Tennessee Judicial Nominating Commission

Application for Nomination to Judicial Office

Rev. 25 August 2011

Name: Stewart Clarke Stallings

Office Address: (including county) 6 Cadillac Dr., Suite 260 Brentwood, Tn. Williamson County

Office Phone: 615-370-7002 Facsimile: 615-

Email Address: stewart.stallings@farmersinsurance.com

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

I am the managing attorney for the Nashville Branch Legal Office of the Farmers Insurance Group of Companies. Currently I am responsible for offices in Brentwood Memphis, and Nashville. I supervise 7 lawyers and 7 support staff as well as handling my own caseload.

I opened the Nashville office which is now in Brentwood in December 2004 with just me and 1 support person handling only the Middle Tn. area. Now my offices handle litigation throughout the state and into North Mississippi.

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

1979, 006943

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.

Mississippi, #9306, 1992. The license is 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).

I voluntarily went on inactive status in Miss. from approximately 2006 – 2009, reactivating my license when Farmers Insurance Group decided to expand my territory into Miss. Otherwise, I've never been denied admission to any Bar nor had either license suspended.

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).

My legal career began with the Army Judge Advocate General Corp (JAGC) immediately after graduating from law school. I was on active duty until Sept. 1983 when I went to work for what was later known as Armstrong, Allen, Gentry, Johnston, & Holmes in Memphis. I was an associate there from Sept. 1983 thru Feb. 1990. I them worked for Petkoff and Lancaster from Feb. 1990 thru March 1996 when I left to work for Stewart, Wilkinson, & Wilson. I was a partner at Stewart Wilkinson thru the spring of 1997 when I went in house with Permanent General Insurance Co. which was a client of Stewart Wilkinson.

In January, 2000 I left Permanent General to work for Travelers Insurance Co. In Dec. 2004 I was offered the job of Managing Attorney for the Nashville Branch Legal Office of Farmers Insurance Group of Companies. I have remained in that position until now.

I have taught legal courses for Embry-Riddle University and the Paralegal Institute of America. This was more than 10 years ago.

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.

As a managing attorney for an insurance company staff counsel office I now spend 50 to 60% of my time on administration of my 3 offices and the rest representing Farmers' policyholders in litigation. My practice is now limited to insurance defense work. I try cases and do all the work that goes into a trial practice.

I also spend a lot of time training my lawyers in how to be trial lawyer not just a litigator.

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.

The vast majority of my legal practice since law school has been trial work. In the JAGC I tried between 45-50 "jury trials" (military courts martial with panels of 6-9 enlisted and officer members) ranging from simple AWOL (absence without leave) to rape, robbery, drug offenses and capital murder. I was both a prosecutor and defense counsel. All the trials were criminal matters. In addition I represented soldiers in administrative hearings. My duties also included advising soldiers on general legal matters, drafting wills, and dealing with consumer issues.

When I came off active duty into the civilian practice of law I continued to try cases. I have tried car wreck cases, slip and falls, trademark infringement, breach of contract, construction, real estate disputes, workers compensation, professional malpractice, prison liability and consumer protection suits. Though I have more often been on the defense side I have represented plaintiffs in personal injury cases as well as business disputes. I appeared in Federal as well as state courts and I tried jury cases in both courts. Moreover, I had numerous matters in Chancery court including requesting and defending restraining orders, contract issues and general equitable matters. I tried several bench trials in Chancery court. I also did appellate work including writing briefs and arguing before the Tennessee Supreme Court and Court of Appeals. Of my federal court matters only one was appealed so I've made one argument before the 6th Circuit Court of Appeals. Fortunately, I won. My practice also included numerous minor's settlements, workers comp settlements, General Sessions trials, examinations under oath, and of course numerous motions. I've even done some bankruptcy litigation work on the creditor side. I also recall appearing in front of at least one state administrative board on an environmental case but I just don't remember the details. I do remember at least one securities arbitration case where I represented the plaintiff.

As part of my pro bono work I represented several people in social security benefit denial appeals, drafted wills and provided general legal advice.

The non litigation work I've done includes contract drafting, franchise agreement work, business consulting including drafting incorporation documents, and one commercial real estate deal where I did all the work to sell a branch bank location.

In the last 10 years I've had very little federal work. Most of my litigation has been in state court including Tennessee and Mississippi. I've tried a couple of jury trials and at least one bench trial in state court in Mississippi.

Currently, besides the administrative work of running a three office, 15 person enterprise I do

state court litigation with the majority of my cases being serious injuries from car wrecks, dog bites and other accidents. I am, in addition to being the managing attorney, also the high exposure, large loss attorney so I get the big cases. These cases seem to settle so I can't brag about any recent big trial but I have mediated many of these which have resulted in settlements of 2.5 million in one, a little less than a million in another one and $650,000 in one plus quite a few in the low 6 figures. I continue to do the occasional binding arbitration.

My personal involvement in the above described cases is significant. For better or worse I've, since my first trial, been the lead counsel. There are only 2 jury trials and one bench trial where I was second chair. The two jury trials were when I was training a lawyer from my office. All the depositions, motions, preparations, and what have you from all the other cases were my responsibility. I am intimately familiar with every aspect of the litigation process.

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

While I consider my cases special the only one I recall that had any community interest or actual significant legal issues was my federal court suit against the City of Bartlett for nonresident discrimination in the use of city recreational facilities. I won an injunction against the City and obtained an award of attorney fees on a little over $40,000. A settlement was reached and the city paid the fees despite a city councilman publically stating I would never win!

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.

My only relevant experience in response to this question is that I've sat at least 5 times as a special judge in the Shelby County General Sessions Court. The contested cases I heard would probably not be considered noteworthy but I learned just how hard it is to decide a well tried albeit small case. I also conducted Summary Courts Martial in the JAGC. Those were, of course, relatively minor criminal or breach of duty cases.

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.

I don't recall serving in any of these capacities.

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

I reviewed and negotiated technology contracts for The Regional Medical Center at Memphis in 2000.

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.

I've never submitted an application for judgeship before.

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.

Middle Tennessee State University, 1972 – 1974, Business major, left to transfer to Vanderbilt.

Vanderbilt University, 1974 – 1976, BS, double major in Economics and Business Administration.

University of Tennessee Law School, 1976 – 1979, JD.

The Army JAGC Advanced Course, 1988 (no degree but it is the functional equivalent of a Masters in Military Law)

PERSONAL INFORMATION

15. State your age and date of birth.

56, DOB Dec. 30, 1956

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

Since September 1983

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

July, 2002

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.

US Army, Judge Advocate General Corps, active duty 1979- 1983 and Jan.1991 thru April 1991(Operation Desert Storm). Reserve duty 1976 – 1979, 1983 – 1991. Rank at time of discharge Major. Decorations include Army Commendation Medal and Army Achievement Medal x 2. Honorable discharge.

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.

No.

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)?

Yes.

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. Divorce filed in1998 and final Order entered May 3, 2000, docket # 160190 RD in Shelby County.

Chapter 7 Bankruptcy, docket # 97-1495, filed Dec. 29, 1997, discharged Oct.9 1998

Memphis Radiological v Jenny Stallings, docket # 674801,1997, Shelby County General Sessions Court. I was also named but dismissed and a judgment was obtained and satisfied against my then wife.

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.

St. Andrews Lutheran Church, Vanderbilt Alumni Association

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.

I am a member of the TBA Tort and Insurance Practice Section Executive Council. This year I am the CLE coordinator and next year the vice-chairman the following year, chairman. I've been on this committee for two years. I am also a member of the ABA; no current duties but I have participated in the staff council section.

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.

I don't recall any of significance other than an Amy Commendation Medal for Operation Desert Storm for my work in getting reservists called up for active duty appropriate legal services such as on the spot Will preparation, powers of attorney and other legal documents so they could deploy for the middle east with their affairs squared away.

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

In law school I co-wrote the Handbook on County Correctional Facilities which was published thru the Tennessee County Technical Assistance Service. Since then the only things I've written are CLE presentations.

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.

1. Civil trial From Start to Finish, 08/25/06
2. Mastering Depositions, 09/20/07

3. Personal Injury Cases: Calculating and Proving Damages, 05/22/08 and 05/21/09
4. Building Your Civil Trial Skills, 12/11/08 and 12/12/08
5. Insurance Fundamentals for Personal Injury Practice, 05/21/09
6. The Mechanics of Tennessee Civil Procedure, 12/16/10 and 12/17/10
7. Tort and Insurance Forum, 04/09/10 and 02/24/2011

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

None.

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

No.

34. Attach to this 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.

I am attaching two briefs and a portion of the CLE seminar I wrote for Building Your Civil Trial Skills. All the writing is mine. In the Selker v Savory brief I had co-counsel but he only reviewed while I did the actual preparation of the brief. In the Hurt v Brown brief Mr. Hollingsworth did the research but I wrote and prepared the brief.

ESSAYS/PERSONAL STATEMENTS

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

In a sense being a circuit court judge is one of the best ways for a trial lawyer to serve the community. For me it is a great opportunity to use my skills and experience to continue the high standards set by Judge Bivins. I've been a trial lawyer and advocate for over 30 years. While I enjoy the good fight I think the ultimate challenge is to be an advocate for justice and fairness.

I think the good judge is one who realizes he or she is a servant to the people who come before the court. This doesn't mean you don't run a high standard courtroom but rather treat everyone who comes before you with respect and dignity. You make decisions promptly, follow the law

and enforce the rules while not degrading the lawyers. I can do these things. While I think I am a good lawyer I also admit I've made mistakes, had hard times, and been less than perfect. This has given me empathy. I believe I know how to treat the lawyers and their clients as well as the court staff.

To be a Circuit Court Judge is the pinnacle of a legal career to me. I think it would be the most difficult thing I've ever done to do it well. I relish challenges and I truly believe with my skill set and varied experience it would a challenge I can meet. It may sound presumptuous but I am applying for this judgeship for the simple reason I think I would be a good judge.

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)***

Some of this I mentioned above. While I practiced in Memphis I was a panel attorney through the Memphis Bar Association for pro bono cases. Since moving to Brentwood and taking an in house position I haven't done formal pro bono work. As mentioned below I have provided free legal services and counseling to families of persons with addictions. Due to the devastating effects of addiction in my own family helping others with similar problems is a special interest of mine.

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 has4 Circuit Court Judges for a 4 County area with Williamson County being the largest. Perry, Lewis and Hickman counties are small population wise. The main office is in Franklin. Two of the Judges are designated for criminal work and two for civil. Judge Bivins was designated for civil cases and he sat as both Chancellor and Circuit Judge. From what I observe the civil docket in the 21st district is very similar to the surrounding districts. Every kind on civil dispute imaginable can be found. Because the judge sits as a Chancellor also the dockets can be quite heavy and the matters quite varied.

My impact would hopefully be minimal in the sense that I would get in and immediately get the dockets moving. Replacing Judge Bivins' is a tall order so my job is to emulate his success and minimize the disruption in replacing the Judge on cases which have been around awhile.

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)***

Other than working on projects with my church my community service has recently been helping

families of addicts with legal advice and support. For sometime I was on the board of directors for a halfway house. My work with Al Anon families is confidential and not formally associated with any organization.

As a judge I would like to address the community in two ways. First, speak to civic groups about how our judicial system really works from the lay person perspective. Second, invite school classes to watch appropriate matters in court so they will gain a better understanding of our local courts.

In years past when my first five children were younger I was very involved in youth athletics; I incorporated the Ellendale Little league and was on the Board of Directors. I've coached every possible youth sport including AAU basketball. Three of my children attended Ravenwood High School in Williamson County and I was quite involved with the Band Boosters though I never held an office.

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)***

For me the greatest teachers are not the successes but the failures and disappointments. I've learned much more from the cases I've lost than won. So it is with life. I almost lost everything I had when my first wife fell into the depths of alcoholism and I couldn't cope. We had 5 young children and I was working all the time to make a living. To make a long story short we had to file bankruptcy because I eventually couldn't work much in order to care for the children and the vast amount of money my wife "lost". The learning point, however, is I got divorced, became a single parent, got back on my feet and things eventually became very good. I didn't give up and while I am embarrassed about the bankruptcy I did what was necessary to protect my family.

As a judge I will understand that sometimes life experiences put you in a bad position but it doesn't mean you are a bad person. I understand how important it is to be treated with dignity when you are in a humble position. I believe in the power of redemption and I think this will help me as a judge. I also know that a consequence for your actions is the best way to improve those actions. So while I will be empathetic I will also apply the law firmly.

What I am try to say without sounding supercilious is I have wisdom and that is invaluable as a judge.

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

Yes. The best example I can think of in the standard for summary judgments. The Tennessee Supreme Court in couple of decisions in 2008, Hannan v Alltel Publishing Co. 270 S.W. 3d 1

(Tenn.2008) and Martin v Norfolk Southern Ry. Co. 271 S.W. 3d 76 (Tenn.2008) made the burden of obtaining a summary judgment almost impossible. I disagreed with those rulings and in fact helped draft the change to the law passed this year which reinstated the previous standard. Despite my belief the Supreme Court was wrong I, as a judge would have applied the standard stated by the Court. I believe very strongly in following precedent. Perhaps my military training impacts this but I don't view my role as a Judge as making law but rather applying the law in a fair manner.

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. Ritchie Worrell, State of Tenn. Dept. of Human Resources, phone # 615-741-5561

B. Patricia S. Wall, Assistant Professor of Business Law, Middle Tennessee State University, phone # 615- 898-2039 & 442-8358 Home),email: pwall@mtsu.edu

C. F. Lee Sarver, Associate Professor, Finance, Middle Tennessee State University, phone # 615-898-5919, email: fsarver@mtsu.edu

D. William F. Travis Attorney, Southaven Ms., phone #662-393-9295, email: bill@southhavenlaw.com

E. Paul Buchanan, Attorney, Nashville, Tn. Phone # 615- 256-9999, email: pbuchanan@ortalekelley.com

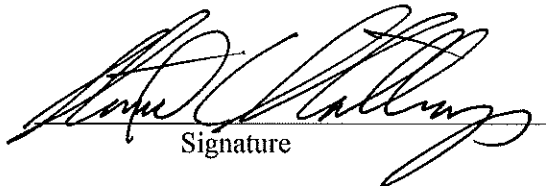
AFFIRMATION CONCERNING APPLICATION

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 of the_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: ___September, 21___________________, 20_11____.



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

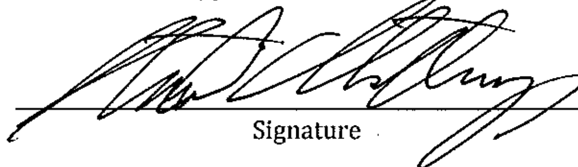
511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

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.

Stewart C. Stallings
Type or Printed Name



Signature

9/21/11
Date

006943
BPR #

IN THE TENNESSEE COURT OF APPEALS
FOR THE MIDDLE SECTION

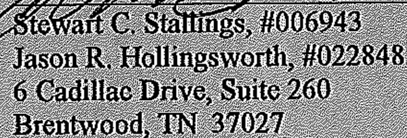
SHAVON HURT,	Middle Section Court of Appeals **M2011-00604-COA-R3-CV**
Plaintiff/Appellant,	
vs.	
HILRIE BROWN and JOHN DOE/JANE DOE	
Defendants	
FARMERS INSURANCE EXCHANGE	
UMC/Appellee.	Davidson County Circuit Court – No. 09C89 (Judge Gayden, Circuit Court)

APPEAL AS OF RIGHT FROM THE CIRCUIT COURT OF TENNESSEE
FOR THE FIRST DISTRICT AT NASHVILLE, DAVIDSON COUNTY

<u>BRIEF OF THE APPELLEE</u>

Respectfully submitted,

STEWART C. STALLINGS & ASSOCIATES



Stewart C. Stallings, #006943
Jason R. Hollingsworth, #022848
6 Cadillac Drive, Suite 260
Brentwood, TN 37027
Phone: (615) 661-9227 x. 20
Fax: (615) 661-9412
Attorney for Defendant/Appellee

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Stellcup v. Duncan, 648 S.W.2d 643, 646 (Tenn. Ct. App. 1984) 7

STATUTORY AUTHORITY

T.C.A. § 56-7-1201, *et seq.*, Uninsured Motorist Coverage 7, 9, 12

REFERENCE IN THE BRIEF TO THE PARTIES

Pursuant to *Tennessee Rules of Appellate Procedure,* Rule 27(f), in this brief, the parties shall be referred to as follows:

Plaintiff Shavon Hurt, hereinafter – **"Mrs. Hurt"**

Defendant Hilrie Brown, hereinafter – **"Ms. Brown"**

John Doe/Jane Doe – **"John Doe/Jane Doe"**

Unnamed Defendant Farmers Insurance Exchange – **"FIE"**

REFERENCE IN THE BRIEF TO THE RECORD

Technical Record, cited in form – **"TR (page)"**

Witness Deposition, cited in form – **"Depo (witness name) page/line(s)"**

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Once Plaintiff reached a settlement with Defendant Hilrie Brown, was the trial court correct in dismissing, upon motion, Shavon Hurt's uninsured motorist claim against Defendant John Doe/Jane Doe on the basis that the settlement with Defendant Brown extinguished any claim Mrs. Hurt had under the Tennessee Uninsured Motorist Statutory Scheme and the terms of her own policy of insurance?

STATEMENT OF THE CASE

Shavon Hurt brought suit against Hilrie Brown arising out of a one vehicle/pedestrian accident occurring in a parking garage on the Vanderbilt University Medical Center campus on April 9, 2008. Ms. Brown answered the Complaint and took the position that she was not the responsible party. During her deposition, she testified that she was not present at the scene where Mrs. Hurt alleged the accident occurred. (Depo. Brown, page 14, line 10).

After party depositions, Mrs. Hurt amended her Complaint to assert a claim under the Uninsured Motorist statute to name John Doe/Jane Doe as a potential responsible party. (TR page 35).

On Wednesday, January 6, 2011, four days before trial of this matter set on January 10, 2011, Plaintiff reached a settlement with Defendant Hilrie Brown. (TR page 78). Counsel for Mrs. Hurt indicated that he was going to proceed to trial against John Doe/Jane Doe.

The trial set on January 10, 2011 was postponed due to inclement weather. John Doe/Jane Doe filed a Motion to Dismiss on February 18, 2011 resulting in the granting of the motion by the trial judge. (TR page 101).

Mrs. Hurt then timely filed her appeal to this court.

STATEMENT OF FACTS

For purposes of this appeal, John Doe/Jane Doe will assume Plaintiff's allegations concerning the facts are correct. Mrs. Hurt was walking through the Vanderbilt University Medical Center parking garage when a car backed out into her, striking her left wrist. (Depo. Hurt, page 69). Mrs. Hurt was heading to the smoking area, talking on a cell phone, getting ready to smoke, when she was struck. (Depo. Hurt, page 75). After being struck, she told her sister the license plate number of the car that backed into her. (Depo. Hurt, page 75). She later made a report to the Vanderbilt Police Department, who in turn obtained information that the license plate identified belonged to Defendant Hilrie Brown. (Depo. Hurt, pages 74, 86, 87).

Mrs. Hurt only described one vehicle being involved in this accident and that is the one that she identified through the license tag number. She never asserted a claim against any other vehicle or person as a causative factor. This was a one car accident.

ARGUMENT

A. Standard of Review

This case makes its way to the Court of Appeals after a Motion to Dismiss. Therefore, Mrs. Hurt's Statement of Standard of Review in her brief is correct.

B. Under the Tennessee Uninsured Motorist Statutory Scheme, Mrs. Hurt's Cause of Action against John Doe/Jane Doe was extinguished upon her settlement with Hilrie Brown

The purpose of the uninsured motorist statute, set forth in T.C.A. §56-7-1201 et seq. is "for the protection of persons insured under the policy who are legally entitled to recover compensatory damages from owners or operators of uninsured motor vehicles…". §56-7-1201(a).

In other words:

> [5] The intent and purpose of the Uninsured Motorist Act is to provide protection by making the insurance carrier stand as the insurer of the uninsured motorist. *See Glover v. Tennessee Farmers Mutual Insurance Co.,* 225 Tenn. 306, 468 S.W.2d 727 (1971). Uninsured motorist insurance coverage is an adjunct to the automobile liability insurance policy. *See* T.C.A. §56-7-1201 (Cum.Supp.1983). Thus, the insured is allowed to purchase uninsured motorist coverage for the protection that he would have had if the alleged tortfeasor had assumed his own financial responsibility by purchasing liability insurance.
>
> Stellcup v. Duncan, 648 S.W.2d 643, 646 (Tenn. Ct. App. 1984)

By settling her claim with Defendant Hilrie Brown, Mrs. Hurt has in effect recovered from a tortfeasor with insurance coverage. The settlement reached on behalf of

Ms. Brown was offered and the check paid by her insurance carrier through her counsel. The Release supplied to Mrs. Hurt by Hilrie Brown (TR page 78) sets forth the terms of the settlement and which was presumably signed by Mrs. Hurt at some point. While the terms of the settlement may not be admissible at trial, they are certainly relevant for purposes of determining whether, in fact, a valid UM claim still exists.

Since the purpose of the statute is to provide an avenue for recovery to injured parties where there is either insufficient insurance or the tortfeasor has no insurance, to allow recovery here against FIE would, in fact, be a double recovery. This is not analogous to the more common situation when there are multiple defendants. This is not a situation where there is even comparative fault as between defendants. Unlike the situation where there is a two car accident or the common claim that a phantom vehicle caused the defendant to strike plaintiff's vehicle, here we have only one car. Mrs. Hurt either recovers from Defendant Brown or from John Doe/Jane Doe. There is no comparative fault with another defendant. This was a one car accident and the only issue for determination at trial, in addition to the damages incurred by Mrs. Hurt, is whether it was Defendant Brown or someone driving a car with her same license tag.

If Mrs. Hurt is allowed to proceed here, it is possible that she could not only recover the money received in settlement from the Defendant carrier, but also money from her UM carrier even though she has recovered from an "insured" tortfeasor.

It is clear from the wording of T.C.A. §56-7-1201 et set. that this is not a statutory scheme to provide double recovery for plaintiffs. Once Mrs. Hurt made the decision to accept the settlement from the Defendant Hilrie Brown's insurance carrier, Mrs. Hurt has in effect made a recovery from an insured vehicle. If the Defendant is insured and it is

not a question of insufficient coverage, then how can Mrs. Hurt be allowed to recover against the alleged uninsured phantom vehicle? Mrs. Hurt concedes in her brief that this is not an underinsured occurrence. In other words, this is not the case where the coverage of John Doe/Jane Doe is standing behind the policy of Hilrie Brown, but rather the situation where Mrs. Hurt is alleging an either/or occurrence. It was either Mrs. Brown or someone else who hit her. It was not two separate persons or vehicles combining to cause an injury.

Plaintiff cites two cases for the proposition that settlement with one defendant does not establish a basis for dismissal as to the remaining defendant. McNabb v. Highways, Inc., 98 S.W.3d 649 (Tenn. 2003) and Burton v. Fine, 2004 WL 1541341 (Tenn. Ct. App. 2004). For this general proposition, John Doe/Jane Doe is not in disagreement. Clearly, where there are multiple defendants, generally a party can settle with one defendant and still proceed against another. This is totally inapposite to the situation here.

Looking first at McNabb v. Highways, Inc., it is clear that this case has nothing to do with the situation at bar. In fact, the McNabb case does not even deal with a UM carrier being involved. In McNabb, the Tennessee Supreme Court was asked to determine whether the trial court erred in granting summary judgment to defendant based on the plaintiff's failure to join all of the tortfeasors in a single proceeding. Defendant Highways sought dismissal of the action because plaintiff failed to sue all of the defendants in the same action. The trial court agreed and dismissed the action against Highways. The Supreme Court indeed held that the trial court erred in granting summary judgment to the defendant based on the plaintiff's failure to join the tortfeasors in a single

proceeding. McNabb had filed two separate yet identical lawsuits against two separate defendants involving the same auto accident. There is simply no analogous logic to be applied from McNabb to this case.

Likewise, in Burton v. Fine, there is simply no reasonable relationship to the issues involved in this appeal. Burton sued Fine and also the UIM carrier, CNA. Fine, the original defendant, countersued against Burton. Before trial, Fine settled with Burton's liability carrier, CNA, and executed a general release of his claims against Burton. Before trial, Burton moved for summary judgment arguing that Fine should not be allowed to argue comparative fault at trial due to the execution of the general release of claims asserted against Burton. The trial court disagreed and instructed the jury on comparative fault. The jury ultimately returned a verdict finding plaintiff 95% at fault. Looking at the release as a contract, the Court of Appeals concluded that it did not contain any provision whereby the defendant was agreeing to waive any affirmative defenses against the plaintiff.

Simply put, Mrs. Hurt fails to understand that this is not a case of choosing between two defendants. There is only one vehicle responsible for her injury. This is a case of identity. Once a tortfeasor was identified and recovered from, the UM statute no longer provided any remedy.

C. **By the terms of Mrs. Hurt's policy of insurance, she is not entitled to recover.**

Mrs. Hurt brought her claim against John Doe/Jane Doe because she had a policy of insurance with FIE which provided Uninsured Motorist coverage as set forth at Part II Uninsured Motorist. It is axiomatic that the policy of insurance is in the nature of a contract and the contractual provisions will be construed in the same manner as any other contract." The provisions must be given their "plain, ordinary and popular sense". Osborne v. Mountain Life Ins. Co., 130 S.W.3d 769, 773 (Tenn. 2004) citing Am. Justice Ins. Reciprocal v. Hutchison, 15 S.W.3d 811, 814 (Tenn. 2000). The policy provisions cited infra are not ambiguous. The policy provides in pertinent part "The bodily injury must be caused by accident and arise out of the ownership, maintenance or use of the uninsured motor vehicle". (Part II, page 6 of policy set out at TR page 86). The policy further defines an uninsured motor vehicle at section 3, page 7 of the policy (TR page 87). Section 3 states:

> 3. **Uninsured motor vehicle** means a **motor vehicle:**
>
> a. To which the sum of all limits of liability available to the **insured person** under all valid and collectible insurance policies, bonds and securities applicable to the **bodily injury** or **property damage** is less than the applicable limits shown in the Declarations for **uninsured motorists** coverage against which the claim is made.
>
> b. Which is a hit-and-run vehicle whose operator or owner has not been identified and which strikes:
> (1) You or any **family member.**
> (2) A vehicle which you or a **family member** are **occupying.**
> (3) **Your insured car.**
>
> c. Which is insured by a **bodily injury** liability bond or policy at the time of the **accident** but the company denies

coverage or is or becomes insolvent.

From the facts as claimed by Mrs. Hurt, this accident would be fairly described as a "hit-and-run". By the terms of her own policy under Section 3b, an uninsured motor vehicle is one "whose operator or owner has not been identified". Simply put, in this either/or scenario, Ms. Hurt has identified Ms. Brown as the causative driver and cannot recover under the terms of her own policy. This is consistent with the intent of T.C.A. § 56-7-1201.

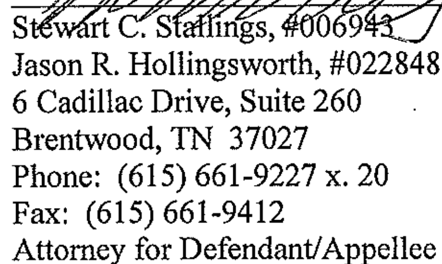
CONCLUSION

Mrs. Hurt has provided no countervailing argument or law in her brief as to the fact that her own policy states that uninsured motorist means a vehicle whose operator or owner has not been identified. While it may have been poor strategy or a simple misunderstanding of the law and unfortunate, it still does not change the fact that once Mrs. Hurt settled with Ms. Brown, she in fact identified a tortfeasor and made a recovery. To do otherwise, would simply provide the specter of a double recovery. The possibility would exist that Mrs. Hurt could recover her policy limits from FIE on behalf of John Doe/Jane Doe at trial, as well as the money she received from the Defendant Hilrie Brown; in effect a double recovery. This is not the intent of our UM/UIM statutory scheme.

For these reasons, the trial court's ruling should be affirmed.

Respectfully submitted,

STEWART C. STALLINGS & ASSOCIATES



Stewart C. Stallings, #006943
Jason R. Hollingsworth, #022848
6 Cadillac Drive, Suite 260
Brentwood, TN 37027
Phone: (615) 661-9227 x. 20
Fax: (615) 661-9412
Attorney for Defendant/Appellee

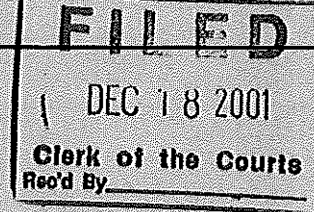
CERTIFICATE OF SERVICE

I hereby certify that on this 20 day of July, 2011, a true and exact copy of the foregoing was forwarded to the following:

Henry S. Queener, Esq.
1230 17th Avenue, South
Nashville, TN 37212-2802
Attorney for Plaintiff/Appellant

Stewart C. Stallings

IN THE TENNESSEE COURT OF APPEALS
FOR THE WESTERN SECTION



**EUGENE I. SELKER and
MARK SELKER,**

Appellants,

vs. **No. W2001-00823-COA-R3-CV**

**RUSSELL W. SAVORY,
GOTTEN, WILSON & SAVORY,
LEONARD YELSKY,
YELSKY & LONARDO, AND
JERRY LAWLER,**

Appellees.

BRIEF OF APPELLEES

Appeal from the Circuit Court of Shelby County, Tennessee
Circuit Court Case No. CT-002930-00

Stewart C. Stallings (#6943)
WALKER LAW OFFICE
6750 Poplar, Suite 412
Memphis, TN 38138
(901) 756-3046

Joe D. Barton
6565 Hwy. 51 North.
Millington, TN 38053
(901) 873-0997

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IN THE TENNESSEE COURT OF APPEALS
FOR THE WESTERN SECTION

EUGENE I. SELKER and
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Appellants,

vs. No. W2001-00823-COA-R3-CV

RUSSELL W. SAVORY,
GOTTEN, WILSON & SAVORY,
LEONARD YELSKY,
YELSKY & LONARDO, AND
JERRY LAWLER,

Appellees.

APPELLEES' REPLY BRIEF

ISSUE PRESENTED

Whether Appellants' cause of action for malicious prosecution accrued on May 4, 1999, the date in which an Ohio Federal District Judge entered the final Order in the underlying case giving rise to the malicious prosecution action.

FACTS

To put appellants' claim in the proper context, it is helpful to briefly recite the history of litigation initiated by Appellants. Appellants formed an Ohio limited liability company called XL Sports. XL Sports purchased the United States Wrestling Association ("USWA") from Jerry Lawler, well known locally and nationally as a professional wrestler and announcer for the World Wrestling Federation (as well as the now defunct XFL). Appellee, Jerry Lawler ("Lawler") had a 50% ownership of the USWA with Jeffery Jarrett. Prior to the sale of the USWA to XL Sports, Lawler obtained 100% ownership of the USWA.

As a result of meeting with limited success, XL Sports filed a suit against Lawler and others in the United States District Court for the Northern District of Ohio on September 12, 1997. This action was voluntarily dismissed on November 17, 1997. On November 21, 1997, XL Sports filed a Voluntary Petition for Chapter 11 Bankruptcy in the Western District of Tennessee. Lawler was a creditor of XL Sports, having entered into an employment contract and non-compete agreement with XL Sports, and was also named as a defendant in an adversary proceeding brought in the bankruptcy action on December 5, 1997.

Appellee Russell Savory ("Savory") of the law firm of Gotten, Wilson & Savory was retained to represent Lawler's interest in the bankruptcy proceeding. Appellee Leonard Yelsky ("Yelsky") was and is Lawler's Ohio counsel assisting in defending lawsuits pending between Lawler and Appellants in Federal Court in Ohio. Yelsky and Savory prepared a Complaint against Appellants alleging, *inter alia*, defamation, malicious prosecution, tortious interference and the unlicensed

and unlawful practice of law. This action was filed on March 6, 1998 in the Federal District Court in Memphis, Tennessee. Appellants answered and counter-claimed against Lawler and others alleging conversion, fraud, conspiracy to injure business, violation of RICO and conspiracy to violate RICO. It is the complaint filed by Lawler on March 6, 1998 which serves as the genesis for the current action.

This case was transferred to Federal District Court in Ohio. On December 14, 1998 Appellants filed a Motion for Summary Judgment as to those claims identified by the Federal Judge as tort claims. Lawler had also brought breach of contract claims against Appellants. Summary Judgment was granted to Appellants on the tort claims on March 23, 1999. It is these claims for which Appellants brought the malicious prosecution action. A jury trial was had in April, 1999 with Lawler prevailing on all issues of liability. In addition, Lawler obtained a judgment against one Larry Burton who can best be described as an intermediary in the original transaction involving the sale of USWA. A final Order was entered on May 4, 1999 (attached as Exhibit 1 in the Appendix). XL Sports likewise obtained a judgment against Mr. Burton and another defendant, Jason Bertman. XL Sports appealed the judgment in Lawler's favor. Lawler did not appeal the summary judgment.

If that litigation was not enough, XL Sports also filed a constructive trust claim in Chancery Court of Shelby County involving the same operative facts presented to the federal jury. This action was removed to Federal Court for the Western District of Tennessee. The District Court Judge on February 14, 2001

entered an order granting Lawler's motion to dismiss the constructive trust case and granting his renewed motion for judgment on the pleadings in the adversary proceeding in the bankruptcy action.

Appellants filed the current action on June 5, 2000. This was one year and thirty (30) days from the date of May 4, 1999, the date of the final order in the underlying action. Appellants contend the statute of limitations does not begin until the time to appeal has expired.[1]

---

[1] The actual 30th day was on Sunday, June 4th, but the Rules allow filing on the next Monday.

ARGUMENT

Appellants cause of action accrued on May 4, 1999, the date of the entry of the final Order of the underlying litigation. Tennessee law requires the establishment of three (3) essential elements to succeed on a claim of malicious prosecution. Plaintiffs must establish:

1. The prior suit or judicial proceeding was brought against the plaintiff without probable cause;

2. The defendant brought the prior action with malice; and

3. The prior action was finally terminated in favor of the plaintiff.

See, e.g., Christian v. Lapidus, 833 S.W.2d 71 (Tenn. 1992); and Hill v. White, 167 F.R.D. 47 (M.D. Tenn. 1996).

Appellants assert that the underlying action which gave rise to their claim of malicious prosecution became final on June 4, 1999, thirty (30) days after entry of the Final Order in the underlying action. This is the fatal flaw in Appellants' claim. A malicious prosecution cause of action action accrues upon entry of the final order. The only case of which counsel is aware that addresses this point in Tennessee holds that the Order granting summary judgment and dismissal of the case does trigger the accrual of a cause of action for malicious prosecution. Parrish v. Robert S. Marquis, an unreported case arising out of Shelby County, No. W1999-02629-COA-R3-CV, 200 Tenn. App. Lexis 509 (July 31, 2000), copy attached as Exhibit 2 in the Appendix. This Court in that opinion stated:

> The law is well established that a plaintiff's cause of action for malicious prosecution does not accrue until the underlying

> malicious suit is terminated in the plaintiff's favor. (citations omitted). In the present case, the legal malpractice action was terminated in Parrish's favor in July, 1996 when the Knox County Circuit Court entered its order granting Parrish's motion for summary judgment and dismissing Miller's claim with prejudice. Accordingly, if Parrish has a cause of action for malicious prosecution based upon the Defendants' prosecution of a legal malpractice claim, Parrish's cause of action arose when the Knox County Circuit Court entered its order in July, 1996.

Id. at 5.

The Court's language is not ambiguous. There is no discussion of entry of an order plus the time to appeal.

Other jurisdictions, including West Virginia and Ohio, follow this approach as well. An excellent discussion and analysis of this issue is found in the Supreme Court of Appeals of West Virginia's opinion in McCammon v. Oldaker, et al, 516 S.E.2d 38 (W. Vir. 1999). In McCammon, a jury verdict was rendered for the physician in a medical malpractice claim, which was later affirmed on appeal. More than two and one-half years after the jury verdict, but within one year of the final decision on appeal, the physician brought her malicious prosecution action. Like Tennessee, West Virginia has a one year statute of limitations for malicious prosecution actions. Plaintiffs in the McCammon case urged the Court to adopt the "tacking" rule which is followed in California. Defendant in the McCammon case took the position that the statute of limitations is triggered upon entry of a final judgment by the trial court.

Relying upon, *inter alia*, Levering v. National Bank of Morrow County, 87 Ohio St. 100 N.E. 322 (1912) which in turn relied in part upon several old Tennessee cases, the McCammon Court held that when the trial court, having

complete jurisdiction, renders a final judgment such judgment is final and conclusive until it is "gotten rid of by some appropriate process, and certainly so long as it stands without any proceeding being taken to review it, it constitutes a termination of the suit in which it is rendered." Id. at 44 citing Allen v. Burdette, 109 SE 739 (1921). In the Allen case, there was no appeal and the court did not address whether a malicious prosecution action begins to run from the termination of the underlying action when an appeal is pending. Though no appeal was was taken by Lawler, whether an appeal is taken, however, makes no difference. In addressing this issue, the court in McCammon noted:

> The rule we adopt in this case is consistent with our holding in Allen which was based, in part, on this court's finding that a termination of an action occurs 'when the court in which the suit alleged to be maliciously prosecuted is pending has complete jurisdiction and renders a judgment finally disposing of the matters'. Allen, 109 SE at 740. This finding is no less true in cases in which there is an appeal pending inasmuch as the trial court's judgment is still final until it is actually reversed or set aside by this court. We simply find no reason to recognize one rule in cases, such as Allen, in which no petition of appeal has yet been filed, and another rule in cases like the instant one in which an appeal is pending. Also, we reject the 'tacking doctrine' recommended by some of the defendants because we believe it interjects needless complexity into malicious prosecution suits. In contrast, the rule that the limitation period commences on the termination of the complained of action in the trial court, regardless of whether there is an appeal pending, is simple and easy to apply. (emphasis added)

Id. at 45.

Later in the opinion, the McCammon court further notes:

> Finally, we are confident that the potential problem of inconsistent judgments will not arise as a result of the rule we adopt herein. In a case in which a party institutes a malicious prosecution action during the pendency of the appeal of the underlying case, as suggested by the court in Levering, supra, the circuit court may stay the malicious prosecution proceedings until the appeal is disposed

> of. If the judgment is ultimately reversed on appeal, the reversal may be pleaded as a defense to the pending action for malicious prosecution.
>
> . . .
>
> Under this rule, the termination of the action complained of in the trial court is the trial court's entry of its final order which terminates litigation between the parties and leaves nothing to be done but to enforce the execution of what has been determined.

Id at 46.

Appellees acknowledge there is a split of authority as to when an underlying action becomes final for statute of limitations purposes in malicious prosecution actions.

Several courts have held that a malicious prosecution is precluded during the pendency of an appeal because the proceedings are not considered terminated until after a final judgment by the highest appellate court. See, e.g., 52 Am.Jur.2d Malicious Prosecution §44, 1970 and 54 CJS Malicious Prosecution §53, 1987. See also, Voth v. Coleman, 945 P.2d 426 (Kan. 1997), relied upon by Appellants.

Other courts follow what has been termed the "tacking" doctrine. These courts tack on the appellate process to the original statute of limitations.

> "[T]he statue of limitations runs from accrual upon entry of judgment until the date of filing of notice of appeal. The statute is then tolled until the conclusion of the appellate process, at which time it commences to run again.

Rare Coin Galleries, Inc. v. A-Mark Coin Company, Inc., 248 Cal. Rptr. 341 (Cal. Ct. of App. 1988) citing Gibbs v. Haight, Dickson, Brown & Bonesteel, 228 Cal. Rptr. 398 (Cal. Ct. of App. 1986). In other words, the statute of limitations begins

running upon the entry of the final judgment in the trial court and therefore filing of a malicious prosecution suit is not considered premature, but once a notice of appeal is filed the statute is tolled until the appellate process is resolved and then the clock starts ticking again. Even under the "tacking" approach, the statute of limitations was triggered in the case at bar by entry of the May 4, 1999 Order. These cases do not hold that the malicious prosecution action accrues thirty (30) days from entry of the Order of Final Judgment.

Appellants assert that defendants rely upon the notion that termination of the underlying suit occurred on March 23, 1999 when the Federal District Court in Ohio granted summary judgment in Appellants' favor. While Appellees would assert that would logically be the triggering point, it is clear that the statute of limitations is triggered no later than entry of the final order of judgment. Appellants also assert that the proper point is the date on which the termination is no longer subject to appeal as a matter of right. In support of this assertion, Appellants rely on Rule 56(b) of the Federal Rules of Civil Procedure. That Rule provides that when there is more than one party the court may direct entry of a final judgment, but that in the absence of such determination any order which adjudicates fewer than all the claim of the rights and liabilities of fewer than all the parties does not terminate the action and "the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties". The judgment was entered by the District Court in Ohio on May 4, 1999. Said order, attached hereto in the Appendix, specifically states "this judgment order is hereby entered pursuant to

Federal Rule of Civil Procedure 58 and this action is terminated." Rule 58 of the Federal Rules of Civil Procedures provides the manner in which the judgment is entered and that it is effective. The Federal Rules of Procedure are clear that a judgment is final when its entered pursuant to Rule 54(b). There is no language that the judgment is not final until the time for appeal has expired.

Perhaps the best analogy is found in the examination of malpractice claims. A legal malpractice action accrues when a person suffers a legally cognizable injury and the client knows or should have known the facts sufficient to give notice of the injury, not when the time for appeal of the wrong has passed. Tennessee Courts have consistently held that an appeal does not toll the running of the statute of limitations. Cherry v. Williams, 36 S.W.3d 78 (Tenn. Ct. App. 2000); Chambers v. Dillow, 713 S.W.2d 896 (Tenn. 1986); Carvell v. Bottoms, 900 S.W.2d 23 (Tenn. 1995); Bradson Mercantile, Inc. v. Crabtree, 1 S.W. 3d 653 (Tenn. Ct. App. 1999). Furthermore, the Court in Carvell addressed the issue of pursuing a legal malpractice action while the appeal of the underlying action was still pending:

> The plaintiffs argue that requiring the client to bring a malpractice action against an attorney before the appeals in the underlying case are concluded has the effect of forcing the client to take inconsistent positions on the same issue in different lawsuits.

Id. At 29.

This argument was rejected and the Court observed: [w]e agree with the New Jersey Supreme Court that clients can avoid the 'discomfort of maintaining in consistent positions,' see, Grunwald v. Bronkesh, 621 A.2d 459, 467 (1993) by filing a malpractice action against the attorney and requesting that the trial court

stay that action until the underlying proceedings are concluded. (citations omitted) Id. Just as in this case, the entry of an order on summary judgment could trigger the statute of limitations for legal malpractice, yet the order could still be the subject of appeals for years.

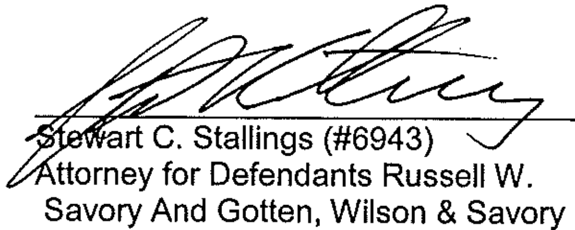
Appellants cite Voth v. Coleman, 945 P.2d 426 (Kan. 1997) for the proposition that the statute of limitations on malicious prosecution actions doesn't begin running until the expiration of the time within which to file a petition for certiorari to the United States Supreme Court. While that certainly appears to be the law in Kansas, it is not binding on this Court nor is it even persuasive.

Appellees assert the reasoning of the West Virginia Supreme Court of Appeals in McCammon provides a good analytical framework for the issues raised in this appeal and furthermore provide a rational solution. In addition, such a holding is consistent with this Court's holding in Parrish v. Marquis, infra at p. 5.

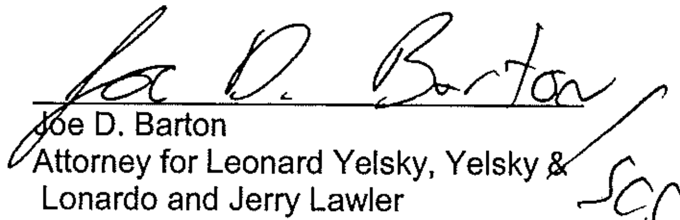
CONCLUSION

Finally, Appellants' reliance upon Tennessee's liberal construction of statutes of limitation misplaced. The orderly administration of justice is also just as important. This litigation has proceeded in Federal Court in two states, Bankruptcy Court, Chancery Court in Shelby County, Tennessee and now Circuit Court. At some point enough is enough. The issue before this Court is not one of differences of issues of fact, but rather a clear question of law. When does the statute of limitations for malicious prosecution begin? The trial court herein reached the proper decision based upon this Court's own prior ruling and the persuasive reasoning of the Supreme Court of West Virginia. Appellees pray this Court affirm the judgment of the trial court.

Respectfully submitted,



Stewart C. Stallings (#6943)
Attorney for Defendants Russell W. Savory And Gotten, Wilson & Savory



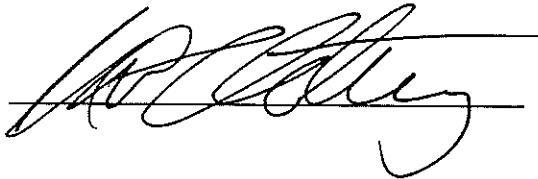
Joe D. Barton
Attorney for Leonard Yelsky, Yelsky & Lonardo and Jerry Lawler

OF COUNSEL:

WALKER LAW OFFICE
6750 Poplar, Suite 412
Memphis, TN 38138
(901) 756-3046

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a copy of the foregoing has been served upon Erich M. Schultz, Attorney for Plaintiffs, 1271 Poplar Ave., Memphis, Tennessee 38104; Mr. Joe D. Barton, Attorney at Law, 6565 Highway 51 North, Millington, TN 38053; Mr. Eugene Selker, Attorney at Law, 1801 East Ninth Street, 1111 Ohio Savings Plaza, Cleveland, Ohio 44114 via U.S. Mail, postage prepaid, this 14 day of December, 2001.



APPENDIX

EXHIBIT "1"

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

JERRY LAWLER,	)	CASE NO. 1:98cv2028
Plaintiff(s),	)	
	)	Judge James S. Gwin
- vs -	)	
EUGENE SELKER, et al.	)	ORDER
Defendant(s).	)	

FILED
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[illegible] DISTRICT COURT
NORTHERN DISTRICT OF OHIO
AKRON

This action came before the Court and a jury. The jury rendered a verdict in favor of Eugene Selker, Mark Selker, Phillip Furber, and the law firm of Selker & Ferber on Burton's claims of fraud and conversion against them. The jury rendered a verdict in favor of Burton on the fraud claim brought by Eugene Selker, Mark Selker, Phillip Furber, and the law firm of Selker & Ferber. The jury rendered a verdict in favor of Lawler on the fraud claim brought by Eugene Selker and Mark Selker.

In light of the Court's directed verdict in favor of Lawler on the breach on contract claim against Burton, the Court enters judgment in favor of Jerry Lawler against Larry Burton in the amount of One Million Dollars ($1,000,000,00); plus interest at the rate of twelve (12%) percent per annum commencing June 23, 1997.

This judgment order is hereby entered pursuant to Federal Rule of Civil Procedure 58 and this action is terminated.

IT IS SO ORDERED.

EXHIBIT "2"

LARRY E. PARRISH, ET AL. v. ROBERT S. MARQUIS, ET AL.

No. W1999-02629-COA-R3-CV

COURT OF APPEALS OF TENNESSEE, WESTERN SECTION, AT JACKSON

2000 Tenn. App. LEXIS 509

July 31, 2000, Decided

PRIOR HISTORY: [*1] Direct Appeal from the Circuit Court for Shelby County. James E. Swearengen, Judge. No. 88963-4 T.D.

DISPOSITION: Judgment of the Circuit Court Affirmed as Modified; and Remanded.

CORE TERMS: cause of action, venue, legal malpractice, malicious prosecution, outrageous conduct, summary judgment, malicious prosecution claim, subpoenas, malicious prosecution action, cause of action arose, abuse of process, wrongful act, proper venue, discovery, terminated, accrue, motion to dismiss, reside, abuse of process action, alternative ground, process issued, prior action, inasmuch, post-judgment, transitory, telephone, order of dismissal, motions to dismiss, improper purpose, failed to state

SYLLABUS: Plaintiffs Larry E. Parrish and Larry E. Parrish, P.C. (collectively, "Parrish"), appeal the trial court's final summary judgment that dismissed Parrish's claim for malicious prosecution against Defendants Robert S. Marquis, McCampbell & Young, P.C., Ronald C. Koksal, and Butler, Vines & Babb, PLLC. The Defendants also have raised an issue on appeal, contending that the trial court erred in denying their motions to dismiss for improper venue. We conclude that the Shelby County Circuit Court was not the proper venue for Parrish's malicious prosecution claim. Accordingly, we affirm the trial court's dismissal of Parrish's malicious prosecution claim on the alternative ground of improper venue.

COUNSEL: John J. Mulrooney, Memphis, Tennessee, for the appellants, Larry E. Parrish and Larry E. Parrish, P.C.

Joe Lee Wyatt and Archie Sanders, III, Memphis, Tennessee, for the appellees, Robert S. Marquis and McCampbell & Young, P.C.

Eugene J. Podesta, Jr., Memphis, Tennessee, for the appellees, Ronald C. Koksal and [*2] Butler, Vines & Babb, PLLC.

JUDGES: DAVID R. FARMER, J., delivered the opinion of the court, in which ALAN E. HIGHERS, J., and HOLLY K. LILLARD, J., joined.

OPINIONBY: DAVID R. FARMER

OPINION: In 1997, Parrish filed this action for malicious prosecution against two Knoxville attorneys, Marquis and Koksal, and their respective law firms, McCampbell & Young, P.C., and Butler, Vines & Babb, PLLC. Parrish's complaint, which was filed in the Circuit Court for Shelby County, contained the following allegations. The basis of Parrish's malicious prosecution claim was a legal malpractice action that was filed against Parrish in Knox County in 1993. The plaintiff in that action, Jennie B. Cain Corum Miller, was a limited partner in the Cain Partnership, Ltd., which Parrish represented from 1989 to 1993. In essence, Miller's legal malpractice complaint alleged that she had suffered damages as a result of Parrish's negligent representation of the partnership. Koksal was the attorney of record for Miller in the legal malpractice action. Marquis was Miller's personal attorney, and he allegedly advised Miller and Koksal to file the legal malpractice action against Parrish. The Knox County Circuit Court dismissed [*3] Miller's claim with prejudice in July 1996 when it granted Parrish's motion for summary judgment. In a memorandum opinion, the court ruled that Miller's action was barred by the one-year statute of limitations applicable to legal malpractice actions. See Tenn. Code Ann. § 28-3-104(a)(2) (Supp. 1995). The court also ruled that Miller had standing to sue Parrish only as a limited partner asserting a derivative cause of action and that she had failed to state such a cause of action. See Tenn. R. Civ. P. 12.02(6). Miller did not appeal the court's order of dismissal. In asserting his malicious prosecution claim against the Defendants in the present action, Parrish alleged that the Defendants knew or should have known that Miller's complaint failed to state a cause of action against Parrish, that the Defendants lacked probable cause to believe that Parrish had engaged in legal malpractice, and that the Defendants brought the action for the improper purpose of intimidating and embarrassing Parrish.

Marquis and his law firm (collectively, "Marquis") initially responded to Parrish's complaint by filing a motion to dismiss for improper venue. See Tenn. R. Civ. [*4] P. 12.02(3). Citing the allegations of Parrish's complaint, Marquis pointed out that the legal malpractice action that formed the basis of Parrish's malicious prosecution claim was filed in Knox County, that the Defendants were practicing attorneys in Knox County, and that none of the Defendants resided in Shelby County, where Parrish filed his malicious prosecution action. Subsequently, Koksal and his law firm (collectively, "Koksal") also filed a motion to dismiss on the ground of improper venue. The trial court denied both motions to dismiss. The trial court later granted the Defendants' respective motions for permission to seek an interlocutory appeal on this issue, but this court denied the Defendants' applications. See Tenn. R. App. P. 9(a).

The parties proceeded to conduct discovery and, in July 1998, Marquis filed a motion for summary judgment on the merits of Parrish's malicious prosecution claim. Koksal also filed a motion for summary judgment as to Parrish's malicious prosecution claim. After considering the affidavits and discovery materials filed by the parties, the trial court entered its order granting the Defendants' respective motions for summary judgment. [*5]

On appeal, Parrish contends that the trial court erred in granting the Defendants' motions for summary judgment on Parrish's claim for malicious prosecution. In response, the Defendants insist that the trial court properly entered summary judgment in their favor, but they contend that, even if the grant of summary judgment was error, Parrish's claim still should have been dismissed for improper venue.

We conclude that this court's decision in *McGee v. First National Bank, 1996 Tenn. App. LEXIS 10, No. 01 A01-9508-CV-00341, 1996 WL 11208* (Tenn. Ct. App. Jan. 12, 1996) (no perm. app. filed), controls the disposition of this appeal and that, in accordance with McGee, Shelby County was not the proper venue for Parrish to file this malicious prosecution action. Accordingly, we affirm the trial court's judgment dismissing Parrish's claim, but we do so on the alternative ground of improper venue. See *Continental Cas. Co. v. Smith, 720 S.W.2d 48, 50 (Tenn. 1986)* (indicating that court will affirm decree "correct in result, but rendered upon different, incomplete, or erroneous grounds").

Like an action for abuse of process, a malicious [*6] prosecution action is a transitory action. See *McGee, 1996 Tenn. App. LEXIS 10, 1996 WL 11208,* at *1. In Tennessee, venue of transitory actions is governed by the following statute:

In all civil actions of a transitory nature, unless venue is otherwise expressly provided for, the action may be brought in the county where the cause of action arose or in the county where the defendant resides or is found.

Tenn. Code Ann. § 20-4-101(a) (1994). In the present case, all of the Defendants reside or may be found in Knox County. In accordance with the foregoing statute, therefore, Shelby County was not the proper venue for Parrish's malicious prosecution action unless the cause of action arose there.

In McGee, this court was faced with the analogous issue of the proper venue for an abuse of process action. See *McGee, 1996 Tenn. App. LEXIS 10, 1996 WL 11208,* at *1. In that case, the defendants previously had sued the plaintiff's husband in a Hickman County Circuit Court and had obtained a substantial judgment against him. See id. In the course of post-judgment discovery procedures in Hickman County, the defendants caused various subpoenas [*7] to be issued and served on the plaintiff and others in Maury County. See id. Pursuant to these subpoenas, the defendants took depositions during which they attempted to ascertain the existence of any assets that might be used to satisfy the judgment against the plaintiff's husband. See id. The plaintiff later sued the defendants in the Maury County Circuit Court, alleging "that each process issued from the Hickman County Circuit Court to be served in Maury County was maliciously issued and was 'a calculated attempt to harass and embarrass [plaintiff] into paying the debt incurred by her husband.'" Id.

The defendants filed motions to dismiss on the ground of improper venue, and the trial court granted the motions. See *McGee, 1996 Tenn. App. LEXIS 10, 1996 WL 11208,* at *1. On appeal, this court affirmed the trial court's order of dismissal. See *1996 Tenn. App. LEXIS 10, 1996 WL 11208,* at *4. Noting that the defendants neither resided nor were found in Maury County as contemplated by the venue statute, we concluded that the determinative issue was where the plaintiff's cause of action for abuse of process arose. See *1996 Tenn. App. LEXIS 10, 1996 WL 11208,* at *1. [*8] In affirming the trial court's dismissal order, we rejected the plaintiff's contention that her cause of action for abuse of process arose when and where process was served in Maury County because that was when the cause of action became complete. See *1996 Tenn. App. LEXIS 10, 1996 WL 11208,* at *2, *4.

Initially, we observed that the process about which plaintiff complains consists of subpoenas to obtain post-judgment discovery from various business enterprises and individuals. Apparently all of the subpoenas were properly served and the discovery process completed. The gist of plaintiff's case is that these processes were a form of extortion to compel plaintiff to pay the judgment against her husband. It is undisputed that all of the subpoenas were issued from the Circuit Court in Hickman County, and that if there was an improper motive or purpose behind the issuance of the subpoenas, that motive or improper purpose was to have a judgment in Hickman County paid.

McGee, 1996 Tenn. App. LEXIS 10, 1996 WL 11208, at *3. After reviewing case law from other jurisdictions, we reached the following conclusion:

Under plaintiff's theory in the case at bar, if plaintiff has a cause of action for abuse of [*9] process, then that cause of action arose in Hickman County where the process was issued. If defendants committed a wrongful act in connection with the process, then they committed that act in Hickman County by virtue of having the process issued in the first place. The fact that the effects of that wrongful act were felt in Maury County through the allegedly harassing discovery procedures does not cause plaintiff's abuse of process action to arise in Maury County.

1996 Tenn. App. LEXIS 10, 1996 WL 11208, at *4.

A malicious prosecution claim is closely analogous to an abuse of process claim because both claims constitute tort actions that "may be brought to obtain redress for the alleged misuse of legal process by another." *McGee, 1996 Tenn. App. LEXIS 10, 1996 WL 11208,* at *1 (quoting *Donaldson v. Donaldson, 557 S.W.2d 60, 62 (Tenn. 1977)).* In accordance with the rationale set forth in McGee, we conclude that Parrish's cause of action for malicious prosecution arose in Knox County, the county where the legal malpractice action against him was prosecuted. If the Defendants committed a wrongful act in connection with the legal malpractice action, then they committed the act [*10] in Knox County by virtue of pursuing the action there. The fact that Parrish may have felt some of the effects of the wrongful act in Shelby County does not cause his action for malicious prosecution to arise in Shelby County. As in McGee, we reject the argument that Parrish's malicious prosecution action arose in Shelby County by virtue of the fact that, in the legal malpractice action, Parrish was served with process in Shelby County.

Although our research revealed no published decision addressing the precise issue raised here, we believe that our disposition of this issue is consistent with our supreme court's venue and malicious prosecution decisions. Our supreme court has indicated that the determination of where a cause of action arose for venue purposes depends upon the type of action being asserted. See *Mid-South Milling Co. v. Loret Farms, Inc., 521 S.W.2d 586, 588 (Tenn. 1975).* Based upon the type of action being asserted, the court must determine when the action arose because "the time a cause of action arises will determine where" the action arises or accrues. *Id. at 589;* accord *Allied Wholesale, Inc. v. Orders Tile & Distrib. Co., 1986 Tenn. App. LEXIS 3264, 1986 WL 9571,* [*11] at *2 (Tenn. Ct. App. Sept. 5, 1986) (no perm. app. filed). Thus, the "paramount issue as relates to . . . venue is the time the cause of action accrues." *Mid-South Milling, 521 S.W.2d at 589.*

The law is well-established that a plaintiff's cause of action for malicious prosecution does not accrue until the underlying malicious suit is terminated in the plaintiff's favor. See *Christian v.*

Lapidus, 833 S.W.2d 71, 73 (Tenn. 1992); Rosen v. Levy, 120 Tenn. 642, 113 S.W. 1042, 1044 (Tenn. 1908); Swepson v. Davis, 109 Tenn. 99, 70 S.W. 65, 68 (Tenn. 1902); Gray v. 26th Judicial Drug Task Force, 1997 Tenn. App. LEXIS 476, No. 02 A01-9609-CV-00218, 1997 WL 379141, at *2 (Tenn. Ct. App. July 8, 1997 (no perm. app. filed); *Millsaps v. Millsaps, 1989 Tenn. App. LEXIS 317, 1989 WL 44840,* at *2 (Tenn. Ct. App. May 3, 1989), perm. app. denied (Tenn. Sept. 5, 1989). In the present case, the legal malpractice action was terminated in Parrish's favor in July 1996 when the Knox County Circuit Court entered its order granting Parrish's motion for summary judgment and dismissing [*12] Miller's claim with prejudice. Accordingly, if Parrish has a cause of action for malicious prosecution based upon the Defendants' prosecution of the legal malpractice claim, Parrish's cause of action arose when the Knox County Circuit Court entered its order in July 1996. Inasmuch as the time a cause of action arises determines where the action accrues, we conclude that Parrish's cause of action for malicious prosecution accrued in Knox County.

In holding that Parrish's cause of action for malicious prosecution arose in Knox County, we reject Parrish's contention that this court's decision in *Nelson v. Ford Motor Credit Co., 590 S.W.2d 457 (Tenn. Ct. App. 1979),* compels a different result. In that case, the plaintiffs filed a claim for outrageous conduct, i.e. intentional infliction of emotional distress, against the company that financed the plaintiffs' purchase of an automobile. See *Nelson, 590 S.W.2d at 458.* The plaintiffs alleged that, over a one-year period, the defendant's agents and employees constantly wrote and telephoned the plaintiffs to tell them that the defendant had not received the plaintiffs' monthly installment [*13] payments and that the plaintiffs' payments were delinquent. See id. Although the plaintiffs had made all of their monthly payments, the defendant's agents and employees assessed late charges against the plaintiffs, and they even threatened to repossess the plaintiffs' automobile. See id. The actions of the defendant's agents and employees took place in Knox County, where the defendant had an office, but the plaintiffs received the letters and telephone calls at their residence in Roane County. See *id. at 459.*

Contending that the plaintiffs' cause of action for outrageous conduct arose in Knox County, the defendant filed a motion to dismiss on the ground of improper venue. See *Nelson, 590 S.W.2d at 458.* The trial court granted the defendant's motion, but on appeal, this court reversed. See *id. at 458-59.* In determining where the plaintiffs' cause of action arose, we first examined the elements of the plaintiffs' claim for outrageous conduct. See *id. at 459.* Citing *Medlin v. Allied Investment Co., 217 Tenn. 469, 398 S.W.2d 270 (Tenn. 1966),* [*14] we observed that, in order to recover on their claim for outrageous conduct, the plaintiffs were required to establish (1) that the defendant's agents and employees engaged in outrageous conduct and (2) that, as a result of the outrageous conduct, the plaintiffs suffered serious mental injury. See *Nelson, 590 S.W.2d at 459.* In concluding that venue was proper in Roane County, we noted that, although the outrageous acts occurred in Knox County, the mental injury occurred in Roane County. See id. We explained that, "where the tort is committed in one county or district and the injury occurs in another county or district, suit may be brought in either." Id. (quoting 92 C.J.S. Venue § 66, at 767 n1).

n1 Now 92A C.J.S. Venue § 64, at 336 (2000).

In our view, the holding and rationale of Nelson do not apply to the case at bar. In Nelson, the alleged tort arguably took place in two counties because, although the defendant's [*15] agents and employees wrote the letters and placed the telephone calls in Knox County, they intentionally

directed their communications to the plaintiffs at their Roane County residence. The plaintiffs' cause of action did not arise merely upon the occurrence of the outrageous conduct in Knox County, but upon the infliction of mental injury in Roane County. Serious mental injury and outrageous conduct constitute distinct elements of the tort of intentional infliction of emotional distress. See *Miller v. Willbanks, 8 S.W.3d 607, 613 (Tenn. 1999).* Our holding in Nelson that venue was proper in Roane County was consistent with the general rule that, "where a tort is continuous and takes place in two counties, [the] action may be brought in either." 92A C.J.S. Venue § 64, at 335 (2000).

In contrast, in the present case, the law is clear that Parrish's cause of action for malicious prosecution arose in Knox County when the Circuit Court dismissed the underlying claim for legal malpractice. See *Christian v. Lapidus, 833 S.W.2d 71, 73 (Tenn. 1992); Rosen v. Levy, 120 Tenn. 642, 113 S.W. 1042, 1044 (Tenn. 1908);* [*16] *Swepson v. Davis, 109 Tenn. 99, 70 S.W. 65, 68 (Tenn. 1902); Gray v. 26th Judicial Drug Task Force, 1997 Tenn. App. LEXIS 476, No. 02 A01-9609-CV-00218, 1997 WL 379141,* at *2 (Tenn. Ct. App. July 8, 1997 (no perm. app. filed); *Millsaps v. Millsaps, 1989 Tenn. App. LEXIS 317, 1989 WL 44840,* at *2 (Tenn. Ct. App. May 3, 1989), perm. app. denied (Tenn. Sept. 5, 1989). In order to establish a claim for malicious prosecution, Parrish was required to show that (1) the prior legal malpractice suit was brought against Parrish without probable cause, (2) the Defendants brought such prior action with malice, and (3) the prior action was finally terminated in Parrish's favor. See *Christian, 833 S.W.2d at 73; Swepson v. Davis, 70 S.W. at 67;* see also *Roberts v. Federal Express Corp., 842 S.W.2d 246, 247-48 (Tenn. 1992); Lantroop v. Moreland, 849 S.W.2d 793, 797 (Tenn. Ct. App. 1992).* Unlike the outrageous conduct claim asserted in Nelson, all of the elements of Parrish's malicious prosecution action occurred in one county, Knox County. Parrish's [*17] malicious prosecution claim did not arise in Shelby County, despite the fact that he was served with process there or that he may have suffered some damages there. n2 Inasmuch as Parrish's cause of action accrued in Knox County, and inasmuch as all of the Defendants reside or may be found in Knox County, we conclude that Knox County was the proper venue for this action.

n2 In *McGee v. First National Bank, 1996 Tenn. App. LEXIS 10, No. 01 A01-9508-CV-00341, 1996 WL 11208,* at *3 (Tenn. Ct. App. Jan. 12, 1996) (no perm. app. filed), we cited *Harrison Community Hospital v. Blustein, 76 Mich. App. 176, 255 N.W.2d 802, 803 (Mich. Ct. App. 1977),* for the proposition that incidental damages occurring in the plaintiff's county "were not part of [the] plaintiff's cause of action, except as elements of damages." The damages recoverable in a malicious prosecution suit include those which "proximately result to the plaintiff, his person, property, or reputation" from the previous unsuccessful proceeding. *Ryerson v. American Sur. Co., 213 Tenn. 182, 373 S.W.2d 436, 437 (Tenn. 1963);* accord *Pullen v. Textron, Inc., 845 S.W.2d 777, 780 (Tenn. Ct. App. 1992); Peerman v. Sidicane, 605 S.W.2d 242, 245 (Tenn. Ct. App. 1980).*

[*18]

The trial court's judgment of dismissal is affirmed on the alternative ground of improper venue. In light of our disposition of the venue issue, we pretermit the other issue raised on appeal, and we remand this cause for further proceedings consistent with this opinion. Costs of this appeal are taxed to the appellants, Larry E. Parrish and Larry E. Parrish, P.C., and their surety, for which execution may issue if necessary.

DAVID R. FARMER, JUDGE

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IV. HOW TO AVOID COMMON ETHICAL PITFALLS

A. Handling Highly Prejudicial Evidence

1. Using the Rules of Evidence

Rule 403 of the Tennessee Rules of Evidence provides:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice…".

There is no requirement that the party against whom the evidence is sought to be introduced is actually prejudiced, but rather whether the prejudicial impact outweighs the probative value of the evidence.

Obviously, if you are aware that the other side intends to introduce evidence that you consider prejudicial and for which you have some basis for objecting, then a motion in limine before trial should be filed. If, however, the evidence comes up and you are caught unaware, then the first step is reliance upon Rule 403 for the evidentiary objection. Of course, other objections based on relevance and perhaps technical objections to the evidence should always be considered since a balancing act between probative value and prejudicial impact will involve a subjective decision by the judge and any other basis for the objection can help carry the day for your client.

2. Confront the Evidence

If the prejudicial evidence is something that you know will be admitted or you have already lost your motion in limine, then my recommendation is to confront the evidence up front. This means discuss the evidence during voir dire through opening statement, of course your case in chief, and closing argument.

There is a theory that we become desensitized to hearing something over and over again and that theory can work in a trial. If the matter is brought up often enough, on occasion it loses some of its luster. The main thing, however, is that you put it in a light to minimize its impact to the jury.

The common example in the defense side of a car wreck, for example, would be the drunk defendant. In certain cases, the fact the defendant was drunk at the time of the accident is going to come out. Generally speaking, having a drunk client cause an accident is highly prejudicial. Address that situation beginning in voir dire and do not be afraid to address it as often as necessary. Hopefully, the client will be repentant and can at least manage an "I'm sorry" during his or her testimony. Sometimes simply saying "I'm sorry" or having your client acknowledge a mistake will do wonders when the judgment is rendered by the jury.

B. Handling Questions of Jurors During Voir Dire

Avoid this by explaining the purpose of voir dire, especially if you are the first to address the jury. In some jurisdictions, the judges do a much better job of this than in others, but it is incumbent upon counsel to lay out for the jury the connection between background and personal questions and their ability to sit as fair and impartial finders of fact.

I do not recommend the approach taken by counsel in Marress v. Carolina Direct Furniture, Inc., 785 S.W.2d 121 (Tenn.App. 1990), but there is certainly nothing wrong with a little background to establish a bond with the jury.

In Marress, plaintiff's counsel, during voir dire, told the potential jurors that in prior cases he had had jurors tell him it was disturbing to have to answer so many personal questions during voir dire. According to plaintiff's counsel, one of the jurors had even said, "How would you like it if we asked you about your background." With that preamble, counsel for the plaintiff said:

"I think, well—I'm going to tell you a little bit about myself, not that it really matters, but just to let you know the kind of questions you can anticipate from me. I'm fifty-one years old. I almost said fifty-two. I'm fifty-one years old. I'm originally from Massachusetts, spent a lot of time in the Army. I'm a registered Democrat. I'm a lawyer. My hobbies at this time—

MR. ORTALE: Your Honor, I don't know if I should object at this point or not. I wonder if—

THE COURT: To what? Being a registered Democrat from Massachusetts? We are going pretty far afield, I think. The purpose of voir dire is to permit them to ask questions, to get twelve people who will listen to this case and decide it fairly for all the parties and not have any prejudices or any biases in the back of their mind that they bring into the courtroom. So, what Mr. Bednarz did or didn't do I don't think really is important. No reflection on your illustrious past, but seriously, we're going a little too far."

The appeals court held that the Court's ruling headed off any problems that might have resulted had plaintiff's counsel continued with his personal history.

Later during the voir dire the following exchange took place:

MR. BEDNARZ: "Mr. Ortale has mentioned several times sympathy as if we are looking for sympathy. Mr. Hastings, we are not looking for sympathy. But I'm going to ask you in closing argument and I will ask you now—although you are not supposed to let sympathy affect your judgment, I think you can let empathy be involved in this case, and that is can you—

MR. ORTALE: Your Honor, I object to Mr. Bednarz telling the jury that they can—what he thinks they can do. That is not proper. It is not proper argument and not proper opening.

THE COURT: I overrule your objection. Go ahead.

MR. BEDNARZ: We don't want sympathy, Mr. Hastings, but we do want understanding, understanding whether it is sympathy or something else. Can you examine these damages with an understanding of the effect that the damages have on the whole person? Can you do that?"

Again, the appeals court held that the question, as amplified after counsel's objection, was a proper question to ask on voir dire.

C. Talking to Witnesses Before They Testify

1. Rule 615. Tennessee Rules of Evidence. Exclusion of Witnesses

> At the request of a party the court shall order witnesses, including rebuttal witnesses, excluded at trial or other adjudicatory hearing. In the court's discretion, the requested sequestration may be effective before voir dire, but in any event shall be effective before opening statements. The court shall order all persons not to disclose by any means to excluded witnesses any live trial testimony or exhibits created in the courtroom by a witness. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) a person designated by counsel for a party

that is not a natural person, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause. This rule does not forbid testimony of a witness called at the rebuttal state of a hearing if, in the court's discretion, counsel is genuinely surprised and demonstrates a need for rebuttal testimony from an unsequestered witness.

2. <u>Rule 3.4 of the Rules of Professional Conduct. Fairness to the Opposing Party and Counsel</u>

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act; or

(b) falsify evidence, counsel or assist a witness to offer false or misleading testimony; or

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists; or

(d) in pretrial procedure, make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party; or

(e) in trial,

(1) allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence;

(2) assert personal knowledge of facts in issue except when testifying as a witness; or

(3) state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and
(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information; or

(g) request or assist any person to take action that will render the person unavailable to appear as a witness by way of deposition or at trial; or

(h) offer an inducement to a witness that is prohibited by law; or pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent on the content of his testimony or the outcome of the case. A lawyer may advance, guarantee, or acquiesce in the payment of:

(1) expenses reasonably incurred by a witness in attending or testifying;

(2) reasonable compensation to a witness for that witness's loss of time in attending or testifying; or

(3) a reasonable fee for the professional services of an expert witness.

3. Rule 4.2. Rules of Professional Conduct. Communication With a Person Represented by Counsel and Rule 4.3 Rules of Professional Conduct. Dealing With an Unrepresented Person

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the

misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are, or have a reasonable possibility of being, in conflict with the interests of the client.

Conclusion

From these rules, there does not appear to be any prohibition, and it is certainly common practice, for counsel to talk to witnesses about what their testimony is going to be at trial so long as they are unrepresented or you have permission of their counsel, if represented, and they are not parties to the suit or employees of a corporate or business party. What you cannot do is rush out after a witness has testified to tell the next witness about the testimony of the first witness.

D. Identifying and Avoid Conflicts of Interest

1. Rule 1.7 of the Tennessee Rules of Professional Conduct. Conflict of Interest: General Rule

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents in writing after consultation.

2. Rule 1.8 of the Tennessee Rules of Professional Conduct. Conflict of Interest: Prohibited Transactions.

(e) A lawyer shall not provide financial assistance to a client in connection with a pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(g) a lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, . . .

(1) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(2) each client consents in writing after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

3. Two Situations which Commonly Arise in Civil Trial Practice

(a) Representing the passenger and driver in an automobile accident.

Fact situation to discuss. Where the lawyer represents both the driver and passenger in the classic pull out car wreck scenario; lawyer withdraws from representation of the driver to represent the passenger and then files suit against the driver, as well as the driver of the other vehicle. Has the lawyer violated the Rules of Professional Conduct?

(b) From the defense perspective, what are the inherent issues in representing the owner and driver of a vehicle where the owner may be a parent or spouse.

(c) In what circumstances is it acceptable to represent the owner and driver and in what situation is it clearly a conflict?

III. HOW TO HANDLE POST-TRIAL ISSUES

A. Judgment – Where Do You Go From Here?

1. Discretionary Costs

Rule 54.04 of the Tennessee Rules of Civil Procedure provides:

54.04. Costs.—(1) Costs included in the bill of costs prepared by clerk shall be allowed to the prevailing party unless the court otherwise directs, … (2) Costs not included in the bill of costs prepared by the clerk are allowable only in the court's discretion. Discretionary costs allowable are: reasonable and necessary court reporter expenses for depositions or trials, reasonable and necessary expert witness fees for depositions or trials, reasonable and necessary interpreter fees for depositions or trials, and guardian ad litem fees; travel expenses are not allowable discretionary costs.

A party requesting discretionary costs shall file and serve a motion within thirty (30) days after entry of judgment. A trial court's decision to award discretionary costs is reviewed for abuse of discretion. Under the abuse of discretion standard, a trial court's ruling will be upheld so long as reasonable minds can disagree as to the propriety of the decision made. A trial court abuses its discretion only when it applies an incorrect legal standard, or reaches a decision which is against logic or reasoning that causes an injustice to the party complaining. The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court. Appellate courts ordinarily permit discretionary decisions to stand when reasonable judicial minds can differ concerning their soundness. Eldridge v. Eldridge, 42 S.W.3d 82, 85 (Tenn. 2001).

Though the prevailing party is ordinarily awarded costs and fees, the prevailing party is not automatically entitled to such fees. Rather, costs should be apportioned as

the equities of the case demand. Vaughn v. Cunningham, 2006 WL 16321, Tenn. App., Jan 04, 2006 involved a traffic accident. Vaughn was sitting at a red light with his foot on the brake when he was rearended. Cunningham blamed the accident on a phantom driver who rearended her pushing her into Vaughn. The jury found the phantom driver 100% at fault for the accident, but found that Mr. Vaughn received no personal injuries in this accident. The jury awarded Plaintiff zero damages.

Ms. Cunningham filed a motion for discretionary costs. She had made an offer of judgment before trial and the Court ordered Vaughn to pay Ms. Cunningham's discretionary costs in the amount of $565.15, representing those costs incurred by Ms. Cunningham after she made an offer of judgment.

The uninsured motorist carrier filed a motion for discretionary costs and the Court ordered Vaughn to pay John Doe's discretionary costs in the amount of $666.91, representing the costs incurred subsequent to John Doe's offer of judgment.

Vaughn appealed the awards of discretionary costs against him. He argued that he was the prevailing party because he was found to be 0% at fault for the accident. However, Ms. Cunningham also was found to be 0% at fault for the accident. The appeals court found that she had successfully defended the claim Vaughn brought against her and prevailed and was entitled to discretionary costs.

Then the appeals court considered whether the trial court erred in ordering Vaughn to pay John Doe's discretionary costs. But John Doe did not file his motion for discretionary costs within thirty days of the "entry of the judgment" as required by Rule 54.04. The phrase 'entry of judgment' is defined in Tenn.R.Civ.P. 58 as: Entry of a

judgment or an order of final disposition is effective when a judgment containing one of the following is marked on the face by the clerk as filed for entry:

(1) the signatures of the judge and all parties or counsel, or

(2) the signatures of the judge and one party or counsel with a certificate of counsel that a copy of the proposed order has been served on all other parties or counsel, or

(3) the signature of the judge and a certificate of the clerk that a copy has been served on all other parties or counsel.

Time periods for post-trial motions or a notice of appeal shall not begin to run until the date of such requested mailing or delivery. Tenn.R.Civ.P. 58.

The judgment on the jury's verdict was marked on the face by the clerk as filed for entry and contained the signature of the trial judge and a certificate of the clerk that a copy had been served upon all parties or counsel on October 13, 2004. John Doe filed his motion for discretionary costs on December 10, 2004, well outside the thirty day period after the entry of judgment.

Some case law exists suggesting that the filing of a motion for a new trial tolls the time for the filing of a motion for discretionary costs. Ashford v. Benjamin, 1995 WL 716822 (Tenn. App. Dec. 6, 1999) (stating: "Once a motion for new trial is filed, the judgment is suspended and prevented from becoming final pending disposition of the motion. The trial court's jurisdiction is preserved. ... As Ashford's motion to assess costs was filed within thirty (30) days after [entry of the order denying a new trial], we hold it timely pursuant to Rule 54.04(2) T.R.C.P.").

Any request for discretionary costs must be adequately documented. Chaffin v. Ellis, 2006 WL 770453 (Tenn.App., 2006), is a post divorce case. The mother, claiming

discretionary costs of $40,000, listed all of the costs of litigation, including a list of expert fees that she claimed were recoverable under Rule 54.04(2). She claimed she was entitled to the fees because they were "professional fees [that] were expended in the prosecution of this case." But for some of the entries, the type of work performed was not described. She submitted the affidavit of her attorney, which stated that the fees reflected in the motion were "reasonable and were necessarily incurred by [Mother] in proving her claims asserted in this case," without any further description or explanation.

The husband took issue with respect to the $20,325 fee awarded to the wife for services provided by a psychiatrist who concluded that the wife suffered from a reactive disorder resulting from her experience with her husband and that his rigid religious beliefs would interfere with his ability to parent the child. The wife's motion indicated that the doctor's fee was for work performed for a specified period of time, but the type of work performed was not described.

At a post-trial hearing on the motion's motion for discretionary costs, the father argued that, under Tennessee Rules of Civil Procedure 54.04(2), recovery for expert fees is limited to fees for time spent in deposition or trial testimony, and does not include time spent in preparation for such testimony. The mother's motion did not identify how much of the expert's fee was for actual trial or deposition testimony and how much was for trial preparation. The trial court agreed that the mother could not be awarded costs for an expert's time spent in preparation for his testimony. The appeals court held that they could not discern what portion of the award for the fee was attributable to trial preparation and remanded the issue to the trial court to award expert fees only for items which are permissible under Rule 54.04(2). See also Mass.Mut.Life Ins. Co. v. Jefferson,

104 S.W.3d 13 (Tenn.App.2002) (Holding that proceedings involving discretionary costs are primarily determined on the affidavits and arguments of counsel in light of the entire record, and evidence beyond the competing affidavits is rarely presented during the hearing.)

Sample affidavit:

__________, having been duly sworn according to law, states as follows:

1. I am an attorney licensed to practice in Tennessee. I am counsel of record in this action for ________________________.

2. An itemized list of ____________ discretionary costs in this action is attached to the motion seeking an award of those costs. All of the costs included in that itemization were necessary for the defense in this action and were reasonable in amount.

3. All the costs in this itemization are within the scope of Tenn.R.Civ.P. 54.04(2) and are recoverable by ____________, except for $__________ in charges for Dr. _________, Plaintiff's expert. Those charges relate to review and preparation efforts by Dr. _______ and should be deducted from the total in the itemization.

4. __________ did not engage in any conduct in this action that justifies depriving it of the discretionary costs it is seeking to recover.

2. Supersedeas Bonds

Tennessee Rules of Civil Procedure, Rule 62.05 requires that a bond staying the judgment be in the amount "of the judgment in full, interest, damages for delay, and costs on appeal." This rule is not to be confused with Rule 6 of the Tennessee Rules of Appellate Procedure which requires that a bond for costs on appeal shall be filed by the

appellant in the trial court with the notice of appeal. Rule 6 applies only to the appellate costs and does not provide security for the amounts awarded in the trial court. Mills v. Hancock, 995 S.W.2d 110 (Tenn.App. 1998).

The right to appeal is not conditioned upon the filing of a bond for stay; but, if the appellant desires the protection of a stay, then the bond for stay must be filed. If there is no supersedeas bond filed, the prevailing party in the trial court has the right to execute on its judgment during the pendency of the appeal.

The purpose of a supersedeas bond or appeals bond was to protect the appellee "from the inherent risks, such as subsequent insolvency of the appellant, associated with the delay in enforcement of the district court's judgment" during the appeals process. Neeley v. Bankers Trust Co., 848 F.2d 658, 660 (5th Cir. 1988). If an award of any monetary damages is affirmed by the court of appeals in its judgment on the initial appeal, then the plaintiff would have been entitled to collect from the surety the amount affirmed. Aetna Casualty & Surety Co. v. LaSalle Pump & Supply Co., 804 F.2d 315 (5th Cir. 1986). If the court of appeals remands the case for a new trial, the supersedeas bond is extinguished. Holmes v. U.S. Fidelity & Guar. Co., 844 S.W.2d 632 (Tenn. App. 1992).

A defendant may seek relief from a supersedeas bond. Usually, though, such a waiver is applicable only if the defendant is either very rich or very poor. The trial court may consider all appropriate factors including the appealing party's financial condition and the amount of the appealing party's insurance coverage, if any. T.R.C.P. 62.05(2).

B. Motions After the Verdict – What is Allowed in your State?

Post trial motions are limited in number. The available post trial motions that are effective in enlarging the time in which a party has to appeal are set forth in Rule 59. The purpose of Rule 59 motions is to prevent unnecessary appeals by providing trial courts with an opportunity to correct errors before a judgment becomes final. Crosslin v. Alsup, 594 S.W.2d 379, 380 (Tenn. 1980). The available motions are as follows:

1. Reservation of Decision on Motion for Directed Verdict (Rule 50.02)

Whenever a motion for a directed verdict made at the close of all the evidence is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 30 days after the entry of judgment a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have a judgment entered in accordance with the party's motion for a directed verdict. In other words, a trial judge may take a motion for directed verdict under advisement without actually granting or denying it at the trial. A motion under Rule 50.02 may be combined with a motion for new trial.

The time of the motion is crucial. A motion for directed verdict cannot be made as a matter of right until the close of the whole evidence. Sadler v. Draper, 46 Tenn. App. 1, 326 S.W.2d 148 (1959). A motion for directed verdict at the close of plaintiff's evidence is waived by the subsequent introduction of evidence by the defendant. Falster v. Traveller's Insurance Co., 216 Tenn. 137, 390 S.W.2d 673 (1965). Failure of the defendant to renew its motion for directed verdict at the close of all evidence operates as a waiver of a previous motion at the close of plaintiff's evidence. Mitchell v. Ketner, 54 Tenn. App. 656, 393 S.W.2d 385 (1966). It would be error for a trial court to direct a

verdict for the defendant after the verdict of the jury where no request for directed verdict was made at the close of all the evidence.

In Tucker v. Sanders, 1989 WL 92176 (Tenn. App. 1989), the defendant moved for directed verdict at the close of the plaintiff's proof, but after that presented its own evidence. The record did not indicate that the defendant renewed its motion at the conclusion of all the proof as required by Rule 50.02. The court held that the trial judge was not authorized to reserve judgment upon motions for directed verdict made at the close of plaintiff's proof and to sustain such motions after the verdict of the jury unless the defendant renews its motion at the conclusion of all the proof.

2. Motion to Amend Findings or Make Additional Findings (Rule 52.02)

When findings of fact are made in actions tried by the court without a jury, the court may amend its findings or make additional findings and may amend the judgment accordingly. The rule is further clear that the appeals court can review the sufficiency of the evidence whether or not a motion under Rule 52.02 has been filed.

The decision of whether to grant a motion for additional findings made pursuant to Rule 52.02 is within the sound discretion of the trial court. Long Equipment Co., Inc. v. Keeton, 736 S.W.2d 611, 614 (Tenn. App. 1987).

3. Motion for New Trial (Rule 59.02)

A motion for new trial must be filed within thirty days after the judgment is entered. Filing and serving motions in serial fashion will not extend the time for filing a notice of appeal with the trial court clerk. In Gassaway v. Patty, 604 S.W.2d 60 (Tenn. App. 1980), the judgment was entered on May 25. On June 11, the defendant filed a motion seeking to set aside the judgment, grant rehearing or enter judgment for

defendant. That motion was denied on July 26. Defendant filed another motion on August 9, asking the court to reconsider its decision on the prior motion and set aside the judgment or otherwise alter and amend the judgment. On September 14, the second motion was denied and on September 25, the defendant filed a notice of appeal "from judgment and motion denying rehearing thereof on September 7, 1979."

T.R.A.P., Rule 4(a), requires that in an appeal as of right to the Supreme Court, Court of Appeals, or Court of Criminal Appeals, the notice of appeal shall be filed with and received by the clerk of the trial court within 30 days after the date of entry of the judgment appealed from. The court found that the appeal was untimely because the time for filing notice of appeal began to run upon the entry of the order of July 26, overruling the motion for rehearing. The court declined to disregard the express language of the rules because the result would enable parties to file repeated post-judgment motions in the trial court to delay the time to appeal.

The grounds relied upon in a motion for new trial must be specified within reasonable certainty to advise the trial court and opposing counsel of the alleged error and to enable the appellate courts to see that the alleged error was presented to the trial court for correction as required by T.R.A.P. Rule 36(a). Ferguson v. State, 166 Tenn. 308, 61 S.W.2d 467 (1933). In Loeffler v. Kjellgren, 884 S.W.2d 463 (Tenn. App. 1994), the plaintiff's motion for new trial stated as a ground: "The trial court erred in jury instructions in the second trial." The appeals court refused to consider the merits of this issue on appeal because the plaintiff failed to specify the portions of the jury instructions from which he complained.

4. Motion to Alter or Amend Judgment (Rule 59.04)

This rule affords the trial court the opportunity to correct any errors as to the law or facts that may have arisen as a result of an oversight or the failure to consider a matter, but may not be employed to allow a party to present a new theory. Chadwell v. Knox County, 980 S.W.2d 378 (Tenn. App. 1998). If the court is being asked to amend a finding of fact, appropriate affidavits in support of the motion should be considered.

Rule 59.04 motions may be granted (1) when the controlling law changes before a judgment becomes final, (2) when previously unavailable evidence becomes available, or (3) when, for *sui generis* reasons, a judgment should be amended to correct a clear error of law or to prevent injustice. See Helton v. ACS Group, 964 F.Supp. 1175, 1182 (E.D. Tenn. 1997) (construing Fed.R.Civ.P. 59(e)). They should not, however, be granted if they are simply seeking to relitigate matters that have already been adjudicated, to raise new, previously untried legal theories, to present new, previously unasserted legal arguments, or to introduce new evidence that could have been adduced and presented at trial. Bradley v. McLeod, 984 S.W.2d 929 (Tenn. App. 1998).

In Tennessee Farmers Mut. Ins. Co. v. Farmer, 970 S.W.2d 453 (Tenn. 1998), the Supreme Court considered whether a "Motion to Reconsider" would be treated as a Rule 59.04 motion and, thus, stop the 30-day limit on filing a notice of appeal from running. A "Motion to Reconsider" is not a motion recognized by the Rules of Civil Procedure. Nevertheless, the defendants filed that very motion after Farmers Insurance prevailed on a claim to require them to reimburse it for medical payments after settling tort suit.

The Court of Appeals held that, unless they filed a properly captioned Rule 59.04 motion in the trial court, the time to appeal does not stop running. The defendants called

the decision of the Court of Appeals an overly technical application of the Rules of Civil Procedure which considered the form rather than the substance of the motion. They argued that despite its title, the "Motion to Reconsider" was in substance a Rule 59.04 motion to alter or amend the trial court's judgment and that is filing within thirty days of entry of the trial court's initial judgment tolled commencement of the time for filing a notice of appeal until the date on which an order was entered granting or denying the motion.

The Supreme Court disagreed with the Court of Appeals and directed the trial court to consider the substance of a motion in determining whether it is, in fact, one of the specified post-trial motions which toll commencement of the time. They applied the rule articulated in Bemis Co. Inc. v. Hines, 585 S.W.2d 574 (Tenn. 1979), in which the plaintiff had filed a written "Motion to Set Aside Decree and Restore the Cause to the Docket". Although commenting that "neither the title nor the format of the motion bears a striking resemblance to the usual motion for new trial," this Court found it to be "clearly ascertainable from a reading of the motion that, in substance," it was a motion for a new trial.

The same rule was applied by the Court of Appeals in Hawkins v. Hawkins, 883 S.W.2d 622 (Tenn. App. 1994) where the plaintiff filed a written post-trial motion which she designated as a "Motion to Reconsider." The Court of Appeals noted, "[t]hough she called it a motion to reconsider, it is clearly ascertainable from a reading of the motion that, in substance, it amounts to a motion to alter." *Id.* At 624.

Finally, the Court stated that a requirement that the court consider the substance of a post-trial motion, rather than its form, is consistent with the rules of civil procedure.

Rule 8.05, Tenn. R.Civ.P., explicitly states that "[n]o technical forms of pleading or motions are required." Allowing the form of a motion to control its substance could result in the dismissal of many appeals and would, in turn, defeat the mandate of Rule 1, T.R.A.P., which instructs that the rules of appellate procedure are to be "construed to secure the just, speedy, and inexpensive determination of every proceeding on its merits." However, attorneys should avoid confusion by utilizing the titles referenced in T.R.A.P. 4, and T.R.C.P. 59.01.

See also Ja'anini v. Ja'anini, 1996 WL 10236 (Tenn. App. 1996) (holding that a "Motion for Equitable Relief" was an obvious attempt to obtain an alteration or amendment of the final judgment of divorce, as was a "Motion for Reimbursement."). Even where the motion erroneously seeks relief under Rule 60, it has been held that if the motion is in the nature of a motion to alter or amend, it should be treated as such. O'Donley v. O'Donley, 1992 WL 312609 (Tenn. App. 1992).

5. Additur/Remittitur

In the event the plaintiff considers a jury verdict inadequate based upon the evidence presented, the plaintiff may seek an additur. The additur statute is found at T.C.A. 20-10-101:

> (a)(1) In cases where, in the opinion of the trial judge, a jury verdict is not adequate to compensate the plaintiff or plaintiffs in compensatory damages or punitive damages, the trial judge may suggest an additur in such amount or amounts as he deems proper to the compensatory or punitive damages awarded by the jury, or both such classes of damages. (2) If such additur is accepted by the defense, it shall then be ordered by the trial judge and become the verdict, and if not accepted, the trial judge shall grant the plaintiff's motion for a new trial because of the inadequacy of the verdict upon proper motion being made by the plaintiff. (b)(1) In all jury trials had in civil actions, after the verdict has been rendered, and on motion for a new trial, when the trial judge is of the opinion that the verdict in favor of a party should be

> increased, and in additur is suggested by him on that account, with the proviso that in case the party against whom the verdict has been rendered refuses to make the additur, a new trial will be awarded, the party against whom such verdict has been rendered may make such additur under protest, and appeal from the action of the trial judge to the court of appeals.

On the other hand, a jury verdict found to be excessive may be cured by remittitur. Poole v. Kroger Co., 604 S.W.2d 52 (Tenn. 1980). Courts are encouraged to exercise caution in ordering a new trial based on the size of a jury verdict and should, if at all possible, utilize the remedy of remittitur. Pitts v. Exxon Corp., 596 S.W.2d 830 (Tenn. 1980); Jenkins v. Commodore Corporation Southern, 584 S.W.2d 773 (Tenn. 1979); Guess v. Maury, 726 S.W.2d 906 (Tenn. App. 1986).

A trial court is authorized to grant an additur or remittitur, in its role as "thirteenth juror" and the Appeals Court must affirm if there is any material evidence to support the verdict. Coffey v. Fayette Tubular Prods., 929 S.W.2d 326 (Tenn. 1996); Ellis v. White Freightliner Corp., 603 S.W.2d 126, 129 (Tenn. 1980). "This deferential standard of review is consonant with the principle, long recognized in Tennessee law, that the jury bears primary responsibility for awarding damages in a personal injury case, followed closely by the trial court in its roll as thirteenth juror." Coffey, 929 S.W.2d at 331 n. 2.

It is the trial judge's responsibility to determine whether the amount fixed by a jury is excessive. Much of the case law governing the use of additur and remittitur centers on a review of the trial judge's use of these tools to avoid a new trial rather than on a review of the trial judge's approval of the jury's verdict. In Reeves v. Catignani, 157 Tenn. 173, 7 S.W.2d 38 (1928), the Supreme Court held that the amount of the verdict is primarily for the jury to determine, and next to the jury the most competent

person to pass upon the matter is the judge who presided at the trial and heard the evidence.

If the defendant accepts the additur, the statute requires the trial court to enter a judgment that includes the additur. If the defendant rejects the additur, the statute requires the trial court to grant the plaintiff's motion for a new trial "upon proper motion being made by the plaintiff." *Id.* Alternatively, if the defendant is dissatisfied with the trial court's suggestion of additur, the statute permits the defendant to accept the additur under protest and to appeal the trial court's decision. McKinney v. Smith County, 1999 WL 1000887 (Tenn. App. 11-5-1999).

The standard of appellate review on the issue of additur/remittitur is governed by T.C.A. §20-10-101 and §20-10-102 which applies T.R.A.P. 13(d). T.R.A.P. 13(d) states in part:

> Unless otherwise required by statute, review of findings of fact by the trial court in civil actions shall be de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. Findings of fact by a jury in civil actions shall be set aside only if there is no material evidence to support the verdict.

In reviewing a trial court's suggestion of additur, the appeals court customarily conducts a three-part analysis. Long v. Mattingly, 797 S.W.2d 889 (Tenn. App. 1990).

This standard requires the appeals court to "review the proof of damages to determine whether the evidence preponderates against the trial court's suggestion of additur." If the additur is supported by the trial evidence, the court then considers two other factors to determine whether the additur was proper: (1) the trial court's reasons for the additur, and (2) the relation between the amount of the additur and the amount of the jury's verdict. Adjustments are proper only when the court disagrees with the amount of

the verdict. Finally, the appeals court will examine the amount of the suggested additur because "adjustments that 'totally destroy' the jury's verdict are impermissible." Guess v. Maury, 726 S.W.2d 906, 913 (Tenn. App. 1986).

C. Appeals – Considerations before appealing.

1. Considerations in appealing punitive damages

The Tennessee Court of Appeals has just rendered an opinion in Gilbert Mohr v. DaimlerChrysler Corporation, No. W2006-01382-COA-R3-CV, filed October 14, 2008.

The Tennessee Court of Appeals for the Western Section upheld liability for compensatory and punitive damages, affirming the amount of compensatory damages, but reducing the punitive damage award of $48,778,000 to $13,800,000 opining that such reduction was necessary to comply with the due process requirements of the United States Constitution.

2. Consider the cost, time and validity of your issues.

3. If you do appeal, consider hiring specialized counsel to assist. Writing an appellate brief requires adherence to technical rules. It is a different skill set than that required for trying cases.