 19 year old adult male who was employed by Labor Ready, an agency for temporary employment of individuals in an as needed basis employment situation.

Joseph came into the custody of the Department of Children Services as a 16 year old on March 6, 1998 for violation of probation as a result of failing a drug screen for cocaine and was placed on an indeterminate sentence. From that date until his release in December 2000, he was placed in various placements including Mountain View Youth Development Center, Taft Detention Center and various others designated hereinafter. At each of these placements, Joseph attended the regular school setting until he was placed in Taft. Each of these placements was for different lengths of time. On June 22, 1999, Joseph was placed in Mountain View Youth Development Center in Dandridge, Tennessee as a result of running away on numerous occasions from other less secure facilities which resulted in DCS requesting a waiver from the Commissioner of DCS and the Blount County Juvenile Judge, William T. Benton.

PROOF

According to the testimony of Ms. Amanda Parrott, on March 12, 1998 the Petitioner was sent to Scott County Detention Center. He stayed there for 13 days and was then transferred to Hamblin County Detention Center and stayed there for 1 night. His next placement was at Freewill Baptist Home for Children for a period of 7 days and on April 2, 1998 was placed in CCS Adolescent Treatment Center, a 120 day program for alcohol and drug treatment. Joseph stayed in that facility 78 days until June 19, 1998 at which time he ran away from the facility. He was returned to DCS custody on July 31, 1998 some 42 days later and was again placed in Freewill Baptist Home for Children where he stayed until August 27, 1998, some 27 days. Again, Joseph ran away from this facility on August 27, 1998 and was absent without leave (AWOL) until October 5, 1998, some 38 days. He was placed in the runaway shelter from October 5, 1998 thru November 3, 1998. He was given a home pass to visit his mother who was terminally ill at the time. On November 19, 1998 he was returned to Freewill thru November 23, 1998 at which time he ran away from the home. On November 30, 1998 he was placed in emergency child services in upper East Tennessee. December 7 thru December 12, 1998 he was placed in Johnny Hall, a foster home until he ran away again. He was AWOL until February 12. On February 12 thru February 14, 1999 he was placed in Youth Emergency Shelter in Morristown on February 14, 1999 he went AWOL thru June 4, 1999. June 4 thru June 22, 1999 he was placed in Scott County Detention Center at which time he was removed to Mountain View Youth Development Center for excessive "runaways". He was held there for over 6 months until January 6, 2000 at which time he had completed the Mountain View program and was stepped down to a less restrictive facility, Bradley County Group Home on January 14, 2000, Joseph went AWOL again until February 23, 2000 at which time he was returned to Bradley County Youth Home thru March 8, 2000. At that

time, he was returned to Mountain View where he stayed until June 23, 2000. By June 23, 2000 he again completed the program at Mountain View and was stepped down to a group home in Knox County called Westview. He went AWOL twice while at Westview, each time for just 1 night. He stayed at Westview until August 21, 2000 at which time he was returned to Mountain View until October 20, 2000 at which time he was transferred to Taft due to non-compliance of the Mountain View program with the agreement of the Judge. He was in Taft from October 20 until December 5, 2000 at which time he was released on an early termination due to his mother's declining health. (Exhibits 341 & 50)

According to Mr. Brody in exhibit 95, page 2, on 12-29-93 Joseph was diagnosed as seriously emotionally disturbed and that school psychologist, S. McCormick, evaluated Joseph on April 4, 1997 and concluded that he still met the criteria for seriously emotionally disturbed and was qualified to receive Special Education Services. He received those services and related services from Blount County Schools until placement in DCS custody on March 12, 1998. Ms. Parrott testified that a copy of Mr. McCormick's report was in her file which included the Blount County School records of Joseph Claybough. (Exhibit 30, Tr. Vol. 1, page 16, line 19 - page 17, line 13) Mr. Brody based his information on the intake sheet presented to him. However, Mr. Fitts could not find Joseph's intake sheet. (T. Vol. 1, page 125, lines 3-7)

On June 29, 1999, Mr. Z.H. Brody, a licensed Psychological Examiner contractor with DCS, performed an initial psychological evaluation to classify Joseph Claybough and recommend treatment for him. (Exhibit 95) The evaluation revealed that a verbal I.Q. of 87 with a performance I.Q. of 105 and a full scale I.Q. of 97. The Woodcock Johnson psychological evaluation revealed a standard score of 70 in mathematics calculation and 88 in mathematics reasoning with a 75 in written expression. On July 6, 1999 the Classification Team met and

recommended that an M-Team should convene to address discrepancies in the achievement test scores along with the previous history of receiving Special Education services. On August 11, 1999 the IEP Team meeting was held.

Mr. Brody did not address the criteria for SED (now ED). (Tr. Vol. 1, page 98, lines 6 - 9) Further, Mr. Brody made no recommendations about Special Education in his report (Tr. Vol. 1, page 99, line 24 - page 100, line 3). On examination of Mr. Jonathan A. Fitts, Special Education Co-coordinator at Mountain View Youth Development Center, he was asked about the report prepared by Mr. Brody (Exhibit 111 A) whereupon Mr. Fitts was asked if Mr. Brody compared the right scores on the right tests to which he responded, "according to this, no, he did not." (Tr. Vol. 1, page 114 lines 2 - 10) Joseph was placed in regular classes and the GED program at Mountain View based on the fact that Mr. Brody did not recommend Special Ed services. According to Mr. Fitts, Joseph did meet the criteria for Learning Disabled (Tr. Vol. 1, page 143 line 25- Page 144 line 7). He further stated that, "according to the IEP team, [that] he did meet the criteria, that his needs can be met in a regular classroom or curriculum." (Tr. Vol. 1, pages 144, lines 11-13) However, this was never mentioned in the documentation of Mountain View.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

With regard to the issues, the Court finds as follows:

1. Failure to provide to a surrogate parent for this student.

   The Petitioner argues that under 20 USC § 1415(b) (2) and Tenn. Comp R. and Regs. 0520-1-9-.01(5) (a) the LEA should have appointed a surrogate parent for the Petitioner. In their post-trial Brief, counsel for the Petitioner argued that, "the surrogate parent is responsible for representing the child in all matters relating to identification, assessment,

educational placement, and the provision of a free appropriate public education including meetings concerning the individualized education program, and any Mediation and Due Process Hearing pertaining to the child." The LEA admits that no surrogate parent was assigned to Joseph Claybough and that one was necessary as Joseph's mother was competent to serve in that role, and that Joseph was not in the guardianship of the Department. The State further argues that although Joseph's mother was ill, she did visit Joseph at Mountain View on three occasions after the M-Team meeting in August 2000.

Under Tenn. Comp. R. & Regs. 0520-1-9-.01(5) (a) the Petitioner has correctly recited the provisions of the Rules and Regulations. However, the Petitioner did not attempt to determine if the child was a ward of the State. Therefore, the Court has reviewed the definition of ward in Black's Law Dictionary 6th Edition, which states, "a person, especially a child or incompetent, placed by the Court under the care and supervision of a guardian or conservator." The Court then has reviewed the definition of guardian which states, "a person lawfully invested with the power, and charged with the duty of taking care of the person and managing the property and rights of another person, who, for defect of age, understanding, or self-control, is considered incapable as administering his own affairs, one who legally has responsibility for the care and management of the person or the estate or both of a child during its minority." The Respondent cites TCA § 39-1-102(10) which states, "Department children are committed to the Department for rehabilitation and treatment, not punishment."

Based on the foregoing, the Court finds that the Petitioner did not qualify under the definitions as a ward and therefore was not entitled to a surrogate parent under the Rules and Regulations and US Code.

The Court will consider issues 2, 3 and 4 together as they are so closely related to each other.

2. Failure to use methods to insure that the parent could participate in the August 11, 1999 IEP Team meeting;

3. Failure to provide adequate prior written notice;

4. Failure to provide a copy of procedural safeguards to parent.

The Petitioner cites 34 CFR § 300.345 and the Tenn. Comp. R. & Regs. 0540-1-9-.01(5)(b)(3) and (5) for the proposition that the public agency is to take steps to insure parental participation in IEP meetings either in person or otherwise including early enough notification and mutually agreed upon scheduling and that the notice must contain the purpose, time and location of the meeting, and who will attend. They argue that DCS did not send notice early enough or arrange other methods for participation by the mother and that the notice did not contain the necessary provisions and that the notice did not contain all of the items required by State and Federal law. The Respondents argue that notice was sent by certified mail, return receipt advising the mother of the date of the meeting and that the mother's rights and procedural safeguards available to her were contained in the notice. The proof was that the mother never participated in any of the meetings held at the facility for her son. This could be because she had to rely on her daughter to drive her and she was very ill. The LEA's testimony was that notice was sent to Ms. Claybough. However, an actual copy of the notice sent to the parent was not contained in Joseph's file. (Tr. Vol. 1, page 129, lines 3 - 13) Mr. Fitts testified that, "the notice would be, would have been, it would have been a four page notice. That's one of the things that kind of disappeared out of his files after it was sent to Taft....." (Tr. Vol. 1, page 121, lines 9 - 20) Upon review of Exhibit 128 which is the certified mail, return

receipt which Mr. Fitts testified is the return receipt of the notice sent to Ms. Claybough of the IEP Team meeting to be held on August 11th showing a post-mark dated July 30, 1999 as the date it was mailed to Ms. Claybough. On the opposite side of the return receipt card, it shows a post-mark of being received on August 10, 1999, one day before the IEP Team meeting. (Tr. Vol. 1, page 151, lines 3 - 13) The Court finds that if the notice which was sent was for the IEP team meeting, it was sent with sufficient time to be received prior to the meeting. If Ms. Claybough did not accept or pick up her certified letter until one day before the hearing, the sender cannot be responsible for that. The testimony was that Mountain View received no call from the mother requesting that the meeting be rescheduled. However, the Respondents did not supply sufficient proof to the Court that they complied with the State and Federal law regarding the contents of the notice sent nor were they able to supply a copy of the actual notice sent to Ms. Claybough. The testimony of Mr. Fitts clearly showed that the notice and enclosures did not comply with the law. There was no copy of the parental procedural safeguards included; the list of rights included with the notice (Exhibit 287) did not fully explain all of the procedural safeguards available. It did not explain what records were maintained or how to obtain a copy of the records. It did not mention the mother's right to give or refuse to give consent for evaluations as well as other rights afforded a parent. The notice was wholly deficient.

Based on the foregoing, the Court concludes that the Respondent did meet the requirements for mailing the notice to the parent of the Petitioner. However, Respondents did not meet the requirements that the School System provide a notice in accordance with Tenn. Comp. R. & Regs. 0520-1-9-.01(5) (b) (2). Additionally, the Respondents did not the mother sufficient notice of other ways she could participate in the IEP team process.

5. Failure to provide a free appropriate public education to Joseph Claybough from the time he entered DCS custody in March 1998 by failing to annually convene an M-Team meeting to review the IEP of Joseph Claybough.

The Petitioners argue that Joseph should have been given an annually IEP Team meeting. The School System argues that Mr. Claybough was provided a free appropriate public education from the time he entered DCS custody of March 1998, and that they were unable to conduct an annual review IEP Team meeting as a result of Joseph's runaway status. A review of Exhibit 341 shows that Joseph was in custody for a little over 75 days from April 2 thru June 19, 1998 at which time he could have received an annual review IEP Team meeting, but did not. CCS is a drug and alcohol rehabilitation program. After that placement, the only other opportunity that the LEA had available to it to conduct an IEP Team meeting an evaluations was when Mr. Claybough was placed in Mountain View that being June 22, 1999. The School System should have conducted and evaluation on while Mr. Claybough was in the CCS facility. DCS had a copy of his school records on March 20, 1998 (Tr. Vol. 1, page 15, lines 14 - 21) which should have given them adequate notice and time to conduct an annual evaluation.

The Court finds that DCS did fail to provide FAPE by not conducting an annual evaluation when it had an opportunity and the necessary information.

6. Failure to provide procedural safeguards required by State and Federal law denied Joseph Claybough a free appropriate public education.

The Petitioners argue that the IEP Team meeting of August 11, 1999 de-certified Joseph Claybough for Special Education and related services and as such prevented him from receiving the appropriate education and safeguards to which his was entitled under State

and Federal law and as such he was unable to obtain his GED. The State argues that the paperwork may have been faulty from the first M-Team report which indicated that Joseph was not eligible for services, but this was based on the decision that extra services could be best provided in the regular class. They further argue that the fact that 14 months later when Joseph was in Taft and was determined to be eligible to receive Special Education services was simply a "philosophical differences" among staff. The Court focuses primarily on the testimony of Mr. Fitts in determining this issue. Mr. Fitts' credibility is extremely suspect based on his evasiveness when asked specific questions and additionally with regard his changing his answers. Initially, Mr. Fitts testified that Joseph did not meet the criteria for Special Education. However, later in his testimony, he admitted that Mr. Brody did not review the data correctly, and that Mr. Claybough did meet the criteria for Special Education services. Further, the Court is disturbed that certain key documents are missing from Mr. Claybough's file some of which the Court has already recited. Additionally, Ms. Linda Russell, GED teacher, testified that she keeps an individual file on each student but when asked if she still had Mr. Claybough's individual file she testified, "you know, it's funny that Joseph's is the only one that's disappeared out of all my papers, my whole file." Joseph testified that he still has not passed the GED exam.

Further, Joseph's transcripts do not indicate that he has received much if any educational benefit.

Further, no transition plan was ever developed for Mr. Claybough. As a result, he testified that he has been unable to find meaningful employment as he lacks work experience and training. (Tr. Vol. 2, page 156, line 24 thru page 157, line 12) DCS should have prepared a transition plan for this student.

Accordingly, the Court that DCS denied Mr. Claybough FAPE by decertifying him and not providing him with special education services.

7. Whether or not DCS failed to re-evaluate the Petitioner's eligibility for Special Educations services upon his request.

The Petitioners argued that the LEA should have conducted an individual assessment in accordance with Tenn. Comp. R. & Regs. 0520-1-9-.01(4) (f) as it was requested by Joseph orally on several occasions. He testified that he asked Ms. Linda Russell, the GED instructor at Mountain View. (Tr. Vol. 2, page 195, lines 8 - 25) He also testified that he told Ms. Russell that was in Special Education prior to being committed to Mountain View. Further, Ms. Russell also testified that Joseph requested Special Education services on a number of occasions. (Tr. Vol. 2, page 18, lines 4 -9) He also asked Ms. Betty Ragland, Assistant Principal at Mountain View and his counselor, Mr. Patrick Bohn. Ms. Russell testified told Joseph that he did qualify for Special Education services. (Exhibit 270)

Although the Rules and Regulations state that an individual assessment should be performed every 3 years or more frequently if a child's parent requests it, under the circumstances in this case the Court determines that the School System should have conducted the assessment as requested. Joseph's mother was extremely ill at the time and later passed away from this illness and did not participate in the educational process served Joseph at the time. Based on the information available to the LEA an assessment should have been performed.

From all of which the Court finds that the Respondent did not comply with the State and Federal laws as required and IT IS THEREFORE ORDERED THAT:

1. Joseph Claybough was a child with a disability and entitled to special education and related

services between August 11, 1999 and November 20, 2000.

2. Special education and related services shall be provided until Joseph Claybough turns 23 years old as compensatory education for the failure of the Respondent to provide FAPE.

3. The Petitioner shall be evaluated by an audiologist who has appropriate experience in Central Auditory Processing Disorder and all recommendations shall be implemented.

4. Respondents shall pay for all speech-language therapy and related services set forth in the November 20, 2000 IEP including transportation costs.

   Pay for all one-on-one tutoring costs to prepare the Respondent to take the General Equivalency Examination (GED) including transportation costs (If necessary)

   Payment of necessary costs associated with registration and taking the GED including transportation.

5. Preparation and implementation of a transition plan.

6. Payment of tuition for vocational training program selected by the Petitioner in accordance with the transition plan established.

7. Payment of a stipend equal to his hourly work wage for the hours he is not able to work as a result of educational or related services as long as he is attending and working toward his GED or other vocational goal and is maintaining a minimum of a C average or is showing sufficient educational progress to prove that he is diligently working toward completion of his program. However, if he shows no initiative and does not do the work necessary, he should be dismissed from the class and the School System released from any further responsibility as to his education. The LEA has the right to review his progress on a monthly basis.

ENTERED THIS THE 17TH DAY OF MAY 2001.

WILLIAM T. AILOR,
Administrative Law Judge

Any party aggrieved by this decision may appeal to the Chancery Court for Davidson County, Tennessee or may seek review in the United States District Court for the district in which the school system is located. Such appeal or review must be sought within sixty (60) days of the date of the entry of a Final Order. In appropriate cases, the reviewing Court may order that this Final Order be stayed pending further hearing in the cause.

If a determination of a hearing officer is not fully complied with or implemented, the aggrieved party may enforce it by a proceeding in the Chancery or Circuit Court, under provisions of section 49-10-601 of the Tennessee Code Annotated.

Within sixty (60) days from the date of this order (or thirty [30] days if the Board of Education chooses not to appeal, the local education agency shall render in writing to the District Team Leader and the Office of Compliance, Division of Special Education, a statement of compliance with the provisions of this order.

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been mailed, with sufficient postage affixed thereto, to Mr. Lenny L. Croce and Ms. Theresa-Vay Smith, Attorneys for student, Rural Legal Services of Tennessee, Inc., Jackson Square, P.O. Box 5209,

Oak Ridge, TN 37831, Ms. Laura Levy, Esq., 308 Home Avenue, Maryville, TN 37801 attorney for school system and Ms. Mary Walker and Mr. Kent Berkley, Attorneys for school system, Cordell Hull Building, 7th Floor, 436 6th Avenue North, Nashville, Tennessee 37243-1290 and on this the _____ day of May 2001.

WILLIAM T. AILOR

BEFORE THE TENNESSEE STATE DEPARTMENT OF EDUCATION

IN THE MATTER OF:

T. B.

vs.

No.03-51

SHELBY COUNTY SCHOOLS

FINAL ORDER

This matter came on to be heard on the 22nd and 23rd days of October, 2003 for trial in the offices of the Shelby County School System. When the case was called the following persons were present: T. B., a student in the Shelby County Schools, Ms. JoAnn Slaughter, the grandmother and guardian of T. B., they were accompanied by Ms. Rhonda Ewing and Ms. Catina Miller, advocates with Tennessee Voices, a group who works as advocates for children in Tennessee, Mr. Eddie Jones, an employee with School-Trans Transportation, and Ms. Wanda McGrew, a nurse who accompanied T. B. Also present were: Mr. Timothy Smith, Attorney for the Shelby County Schools, Dr. Ashcroft, Ms. Rike, Ms. Kathy Johnson, who is over the nurses in Shelby County and also Memphis City Schools, Ms. Martin, the school teacher, Ms. Kelly Reimann, law clerk for Mr. Smith, Ms. Jo Billanti who joined the hearing at a later time.

The issue to be determined by the court is whether Shelby County Schools is required to provide a Certified Nurse Assistant (CNA) on the school bus while transporting T. B. In the alternative, whether or not T. B. should be place back in the Shrine School in Memphis City Schools.

PROOF

After opening statements, Ms. Slaughter called Mr. Eddie Jones as her first witness. Mr. Jones testified that he was employed by a company called School-Trans, a private company which handles specialized transportation needs and has been in business for a three (3) years transporting students to and from schools in the City of Memphis and Shelby county and surrounding areas. He stated that he is technical and operations manager for the company, and he has been in transportation for nine (9) years. All of the busses for School-Trans have medical personnel on board as part of the service provided depending on the particular needs of the children on the bus. He testified that School-Trans has “a little bit more latitude and flexibility when it comes to [their]

busses". (Tr. P. 36)

The testimony of Mr. Jones was that when School-Trans transported T. B. there was a LPN (Licensed Practical Nurse) and a Certified Nurse Assistant (CNA) on the bus, "because there were other kids that required the LPN to be with these kids and T. had to have an RN." (TR 41) He further testified that when there were problems with T. B.'s ventilator, "[we] put an extra person or extra pair of hands on the bus to help the RN." (TR 44) He testified that if T. B. was the only person on the bus, **they** would have had a CNA on the bus, (TR 47) but that under Tennessee guidelines, a CNA is not allowed to do more than an unlicensed assistant can do. (TR 48) Additionally, he testified that if an RN was on the bus with another set of hands this child would be safe. (TR 50) He qualified that answer by saying that it should be a trained set of hands. (TR 52) On re-cross, he further qualified that answer by saying that the person would need to be trained to be familiar with the "go bag" and be of assistance to the RN when taking care of T. B. (TR 62)

Next, the parties stipulated exhibit 1, the letter of Dr. Noel K. Frizzell, into evidence. According to the letter, Dr. Frizzell is general pediatric and adolescent physician. His credentials do not show any specialties concerning any specific areas of medicine. He notes that this student is a quadriplegic and ventilator dependent as a result of severe spinal cord injury requiring a great deal of medical care. He "strongly encourages" that she remain in the Shrine School stating that "[his] fear is that a school that does not have experienced personnel will have a hard time caring for a child as complex as [T.B.]. (Exhibit 1)

Ms. Slaughter testified next. She stated that Shelby County Schools did not provide the same services as Memphis City Schools because a CNA was not on the bus when it was to pick up her granddaughter but that School Trans, who transported her, did have a CNA (TR 66-67). Ms.

Slaughter testified that the nurse for Memphis City Schools spent some time each day for a couple of weeks at the house getting to know T. B. and how to work with her special conditions. (TR 67) The testimony from her was that she was happy with School Trans because they came to her house and spent time with her and discussed plans such as emergency plans and other scenarios which made her feel comfortable, but that was not done by Shelby County Schools. (TR 68) The school system had scheduled to have an LPN on the bus initially when school started. However, the LPN was not on the bus when it showed up to pick up Ms. Slaughter's granddaughter the first day, and Ms. Slaughter would not allow T. B. to ride the bus. (TR 69) She stated that it took three years to work out everything with Memphis City Schools. (TR 74) Memphis City had two other back up nurses trained and Shelby County has not done the same which has caused Ms. Slaughter concerns. (TR 74) On cross examination, Ms. Slaughter agreed that Memphis City Schools has a good educational plan in place (TR 77) and with Ms. Martin, RN. (TR 78) When asked if her big concern was the ventilator, Ms. Slaughter agreed (TR 90) and that T. B. has three batteries for the ventilator that go with her to school. (TR 91) It was admitted that Ms. Martin, RN, could switch batteries by herself if that was needed. (TR 92) Ms. Slaughter testified that the person who is helping Ms. Martin, RN, on the bus needs to be familiar with, "everything in that go bag, the proper name for it, what it's used for....", and That person needs to just be there to work with Ms. Martin, and "...." take Ms. Martin's directions."...."be familiar with reviving a person who's not breathing." (TR 101) She stated that the person who works with Ms. Martin on the bus needs to, "have some kind of certification or qualifications, not just a person off the bus that's going to be a bus driver and a medical person." (TR 106) The Court asked Ms. Slaughter what qualifications a person who would assist the RN needed to have. She responded, "Having a CNA rather than having a person who is — doesn't have a label, knowing that it is a CNA certified by the state, that

reassures me that this person is going to be able to react professionally medically and is familiar and prepared for the different emergencies that T. could have rather than training Joe Blow and talking to him and he says, 'Well, okay, I can do this,' and emergency comes up and they find out, 'I don't have the guts for this. I cannot do it, or it's too much."(TR 118) She further states, "I've seen licensed nurses and other people back out." (TR 118) She states, " If we settled for less than a CNA, then I would be getting less than what Memphis City offered because T. has been used to riding with a CNA on the bus along with her nurse." (TR 119)

T. B. was then called as the next witness. She testified that when something happens to her ventilator on the bus she feels, "scared". (TR 122) The witness was asked if Ms. Martin, RN, took good care of her to which she responded, "yes", and that she felt safe with her. (TR 128)

This witness concluded the petitioner's proof. The respondent called Ms. Kathleen Johnson as their first witness.

Ms. Johnson testified that she is employed by the Memphis and Shelby County Health Department and is the supervisor of school health services, supervising school nurses and that she consults with private and parochial schools, child care facilities in the area. She is a liaison with the school systems, State Board of Nursing, State Department of Education, and State Department of Health concerning school health issues in the Memphis area having been employed in that capacity for 17 years. She stated that she is the highest ranking person in her area of school health at the department. (TR 131) She further stated that she became a registered nurse in 1969 and maintained an active license the entire time. (TR 132) She further testified that she was instrumental in the development of Tennessee Code Annotated 49-5-415 Assistance in self-administration of medications - Administration of glucagon by volunteers (Exhibit 2) by actually work with the agencies and legislators who were crafting the legislation of how to provide

for children's health care needs.(TR 134) Additionally, she stated that she was involved in the drafting of the State Guidelines for Use of Health Care Professionals and Health Care Procedures in a School Setting (Exhibit 2) which govern use of medical personnel in schools (TR 136) Ms. Johnson testified that under Tennessee Law, a CNA is not a licensed healthcare professional and that any person without any qualifications can do the same things as a CNA that "they are both considered unlicensed assistive personnel....some folks may be referred to as CNAs because they've been through some brief training." (TR 137) She stated that she was familiar with T. B. (TR 132, 133)

She was asked in her opinion if someone familiar with the "go bag" and with the child as provided by the Shelby County Schools. She responded, "yes, I believe they could be met by anybody who had been familiarized with the things in the go bag, the pieces of equipment." (TR 139) Ms. Johnson then testified that Exhibit 3, Transportation Procedure for Nursing Staff Providing School Health Nursing Service for students attending Shelby County Schools, defined the responsibilities of a nurse as well as other personnel involved with a medically challenged student on a school bus and at school.(TR 141) This document states on unnumbered page 3 number 2 under Staff Considerations, "Transportation of identified student(s) and the absence or untimely arrival of the TN (Transportation Nurse) will impact students attending other schools." It further states on unnumbered page 11 under Emergency Procedure for Bus Personnel, "Driver and assistant will assist as needed with the emergency and other students and keep radio contact with the transportation office". Ms. Johnson next testified as to the Shelby County Individualized Health Plan for T. B. and the Memphis City School's Individualized Health Plan for T. B. She was asked if the level of services was comparable and whether they make appropriate accommodations for her health conditions. She stated that they are and do. (TR 146-147) She

further testified that there were appropriate emergency procedures in place that are appropriate to care for the student and if the nurse were to say, “This is more than I can handle,” someone else is calling 911.(TR 150) When asked if there was any difference between the services provided by the Memphis City Schools and Shelby County Schools, she responded that there was not. (Tr 157) Later in her redirect testimony, Ms. Johnson testified that the Memphis City School’s healthcare plan only provided for a registered nurse and did not call for any other assistant on the bus.(TR 188) The witness testified that she was at the school to conduct in-service training with the staff who would be working with T. B. to train them instruction on the ventilator and tracheostomy specifically concerning T. B. (TR 154-154) Further, she testified that the school system went, “above and beyond what we usually do” by sending the nurse to Ms. Slaughter’s house for five to seven days to become familiar all of the student’s health care needs. (TR 157-158) School personnel were called back early from their summer vacations to attempt to assist Ms. Slaughter with the transition to the new school. (TR 184) On cross examination by Ms. Miller, Ms. Johnson was asked if “the assistant would even understand the terminology”. She responded; I absolutely know they would understand the terminology .... They understand what they need to do to assist as much or more than a certified nursing assistant, and that’s based on my years of experience as a nurse and knowing what CNAs are trained to do and what they’re not trained to do.” (TR 166)

The School System called Ms. Angela Martin, RN, as their next witness. She stated that she was employed with the Memphis and Shelby County Health Department as a registered nurse. (TR 198) Ms. Martin testified that she had meeting scheduled with Ms. Slaughter on August 4th and 7th and as a result of Ms. Slaughter’s scheduling problems was unable to meet with her as scheduled to get acquainted with T. B. on the 11th she met with the family and was shown some of the things that would be required of her. She was asked if she was comfortable that she could

safely take care of the child. She responded that she was to an extent.(TR 203-206) She was asked if a CNA was ever present during the week she spent at the child's house. To which she responded, "no". (TR 209) She was also asked if she felt that she could safely take care of T. B. by herself and whether or not she needed anyone else to herp her take care of her. Her response was that she could take care of her by herself and did not need anyone else. (TR 209) She testified that there were two in-service trainings with the bus drivers which included some informal testing to make sure they were familiar with the contents of the go bag so they could have some hands on training with the equipment that would be used for T. B's conditions.(TR 215) The assistant had been through an in-service with Kathy Johnson. (TR 217) Ms. Martin further stated that the assistants had two occasions at school where they were required to react to emergency situations with other children and she was impressed with the way they handled themselves and no one panicked. (TR 219) Ms. Martin agreed that she felt that she could safely take care of T. B. whether on the bus with an assistant or at school. On Cross examination, she stated that she has taken care of two other ventilator patients, one of whom was at Cordova school and more fragile than T. B. (TR 232)

Next, Ms. Debbie Rike testified for the school system. She is the transportation supervisor for Shelby County Schools primarily dealing with children with special needs on special ed and regular ed busses driver and bus assistant in-service, routing the bus and information concerning the student for the bus. She has been employed as a special educator since 1978 having an undergraduate and master's degree in special education with certification in special education mental retardation, learning disability sociology and administration supervision. (TR 241-242)

The driver who is assigned to transport the student has experience transporting a child with

a ventilator. (TR 249) Every special ed driver and special ed assistant, the bus lot manager and the bus lot manager assistant were required by Ms. Rike to attend the in-services so that there were back up scenarios in place for transportation. (TR 271) Ms. Rike went to Ms. Slaughter's house and gave her a copy of the transportation handbook and her business card and encouraged her to contact her personally if there were concerns about her granddaughter's safety. (TR 523) Drivers and assistants are required by Ms. Rike to attend a minimum of four in-service trainings each year (TR 256) including CPR training every other year conducted by St. Francis Hospital. (TR 257)

Dr. Wendy Ashcroft, Special Ed supervisor for Shelby County Schools, was the next witness who testified. Her position is the next position in special education below the director of special education. She stated at she has a doctorate in education, a masters and doctorate in special education and an undergraduate degree in psychology with subspecialties in special education, elementary education, mental retardation and administration having been in special education since 1975. (TR 281) She further testified that she is trained in CPR and first aid and certified as a national crisis prevention institute instructor and a professional crisis manager master trainer and other (TR 283)

The final witness called by the school system was Ms. Joe Billanti, director of special education for Shelby County Schools since 1999, the highest ranking official in Shelby County concerning special education. She stated that she has been in special education for Shelby County since 1978 teaching homebound children with multiple and severe disabilities first, gifted children, regular education, then special ed supervisor. (TR 317-318) She testified at length about the things that the school system did to attempt to make the transition for T. B. as easy as possible. (TR 319-351) After Ms. Billanti testified, the school system rested.

FINDING OF FACT

The Court having heard the testimony of the witnesses observed their demeanor and determined their credibility, reviewed the record and the exhibits, it is the finding of the Court as follows:

1. T. B. is a very bright, polite, personable ten-year-old female student who suffered a spinal cord injury approximately five years ago which resulted in her being a quadriplegic and requiring her to have a ventilator to breathe and be totally dependent on for all activities of daily living. (Exhibit 4 and testimony of Angela Martin TR 198-199 and testimony of Ms. Slaughter TR 198)
2. This student lives with Ms. Jo Ann Slaughter, her grandmother and legal guardian, who represented her at the due process hearing. Ms. Slaughter is an extremely caring, intelligent, determined caregiver who is obviously concerned that her granddaughter receive the best she can receive and who is as protective of her as a lioness of a lion cub. Ms. Slaughter has petitioned the Court for an order compelling the Shelby County School System to provide a Certified Nurse Assistant to ride with her granddaughter on the school bus at all times or in the alternative for an order compelling the school system to return the student to the Shrine School, a Memphis City School, where she was previously educated.
3. On May 13, 2003, Ms. Slaughter contacted Ms. Joe Bellanti's, Director of Special Education of Shelby County, concerning her granddaughter moving from the Shrine school to Southwind Elementary and bringing the records. A few days after the conversation, she did bring the records but did not live in Shelby County at that time. Ms. Bellanti's records show that Ms. slaughter was to close on a house in Shelby County on June 6, 2003 but did not have proof of residency in Shelby

County. (Testimony of Joe Bellanti TR 320-321, 324) T. B. was later enrolled in Southwind Elementary School.

4. Even though Ms. Slaughter and T. B. had not moved into Shelby County, and could not be officially placed in the system, Ms. Bellanti attempted to make preparations for her to transfer into their system making over 60 separate contacts related to the student's transition to Southwind Elementary.(Testimony of Bellanti TR 319-323)

5. In early July 2003, Ms. Bellanti met with Barbara Guffey, Special Education Coordinator at Southwind Elementary, to review T. B.'s file to ensure that her educational needs would be met even though Ms. Guffey is not employed by the school system during the summer months. Ms. Guffey voluntarily gave up her vacation time to attempt to protect this student's educational interest. (Testimony of Bellanti TR 326)

6. Over the summer vacation months and after, Ms. Bellanti had numerous contacts with personnel for Shelby County Health Department in an effort to provide the best Individualized Health Plan would be put in place to protect T. B. To learn more about her, her medical needs and attempt to reassure Ms. Slaughter, two Shelby County School nurses had been to Ms. Slaughter's home on at least two occasions prior to the first IEP team meeting in early August. Ms. Barbara Duddy, RN and a senior nurse with the health department, visited the home in July and Ms. Angela Martin, RN, who will be with T. B. while involved in school or on the bus, also visited the home. (Testimony of Johnson TR 184-185 and Testimony of Bellanti)

7. Ms. Martin spent a period of one week at Ms. Slaughter's home learning about her

granddaughter's, her particular medical needs and her equipment. (Testimony of Martin TR 204, 206-209 and testimony of Slaughter) After two days, Ms. Martin knew what she needed to safely take care of T. B. as far as transportation. (Testimony of Martin TR 208)

8. Prior to the first day T. B. was to be in school, the school system conducted a "test run" trip to the school with T. B., the bus driver, assistant and Ms. Martin. (Testimony of Martin and Testimony of Rike TR 247-248)

9. Memphis City Schools together with the Shelby County Health Department developed an Individualized Health Plan (Exhibit 5) for T. B. while she in the city. Shelby County Health Department nursing supervisor Kathy Johnson, RN, who is in charge of school health for Shelby County, is principally responsible for ensuring that T. B's medical needs are taken care of. (Testimony of Johnson TR 131-134) Ms. Johnson continued to be responsible for her medical needs when she enrolled in Shelby County Schools. (Testimony of Johnson)

10. When T. B. enrolled at Southwind Elementary, Ms. Johnson participated in the development of her Individualized Health Plan. The Shelby County Health Plan is equal to or better than that of Memphis City Schools (Testimony of Johnson TR 146) The Individualized Health Care Plan requires an RN be with her and does not call for any other personnel.

11. The primary health concern for this student is that if her ventilator fails she must have a registered nurse who is familiar with her medical history and the contents of her go bag and who can "bag" T. B. to breathe for her until the ventilator is fixed or emergency services arrives. (Testimony of Martin, Johnson and Slaughter, Exhibits

4 and 5)

12. Ms. Slaughter who has no formal medical training stated that she can "bag" her granddaughter by herself in a few seconds and that once she is bagged she is safe until the ventilator is fixed or emergency services arrives. (Testimony of Slaughter TR 93) Ms. Martin, RN and school nurse, stated she is familiar with the procedure and is able to bag T. B. without assistance. If Ms. Martin needs assistance a trained assistant who has been trained to know the equipment in the go bag is all that is needed. (Testimony of Martin TR 210-217 and 230-231, Testimony of Eddie Jones TR 62) Further, Ms. Martin is confident that she can take care of her without any assistance, but even with assistance, the only one on the bus who can provide any kind of medical treatment is Mr. Martin. (Testimony of Martin, Exhibit 2)

13. While T. B. was attending the Shrine School , School-Trans, an independent transportation company for special needs children, transported her to and from school. (Testimony of Eddie Jones) School-Trans relied on Memphis City School's health care plan to determine what level of medical services was necessary for T. B. which required that she have a registered nurse. (Testimony of Eddie Jones TR 47, Exhibit 5). School-Trans provided the bus, driver for the bus that T. B. rode. They also provided a Certified Nurse Assistant at their discretion as an "extra pair of hands on the bus to help the RN", and that she was safe with the RN and an extra pair of hands. (Testimony of Eddie Jones TR 44, 62, 63) Under the IEP, the RN was the only medical person riding the bus (Testimony of Eddie Jones TR 47)

14. Shelby County is providing a bus driver and an assistant who are trained in CPR and have been involved in extra in-service training on this student's "go bag" to assist the registered nurse on the bus to ensure her safety. These people have had sufficient training to assist Ms. Margin in the event of an emergency (Testimony of Johnson 154-155, Rike TR 256-258 and Martin TR 215-216) Additionally, the Shelby County Transportation personnel have attended further in-service training medical support, emergency management and related areas. (Testimony of Rike TR 256-257)

15. While at either the Shrine School or Southwind, Ms. Martin takes care of T. B. without the assistance of any specific licensed or certified personnel. She has never had a CNA assist the RN while on school grounds. (Testimony of Slaughter and Martin TR 218) T. B. testified that Ms. Martin takes good care of her and that she feels safe with her. (Testimony of T. B. TR 128)

16. Ms. Slaughter testified that for her granddaughter to be safe on the bus, whoever is there to assist the RN bust be able to provide the following to Ms. Martin: (1) assist in getting T. B. on the bus, which she stated the bus driver could do; (2) assist securing her on the bus, which she stated the bus driver could do; (3)be capable of calling 911; (4) be familiar enough with the contents of the "go bag" to be able to hand the requested equipment to the RN, and (5)be familiar with T. B's general medical history. (Testimony of Slaughter TR 89-106) Ms. Martin and Ms. Rike both confirmed that the assistant who is assigned to her bus is qualified to perform these tasks and that Ms. Rike had tested their knowledge of her equipment. (Testimony of Martin TR 213-214 and Testimony of Rike TR 264)

17. Ms. Johnson testified that the only person on the bus who is qualified to work on the ventilator, ”bag” T. B. or the tracheostomy is the registered nurse and that neither a CNA nor unlicensed assistant is able to do these things. (Testimony of Johnson TR 138-141)

18. To follow Tennessee law concerning the medical needs of a child with a medical condition, a Transportation Binder must be kept on the student’s bus which included specific information concerning the child’s condition, care plan, emergency information, emergency contact information including family and physicians and the child’s condition and healthcare needs. (Testimony of Johnson TR 140-142)

19. On the first day T. B. was scheduled to attend school, Shelby County Schools sent a bus to Ms. Slaughter’s house which had a trained driver and assistant who were CPR certified as well as an RN. The school system had arranged for an LPN to ride the bus that day as well, but as a result of a miscommunication, the LPN was not at the correct location but was at the next stop. Ms. Slaughter questioned the driver and the assistant about seeing their certification cards which they did not have with them and apparently were inappropriate in their responses to Ms. Slaughter. As a result, Ms. Slaughter did not allow her granddaughter to ride the bus that day. (Testimony of Martin TR 216-217)

20. Shelby County Schools has changed the driver who would pick up T. B. and the bus route so that she would be the last person picked up in the morning and the first person dropped off after school to make her ride on the bus as short as possible. (Testimony of Rike TR 267-270) They conducted additional in-service trainings

for every potential bus driver, every special ed assistant, and even the bus lot manager and lot manager assistant to make sure they had all possible situation covered as far as personnel who would ride with this child. (Testimony of Rike TR 270-271)

21. Shelby County Schools attempted to do numerous things to make Ms. Slaughter feel comfortable, safe and secure with her granddaughter riding on the bus. Ms. Slaughter admitted that she was very afraid (Testimony of Slaughter TR 70), and that when people are inconsistent, she does not have any trust in them and is scared (Testimony of Slaughter TR 71)

CONCLUSIONS OF LAW

1. The first question to be answered is whether or not the Shelby County School System

is providing an appropriate educational program that offers a Free Appropriate Public Education and if so, are they providing the necessary related services. The guardian of a student has the burden to prove by a greater weight of the evidence that the individualized educational program proposed by the school violates the IDEA, McLaughlin v. Hold Public Schools Bd. Of Education, 320 F. 3d 63 (6th Cir. 2003) citing 20 U.S.C.A. 1412(a)(1)(A)(5), 1414(d)(1)(A, B), 1415((b)(6); Knable v Bexley City School District, 238 F.3d. 755(6th Cir. 2001). A school district is not required to provide handicapped students with each and every available special service which is available to nonhandicapped children. They are required to provide related services or those supportive services which may be required to assist a child with a disability to receive a benefit form his or her education Id. Citing 20 U.S.C.A. 1401. The test to be applied is

whether taken in its entirety, the Individualized Educational Program of the handicapped child is reasonably calculated to enable the child to receive educational benefit, 20 U.S.C.A. 1412 citing Rettig v. Kent City School District, 788 F. 2d 328 (6th Cir. 986).

Shelby County developed an IEP that has not been questioned as to its educational benefit. "As far as the educational part of it and the plan that Dr. Ashcroft was in on and this IEP meeting as far as academics was superb; no -- I didn't have anything against it. As a matter of fact, it was better than Shrine's" (Testimony of Slaughter Tr 285) As a result, the Court moves to the second question, is the school system providing appropriate related services?

Shelby County Schools' Individualized Health Plan provides for a Registered Nurse during the time that T. B. is on the bus and at school. This is the same plan as was implemented by Memphis City Schools. Ms. Slaughter has made the claim that Shelby County is not providing the same services as Memphis City claiming that Memphis City provided a Certified Nurse Assistant (CNA) on the bus with her granddaughter. The proof does not support this argument. The testimony of Mr. Jones is that School Trans provided the CNA and that Memphis City Schools provided a Registered Nurse.

Based on the above, the Court needs to determine if by providing an assistant who has been trained by the school system and health department to know the contents of T. B's "go bag" is sufficiently trained to assist the RN on the bus or whether the schools system must provide a CNA to work with the RN to provide for the safety of this child. Under Tennessee Code Annotated 49-5-415, the State Departments of Education and Health developed Guidelines for Use of Health Care Professionals and Health Care Procedures In a School Setting(Exhibit 2) to govern medical support for licensed and unlicensed personnel which controls medical and nursing procedures in

school settings. Under the Guidelines, a CNA and unlicensed assistive person are both classified as "Ancillary Personnel" or unlicensed health care professionals and neither is not qualified to provide any medical services for this child that are required to maintain her safety.

Ms. Slaughter believes that because a CNA has some "specialized" training and they will be more able to handle a situation should it arise than a person trained by school personnel. A CNA is not licensed by the State of Tennessee. Based on the Guidelines, both a CNA and unlicensed Assistive Personnel "must complete appropriate training provided by appropriate health care professionals (RN, MD, DO, Dentist) and must have continued supervised by appropriately licensed health care professional (RN, MD, DO, Dentist)." (Exhibit 2) There is no proof in the record that a CNA can provide any more than an unlicensed assistive person. The proof actually is that under the circumstances of this student the personnel provided by the schools system can provide the same level of services or better because they have been trained specifically to know the contents of T. B's "go bag".

Ms. Slaughter is concerned that a person who does not have a title or some kind of certification or qualifications such as a CNA, they will not have the ability to do whatever is required if an emergency situation arises which will jeopardize her granddaughter's safety. She has stated, "I've seen licensed nurses and other people back out." (TR 118) Although her concerns are completely valid, there is no proof that a CNA or any other trained person will be able to do anything more than what the personnel who Shelby County has provided. Although the Court is sympathetic with and understands Ms. Slaughter's concerns, based on a very thorough review of the trial transcripts, the testimony of the witnesses and the exhibits the Court cannot find in the proof in this record that the Shelby Count Schools is providing less than the Memphis City Schools or that Shelby County is not in compliance with IDEA. The Court finds by an

overwhelming weight of the evidence that the level of services provided by Shelby County is more than appropriate and that a CNA is not necessary to provide for T. B. and would not be able to provide any more or better services than the personnel provided by Shelby County Schools.

Based on all of the above, the Court finds that at all times material to this matter, T. B. has been offered and afforded a Free and Appropriate Public Education (FAPE) in accordance with 20 U.S.C. 1401 (a) (18) by Shelby County Schools and has complied with the IDEA's requirements to provide T. B., a disabled child, with a Free Appropriate Public Education. The Court further finds that Shelby County Schools developed an appropriate Individualized Health Plan for T. B. and provided the appropriate level of services necessary to carry out the plan by providing a Registered Nurse to be with her at all times in accordance with the plan and an appropriate level of assistive services. The petition of the petitioner is hereby dismissed.

ENTER this the _____ day of _____, 2003.

WILLIAM T. AILOR
Administrative Law Judge

Any party aggrieved by this decision may appeal to the Chancery Court for Davidson County, Tennessee or may seek review in the United States District Court for the district in which the school system is located. Such appeal or review must be sought within sixty (60) days of the date of the entry of a Final Order. In appropriate cases, the reviewing Court may order that this Final Order be stayed pending further hearing in the cause.

If a determination of a hearing officer is not fully complied with or implemented, the aggrieved party may enforce it by a proceeding in the Chancery or Circuit Court, under provisions of section 49-10-601 of the Tennessee Code Annotated.

Within sixty (60) days from the date of this order (or thirty [30] days if the Board of Education chooses not to appeal), the local education agency shall render in writing to the District Team Leader and the Office of Compliance, Division of Special Education, a statement of compliance with the provisions of this order.

ENTER this the _____ day of _____, 2003.

WILLIAM T. AILOR
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been mailed in the U. S. Mail, with sufficient postage affixed thereto, to Bill Ward, Staff Attorney, State of Tennessee Department of Education, 5th Floor, Andrew Johnson Tower, 710 James Robertson Parkway, Nashville, TN 37243, **Timothy Smith**, Esq., attorney for school system, 2670 Union Extended, Suite 1200, Memphis, TN. 38112, **JoAnn Slaughter**, mother of T.B. 7133 Brook Mill Cove, Memphis, TN. 38125, on this the **1st** day of **December**, 2003.

WILLIAM T. AILOR

IN THE CIRCUIT COURT FOR KNOX COUNTY, TENNESSEE

GLORIA ANDREWS, ADMINISTRATRIX
Of the Estate of RAYMOND ANDREWS

Plaintiff, No. 2-168-11

vs.

NORFOLK SOUTHER RAILWAY
COMPANY

Defendant,

ORDER ON MOTION FOR SUMMARY JUDGMENT

This matter came on to be heard on the Defendant's Amended Motion for Summary Judgment, the response of the Plaintiff in opposition to the motion as well as the other filings by the parties and the arguments of counsel. The Defendant argues that pursuant to Tenn. R. Civ. P. 56 they are entitled to summary judgment as there are no genuine issues of material fact and they are entitled to a judgment as a matter of law.

The Defendant's motion is based on three (3) grounds:

1. FELA requires Plaintiff to offer "expert testimony on the issue of specific medical causation unless the injury involved has such an obvious causal origin that lay jurors can assess causation based on their common knowledge and experience;"
2. Plaintiff cannot establish notice by her own admission and based on the Court's prior rulings;
3. Plaintiff cannot prove that the "decedent was exposed to disturbed friable asbestos source (above background levels) in his work;"

In response, the Plaintiff asserts that:

1. The Defendant has failed to rebut **ALL** essential elements of the Plaintiff's claim;

2. The Plaintiff will be able to offer expert testimony on general causation regarding the medical relationships of lung cancer and asbestos exposure and will be able to offer expert and lay testimony as to the presence of asbestos at decedent's workplace and that under FELA the jury may infer specific causation from this general testimony.
3. Under FELA the standard for causation is relaxed and the jury can determine causation from circumstantial evidence from lay and expert testimony;
4. Under FELA Plaintiff only has to prove causation by more than a "scintilla of evidence".

The Plaintiff was an employee of the Norfolk Southern Railroad from 1965 to 1989 as a trainman, brakeman and locomotive engineer. He was diagnosed in 2000 with lung cancer and died in November 2002 at the age of 63. He was a smoker for 47 years of at least one pack of cigarettes containing approximately 20 cigarettes in each pack from the age of 13 until he quit in August 2000. The Plaintiff alleges that the railroad did not provide a safe work environment and subjected Plaintiff to toxic asbestos

In a FELA case, the railroad is liable to an employee for injuries caused in whole or in part by the negligence as a result of the railroad's negligence. 45 U.S.C. § 51 (1994). "This Court has held that a FELA plaintiff asserting a cause of negligence against its employer "must prove the traditional common law elements of negligence: duty, breach, foreseeability, and causation." *Adams v. CSX Transp.,* 899 F.2d 536, 539 (6th Cir.1990) (quoting *Robert v. Consolidated Rail Corp.,* 832 F.2d 3, 6 (1st Cir.1987)). The Plaintiff argues that the standard is a relaxed standard under FELA and that the Plaintiff must only put forward a bit more that a scintilla of evidence to support their case to get it to a jury. Citing Apiricio, "[The] plaintiff must present more than a scintilla of evidence to prove

that (1) an *259 injury occurred while the plaintiff was working within the scope of his or her employment with the railroad, (2) the employment was in the furtherance of the railroad's interstate transportation business, (3) the employer railroad was negligent, and (4) the employer's negligence played some part in causing the injury for which compensation is sought under the Act." Aparicio, 84 F.3d at 810 (citing *Green v. River Terminal Ry. Co.,* 763 F.2d 805, 808 (6th Cir.1985) If plaintiff can show negligence " 'played any part, even the slightest, in producing the injury,' " then the railroad company is liable, even if its negligence was not " '[p]robable' " or " 'foreseeable.' " *Id.* at 2643 (quoting *Rogers, supra,* 352 U.S. at 506, 77 S.Ct. 443, *945 and *Gallick v. Baltimore & O.R. Co.,* 372 U.S. 108, 120–121, 83 S.Ct. 659, 9 L.Ed.2d 618 (1963)). This relaxed FELA standard contrasts with the common law's "proximate cause" standard. *Id.* at 2634. But this relaxed standard "does not mean that a FELA plaintiff need not make any showing of causation." *Hardyman, supra,* 243 F.3d at 267

The Court in prior rulings has excluded Plaintiff's evidence concerning the speculative testimony of the Plaintiff and his co-workers who were told about asbestos and saw what they thought and assumed was asbestos as speculative and not corroborated and therefore not trustworthy and likely to confuse a jury and the prejudicial value outweighing the probative value. There has been no testimony of any friable asbestos material which as one of Plaintiff's experts, Dr. Vance, said creates a hazard. (p. 132, Vance Depo.) In fact, taking the facts in the light most favorable to the non-moving party,

there is no testimony of any asbestos containing material in a dangerous condition that the Plaintiff was exposed to.

Regarding Defendant's first argument that FELA requires expert testimony concerning causation, Defendant argues that the Court's ruling on February 3, 2015 concerning Dr. Frank's causation testimony and that the testimony of the decedent's treating oncologist, Dr. Bruce Avery, M.D. does not have expertise in asbestos-related lung cancer and does not, and cannot offer any opinion on medical causation as to asbestos within a reasonable degree of medical certainty and therefore, the Plaintiff cannot meet her burden concerning expert testimony in a toxic exposure case.

In reviewing the case law cited by Plaintiff, the Court reviewed Hardyman v. Norfolk and Western 243 F. 3rd 255 (2001), which stated, "we recognize FELA to be a remedial and humanitarian statute ... enacted by Congress to afford relief to employees from injury incurred in the railway industry." *Mounts v. Grand Trunk W. R.R.*, 198 F.3d 578, 580 (6th Cir.2000) (quoting *Edsall v. Penn Cent. Transp. Co.*, 479 F.2d 33, 35 (6th Cir.1973)). Congress intended FELA to be a departure from common law principles of liability as a "response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety." *Aparicio v. Norfolk & W. Ry. Co.*, 84 F.3d 803, 807 (6th Cir.1996) (quoting *Sinkler v. Missouri Pac. R.R. Co.*, 356 U.S. 326, 329, 78 S.Ct. 758, 2 L.Ed.2d 799 (1958)).

The Defendant has offered witnesses who have tested the locomotives that Mr. Andrews worked on who have each testified that there was not asbestos in the areas of the locomotive where Mr. Andrews worked. Under FELA the Plaintiff does not have to prove that the asbestosis

was caused solely by the negligence of the Defendant only that is either caused it or contributed to it.

Dr. Avery, M. D., the Plaintiff's oncologist, testified that the only information he had concerning Mr. Andrews' was either provided by Mr. Andrews and his own treatment of him and that he could not offer testimony within a reasonable degree of medical certainty that Mr. Andrews' lung cancer was caused by asbestos exposure.

The Court further finds that the testimony of Dr. Vance is not sufficient to be submitted to a jury as his testimony is not based on any testing he has done or his own experience or knowledge and is not reliable under rule 702 and 703 of the TRE. Dr. Vance testified that he cannot to a reasonable degree of certainty give an opinion that Mr. Andrews was exposed to asbestos from the ceilings of locomotives. (Depo. p. 120) He has not seen any evidence of asbestos or abatement of the same in the dormitories that Mr. Andrews stayed in at the John Sevier yard. (Depo. p. 121) He has never been on a diesel locomotive, seen a cab heater and never been in, studied or conducted any sampling of any railroad environment. There is no evidence of asbestos containing products where Mr. Andrews worked or that if there were that they were in a friable condition. There is no proof that there was asbestos above background levels that everyone is subjected to on a regular basis. The Court must have some reliable date to allow an expert to base his opinion on. Here that is not the case.

The testimony of the co-workers of Mr. Andrews that there was asbestos containing material was determined to be unreliable as it was third-hand information that could not be corroborated and was otherwise speculative.

The defendant cited *Aparicio v. Norfolk & Western Ry. Co.*, 84 F. 3d 803, (1996) which does not apply in this case as it deals with carpel tunnel syndrome which was diagnosed by an orthopedic surgeon after the plaintiff complained of numbness and tingling in his hand. In that case, the plaintiff's work history showed that he was subject to repetitive use of his hands as a result of his work requirements using tools such as air tampers, jack hammers, impact wrenches, claw bars, anchor wrenches, grinders, and spiking guns. The case before this Court is a toxic exposure case and thus the proof is more exacting.

In *Claar v. Burlington Northern Railroad Co.*, 29 F.3d 499 (9th Cir. 1994), the trial court excluded the causation opinions of the plaintiffs' experts under *Daubert*, and granted summary judgment to the railroad. On appeal, concluding that allegations of injuries caused by exposure to toxic chemicals required special expertise, the court held that "Plaintiffs, not having proffered any admissible expert testimony, have no evidence that workplace exposure to chemicals played any part, no matter how small, in causing their injuries." *Id.* at 504. The court then affirmed summary judgment, finding "no genuine issue of material fact" as to causation. *Id*. "The test for causation in FELA cases is whether an employer's actions played any part at all in causing the injury." See Aparicio, 84 F.3d at 810 In Aparicio, the Plaintiff "argue(s) that in a Federal Employers' Liability Act case, judgment as a matter of law can be directed only in the complete absence of any probative facts. *Aparicio is not correct". id*

Plaintiff alleges that Defendant must negate all essential elements of Plaintiff's claim. This is not the law is Tennessee. In ruling on a Motion for Summary Judgment, the Court must look at the facts of the case in the light most favorable to the non-moving party. The Supreme Court in the Rye decision, stated, "when the moving party does not bear the burden of proof at trial, the moving party may satisfy its burden of production either (1) by affirmatively negating

an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the nonmoving party's claim or defense. We reiterate that a moving party seeking summary judgment by attacking the nonmoving party's evidence must do more than make a conclusory assertion that summary judgment is appropriate on this basis." The Court went further to say, "The nonmoving party ―must do more than simply show that there is some metaphysical doubt as to the material facts.‖ Matsushita Elec. Indus. Co., 475 U.S. at 586. 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."

In this case, the Defendant has negated an essential element of the plaintiff's case, the negligence of the Defendant to provide a safe work environment free from toxic exposure to asbestos. The testimony of the Plaintiff's witnesses as to possible exposure to asbestos has been speculative and not sufficient to meet the burden to show that the Defendant was negligent or that there was friable asbestos such that could cause or contribute the condition of the Plaintiff. The Plaintiff's proof is of such a speculative nature and has not tied anything to the Defendant that would show that the Defendant was negligent or that there was asbestos in such a form that would expose Plaintiff to dangerous levels causing or contributing to his condition. Therefore, the plaintiff has been unable to bring forth evidence that this plaintiff was exposed to asbestos as a result of the negligence of the defendant and as a result the Motion for Summary Judgment is granted.

IT IS THEREFORE ORDERED that the Defendant's Motion for Summary Judgment is hereby granted.

ENTERED This The ___ day of February, 2018.

_____

JUDGE, WILLIAM T. AILOR

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing Order has been served upon the parties directly or to their attorneys of record by personal hand delivery or through the U.S. postal service with sufficient postage affixed for first class mailing to their last known address, on

This _____ day of _____, 2018.

_____

Deputy Court Clerk

IN THE CIRCUIT COURT FOR KNOX COUNTY, TENNESSEE

HUBER PROPERTIES, L.L.C., CLEAR WATER PARTNERS, LLC, and THE GLORIA L. MELGAARD TRUSTS,

Plaintiffs,

vs. **No. 1-194-14**

KNOX COUNTY BOARD OF ZONING APPEALS, KNOX COUNTY, TENNESSEE, CHARLES E. and REBECCA BENSON, *et al*.,

Defendants.

CHARLES E. and REBECCA BENSON, *et al*.,

Plaintiffs,

vs. **No. 2-192-14**

KNOX COUNTY, THE BOARD OF ZONING APPEALS OF KNOX COUNTY, HUBER PROPERTIES, L.L.C., CLEAR WATER PARTNERS, LLC and GLORIA L. MELGAARD TRUST,

Defendants

CHARLES E. and REBECCA BENSON, *et al.*,

Plaintiffs,

vs. **No. 3-90-14**

KNOX COUNTY, THE COMMISSION OF KNOX COUNTY, HUBER PROPERTIES, LLC. CLEAR WATER PARTNERS, LLC, and GLORIA L. MELGAARD TRUST

Defendants

ORDER

These maters having come on for trial before the Court on the 13th day of November, 2014 concerning the rezoning of property located on the northeast and southwest sides of Emory Church Rd. and I-140 (also known as Pellissippi Parkway), north of Henderson Ln. in

Knoxville, Tennessee. (the "Subject Property") comprising a little over 100 acres currently owned by the Gloria L. Melgaard Trust (the "Trust")and zoned agricultural (A). This is a consolidation of 3 separate matters (Case No. 2-192-14; Case No. 3-90-14; Case No. 1-194-14) for purposes of judicial economy. Present at the trial were Mr. Wayne Kline, attorney for the individual Property Owners (the "Property Owners") who live in the area surrounding the subject property. Mr. John King, Attorney for Huber Properties, LLC. Clear Water Partners, LLC., (the "Developer") and the Trust and Mr. Daniel Sanders, attorney for Knox County and the County Agencies ("County").

In September 2013 Developer filed an application with Metropolitan Planning Commission, (MPC) to rezone a large portion of property (Subject Property) from Agricultural (A) to Planned Residential (PR) along with a development plan to build an apartment complex which also included a boat marina and parking lots which was recommended to the County Commission for approval at a density of 5 dwelling units/acre(du/ac) with conditions. Subsequently by a vote of 6 to 5 County Commission rezoned the property to PR. The Property Owners appealed the approval of the rezoning and the development plan to the Board of Zoning Appeals (BZA) which upheld the decision of the Commission in all respects except the marina which it overruled.

The Property Owners filed a Complaint for Declaratory Judgment and Petition for a Writ of Certiorari alleging that the actions of the Board of Zoning Appeals were illegal, arbitrary, capricious and of no effect. Also, the Property Owners have challenged Knox County Commission's approval of rezoning to Planned Residential ("PR") at a density of 1-5 dwelling units per acre (Case No. 2-192-14). Additionally, the Property Owners have challenged the approval by Knox County Board of Zoning Appeals' ("BZA") of Developer's

Use on Review of the development plan to build apartments on the property claiming that both decisions are not **consistent with the Knoxville-Knox County General Plan 2033**. (Case No. 3-90-14). The County's position and the Developer's positions are that the BZA acted within its authority, and therefore the decisions should be upheld.

The MPC also approved the proposed marina. However, the BZA overruled the MPC's approval of this portion of the project. The Developer has challenged the BZA's denial of the Use Permitted on Review for the marina development. (Case No. 1-194-14). The County and the Property Owners take the position that the BZA's decision to overrule the MPC's approval of the proposed marina was supported by substantial and material evidence; therefore, the BZA's decision cannot be reversed by this Court.

Filed with the Court for review are two bankers boxes including the record from the January 22, 2014 and February 26, 2014 Board of Zoning Appeals meetings including the verbatim transcripts together with a Bates stamped copy of the Record of Proceedings before the Board during each meeting with exhibits, as well as certified copies of the Knox County Zoning Ordinance and the Knoxville-Knox County Hillside Ridgetop Protection Plan, along with the briefs of the parties and the exhibits all of which the court reviewed.

In this case the Property Owners are seeking a review of the local legislative body's approving of the rezoning of property zoned Agricultural (A) to Planned Residential (PR) at 1-5 dwelling units per acre and the approval of the development plan. They challenge the decision of the County of 5 grounds:

1) "all actions are in violation of T.C.A. § 13-3-304, which requires that land use decisions "must be consistent" with the Knoxville-Knox County General Plan 2033;

2) the rezoning was the result of illegal contract zoning;

3) the rezoning is illegal spot zoning;

4) the MPC's acceptance of the Use on Review violated Knox County's Zoning Ordinance; and

5) Knox County's actions were arbitrary and capricious."

The Property Owners contend that the County Commission's rezoning of the property to a density of 1-5 du/acre was improper, and that the development plan submitted by Developer could not be approved under State law or County zoning laws because it was arbitrary, capricious, and was contrary to well established Tennessee law. The Developer responds that "this Court must apply the "any reasonable basis," or "fairly-debatable," to legislative actions such as the County's legislative body.

The record in this case has been considered extensively by the court which finds that the Commissioners conducted a lengthy hearing on the merits of this matter considering all of the arguments of both sides. Commissioner Smith [Record of Proceedings at tab 3, p. 70] stated, "We received hundreds of emails, phone calls and letters. It's probably one of the best organized group efforts I've seen in my seven and a half years being on the commission." The commission record shows that the Commissioners considered the proposed rezoning of the Subject Property to PR at a density of up to 5 du/acre to be consistent with the Sector Plan, and Growth Plan [Record of Proceedings tab 4, pp. 1, 2]. It further shows that the surrounding land use and zoning is developed with agricultural, rural and low density residential uses under PR(Planned Residential), RP-1(Planned Residential), A(Agricultural), F(Floodway) zoning [Record of Proceedings tab 4, p. 3]. They went further to state,

> "1. Staff is recommending conditions 1 and 2 above to meet the 'Density Bonus Provision' of the Hillside and Ridgetop Protection Plan (HIPP), which recommended allowing a bonus of up to 10% more dwelling units when a conservation easement is placed on an undisturbed steep hillside portion of a parcel. It also recommends allowing an additional bonus of up to 10

% more dwelling units when public access, such as a trail easement is provided within the development and/or conservation easements (see the attached slope analysis with calculations that were used to determine the recommended density based on the suggestions of the HRPP.
2. ……Staff is recommending the additional density on the site, allowing for up to 5 du/ac, based on the following locational criteria:

- The site is located within a half mile from the major interchange of Pellissippi Parkway and Westland Dr.
- The site is adjacent to and has easy access to Pellissippi Parkway, which is a major regional transportation corridor linking Anderson, Knox and Blount Counties.
- The site is surrounded by suburban low density residential development at zoning densities of up to 5 du/ac.
- The site is separated from lower density development by a railroad right-of-way to the north and portions of Ft. Loudon Lake to the east and west. To the south are two large parcels that are zoned planned residential at densities ranging from 3 to 5 du/ac.
- The site is located in such a way that it has lake-frontage, as well as higher elevation areas that could offer mountain views, increasing the desire for greater density development, also. If the accompanying use on review development plan (9-B-13-UR) is approved, the proposed apartments would be located next to a marina.

3. The property is located in the Planned Growth Area on the Growth Policy Plan and is proposed for low density residential uses and slope protection on the sector plan, consistent with the recommended density." [Record of Proceedings tab 4, Staff Recommendations, pp. 3, 4]

The County Director of Planning and Development for the County's Department of Engineering and Public Works, testified that "there were four conditions related to traffic-specific situations in terms of what improvements needed to be made at what points in time. And [she] actually helped craft those comments in the staff report from MPC to make sure that they got them right."

The Property Owners contend that the language in Knox County Zoning Ordinance would require a development to be in conformity with section 6.50 pursuant to (Knox. County, Tenn. Zoning Ordinance 5.13.15).

Knox County Zoning Ordinance 5.13 PR Planned Residential Zone in pertinent part states as follows:

"5.13.1 General Description

The regulations established in this zone are intended to provide optional

methods of land development which encourage more imaginative solutions to environmental design problems. Residential areas thus established would be characterized by a unified building and site development program, open space for recreation and provision for commercial, religious, educational, and cultural facilities which are integrated with the total project by unified architectural and open space treatment.

Each planned unit development shall be compatible with the surrounding or adjacent zones. **Such compatibility shall be determined by the Planning Commission by review of the development plans.**

5.13.15 Administrative Procedure for a Planned Residential Development.

A. The Planning Commission may recommend establishment of a PR, Planned Residential Zone or an application may be made to the Planning Commission for rezoning to PR, Planned Residential in accordance with the regulations set forth in Section 6.30, "Amendments", of this resolution.

B. No building permit shall be issued for development of any property within a PR, Planned Residential Zone until a written application for review and approval of the development plan has been filed with the Planning Commission. This same requirement shall apply to multi-dwelling structures and developments as required under the RB, General Residential Zone, when the density of the development is twelve dwelling units per acre or greater. Said application shall be made in conformity with Section 6.50, "Procedure for Authorizing Uses Permitted on Review", of these regulations and shall be accompanied by the following information:"

Additionally, the Property Owners contend that the Developer must comply with the General Plan and the Southwest Sector Plan discussed above, must also meet the requirements of Article 4, "Supplementary Regulations," of the Ordinance, and must be **consistent with adopted plans and policies, including the General Plan and the Sector Plans.** "the use is in harmony with the general purpose and intent of these zoning regulations, compatible with the character of the neighborhood where it is proposed, and with the size and locations of buildings in the vicinity will not significantly injure the value of adjacent property by noise, lights, fumes, odors, vibration, traffic congestion or other impacts which may detract from the

immediate environment, not of a nature or so located as to draw substantial additional traffic through residential streets and the nature of development in the surrounding area is not such as to pose a potential hazard to the proposed use or to create an undesirable environment for the proposed use." They complain that the proposed use is not in harmony with the makeup of the surrounding community in the size and locations of the buildings of the area. They next contend that the development will cause an increase in traffic in residential area streets as a result of the location being close to the Pellissippi Parkway, Westland Drive and Emory Church Road which they argue is not designed for the additional traffic based on the traffic study entered in the record.

Tennessee Courts have consistently held that judicial review of a local legislative body is limited in scope. The Court in Heyne v. Metropolitan Nashville Board of Public Education, 380 S. W. 3rd 715 (2012) conducted an extensive analysis of the trial Court's review and stated, "**The judicial review available under a common-law writ of certiorari is limited to determining whether the entity whose decision is being reviewed (1) exceeded its jurisdiction, (2) followed an unlawful procedure, (3) acted illegally, arbitrarily, or fraudulently, or (4) acted without material evidence to support its decision**. *Harding Acad. v. Metropolitan Gov't of Nashville & Davidson Cnty.*, 222 S.W.3d at 363; *see also Stewart v. Schofield*, 368 S.W.3d 457, 463 (Tenn.2012) **A common-law writ of certiorari proceeding does not empower the courts to redetermine the facts found by the entity whose decision is being reviewed**. *Tennessee Waste Movers, Inc. v. Loudon Cnty.*, 160 S.W.3d 517, 520 n. 2 (Tenn.2005); *Cooper v. Williamson Cnty. Bd. of Educ.*, 746 S.W.2d 176, 179 (Tenn.1987). **Accordingly, we have repeatedly cautioned that a common-law writ of certiorari does not authorize a reviewing court to evaluate the intrinsic correctness of a**

governmental entity's decision. *See, e.g., Stewart v. Schofield,* 368 S.W.3d at 465; *Arnold v. Tennessee Bd. of Paroles,* 956 S.W.2d 478, 480 (Tenn.1997). **Similarly, we have noted that reviewing courts may not reweigh the evidence or substitute their judgment for the judgment of the entity whose decision is being reviewed**. *See, e.g., State v. Lane,* 254 S.W.3d at 355 (quoting *Robinson v. Clement,* 65 S.W.3d at 635); *Harding Acad. v. Metropolitan Gov't of Nashville & Davidson Cnty.,* 222 S.W.3d at 363." citing Heyne v. Metropolitan Nashville Board of Public Education, 380 S. W. 3rd 715 (2012)

Knox County adopted a Regional Plan for development in accordance with TCA 13-3-304 which governs the use of land in the city and county and has been amended from time to time as deemed appropriate by the local legislative body. Further, Knoxville & Knox County adopted the Knoxville-Knox County General Plan 2033 in 2003. "*The General Plan incorporates several other official plans, including sector plans, small area plans, the city and county greenway plans, the City of Knoxville's One Year Plan, and the Knoxville Urban Area Transportation Plan. Each of these plans proposes many worthwhile actions or projects."* (General Plan 2033 p. 50) The Sector Plans including the Southwest County Sector Plan were adopted by the Planning Commission along with all subsequent amendments and updates thereto, and incorporated into the General Plan. Land Use Plan maps from each of the 12 adopted sector plans have been incorporated into the General Plan as well. [These maps are] amended by the periodic updates of the sector plans. The plan may also be amended in response to applications from property owners. Plan amendment applications are usually filed in conjunction with rezoning applications. Changes to the Land Use Plan should be consistent with the policies in the General Plan. "Tennessee State law (public chapter 1101) requires that local land use decisions must comply with the Knoxville-Knox County-Farragut Growth Policy Plan." (General Plan 2033 p. 58)

There appears to be no dispute between the parties that the Court's limited review of the legislative body's actions based on the "any reasonable basis," or "fairly-debatable," standard. It is clear that the actions of the legislative body had sufficient basis to support their decision and cannot be overturned on that basis. After that, the court will must determine if the actions were arbitrary, capricious or without merit and violated state statute.

Tennessee Code Annotated § 13-3-304 states in pertinent part, "any land use decisions thereafter made by the legislative body, planning commission or board of zoning appeals when the board of zoning appeals is exercising its powers on matters other than variances, must be consistent with the general regional plan." The Knox County General Plan 2033 ("General Plan") provides, "**Tennessee State law (public chapter 1101) requires that local land use decisions must comply with the Knoxville-Knox County-Farragut Growth Policy Plan. The General Plan is linked to the Growth Policy Plan in at least two ways**:

- The Planning Framework map (Exhibit 1) is consistent with the Urban Growth, Planned Growth and Rural designations of the Growth Policy Plan, although the Planning Framework breaks these three categories down into seven more specialized categories.
- **The Knoxville-Knox County-Farragut Growth Policy Plan, along with the Knoxville City Charter and the Knoxville and Knox County Zoning Ordinances, require that land use decisions (rezonings and development plan approvals) be consistent with the sector plans, which are elements of the General Plan. (General Plan p. 58)**

Additionally, the General Plan states, "[t]he density for residential development will be based upon the amount of usable acreage, excluding areas which are under water, in floodways, have steep slopes, or are otherwise undevelopable." (p.68, 11.2 of Knox County General Plan 2033). On January 22, 2012, the Knox County Commission adopted an amendment to the Hillside and Ridgetop Protection Plan ("HRPP"), which shows that it is an Amendment to the general plan and under which it declares "[a]ny comparable provisions of the Knoxville-Knox County General Plan 2033 or any Sector Plan which relate to hillside and ridgetop protection

shall also be considered advisory consistent with this plan." It continues in the preface to state, "This plan sets forth the vision and primary means to be used to safely development steep slopes and ridgetops while mainimizing offsite environmental damage; and it recognizes that implementation of theses general objectives depends upon future adoption of ordinances and regulations by the legislative bodies of the City and County Governments. The plan likewise recognizes that flexibility will be needed in applying these general goals and principles to specific proposals and site conditions on unique parcels of land, and leaves room for approval of sound engineering and creative solutions to meet these objectives." (Knox County Amendment to HRPP).

"The original version of [the Knoxville-Knox County Hillside and Ridgetop Protection Plan] was prepared by the City-County Task Force on Ridge, Slope and Hillside Development and Protection following more than two years of work and public review and presented to the Knoxville-Knox County Metroplitan Planning Commission for consideration in September, 2010; revised as an amendment to the Knoxville-Knox County General Plan 2033 by the Knoxville City Council and Knox County Commission in November 2011." (Preface to the Hillside and Ridgetop Protection Plan) It is further stated, "it is intended to provide background and supplemental information of an advisory nature and to serve as a guide to future MPC staff recommendations, but it is not intended to form an official part of the General Plan which would be binding on future land use decisions by County Commission, MPC, the County Board of Zoning Appeals pursuant to T.C.A. § 13-3-304." It is clear that the County spent a lot of time and money considering this amendment and the code section.

The Property Owners argue that the County's Amendment to the General Plan through

this amendment which states "any comparable provisions of the Knoxville-Knox County General Plan 2033 or any Sector Plan which relate to hillside and ridgetop protection …. Advisory consistent with [this] plan" would be in violation of Tennessee Code Annotated § 13-3-304. They argue that the language in the statute, "must be consistent with the general regional plan" requires that any land use decisions must be based on the General Plan, and it cannot be amended by subsequent amendment. They also argue that the amendment would make the language of the General Plan advisory as it relates to the density of residential development based on the usable acreage which excludes land "under water, in floodways, have steep slopes, or are otherwise undevelopable" (Knox County Amendment to HRPP) (p.68, 11.2 of Knox County General Plan 2033) advisory and would therefore violate the statute. There is no definition for "undevelopable" land in the General Plan or any of the amendments and it is the Courts interpretation that such is left to the discretion of the County. The amendment appears to make the General Plan with regard only to steeply sloped areas advisory which would make the interpretation of "usable" land advisory and at the discretion of the County thus making the County's opinion in that respect consistent with the General Plan. Although the issue of whether an amendment can make a portion of the General Plan advisory is debatable, the Court must uphold "[l]egislative classification in a zoning law, ordinance or resolution . . . if any possible reason can be conceived to justify it." *Fallin v. Knox County Bd. of Comm'rs*, 656 S.W.2d 338, 342 (Tenn. 1983). Therefore, the Court should find the rezoning consistent with the General Plan and not a violation of Tennessee law. The Court is of the opinion that the Property Owners petition fails on this ground.

> Next, the Court deals with the issue raised by the Property Owners of whether there was illegal contract zoning. In Osborne v. Allen, 143 Tenn. 343, 226 S.W. 221, the Court stated, "**Contracts made for the purpose of unduly controlling or affecting official conduct of the exercise of legislative, administrative**

> **and judicial functions, are plainly opposed to public policy.** They strike at the very foundations of government and intend to destroy that confidence in the integrity and discretion of public action which is essential to the preservation of civilized society. **The principle is universal and is applied without any reference to the mere outward form and purpose of the alleged transaction."** However, "the mere unilateral imposition of conditions for public benefit is quite different. In contract zoning the government entity sacrifices its authority. In conditional zoning it exercises it." *Benton v. Chattanooga*, 1988 Tenn. App. LEXIS 454 at *7.

The Property Owners take the position that the Developer made illegal promises through illegal negotiations with Knox County, and with the MPC staff and Commissioners in order to obtain approval for his development plan and the rezoning. They point to the conditions set out by the commissioners as previously stated herein as their support for this proposition. Furthermore, the appellants' include statements made by Mr. Huber:

> "MPC staff and Knox County Engineering have not made their decision lightly with regards to their support of the Westland Cove project. They have balanced the need of safety of the community with the needs and growth of our town. After much thought and deliberation they recommended approval for our project and here is why. We are embracing the Hillside and Ridgetop Protection Plan. This is the best and most effective and most environmentally friendly [w]ay for this particular parcel to be developed. We are conserving 17 sensitive acres that actually includes part of the Sinking Creek embayment as well as maintain an additional 10 acres on top of that in a tree buffer because this project will [re]duce sprawl in the fastest growing sector of Knox County. Also we are working with Parks and Recreation to allow an easement across our land for them to access 80 acres of lakefront parkland that has not access or no reasonable access at this time. Also in coordination with the Tennessee Department of Transportation improvements planned as you see for Westland Drive and Pellissippi Parkway. We are being the catalyst behind the needed road improvement at Westland and Emory Church Road. In this next slide you will see where we have been working with Knox County Engineering and on record right now we are selected to contribute over $400,000 to a County public right of way to repair that intersection. This is an intersection that already has a problem right now. It is just not high enough on the list for Knox County Engineering to address. Bottom line we are here today willing to put $400,000 into a public right of way. If we don't get approved we are not able to that the problem remains. Knox County Engineering's position is that it will not be improved in the foreseeable future.
>
> (p.32-33 appellants' trial brief)." It appears to the Court that the County

determined what conditions to be placed on the development based on the testimony of the County Director of Planning and Development for the County's Department of Engineering and Public Works as cited herein above. Based on everything in the record, the Court is of the opinion that there was no illegal contract zoning and that the County exercised it discretion after careful consideration of all of the facts and determined what needed to be done to make the development comply with the County's guidelines.

The Property Owners also complain that "the decision to rezone the property resulted in illegal "Spot Zoning". (p. 35 appellants' trial brief) They acknowledge that not every instance of spot zoning is illegal. Citing *Fielding v. Metro. Gov't of Lynchburg, Moore Cnty.*, 2012 WL 327908, at *3 (Tenn. Ct. App. 2012),

> "In order to constitute "illegal spot zoning," a zoning ordinance: (1) must pertain to a single parcel or a limited area, ordinarily for the benefit of a particular property owner or specially interested party; and (2) must be inconsistent with the city's comprehensive plan, or if there is none, with the character and zoning of the surrounding area, or the purposes of the zoning regulation, i.e., the public health, safety, and general welfare. In addressing a claim of improper spot zoning, **the most important factor** is whether the rezoned land is being treated *unjustifiably different* from the surrounding land, thereby creating an island having no relevant differences from its neighboring property."

they argue that the actions of the County constituted illegal spot zoning because the rezoning of the Subject Property was a "violation of the Commission's statutory requirement to operate within the parameters of the General Plan and Southwest Sector Plan." (p. 35 appellants' trial brief)

Considering the factors set forth and the facts that have been presented as the

Court has already discussed at length, the Court is of the opinion that the County acted within its discretion and that there was no illegal spot zoning and that the Property Owners petition fails on this ground.

The final issue to be considered by the Court is the BZA's decision to overrule the MPC's approval of the proposed marina which would be located on the Subject Property north of the sinking creek embayment on land that would remain zoned agricultural. The MPC approved a marina that included dock slips and other floating structures proposed by the developer along with the apartments. The Property Owners presented arguments and documentary proof to the BZA in opposition to the proposed marina and the BZA overruled the MPC's approval. The County takes the position that the decision of the BZA was administrative in nature and therefore should be upheld as it was supported by substantial and material evidence; therefore, the BZA's decision cannot be reversed by this Court.

The Developer has made no argument in his brief concerning the BZA's decision concerning the marina. However, he has filed a Complaint and Petition for Writ of Certiorari and/or in the Alternative for Declaratory Judgment (Case No. 1-194-14) seeking to overturn the ruling of the BZA as to the marina portion of the development plan on the basis that it was illegal, arbitrary, capricious and/or not supported by material facts.

In reviewing a legislative body's decision concerning the refusal to approve the marina development, this Court must determine whether material evidence exists to support the BZA decision by applying the "any reasonable basis," or "fairly-debatable," standard, which is the appropriate standard for legislative actions. *McCallen v. Memphis*, 786 S.W.2d 633, 639-40 (Tenn. 1990). Under this standard, "judicial review is limited to 'whether any rational basis exists for the legislative action and, if the issue is fairly debatable, it must be permitted to stand

as valid legislation.'" *Id*. at 640. Under the "any reasonable basis" standard, "[e]very intendment is to be made in favor of the rezoning decision and the matter is largely in the discretion of the municipal authorities." *Id*. (quoting *Episcopal Foundation of Jefferson City v. Williams*, 281 Ala. 363, 202 So.2d 726, 729 (1967)). The Supreme Court of Tennessee has noted, "[i]t is hard to imagine a more difficult undertaking than that to overcome the 'any possible reason' standard." *McCallen*, 786 S.W.2d at 641.

Under the "any reasonable basis" standard, "the court's primary resolve is to refrain from substituting its judgment for that of the local governmental body." *Id*. Because an action will be upheld under this standard as long as "'any possible reason' exists justifying the action . . . legislative . . . decisions are presumed to be valid and a heavy burden of proof rests upon the shoulders of the party who challenges the action." *Id.*

The case of *Citizens for Safety & Clean Air v. City of Clinton*, 434 S.W.3d 122 (Tenn. Ct. App. 2013) is particularly relevant to the issues in this case. In *Citizens for Safety & Clean Air*, a hearing was held before the Clinton City Council to determine whether approximately 100 acres should be rezoned to M-2 heavy industrial. *Id*. at 124. "A record of the public hearing reflects that the Council debated the zoning classifications." *Id*. The Clinton City Council voted to adopt the zoning ordinance and neighboring citizens filed an appeal, asserting that the decision was arbitrary and capricious. *Id*.

The actions of the legislative authority cannot be deemed "arbitrary and capricious" as long as "'any possible reason' exists justifying the action." *McCallen*, 786 S.W.2d at 641In the present action, the record indicates that in the two and a half hour presentation both sides provided significant information to the BZA concerning the issue of the mairna

The Tennessee Court of Appeals upheld the Trial Court's final judgment in favor of the

City of Clinton. *Id*. The court first noted that "[z]oning is a legislative matter, and, as a general proposition, the exercise of the zoning power should not be subjected to judicial interference unless clearly necessary." *Id*. at 127. The court further stated, "in cases where the validity of a zoning ordinance is fairly debatable, the court cannot substitute its judgment for that of the legislative authority." *Id*. The court found that because evidence was presented showing "the Property's location next to major transportation arteries, the Property's natural attributes, and the economic necessity of the materials that could be extracted from the Property," there was a rational basis for the rezoning and the Clinton City Council's decision could not be judicially overturned. *Id*. at 127-28.

The Tennessee Supreme Court's holding *McCallen v. Memphis*, 786 S.W.2d 633, 638-39 (Tenn. 1990) has established the standard of review for this action that an administrative action will be overturned "only if it constitutes an abuse of discretion." *Mcallen*, 786 S.W.2d at 641, "judicial review is limited to 'whether any rational basis exists for the legislative action and, if the issue is fairly debatable, it must be permitted to stand as valid legislation.'" *Id*. at 640. Under the "any reasonable basis" standard, "[e]very intendment is to be made in favor of the rezoning decision and the matter is largely in the discretion of the municipal authorities." *Id*. (quoting *Episcopal Foundation of Jefferson City v. Williams*, 281 Ala. 363, 202 So.2d 726, 729 (1967)). The Supreme Court of Tennessee has noted, "[i]t is hard to imagine a more difficult undertaking than that to overcome the 'any possible reason' standard." *McCallen,* 786 S.W.2d at 641.

Under the "any reasonable basis" standard, "the court's primary resolve is to refrain from substituting its judgment for that of the local governmental body." *Id*. Because an action will be upheld under this standard as long as "'any possible reason' exists justifying the

action . . . legislative . . . decisions are presumed to be valid and a heavy burden of proof rests upon the shoulders of the party who challenges the action." *Id.*

The Court having reviewed the record in this matter finds that the legislative body's decision concerning the denial of the marina based on the standard established by the Supreme Court set forth above was supported by substantial and material evidence and is therefore upheld.

Here, substantial material evidence supports the BZA decision to deny the marina. The Knox County Zoning Ordinance provides that a Use Permitted on Review may be approved only when the use "is reasonably necessary for the convenience and welfare of the community" and may be denied where the above cannot be shown or "where it can be shown that approval would have an adverse impact on the character of the neighborhood in which the site is located." Material evidence supports both standards.

There was substantial evidence presented to BZA that the approval would have an adverse impact on the character of the neighborhood. The record shows this proposed marina would be intrusive on the area. The proposal consists of a parking lot for 141 boats on trailers and 75 permanent fixed docks that occupy the entire shoreline from the I-140 Pellissippi Bridge to Emory Church Road, together with a pedestrian bridge to connect the docks. It would be unsightly, noisy and lighted 24 hours a day, 365 days a year. In winter, the docks would be "high and dry" and sit on mud flats, exacerbating their unsightliness. The narrow cove on Fort Loudoun Lake where the marina is proposed ends at Emory Church Road. The community essentially would drive through the marina with as many as 5,000 trips per day, and the unsightliness of the marina would impinge every trip.

Substantial evidence showed that the use was not reasonably necessary for the

convenience and welfare of the community. David Kiger, who owns five marinas on Fort Loudoun and Norris Lakes, submitted substantial evidence that because of the characteristics of the site the cove is not a feasible location for a marina. He submitted further information that most of the entire marina area is six feet deep during summer pool. At winter pool much of the area under the boat docks will consist of silt or water only one or two feet deep. Two other marinas are already located on Sinking Creek at locations accessible to the main channel. The BZA had no evidence of the necessity for a marina at this location but had substantial evidence that a marina was not necessary. The evidence was sufficient for BZA to deny the Use Permitted on Review for the marina.

IT IS THEREFOR ORDERED THAT the holdings of the BZA are hereby affirmed and that the Petitions of the Property Owners and the Developer are hereby dismissed and the costs are taxed equally to the Property Owners and the Developer.

ENTERED THIS THE ___ day of June, 2015.

_____
Judge, William T. Ailor

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Order has been either hand delivered or mailed in the U. S. Mail, with sufficient postage affixed thereto, to counsel for all of the parties, on this the _____ day of October, 2014.