Tennessee Judicial Nominating Commission

Application for Nomination to Judicial Office

Rev. 25 August 2011

Name: George Travis Hawkins

Office Address: 120 Old Liberty Pike, Franklin, Williamson, TN 37064
(including county)

Office Phone: (615)599-1010 Facsimile: (615)599-1091

Email Address: georgetravishawkins@gmail.com

Home Address: [redacted] Williamson TN [redacted]
(including county)

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

INTRODUCTION

Tennessee Code Annotated section 17-4-101 charges the Judicial Nominating Commission with assisting the Governor and the People of Tennessee in finding and appointing the best qualified candidates for judicial offices in this State. Please consider the Commission's responsibility in answering the questions in this application questionnaire. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Commission 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 http://www.tncourts.gov). The Commission 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 word processing document.) Please read the separate instruction sheet prior to completing this document. Please submit the completed form to the Administrative Office of the Courts in paper format (with ink signature) ***and*** electronic format (either as an image or a word processing file and with electronic or scanned signature). Please submit seventeen (17) paper copies to the Administrative Office of the Courts. Please e-mail a digital copy to debra.hayes@tncourts.gov.

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Attorney.

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

1995. BPR No. 17395

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.

1. Tennessee, BPR No. 17395
2. District of Columbia, BPR No. 457542

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. Legal Fellow, Reporters Committee for Freedom of the Press, Rosslyn, VA (1995-1996)
2. Law Clerk, Office of General Counsel, Gannett/USA Today, Rosslyn, VA (1996-1997)
3. Editor and Writer, *The Tennessean*, Nashville, TN (1997-1998)
4. Attorney, self-employed, Franklin, TN (1998-Present)

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

N/A

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

1. Criminal defense, state and federal courts (50%)
2. Civil litigation (libel defense, personal injury, contracts) (40%)
3. Probate (10%)

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Commission 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 Commission. Please provide detailed information that will allow the Commission 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. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

In 14 years of solo practice, I have had 11 jury trials and more bench trials than I can count. I have tried cases in Williamson County, Davidson County, Marshal County, before state and federal juries. I have successfully defended a homicide charge (pretrial diversion granted) and likewise successfully prosecuted a civil wrongful death action. I have made appearances in at least 20 of Tennessee's 95 counties.

My criminal practice has taken me to all three divisions of Tennessee's federal court system,

and to federal courts in Kansas City, MO, and Baton Rouge, LA. I have conducted oral arguments in the Tennessee Court of Criminal Appeals and in the Sixth Circuit Court of Appeals.

As a member of the Criminal Justice Act Panel in the Middle District of Tennessee since 2005, I have taken dozens of cases in behalf of indigent defendants. I also have a healthy private caseload.

My emphasis would be on the quality of the jury cases. At my most recent jury trial was in December 2010, I represented an F.B.I. Agent charged in the U.S. District Court for the Middle District of Tennessee with wire fraud, bank fraud and bankruptcy fraud. I put together a team of three lawyers, an investigator and two experts, and we spent around 6 months going over 14,000 documents of government discovery and talking to witnesses. The extremely contentious trial lasted 10 days. The jury convicted on the bankruptcy and wire fraud counts, but hung on the bank fraud count. What I believe to be a very strong appeal is pending in the Sixth Circuit.

In a jury trial in Williamson County in 2008, a jury acquitted my client of a felony charge of introducing contraband into a penal institution.

I admit that my record in the courtroom has improved only as I have gotten older and grayer.

Because of my background in the media and in First Amendment issues, I have had the privilege of defending libel actions against a state legislator as well as against a local Tea Party organizer. A memorandum of law that I wrote in the latter case is attached as one of my writing samples. The court granted summary judgment in that libel claim, and the defendant later dismissed the rest of his claims.

I am a neophyte as a politician, however I did have the fortune of winning my first campaign for public office in the May 2010 Williamson County Republican Primary. Only two days after the biblical flooding of Nashville and environs, I pulled off an upset of the Williamson County Commission Chairman – by six votes! A friend later quipped that this was "not exactly a mandate." A win is a win. And I have most thoroughly enjoyed my service as a Willimason County Commissioner. It has opened my eyes to the possibilities in public service.

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

In the only appeal I have filed in the Tennessee Court of Appeals, *Dolan v. Poston*, 2005 Tenn. App. LEXIS 631 (Tenn. Ct. App. Sept. 29, 2005), the Court of Appeals reversed the judgment of the Davidson County trial court and remanded the case for further proceedings. A copy of my appellate brief in that case is attached as another writing sample.

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.

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

When I began practicing as a solo in 1998, I was appointed guardian ad litem in a petition for conservatorship involving a 40-year-old lady suffering early onset of dementia. She lived at home with her elderly mother. This was virtually my first "case". Sadly, the young woman died only a few years after I met her and visited her home. But I have remained in touch with and very close to her mother. I call her "my first client," though she was not *really* my client. Her name is B.J. Moss and she is a treasure. Betty Jean ("BJ") Moss is among the persons whom I listed as a reference. She manned a voting precinct with one of my campaign signs in May 2010 during my successful bid for a County Commission seat in Williamson County.

I was appointed to numerous guardianships in the Williamson County Juvenile Court during the first several years of my practice. I am grateful to the judges who appointed me to these cases for their trust, including General Sessions Judge Al Nations, whom I have listed as a reference. These appointments typically involved children who were either neglected or unruly or both. I spent a great deal of time with these kids. I remember especially taking a walking tour some time around 2000 with one of my kids at the Tennessee Baptist Children's Home on Franklin Road in Brentwood.

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

13. List all prior occasions on which you have submitted an application for judgeship to the Judicial Nominating Commission or any predecessor commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

N/A

EDUCATION

14. List each college, law school, and other graduate school which you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

University of Virginia College of Arts and Sciences (B.A., 1990)

University of Tennessee College of Law (J.D. 1995)

Dean's Citation for Extraordinary Contributions to the College of Law (University of Tennessee, 1995); This award was in appreciation for a bluegrass band composed of law students (and one professor!) We called ourselves *Learned Hand*.

PERSONAL INFORMATION

15. State your age and date of birth.

Forty-three. May 2, 1968.

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

Fourteen years.

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

Fourteen years.

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

Williamson.

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.

I received an R.O.T.C. Scholarship to attend the University of Virginia as an undergraduate. After I graduated, I attended the Transportation Basic Officer Course at Fort Eustis, Virginia (1991).

I served as a reserve officer and platoon leader with the 212th Transportation Unit in Chattanooga, TN, while I was in the College of Law School at the University of Tennessee. (1993-1995). I was honorably discharged as a First Lieutenant in July, 1999.

20. Have you ever pled guilty or been convicted or are you now on diversion for violation of any law, regulation or ordinance? Give date, court, charge and disposition.

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. If you have been disciplined or cited for breach of ethics or unprofessional conduct by any court, administrative agency, bar association, disciplinary committee, or other professional group, give details.

N/A

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.

In 2010, the State of Tennessee executed a tax levy on my business for about $1,000 because of my failure timely to file a Franchise and Excise Tax Return. It was my error.

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.

No.

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 which you have held in such organizations.

Williamson County Commission (2010-Present)

Franklin Citizens Advisory Committee (2007)

Member, Big Harpeth Primitive Baptist Church. (1999-Present)

27. Have you ever belonged to any organization, association, club or society which limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.

    a. If so, list such organizations and describe the basis of the membership limitation.

    b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

No.

ACHIEVEMENTS

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

Tennessee Bar Association (I have been a member on and off for 14 years)

Williamson County Bar Association (1998-2003, 2011)

Tennessee Association of Criminal Defense Lawyers (2009)

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

Appointed by the Federal Defender's Office (Nashville, TN) to the Criminal Justice Act Panel of private area lawyers qualified to take appointed criminal cases involving indigent clients. (2005-Present)

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

None.

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

None.

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

Williamson County Commissioner, Elected August 2010 for a four-year term.

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

No.

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

1. Appellant's Brief (*Dolan v. Poston*). I wrote this brief. It obtained a reversal of the Davidson County Trial Court.
2. Memorandum of Law in Support of Summary Judgment, *Hemrick v. Phillips*, Williamson County Circuit Court. This memo of law is an antithesis of Sample 1 in that it involves the defense of a libel claim. Sample 1 involves the prosecution of a libel claim.

ESSAYS/PERSONAL STATEMENTS

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

I think the progression from trial lawyer to judge is an organic one. I have been in and out of courtrooms now for nearly 15 years and have seen good judges and bad ones. I think I could be one of the good ones. While there are many qualities that make a bad judge, I believe the qualities that make a good judge are common to all good judges: intellect, curiosity, humor, patience, decency and humility. I promise this Commission that I will strive to cultivate all of these qualities in myself.

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

I do strive every day to make myself available to the indigent and under-represented. I believe that this is evident in my work as a CJA Panel lawyer, and the pro bono work I have done for the Nashville Bar. (I recently represented an individual pro bono in a civil case filed against him in Williamson County for allegedly having been involved in a gunfight where the plaintiff suffered gunshot wounds. The case against my client was dismissed)

On a daily basis, I estimate a third of my phone calls are with people who cannot pay me. I believe this is part of the life and duty of every lawyer. Daily, we must pleasantly surprise. We must leave strangers and friends with renewed respect for us and our profession.

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 21st Judicial District includes Williamson, Hickman, Lewis and Perry Counties. It includes the fast-paced communities and economies of Brentwood and Franklin and some more rural, sparsely populated areas with very different dockets. The character of Cool Springs is vastly different from that of Hohenwald. I would like to say that I am comfortable in both settings. As a fisherman, I have spent a pretty good deal of time in the hinterlands of our district.

Our current panel of Judges includes Robbie Beal, Jim Martin and Tim Easter. I have had jury trials in front of Judge Beal and Judge Easter (my first trial). I have argued in front of Judge Martin. I believe I could make a positive impact on the workload for the other judges and would certainly be ready to help in any way necessary. My attitude would be one of deference to the other judges as to where I was needed.

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

I was appointed by in 2005 by Franklin Mayor Tom Miller to serve on Citizens Advisory Committee to meet with subcommittees of the Board of Mayor & Alderman and to discuss issues of importance to Franklin residents. I live and work in downtown Franklin and have been involved and spoken at various meetings about quality of life topics. I am a strong advocate of a walking culture, walking trails and infrastructure for every neighborhood in Williamson County whose geography allows.

In or around 2002, I got a petition together to change the name of the street I live from "Liberty Pike" to "Old Liberty Pike" when the city expressed a plan to change the name to Lancaster Drive. This petition was approved by the Board of Mayor and Alderman.

As a judge, I would be particulary interested in mentoring programs for young lawyers and even students. I have always tried to be of help to younger lawyers and currently have two lawyers with whom I work quite a bit. During the first few years of my practice, I participated as a "judge" in our local high school mock trial programs put on by the Williamson County Bar Association. I would like to get more involved in that. I believe that to be a terrific way to reach out to the community.

I am also very proud of and would support the 21st Judicial District's Drug Court. I have witnessed the program do great things in the lives of struggling drug addicts, young and old.

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

Beginning in February 2010, I undertook my campaign for a Williamson County Commission Seat. In the evenings after work, my wife and I went door to door in the Tenth District of Williamson County talking to anybody kind enough to listen. We knocked on hundreds of doors. What surprised and galvanized me most about the humbling act of cold knocking on doors was how warm and receptive the people were. The truth revealed to me in this experience was that people welcome a chance to discuss their community, their government, their lives.

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

I firmly believe that judges, lawyer and litigants live with the law. They do not make it. At least not to the extent that the law is black letter and statutory in nature. The role of making the law is reserved to our legislature and should not be usurped by the judiciary. This is fundamental and it goes to making our democracy work. A court's understanding and recognition of its limits is also key to fostering respect for its decisions.

The practicing lawyer's place in this is somewhat different from that of the judge. However,

a lawyer seeking to advance a position must still and always be truthful with the court about the state of the law. In countless arguments, I have sought to acknowledge law that was contrary to my own position. That is an ethical duty.

In my own criminal practice, I have found the federal sentencing statutes frustrating and sometimes unduly harsh. There is no use in shedding tears about this. My federal clients and I must live with these statutes. It is up to Congress to address these problems. And in spite of my disagreements with some of the policy choices reflected in the sentencing statutes, I find much more abhorrent the act of judicial legislation, effectively usurping our elected legislators. In short, legislation from the bench is a dangerous threat to our system of government.

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 Commission or someone on its behalf may contact these persons regarding your application.

A.	Hon. Al Nations, Williamson County General Sessions Judge, (615)790-5609
B.	Hon. Thomas Taylor, Fairview City Judge, (615)794-0807
C.	Betty Jean Moss, "first client," retired, Franklin resident, (615)794-3106
D.	Brian Kelsey, Attorney, State Senator, (901)428-2442
E.	Margaret Martin, Franklin Alderman, (615)7942113

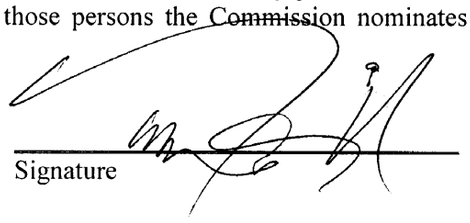
AFFIRMATION CONCERNING APPLICATION

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

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the Circuit Court, 21st Judicial District, of Tennessee, and if appointed by the Governor, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended questionnaire with the Administrative Office of the Courts for distribution to the Commission members.

I understand that the information provided in this questionnaire shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Commission may publicize the names of persons who apply for nomination and the names of those persons the Commission nominates to the Governor for the judicial vacancy in question.

Dated: 21 September, 2011.



Signature

When completed, return this questionnaire to Debbie Hayes, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

TENNESSEE JUDICIAL NOMINATING COMMISSION

511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information which concerns me, including any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, and I hereby authorize a representative of the Tennessee Judicial Nominating Commission to request and receive any such information.

George Travis Hawkins
Type or Printed Name

Signature

~~09/18/2011~~ 9/21/11
Date

017395
BPR #

IN THE COURT OF APPEALS OF TENNESSEE AT NASHVILLE

THOMAS ALBERT DOLAN, APPELLANT, v. BRUCE POSTON, EAST TENNESSEE BANKING (ETB) CORP., and ENVIRONMENTAL INK, INC., APPELLEES.	))))))))))	M2003-02573-COA-R3-CV

APPEAL AS OF RIGHT PURSUANT TO RULE 3(b)
OF THE TENNESSEE RULES OF APPELLATE PROCEDURE

BRIEF OF APPELLANT THOMAS A. DOLAN

Submitted by Travis Hawkins
Attorney for the Appellant

Oral Argument Waived

Travis Hawkins
BPR 17395
Cummins Station Suite 426
209 10th Avenue South
Nashville, Tennessee 37203
(615)248-6235
(615)248-3199 (facsimile)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

This is as an appeal as of right pursuant to Rule 3(a) of the Tennessee Rules of Appellate Procedure from a final order entered in the Davidson County Second Circuit Court, the Honorable Marietta Shipley presiding.

Appeal will proceed by the presentation of this brief and based upon the record that has been filed. Reference to Technical Record of the proceedings in the lower court shall be designated by (T.R. at ____) and a reference to the page number.

ISSUE PRESENTED FOR REVIEW

1. DID THE TRIAL COURT ERR BY DISMISSING LIBEL ACTION AGAINST INDIVIDUAL DEFENDANT WHO PERSONALLY SIGNED ALLEGEDLY LIBELOUS LETTER?

STATEMENT OF THE CASE

Appellant Thomas Albert Dolan by and through counsel submits this brief on appeal following the entry of a final order by the Circuit Court of Davidson County dismissing Bruce Poston as an individually named defendant in this matter. (T.R. at 125)

On November 3, 1998, Mr. Dolan, pro se, filed his Complaint in the Circuit Court for Davidson County, Tennessee. (T.R. at 1). The original complaint alleged libel, slander, and fraud against defendants Bruce E. Poston, East Tennessee Banking Corp. (E.T.B.) and Environmental Ink, Inc. (T.R. at 1-4)

The complaint stated that the Appellee Bruce Poston and the corporate defendants "submitted information" to Mr. Dolan's employer and to "agencies of the Federal and State of Tennessee Governments" that "did do severe damage to the Plaintiff's ability to carry forth with his career, and maintain his family and community responsibilities, and maintain and enjoy his personal lively-hood." (T.R. at 2). The complaint further alleged that the actions of the defendants were "directly responsible for ending Mr. Dolan's career with the University of Tennessee, and for rendering upon he and his family the embarrassment, emotional trauma, fiscal, and societal loss experienced with that separation." (T.R. at 3)

The complaint alleged that the information submitted was "stylized in false light by the Defendants". The complaint stated that these "falsifications of information" were done with "full intent, purpose, and knowledge" that they would harm Plaintiff. (T.R. at 3).

Finally, the complaint stated that Appellee Bruce Poston "is being sued both in his corporate capacity with the ETB Corp., and with the Environmental Ink, Inc., and as an individual". (T.R. at 1)

On December 29, 1998 Defendants filed a Motion to Dismiss and Memorandum in

Support, claiming that Plaintiff had failed to state a cause of action against Defendant Bruce Poston as an individual. (T.R. at 5) The motion sought a dismissal of the fraud claims for failure to plead with particularity and a dismissal of the claims of slander and libel on the basis that the Complaint failed "to allege any specific statements, written or oral, made by defendants." (Id.)

Following a hearing on February 19, 1999 on the Defendants' motion to dismiss, the trial court ordered Plaintiff to amend his complaint to state a cause of action against Bruce Poston, in his individual capacity, ETB Corp. and Environmental Ink, Inc. (T.R. at 10)

Mr. Dolan filed his "Amendment to Complaint" on March 18, 1999. (T.R. at 11) This pleading specifically identified a letter dated December 15, 1997, with attachments making it "100 plus pages", and specified that the Defendants' defamatory claims included the following:

> The Plaintiff had a secret investment with the client for personal gain.
> The Plaintiff falsified records and data to win a Federal Grant for the client.
> The Plaintiff negotiated with the client for an equity position in his private company.
> The Plaintiff negotiated for, and was promised a position of management in the client's company,
> The Plaintiff received, and/or, put the client in his debt, to receive personal funds form the client.
> The Plaintiff arranged for the delivery of unsubstantiated grant funds back to the client.
> The Plaintiff participated in authorizing grant payments and in authorizing private investor committal documentation.

(T.R. at 11)

The "Amendment to Complaint" stated that the "Defendants … broadly published the information in their document…." This pleading further stated, "In addition to the bound document publication, the Defendant, Mr. Bruce Poston, continued on his own to give false information in a formal investigatory review as mentioned in article (14) of the complaint." (T.R. at 11).

At a March 19, 1999 hearing on the Defendants' Motion to Dismiss, Plaintiff apparently made an oral request of an additional thirty days to retain counsel. (T.R. at 13) The Court denied this request and dismissed all claims against Bruce Poston in his individual capacity, as well as the claims of fraud. (Id.)

In its order dated April 12, 1999, the lower court failed to state its reasoning or grounds for dismissing the claims against Bruce Poston. (Id.)

On November 13, 2001, the remaining defendants moved the court to dismiss the surviving claims, or to stay further proceedings in the case pending the "resolution of the proceedings before the United States District Court for the Eastern District of Tennessee in the case styled *United States of America v. Frank J. Prasil & Thomas Dolan*, No. 3:01-CR-115." (T.R. at 61) In his "Answer to Defendants Plea for Dismissal," the Plaintiff agreed to a stay of the proceedings, stating that he expected a resolution of the federal case within "a few months." (T.R. at 62)

On July 9, 2003, Appellant, having obtained counsel, moved the trial court to reinstate Appellee Bruce Poston as an individual defendant pursuant to Tenn. R. Civ. Pro. 60.02. (T.R. at 64) Contemporaneously, Appellant filed a proposed Second Amended Complaint alleging libel, slander, intentional infliction of emotional distress and negligent infliction of emotional distress. (T.R. at 68-77) The proposed Second Amended Complaint quoted directly from the 24-page letter sent to various third parties and specifically alleged that the letter bore the signature of Bruce Poston. (T.R. at 72) The trial court denied this motion. (T.R. at 96)

On August 6, 2003, Defendants filed their "Motion to Designate Order As Final" with respect to the dismissal of the claims against Bruce Poston. (T.R. at 95) The Appellant timely filed a "Response in Opposition" to such designation. (T.R. at 98) Appellant attached to his

Response a copy of the 24-page letter bearing the signature of Bruce Poston. (T.R. 101-124)

On September 23, 2003, the trial court granted the Defendants' motion to designate the order dismissing Plaintiff's claims against Bruce Poston as final.

STATEMENT OF THE FACTS

Because this case is on appeal from the granting of a Rule 12 motion to dismiss, there are few facts to recite that have not already been recited in Statement of the Case.

However, the Appellant would reiterate and enlarge upon the most important of these facts: on or around December 15, 1997 Appellee Bruce Poston authored, signed and later published to various third parties a 24-page letter accusing Thomas Dolan of engaging in work-related conflicts of interest and defrauding state and federal government officials. (T.R. 101-124)

Specifically, the letter alleged that Mr. Dolan, a University of Tennessee Center for Industrial Services Engineer, had used his faculty position with the university to gain a personal financial interest in an ink-recycling technology for which Mr. Dolan was an Industrial Services advisor. (T.R. at 102-103) The letter also alleged that Mr. Dolan had falsified documentation sent to state and federal agencies to gain federal grant money for the project. (T.R. at 103)

In his complaint and later amended pleadings, Mr. Dolan consistently and repeatedly averred that these allegations were false. (T.R. at 3)

The letter was mailed or delivered to Mr. Dolan's supervisors at the University of Tennessee, the United States Department of Energy, The Tennessee Department of Environment and Conservation and the United States Department of Justice. (T.R. at 101, 124)

As a result of these allegations, Mr. Dolan was terminated from his faculty position with the University. (T.R. at 3).

ARGUMENT

1. THE TRIAL COURT ERRED BY DISMISSING LIBEL ACTION AGAINST INDIVIDUAL DEFENDANT WHO SIGNED ALLEGEDLY LIBELOUS LETTER

To state a claim for defamation, a plaintiff must allege that "(1) a party published a statement; (2) with knowledge that the statement was false and defaming to the other; or (3) with reckless disregard for the truth of the statement or with negligence in failing to ascertain the truth of the statement." *Sullivan v. Baptist Mem'l Hosp.,* 995 S.W.2d 569, 571 (Tenn.1999) (relying on Restatement (Second) of Torts § 580 B (1977)).

The Supreme Court of Tennessee has described the standard of review of the Trial Court's granting of a Motion to Dismiss under Tenn. R. Civ. P. 12.02(6) as follows: A Rule 12.02(6) motion to dismiss only seeks to determine whether the pleadings state a claim upon which relief can be granted. Such a motion challenges the legal sufficiency of the complaint, not the strength of the plaintiff's proof, and, therefore, matters outside the pleadings should not be considered in deciding whether to grant the motion. *See Bell ex rel. Snyder v. Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A.,* 986 S.W.2d 550, 554 (Tenn.1999).

In reviewing a motion to dismiss, the appellate court must construe the complaint liberally, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences. *See Pursell v. First Am. Nat'l Bank,* 937 S.W.2d 838, 840 (Tenn.1996). It is well-settled that a complaint should not be dismissed for failure to state a claim unless it appears that the plaintiff can prove no set of facts in support of his or her claim that would warrant relief. *See Doe v. Sundquist,* 2 S.W.3d 919, 922 (Tenn.1999); *Fuerst v. Methodist Hosp. S.,* 566 S.W.2d 847, 848 (Tenn.1978). Great specificity in the pleadings is ordinarily not required to survive a motion to dismiss; it is enough that the complaint set forth "a short and plain

statement of the claim showing that the pleader is entitled to relief." *White v. Revco Disc. Drug Ctrs., Inc.,* 33 S.W.3d 713, 718 (Tenn.2000) (citing Tenn. R. Civ. P. 8.01). The appellate court reviews the trial court's legal conclusions *de novo* without giving any presumption of correctness to those conclusions. *Id*

In the context of libel, while Tennessee law formerly required a plaintiff to set forth the exact language claimed to be defamatory, it is now the rule that a complaint which sets out the substance of the defamatory statement is sufficient. *See Handley v. May,* 588 S.W.2d 772 (Tenn. App. 1979) Thus, Appellant submits that his original pro se complaint, along with his many subsequent pleadings clearly allege that the Bruce Poston individually participated in the publication of written statements, that such statements were false and that the Appellee knew the statements were false. These pleadings, taken as true, are sufficient to survive a motion to dismiss.

As to who is a proper defendant, the law of defamation is well established: "[a]s a general rule, every person who takes a responsible part in a defamatory publication – that is, every person who, either directly or indirectly, publishes or assists in the publication of an actionable defamatory statement – is liable for the resultant injury." 50 Am. Jur. 2d (1995 Lawyers Cooperative Publishing) (citations omitted); *see also Stansberry v. McKenzie et al.,* 241 S.W.2d 600 (Tenn. 1951)(holding in slander action that when there exists a common agreement or conspiracy between two or more parties to injure another by utterance or publication of slanderous statements, parties who thus agree to conspire are jointly liable.)

In the context of the newspaper libel, where the First Amendment rights of the defendant are jealously guarded, Prosser has stated, "… every one who takes part in the publication, as in the case of the owner, editor, printer, vendor, or even carrier of a newspaper is charged with

publication." Prosser and Keeton on Torts, § 113 at 799 (1996).

Tennessee courts follow this rule:

> The record shows there is a material question of fact as to whether the defendants personally participated in the publication of the report since they may have had editorial power and control over the publication of the report. It should be noted that *Knoxville* at 215 S.W.2d 27, 29-30, also states that an editor is liable ' 'equally with the proprietor when he has personally assisted in any manner in the preparation, revision, or otherwise in the publication of the libel." ' *2 "Those who publish books by way of approving the printing of them and those who print and sell newspapers, magazines, journals and the like are subject to liability as primary publishers.' ' W. Page Keeton, *Prosser and Keeton on Torts* at 803, § 113, 5th edition. Therefore we find that the trial court erred in granting Drs. Montgomery, Drewry and Hiatt summary judgment on Count I of defendants action because the record discloses a genuine issue of material fact as to whether the defendants personally participated in the publication of the alleged defamatory report.
>
> *Southern College of Optometry v. Tennessee Academy of Ophthalmology, Inc.,* 1986 WL 8162, at 1-2 (Tenn. App. 1986).

Accordingly, Bruce Poston, who is alleged to have participated in the defamatory publications -- indeed to have authored and signed them -- is an indispensable defendant in Appellant's libel action.

Pursuant to Rule 54.02 of the Tennessee Rules of Civil Procecdure,[1] this Court has authority to reinstate Bruce Poston as a defendant in this matter.

[1] Tenn. Rule of Civ. Pro. 54.02 states, Multiple Claims for Relief; When more than one claim for relief is present in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the Court, whether at law or in equity, may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of the judgment adjudicating all the claims and the rights and liabilities of all the parties.

CONCLUSION

The Appellant respectfully requests that this Court (1) find that trial court committed error by granting Defendant Bruce Poston's motion to dismiss Appellant's claims of libel and (2) remand this matter for further proceedings consistent with such finding.

Respectfully submitted on 1 March 2004.

Travis Hawkins
Attorney for Appellant
BPR 17395
Cummins Station Suite 426
309 10th Avenue South
Nashville, Tennessee 37203
(615)248-6235
(615)248-3199 (facsimile)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been hand delivered on March 1, 2004, to the following parties:

Mr. Thomas Swafford, Esq.
MILLER & MARTIN LLP
1200 One Nashville Place
150 4th Avenue North
Nashville, Tennessee 37219

Travis Hawkins

IN THE CIRCUIT COURT FOR WILLIAMSON COUNTY, TENNESSEE AT FRANKLIN

WILLIAM "BILL" HEMRICK	)	
	)	
Plaintiff,	)	
v.	)	No. 2010-CV-135
	)	JURY DEMAND
JUDSON WHEELER PHILLIPS,	)	
	)	
Defendant.	)	

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

Comes now the defendant JUDSON PHILLIPS, by and through undersigned counsel, and hereby submits his Memorandum of Law in Support of the Motion to Dismiss on the Pleadings or in the Alternative for Summary Judgment.

I. SUMMARY OF PLEADINGS AND FACTS

The Plaintiff filed his Complaint on March 23, 2010 naming defendant JUDSON PHILLIPS as the defendant in his action for damages under the following theories: (1) libel; (2) false light invasion of privacy; (3) intentional or, alternatively, negligent misrepresentation representation; and (4) promises without an intent to perform. [Complaint at ¶¶ 5-6]

Plaintiff is a local businessman and long time Republican who is interested in national issues and who follows and supports certain political ideologies and movements. Plaintiff has become increasingly involved in politics. Mr. Hemrick has followed and/or supported several groups including the Williamson County Charimain's Circle, the

Williamson County Republican Party and the Tea Party Movement. Plaintiff was instrumental in the creation of a Political Action Committee known as *National Fiscal Conservative Political Action Committee* [hereinafter, "NFC"] as a means of furthering his political convictions. [Complaint at ¶¶ 4-5.]

Defendant operates a for-profit entity known as Tea Party Nation, Inc, which holds itself out as a social networking site or organization focused on conservatives. [Complaint at ¶ 6].

Plaintiff met the Defendant at an event sponsored by the Williamson County Republican Party in the Summer of 2009. [Complaint at ¶ 7] According to the Complaint, the Defendant at this time "inquired about having [Plaintiff] join Defendant's for-profit entity, *Tea Party Nation, Inc.*, as well as other opportunities which included the prospect of bringing former Alaska Governor Sarah Palin for a speaking engagement to raise funds for, or otherwise highlight, conservative and/or Republican-based movements. [Id.] Defendant avers that it was at a later time that he spoke with Plaintiff about Defnendant's plan to bring Governor Palin to Nashville for the Tea Party event and that it was Plaintiff who sought out the Defendant. [Affidavit of Judson Phillips at ¶ 4].

On November 10, 2009, Plaintiff loaned *Tea Party Nation* $25,000 to pay the deposit securing Governor Palin as the keynote speaker at the convention scheduled for February 4-6, 2010. [Affidavit of Judson Phillips at ¶6]. The Defendant drafted and signed a "Promissory Note" reflecting the terms of this loan and provided the document to the Plaintiff. [See Answer, Exhibit 1] The loan was repaid on January 20, 2010, with interest (at 60 percent annual percentage rate). [Affidavit of Judson Phillips at ¶ 16]. The Plaintiff omitted any mention of this promissory note in his Complaint.

Prior to the Tea Party convention in Nashville, the Plaintiff and Defendant developed differences that caused Defendant to sever their relationship. Defendant attributes these differences to, among other things, Plaintiff's several negative public comments to national news media in advance of the convention about the Defendant and Tea Party Nation, Inc. These public comments were inaccurate and threatened the success of the convention. [Affidavit of Judson Phillips ¶¶ 17-20].

In one story appearing on www.politico.com on January 21, 2010, the Plaintiff revealed that Defendant had received much of a $50,000 loan from him and that Defendant had missed the deadline for repayment. [See Answer, Exhibit 2]. The payment was in fact late – by a few days. However, the Defendant had contacted the Plaintiff prior to the deadline to advise that payment may be late. Plaintiff privately assured Defendant that this would be alright and that Tea Party Nation need not pay back the loan ($25,000) until after the convention. The Defendant nevertheless repaid the loan with interest on January 20, 2010, just four days after it was due. [Affidavit of Judson Phillips at ¶¶ 14-16].

Plaintiff's public comments on the subject of this loan contradicted his private assurances to the Defendant. [Affidavit of Judson Phillips at ¶¶ 15-17]. Published only two weeks in advance of the convention, the comment created uncertainty about the convention and threatened its success.

In another news story appearing in *Mother Jones* magazine on January 27, 2010, entitled, "Sarah Palin's Tea Party Dinner Disaster," the Plaintiff appeared to criticize Tea Party Nation's for-profit status:

> …[N]ot all the critics are convinced [Governor Palin] should cancel [her appearance]. For all her qualms about the convention, [former Tea Party Nation

> planning committee member Tami] Kilmarx isn't rooting for Palin to back out. She says she trusts Palin's judgment, and that too many unsuspecting people have paid large sums to attend. "I would not want to have any of the good people who have forked over good money to see her get hurt. It's a sorry state of affairs," she says. But [Florida tea party leader Robin] Stublen isn't so charitable. "it is up to us as individuals to be an informed public. Maybe this will teach people that anytime somebody uses the name 'Tea Party' to check them out before giving them money."
>
> Bill Hemrick might be included to agree. He is the Nashville businessman who loaned Phillips the initial $50,000 to pay Palin's speaking fee, unaware that the event was designed to net Phillips a profit. "I wish I had known. I just thought the Tea Party movement *was* nonprofit. That's my own stupid fault,' he tells *Mother Jones*. Hemrick has since gotten his money back, but like many of the event's original enthusiasts, he has fallen out with its organizers, who have asked him not to attend Palin's speech. Nonetheless, Hemrick thinks it would be tragic if Plain failed to show up. "If she pulled out it would do more detriment to the Tea Party movement than to any one person," he says. "I sincerely hope that it's a good deal for those people."

[See Answer, Exhibit 3]

Plaintiff's comment that he did not know Tea Party Nation was for profit is false. Plaintiff − a self-described businessman and the founder of his own political action committee − had not only loaned Tea Party Nation $25,000 but had sought a seat on Tea Party Nation's board of directors. Defendant avers in his affidavit that on more than one occasion he and Plaintiff discussed Tea Party Nation, Inc's for-profit status. [Affidavit of Judson Phillips at ¶¶ 19]

Contemporaneous with Plaintiff's efforts to become increasingly involved in Tea Party Nation, Inc., Plaintiff also was promoting a startup business he called Safeplate, involving an automotive safety device Plaintiff was seeking to get mandated by state or federal government. Plaintiff was aggressively promoting Safeplate with people he believed had influence or money. And he was expectant of having a seat beside Governor Palin at the Tea Party Convention. [Affidavit of Judson Phillips at ¶¶ 11-12, and ¶ 22]. After falling out with the Defendant, Plaintiff had his prior counsel send an

email to the Defendant demanding that Plaintiff be allowed to sit beside Governor Palin at the convention. [Answer, Exhibit 4]. The Defendant declined.

On January 28, 2010, just a week before the convention was to begin, the Defendant sent an email to Tea Party Nation members that is the subject of Plaintiff's claim for defamation. The email makes no personal reference to the Plaintiff whatsoever. It states,

> Subject: PAC
>
> A couple of weeks ago, I sent out information about the National Fiscal Conservative PAC, located in middle TN. I have received new information about this group, which makes me no longer comfortable in recommending them or endorsing them.
>
> There is another PAC that will be announced at the convention. This is not Tea Party Nation's PAC, but it is led by individuals we know, who I believe are reputable and trustworthy people.

[See Answer, Exhibit 5]

In addition to his claims of defamation and fraud, the Plaintiff alleges that Defendant made "promises" to the Plaintiff without "an intent to perform." [Complaint at ¶ 27]. To the extent that this claim sounds in contract, the Plaintiff proffers no written document to support such a contract. The Defendant has exhibited to his Answer a copy of the "Promissory Note" as evidence of the agreement between the parties.

Defendant would show that no other documents in support of Plaintiff's apparent claim for breach of contract exist.

II. LAW AND ARGUMENT

A. Standard of Review

A motion to dismiss for failure to state a claim only tests the sufficiency of the complaint, seeking to determine whether the pleadings state a claim upon which relief can be granted. *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 696 (Tenn. 2002); *Smith v. First Union Nat. Bank of Tenn*., 958 S.W.2d 113, 114-115 (Tenn. Ct. App. 1997). The basis for the motion is that the allegations in the complaint, when considered alone and taken as true, are insufficient to state a claim as a matter of law because they do not constitute a cause of action. *Smith*, 958 S.W.2d at 115. In making this determination, the Court construes the complaint liberally in favor of the plaintiff, taking all allegations of fact therein as true. *Id*. (citing *Fuerst v. Methodist Hosp. South*, 566 S.W.2d 847, 848-49 (Tenn. 1978); *Holloway v. Putnam County*, 534 S.W.2d 292, 296 (Tenn. 1976)).

"If, on a motion asserting the defense numbered (6) to dismiss for failure to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment, and disposed of as provided in Rule 56 ." *Hixson v. Stickley*, 493 S.W.2d 471, 473 (Tenn. 1973).

Rule 56.04 of the Tennessee Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (Emphasis supplied). See also Brookins v. The

Roundtable, Inc., 624 S.W.2d 547, 550 (Tenn. 1981). The purpose of Rule 56 is to "provide a quick, inexpensive means of concluding cases on issues as to which there is no dispute regarding material facts." Ferguson v. Tomerlin, 656 S.W.2d 378, 382 (Tenn. Ct. App. 1983). In making its determination as to whether summary judgment is appropriate, the trial court is to view all of the evidence in light most favorable to the party opposing the motion. Price v. Mercury Supply Co., Inc., 682 S.W.2d 924, 929 (Tenn. Ct. App. 1984). If, however, the opposing party offers no competent and material evidence showing a genuine issue of material fact then summary judgment is appropriate. Id. at 929-30. The procedure is designed to secure an expedited and inexpensive determination of actions that are factually unsupported, rather than being viewed as a disfavorable procedural shortcut. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Byrd v. Hall, 847 S.W.2d 208 (Tenn. 1993).

Recently, the Supreme Court of Tennessee has provided further guidance regarding the initial showing that must be made by a party moving for summary judgment. See Hannan v. Alltel Publ'g Co., 270 S.W.3d 1 (Tenn. 2008). In Hannan, the Court clarified that it is insufficient for the moving party to simply allege that the nonmoving party lacks evidence to prove an essential element of his or her claim. Id. at 8. Rather, the moving party must either "(1) affirmatively negate an essential element of the nonmoving party's claim; or (2) show that the nonmoving party cannot prove an essential element of the claim at trial." Id. at 9. The Court has indicated that a moving party may satisfy its initial burden by demonstrating that the nonmoving party lacks evidence supporting an element of the claim and by referencing evidence that refutes the element. Id.

The Court reiterated its holding in Hannan, in Martin v. Norfolk Southern Railway Co., 271 S.W.3d 76, 83 (Tenn. 2008). The Court again stated that while it is insufficient for the moving party to claim that the nonmoving party lacks evidence, the moving party may fulfill its burden by "poin[ting] to evidence that tends to disprove an essential factual claim made by the nonmoving party." Id. at 84. Applying this reasoning, the Court concluded that the defendant had filed a properly supported motion by "setting forth facts that tend to show that [the defendants] acted reasonably and that [the plaintiff] did not exercise reasonable care." Id.

Once the moving party has made the initial showing described in Hannan and Martin, the burden of production shifts to the non-moving party. Id. At that point, if the non-moving party fails to set forth specific facts that demonstrate the existence of a genuine issue of material fact, then the summary judgment motion should be granted. Id.

As discussed in more detail hereinafter, because of the guarantees in the First Amendment to the United States Constitution and Article I, § 19 of the Tennessee Constitution, public figures and/or public officials like Plaintiff "who desire to pursue defamation actions bear a heavy burden of proof because of our society's commitment to the principle that 'debate on public issues should be uninhibited, robust and wide open.' " Tomlinson v. Kelley, 969 S.W.2d 402, 405 (Tenn. Ct. App. 1997) (citing New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)). "In order to recover damages, they must prove with convincing clarity that the defendant acted with actual malice." Tomlinson, 969 S.W.2d at 405 (citing Press, Inc. v. Verran, 569 S.W.2d 435, 441 (Tenn. 1978); Moore v. Bailey, 628 S.W.2d 431, 433 (Tenn. Ct. App. 1981)).

Summary judgments are particularly "well-suited" to defamation cases because the question of whether Plaintiff is a public official or public figure is a question of law. Tomlinson, 969 S.W.2d at 405 (citing McDowell v. Moore, 863 S.W.2d 418, 420 (Tenn. Ct. App. 1992)). Similarly, the determination concerning whether a public figure or public official has come forward with "clear and convincing evidence that the defendant was acting with actual malice" is a question of law appropriate for summary judgment. Tomlinson, 969 S.W.2d at 405 (citing Trigg v. Lakeway Publishers, Inc., 720 S.W.2d 69, 74 (Tenn. Ct. App. 1986) (affirming trial court's grant of summary judgment for failure to show actual malice)). See also Ferguson v. Union City Daily Messenger, 845 S.W.2d 162, 167 (Tenn. 1992) (affirming trial court's grant of summary judgment for failure to show actual malice); Lewis v. Newschannel 5 Network, L.P., 238 S.W.3d 270, 302 (Tenn. Ct. App. 2007) (affirming the trial court's grant of summary judgment for failing to present clear and convincing evidence that the defendant acted with actual knowledge of the falsity or with reckless disregard as to the truth or falsity of the statements).

B. Plaintiff is a "Public Figure" and Must Allege and Prove "Actual Malice"

The Plaintiff is a public figure, either generally or for the limited purposes of the action at bar. In *New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964), the U.S. Supreme Court first recognized that traditional actions for defamation might interfere with First Amendment rights of free expression. Discerning in the First Amendment a demand that writers and speakers enjoy enough "breathing space" to avoid self-censorship and encourage "debate on public issues [that is] uninhibited, robust, and wide open," *id.* at 270, the Court held that a public official could

recover damages for libel only by showing that the allegedly defamatory statement was made with 'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80. In *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 18 L. Ed. 2d 1094, 87 S. Ct. 1975 (1967), this constitutional protection was applied to speech concerning "public figures" who were not government officials, but who nonetheless "often play an influential role in ordering society." *Id.* at 164 (Warren, C.J., concurring).

The Supreme Court has identified two classes of public figures in addition to government officials: general purpose and limited purpose public figures. "In some instances, an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974). A "public controversy" is "a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way." *Waldbaum v. Fairchild Pub., Inc.*, 201 U.S. App. D.C. 301, 627 F.2d 1287, 1296 (D.C. Cir. 1980). It is "a dispute that in fact has received public attention because its ramifications will be felt by persons who are not direct participants." Id.

Whether the plaintiff in the case at bar is a public figure is a question of law to be determined by this court. *See Marcone v. Penthouse Int'l*, 754 F.2d 1072, 1081 n. 4 (3rd Cir. 1985); *see also Cobb v. Time, Inc.*, 278 F.3d 629, 637 (6th Cir. 2002) ("The unique nature of the interest protected by the actual malice standard requires that reviewing courts conduct an independent review to determine whether that standard has been

met."). Analyzing whether a plaintiff is a limited-purpose public figure proceeds in two stages. *Clark v. ABC, Inc.*, 684 F.2d 1208, 1218 (6th Cir. 1982) (citing Gertz, 418 U.S. at 345, 352). "First, a 'public controversy' must exist." Id. "Second, the nature and extent of the individual's involvement in the controversy must be ascertained." *Id.*

In the case at bar, Plaintiff describes himself as follows:

> 4. Mr. Hemrick is a local businessman. He is interested in national issues and n connection therewith, [plaintiff] follows and supports certain political candidates, ideologies and movements. As a long time Republican, Mr. Hemrick has recently become increasingly involved in politics, given that both the Executive and Legislative branches of the federal government are currently controlled by the Democratic Party. In connection with his convictions, Mr. Hemrick has followed and/or supported several roups including the Williamson County Chairman's Circle, the Williamson County Republican Pary and what has recently become known as the *Tea Party Movement*.
>
> 5. In furtherance of his political convictions, Mr. Hemrick was instrumental in the creation of a Political Action Committee (otherwise known as a PAC), known as *National Fiscal Conservative Political Action Committee* [hereinafter, "NFC].

[Complaint at ¶¶ 4 and 5].

It is clear from the Plaintiff's own allegations that he has voluntarily, actively and generally inserted himself into public life. In the present instance, plaintiff has voluntarily inserted himself into the "public controversy" known as the Tea Party Movement. *See Press, Inc.v Verran*, 569 S.W.2d 435 (Tenn. 1978). Accordingly, the Plaintiff must allege and prove that the statements complained of were made with "actual malice."

C. The Complaint Fails As a Matter of Law To Plead "Actual Malice"; Plaintiff Cannot Prove "Actual Malice

The Complaint should be dismissed as a matter of law for its failure to recite or otherwise plead any facts suggesting that the defendant acted with "actual malice." Our

Tennessee Supreme Court has adopted the language of § 580A of the Restatement (Second) of Torts which provides as follows:

> § 580A. Defamation of Public Official or Public Figure. One who publishes a false and defamatory communication concerning a public official or public figure in regard to his conduct, fitness or role in that capacity is subject to liability, if, but only if, he
>
> (a) knows that the statement is false and that it defames the other person, or
>
> (b) acts in reckless disregard of these matters.
>
> § 580B. Defamation of Private Person. One who publishes a false and defamatory communication concerning a private person, or concerning a public official or public figure in relation to a purely private matter not affecting his conduct, fitness or role in his public capacity, is subject to liability, [**20] if, but only if, he
>
> (a) knows that the statement is false and that it defames the other,
>
> (b) acts in reckless disregard of these matters, or
>
> (c) acts negligently in failing to ascertain them.

Restatement of Torts (Second) §§ 580A-580B

"We believe that these standards meet the criteria of our federal and state constitutions and we adopt them as the law of this jurisdiction," the Tennessee Supreme Court opined. *Press, Inc.*, 569 S.W.2d at 442. The Court continued,

> In adopting these standards, we look to the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wideopen." We are guided by our belief that the news media have not only a right but a duty to make searching inquiry into all phases of official conduct and to realistically evaluate and assess the performance of duty by public officials.
>
> Only under the most compelling circumstances should the courts place obstacles in the way of the news media, or muzzle or deter their investigative efforts and reporting, even though the end result may be distasteful, despicable and shorn of all sense of fairness. The right of the news media to criticize official conduct is limited solely to their answerability for actual malice, which means that the publication was made with knowledge of its falsity or with reckless [**21] disregard for the truth.

> Any other standard would have a chilling effect upon one of the most cherished of all the freedoms specified in our bill of rights.

Press, Inc. v. Verran, 569 S.W.2d 435, 442 (Tenn. 1978)

D. The statement made by the Defendant is not defamatory nor is it an affirmative statement "of and concerning" Plaintiff.

The crux of Plaintiff's defamation and false light claims is that the statement disseminated by the Defendant falsely implied that Plaintiff is neither "trustworthy" nor "reputable." To establish a *prima facie* case for defamation in Tennessee a plaintiff must allege that: (1) a party published a statement; (2) with knowledge that the statement was false and defaming to the other party; or (3) with reckless disregard for the truth of the statement or with negligence in failing to ascertain the truth of the statement. *Sullivan v. Baptist Memorial Hospital*, 995 S.W. 2d 569, 571 (Tenn. 1991).

Plaintiff's failure to include the text of the "defamatory" document in its entirety in his Complaint is especially curious insofar as the email is only two paragraphs long. Without quoting the email verbatim, the Complaint alleges that the Defendant "authored and created a document that reflects expressly (or by implication) that Mr. Hemrick is neither "reputable" nor "trustworthy." Yet the only colorably pejorative language in this email involves Defendant's statement about not being "comfortable" endorsing the National Fiscal Conservative PAC. The rest of the email is an affirmative endorsement of unnamed third parties whom the Defendant intended to introduce at a later time.

Defendant is at a loss as to how any part of the email can be read to be "of and concerning" the Plaintiff. The Plaintiff's reading a personal attack into Defendant's email is not reasonable or consistent with ordinary usage. In determining whether the email is capable of being understood in a defamatory sense, this court must consider

whether "[t]he import of this language taken as a whole could reasonably be capable of a defamatory meaning." *Stones River Motors,* 651 S.W. 2d at 719. The words must be given their natural and ordinary meaning "as would be reasonably understood by the people who hear them." *Id*. Statements alleged to be defamatory "should be judged within the context in which they are made" and "read as a person of ordinary intelligence would understand them in light of the surrounding circumstances." *Revis v. McClean*, 31 S.W.3d 250, 253 (Tenn. Ct. App. 2000).

The offending email here makes no personal mention of Plaintiff William Hemrick. Nor does it imply that the Plaintiff William Hemrick is not "reputable" or "trustworthy." The email, to coin a phrase, says what it says. Plaintiff would have this court read a nefarious meaning where none exists. Simply put, the text of this email is a far cry from a personal assault on the character of Plaintiff William Hemrick, an assault made with "actual malice." "A libel does not occur simply because the subject of the publication finds the publication annoying, offensive or embarrassing. The words must be reasonably construable as holding the plaintiff up to public hatred, contempt or ridicule, and they must carry with them an element "of disgrace." *Stones River Motors, Inc. v. Mid-South Pub. Co.*, 651 S.W.2d 713, 719 (Tenn. App. 1983). *See also* W. Prosser, Law of Torts, § 111, p. 739 (4th Ed.1971).

In *Stones River Motors,* the determinative issue was whether as a matter of law the Plaintiffs failed to prove that they were the subject of an alleged defamatory letter as it appeared in a local newspaper, when there was no direct reference to the Plaintiffs by name:

> As an essential element of a cause of action for defamation, the plaintiffs must prove a false and defamatory statement *concerning* another. Restatement

> (Second) of Torts § 558 (1977) (emphasis added). Otherwise stated at common law, one of the required elements of proof was the "colloquim," a showing that the language was directed to or concerning the charging party. The burden of proving this element of the cause of action is on the plaintiff. HN6As an essential element of a cause of action for defamation, the plaintiffs must prove a false and defamatory statement concerning another. Otherwise stated at common law, one of the required elements of proof was the "colloquim," [sic] a showing that the language was directed to or concerning the charging party. The burden of [*10] proving this element of the cause of action is on the plaintiff.Stones River Motors, Inc. v. Mid-South Publ'g Co., 651 S.W.2d 713, 717 (Tenn. Ct. App. 1983) (citations omitted).

Stones River Motors, 651 S.W.2d at 717 (citations omitted).

The Tennessee Court of Appeals has elaborated:

> *A plaintiff may not support a claim for defamation based on an alleged defamatory statement made "of and concerning" a third party*. Id. (citing QSP, Inc. v. Aetna Cas. and Sur. Co., 256 Conn. 343, 773 A.2d 906 (Conn. 2001)); Dan B. Dobbs, The Law of Torts § 405, at 1134-35 (2000) (citing Johnson v. Southwestern Newspapers Corp., 855 S.W.2d 182 (Tex. Ct. App. 1993)). A claim for defamation based on an alleged statement that does not expressly designate its subject will survive a motion to dismiss only if it is alleged that the statement was made "of and concerning" the plaintiff or referred to the plaintiff by reasonable implication. See Yow v. National Enquirer, Inc., 550 F. Supp. 2d 1179, 1187 (E.D. Cal. 2008) (citation omitted) (applying [*11] California law).

Steele v. Ritz, 2009 Tenn. App. LEXIS 843, 10-11 (Tenn. Ct. App. Dec. 16, 2009) (emphasis added)(holding that plaintiffs' complaint fails to breach this minimum threshold where alleged defamatory statement did not expressly mention the plaintiffs and there was no allegation that the statement refers to the plaintiffs by reasonable implication)

Defendant would show that the Complaint in the case at bar also fails to breach the minimum threshold necessary to survive a motion to dismiss. The Plaintiff cannot allege or prove – by any "reasonable implication" – that the statements in the offending email were "of and concerning" him. Accordingly, Plaintiff's defamation and false light claims should be dimissed.

E. Defendant's Email Was a Statement of Opinion and is Protected by the First Amenment

The law of defamation generally exempts expressions of opinion. *See Milkovich v. Lorain Journal, Inc*., 497 U.S. at 20; *see also Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6, 14, 90 S. Ct. 1537, 26 L. Ed. 2d 6 (1970) (finding that the use of the term "blackmail" to describe the plaintiff's negotiating tactics was not slander when spoken in a heated city council meeting, and not libel when published in newspaper articles accurately reporting the public debate because "the word was no more than rhetorical hyperbole, a vigorous epithet by those who considered [the defendant's] negotiating position extremely unreasonable"); Old Dominion Branch No. 496 v. Austin, 418 U.S. 264, 286, 94 S. Ct. 2770, 41 L. Ed. 2d 745 (1974) (holding that a union publication describing the plaintiff non-union member as a scab, and therefore "a traitor to his God, his country, his family, and his class" was not actionable because use of words like "traitor" in that case could not be construed as representations of fact, but rather as "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members towards those who refuse to join").

While there is no wholesale defamation exemption to every statement that might possibly be labeled "opinion," *Milkovich v. Lorain Journal, Inc*., 497 U.S. at 18, a statement of opinion is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion. *Revis v. McClean*, 31 S.W.3d 250, 253 (Tenn. Ct. App. 2000) (citing RESTATEMENT (SECOND) OF TORTS § 566 (1977)). Conversely, "where there is no false representation of fact, one may not recover in actions for defamation merely upon the expression of an opinion which is based upon disclosed, nondefamatory facts, no matter how derogatory it may be." *Windsor v.*

Tennessean, 654 S.W.2d 680, 685 (Tenn. Ct. App. 1983). "Such statements of opinion are not provable as either true or false." *Anderson v. Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 2007 Tenn. App. LEXIS 29 (Tenn. Ct. App. Jan. 19, 2007)

To the extent that the Plaintiff personally suffered any disparagement from the offending email, such disparagement was very attenuated. It would lie in the fact that Plaintiff is the founder of a political action committee which, Defendant's email declares, the Defendant was no longer "comfortable in recommending or endorsing…." This language is an expression of an opinion, more precisely a feeling. The phrase contains no assertion of fact other than the feeling itself.

As has been discussed earlier, the Defendant's lack of "comfort" with the Plaintiff's PAC was well founded. In the critical days leading up to the Tea Party Convention, the Plaintiff had discussed sensitive information about his loan to Tea Party Nation with the national media. Plaintiff also had professed ignorance about and criticized Tea Party Nation's for-profit status to a decidedly liberal media outlet, *Mother Jones* magazine, who then labeled the convention a "disaster" before it happened. Additionally, there was the Plaintiff's aggressive marketing of his own agenda, the startup business Safeplate, and Defendant's concern that Safeplate would become dinner conversation with Governor Palin.

All of these actions taken together provide ample support for the proposition that the Defendant's unease – and his actions to save the Tea Party Convention from derailment – were justified. Truth, no matter how disparaging, is always available as an absolute defense to a claim of defamation. *See Memphis Pub. Co. v. Nichols*, 569 S.W.2d 412, 420 (Tenn. 1978) Indeed, the Defendant was forebearing in the language he

chose in withdrawing Tea Party Nation's endorsement of NFC. The decisional law on this subject is clear: words like "scab," "traitor," and "blackmail" have been found to be mere "hyperbole" and "lusty expressions of contempt" worthy of the protections of the First Amendment. The offending utterance here deserves the First Amendment's jealous protection.

F. The complaint does not meet the particularity requirement under Tennessee Rule of Procedure 9.02.

Count III of the complaint alleges that the actions of the Defendant constitutes intentional misrepresentation. The Tennessee Supreme Court has recognized that the terms "intentional misrepresentation," "fraudulent misrepresentation" and "fraud" are synonymous. *Concrete Spaces, Inc. v. Sender,* 2 S.W. 3d 901, 904 n.1 (Tenn. 1999). Accordingly, Plaintiff's claim is not properly pled under Tennessee Rule of Civil Procedure 9.02.

Tennessee Rule of Civil Procedure 9.02. states that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." A plaintiff must allege the following elements to assert a common law fraud claim: "(1) an intentional misrepresentation of a material fact, (2) knowledge of the representation's falsity, . . . (3) an injury caused by reasonable reliance on the representation [and (4) the requirement] that the misrepresentation involve a past or existing fact. . . ." *Dobbs v. Guenther*, 846 S.W.2d 270, 274 (Tenn. Ct. App.1992). This Court has found a complaint sufficient where it "specifically identifies the time and place of each alleged false representation, and identifies the manner in which each

representation was deemed to have been fraudulent." *City State Bank v. Dean Witter Reynolds*, 948 S.W.2d 729, 738 (Tenn. Ct. App. 1996).

The Complaint, tested by the particularity requirement, is legally insufficient and fails to make specific allegations concerning each of the above requisites comprising an action for fraud. Plaintiff's allegations only generally claim that the Defendant made intentional misrepresentations upon which Plaintiff relied, with only Plaintiff's subjective belief asserted in support. Since Rule 9.02 of The Tennessee Rules of Civil Procedure requires that matters of fraud be stated with particularity and the Plaintiff's complaint fails to so do, the complaint does not state a cause of action for intentional misrepresentation.

Plaintiff cannot establish a *prima facie* case under either intentional or negligent misrepresentation because the alleged misrepresentation does not concern an existing or past fact. In order to prove a claim based on fraudulent or intentional misrepresentation, a plaintiff must show that:1) the defendant made a representation of an existing or past fact; 2) the representation was false when made; 3) the representation was in regard to a material fact; 4) the false representation was made either knowingly or without belief in its truth or recklessly; 5) plaintiff reasonably relied on the misrepresented material fact; and 6) plaintiff suffered damage as a result of the misrepresentation. *Metro. Gov't of Nashville & Davidson County v. McKinney*, 852 S.W.2d 233, 237 (Tenn. Ct. App. 1992); see *First Nat'l Bank v. Brooks Farms*, 821 S.W.2d 925, 927 (Tenn. 1991); Lopez v. Taylor, 195 S.W.3d 627, 634 (Tenn. Ct. App. 2005). Similarly, to succeed on a claim for negligent misrepresentation, a plaintiff must establish "that the defendant supplied information to the plaintiff; the information was false; the defendant did not exercise

reasonable care in obtaining or communicating the information and the plaintiffs justifiably relied on the information." *Walker v. Sunrise Pontiac-GMC Truck, Inc.*, 249 S.W.3d 301, 311 (Tenn. 2008) (quoting *Williams v. Berube & Assocs*., 26 S.W.3d 640, 645 (Tenn. Ct. App. 2000); see also *Robinson v. Omer*, 952 S.W.2d 423, 427 (Tenn. 1997).

Whether the claim alleges an intentional or negligent misrepresentation, the plaintiff must allege as part of his *prima facie* case that the misrepresentation relates to an existing or past material fact. *McElroy v. Boise Cascade Corp.,* 632 S.W. 2d 127, 130 (Tenn. App. 1982). This issue was explored in *Henley v. Labat-Anderson, Inc.*[1] Finding no evidence of a misrepresentation of an existing or past material fact, the *Henley* court explained that "in order for a fraudulent misrepresentation to be actionable, *it must consist of a statement of an existing or past material fact*, made with knowledge of its falsity or with reckless disregard of the truth." *Fowler v. Happy Goodman Family*, 575 S.W.2d 496 (Tenn.1978) (emphasis added). Although an action for negligent misrepresentation replaces the scienter requirement in fraudulent misrepresentation with a less stringent reasonable care standard, *Haynes v. Cumberland Builders, Inc*., 546 S.W.2d 228 (Tenn.App.1976), the misrepresentation still must consist of a statement of a material past or present fact. *McElroy v. Boise Cascade Corp*., 632 S.W.2d 127 (Tenn.App.1982); *Brungard v. Caprice Records, Inc.*, 608 S.W.2d 585 (Tenn.App.1980). " Thus statements of opinion or intention are not actionable. . . . Similarly, conjecture or representations concerning *future* events are not actionable even though they may later prove to be false." *McElroy, supra*. (Emphasis in original)." 1991 Tenn. App. LEXIS 522.

[1] 1991 Tenn. App. LEXIS 522 (Tenn. Ct. App. July 9, 1991).

The complaint in the present case is devoid of any allegation indicating a misrepresentation by the Defendant of an existing or past material fact. The Plaintiff's allegation that the Defendant "agreed to partner with, join in or otherwise assist Mr. Hemrick in what later was to be known as the NFC" were not representations about past or present facts, but rather plans, expectations, and intentions concerning future endeavors. An essential element in the Plaintiff's claims of fraudulent and negligent misrepresentations is lacking, and the Complaint should be dismissed.

G. Plaintiff's Claim for a "Promise Without an Intent to Perform" Fails for Want of Consideration

The final count of the complaint charges that Defendant made "promises without an intent to perform." While the language of this count suggests fraud, the Complaint already asserts separately a count for fraud and negligent misrepresentation. The deficiency of the Complaint's allegations of fraud were explored in the previous section to this Memorandum of Law.

Insofar as Plaintiff's claim is one that sounds in contract, Defendant would show that Plaintiff has failed to plead any facts in support of such a contract or quasi-contract. The Plaintiff has altogether omitted any mention in the Complaint of the only written contract between the parties, the promissory note for which the Plaintiff received satisfaction.

In order to establish a claim for breach of contract, the plaintiff must show the existence of a contract and that the breaching party failed to perform according to the contract. *Asbury v. Lagonia*, 2002 Tenn. App. LEXIS 731 (Tenn. Ct. App. Oct. 15,

2002)(citing Tenn. Juris. Contracts § 78 (1997)). As to any contract between the parties, Defendant would show accord and satisfaction.

Additionally, the Plaintiff must plead consideration. As has already been pointed out, the four coners of any contract between the Plaintiff and the Defendant were memorialized in the signed "Promissory Note" which involved the $25,000 loan from the Plaintiff to Tea Party Nation. Defendant repaid this note at an extraordinary rate of interest.

The Complaint relies on Plaintiff's conclusory assertion that he relied on the Defendant's "promises" and "has sustained damages" [Complaint at ¶27] and fails to allege any consideration in support of this quasi-contract and fails to specify any damages. To recover in equity, in *quantum meruit*, the Plaintiff must allege and prove the following:

> (1) There is no existing, enforceable contract between the parties covering the same subject matter;
> (2) The party seeking recovery proves that it provided valuable goods or services;
> (3) The party to be charged received the goods or services;
> (4) The circumstances indicate that the parties to the transaction should have reasonably understood that the person providing the goods or services expected to be compensated; and
> (5) The circumstances demonstrate that it would be unjust for a party to retain the goods or services without payment.

Doe v. HCA Health Servs. of Tenn., 46 S.W.3d 191, 198 (Tenn. 2001)(*citing Swafford v. Harris*, 967 S.W.2d 319, 324 (Tenn. 1998))

Plaintiff has failed to plead the existence of any "goods or services" rendered by him to the Defendant in support of any claim in contract or quasi-contract. "[A]llegations of pure legal conclusions will not sustain a complaint." *Givens v. Mullikin*, 75 S.W.3d 383, 406 (Tenn. 2002). Where the complaint does not allege "facts showing the existence of an enforceable express contract supported by adequate and

sufficient consideration" such complaint should be dismissed for failure to state a claim. *Id.* Accordingly, Plaintiff's count against the Defendant for a "promise without an intent to perform" must fail.

H. Conclusion

The factual allegations averred by the Plaintiff are not actionable as a matter of law under any of the various and creative theories asserted in the complaint. Alternatively, the Defendnat is entitled to Summary Judgment for the reasons stated.

This 1st day of June 2010.

THE HAWKINS LAW FIRM, PLLC

_____
Travis Hawkins, BPR #17395
For The Firm
Attorney for Defendant
120 Old Liberty Pike
Franklin, TN 37064
(615)599-1010 office
(615)599-1091 fax

CERTIFICATE OF SERVICE

I, Travis Hawkins, hereby certify that a true and exact copy of the foregoing was served via first class mail and email on June 1, 2010:

Phillip Byron Jones, Esq.
EVAN, JONES & REYNOLDS, P.C.
401 Commerce Street, Suite 710
Nashville, Tennessee 37219

_____
Travis Hawkins