

**Tennessee Judicial Nominating Commission**  
***Application for Nomination to Judicial Office***

*Rev. 25 August 2011*

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**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](mailto:debra.hayes@tncourts.gov).

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

**PROFESSIONAL BACKGROUND AND WORK EXPERIENCE**

1. State your present employment.

Attorney with Lowery, Lowery & Cherry, PLLC.

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

2004; BPR#023941

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

Tennessee (BPR#023941; October 21, 2004; license is currently active)

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

No.

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

February 2008 - present: attorney with Lowery, Lowery & Cherry

February 2005 - February 2008: attorney with Rochelle, McCulloch & Aulds

February 1998 - February 2005: Police Officer and Sergeant, Metropolitan Nashville Police Department

April 1996 - February 1998- American Cellular (sales)

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.

Not applicable.

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

I am in private practice with three other lawyers in an office based in Lebanon, Tennessee. My practice currently consists of the following:

Criminal defense: 60%

Domestic (divorce & child custody): 25%

General civil litigation (breach of contract, construction litigation, business litigation): 15%

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.

I have enjoyed an extremely diverse practice, appearing before no fewer than 70 judges in 20 counties across this state regarding both criminal and civil matters, through which I have been exposed to a vast array of courtroom management procedures and decorum. I have represented hundreds of clients in various general sessions, circuit, criminal, and chancery courts.

When I began my practice, it consisted primarily of civil litigation. I represented plaintiffs and defendants in various civil matters, including construction litigation, personal injury, breach of contract, condemnation of real property by public authorities, lease disputes, land use/zoning appeals, civil rights violations, and probate matters. I have tried civil cases (jury and non-jury) in circuit and chancery courts, as well as numerous trials in general sessions courts. I have represented clients on direct appeal (including brief and oral argument) before the Court of Appeals. I have also represented clients before boards of zoning appeals and in disciplinary

hearings/appeals before the Metropolitan Nashville Police Department Disciplinary Board and the Metropolitan Nashville Civil Service Commission.

As my practice progressed, I changed my focus to criminal defense. In the criminal arena, I initially prosecuted defendants during an internship with the 20<sup>th</sup> Judicial District Attorney General's office (while serving as a Metropolitan Nashville Police Officer) and, more recently, as a special prosecutor in the municipal courts of Mt. Juliet and Lebanon. Throughout the course of my practice, I have defended those accused of crimes ranging from a speeding ticket to assisting in the defense of first degree murder/death penalty case. I have tried criminal cases (jury and non-jury) in circuit/criminal courts, as well as bench trials in general sessions courts. I have represented several criminal clients on direct appeal (including brief and oral argument) before the Court of Criminal Appeals involving conviction, sentencing, and post-conviction relief.

In addition to the areas listed above, my practice includes domestic relations law. I represent clients regarding divorce, post-divorce disputes, child custody, and paternity matters in circuit, chancery, and general sessions courts.

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

I represented a funeral home in an appeal from a local board of zoning appeals to chancery court and ultimately to the Court of Appeals, where the appellate court affirmed our position that a crematory is a lawful expansion of a funeral home's business and permitted the funeral home to build a crematory on site. See *BMC Enterprises, Inc. v. City of Mt. Juliet*, 273 S.W.3d 619 (Tenn.Ct.App.,2008).

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.

I have served as special judge for the Municipal Court of Mount Juliet, TN, on various occasions from 2008 through the present when the appointed judge was unavailable. From 2007 through the present I have been appointed by the Lebanon City Council as an Administrative Hearings Officer for the City of Lebanon, with the responsibility to hear internal disciplinary matters and serve as an ethics investigator.

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.

None.

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

During law school, I was employed full-time as a police officer with the Metropolitan Nashville Police Department. In this capacity, I was ultimately assigned to teach criminal and constitutional law to police recruits in the police academy (consisting of approximately 120 hours per academy session) and to all existing officers during annual training. I was certified as a Police Instructor by the Tennessee Peace Officer Standards and Training Commission in the specialized area of Criminal Law. Also in this capacity, I conducted legal research for the members of the police department and assisted with drafting search warrants and in preparing cases from the Metropolitan Police Department for presentation to the grand jury.

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.

This is my first application for judgeship.

### 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.

Nashville School of Law: attended from 2000-2004; received Doctor of Jurisprudence; ranked third in graduating class; inducted into the Honorable Society of Cooper's Inn; received the Candace Ripp Memorial Scholarship; received the Joe P. Binkley, Sr., Scholarship; received the Tulley Award;

Middle Tennessee State University: attended from 1995-1998; received Bachelor of Arts with major in Foreign Language (Spanish) and minor in political science; graduated cum laude;

University of Memphis: attended from 1994-1995; received Cecil C. Humphreys Presidential Scholarship; left due to family emergency when fiancée was critically injured in an automobile collision.

**PERSONAL INFORMATION**

15. State your age and date of birth.

35 years; April 20, 1976

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

35 years

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

4 years and 9 months

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.

Not applicable.

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.

During the period from 1995 through 1996, I pled guilty to approximately four speeding violations. I attempted to procure the specific information from the Tennessee Department of Safety but was informed that their report only includes the most recent seven years. I have no other convictions for any violation of law, regulation, or ordinance.

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.

Not applicable.

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

No.

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

No.

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

No.

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices which you have held in such organizations.

Hearthside, Inc. (non-profit assisted living facility) – served on the Board of Directors and as Secretary from January 2011 through present

Habitat for Humanity of Wilson County – served on the Board of Directors from January 2009 through January 2011

Tennessee Bar Foundation IOLTA Grant Review Committee – June 2010 through June 2013 – review grant applications and make recommendations to the Board of Trustees for disbursement of IOLTA funds

27. Have you ever belonged to any organization, association, club or society which limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.
- a. If so, list such organizations and describe the basis of the membership limitation.
  - b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

No.

**ACHIEVEMENTS**

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

Tennessee Bar Association – February 2005 through present.

Tennessee Bar Association Board of Governors – June 2011 through June 2013: Responsible for governing the activities of, administering the business of, and acting for the Tennessee Bar Association in all matters, subject to the direction of membership and provisions of the Charter and Bylaws.

Tennessee Bar Association Young Lawyers Division –

President – June 2012 through June 2013

President-Elect – June 2011 through June 2012

Vice President – June 2010 through June 2011

District Representative – June 2006 through June 2010

Executive Committee – June 2010 through June 2014

Chair – Long Rang Planning Committee – June 2010 through June 2011

Chair – Wills for Heroes Committee – June 2009 through June 2011: Responsibilities included assisting in the coordination of 23 Wills for Heroes events across the state, during which 365 volunteer attorneys assisted 830 first responders and



spouses with estate planning documents at no charge

15<sup>th</sup> Judicial District Bar Association – February 2005 through present

American Bar Association – February 2005 through February 2008; May 2010 through present

Tennessee Association of Criminal Defense Lawyers – February 2008 through present

Harry C. Phillips American Inn of Court – Student member, 2003 through 2004

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.

Received the 2009-2010 President's Distinguished Service Award from the Tennessee Bar Association Young Lawyers Division, June 4, 2010;

Received President's Special Recognition Award from the Tennessee Bar Association Young Lawyers Division, June 17, 2011;

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

None.

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

June 25, 2011 - I taught a CLE course regarding consecutive versus concurrent sentencing during the Annual Legislative Update of the Tennessee Association of Criminal Defense Lawyers.

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.

See attached briefs, which are 99% my own personal effort. Note that unreported cases originally attached in the appendixes to these briefs have not been included.

**ESSAYS/PERSONAL STATEMENTS**

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

As an attorney, my duty is to advocate for and represent the interests of my clients. It is my job to be partial to my clients' interests. A judge is, first and foremost, a public servant uniquely charged with the responsibility of impartially and fairly applying the laws that govern us. I want to use my knowledge and abilities to be an impartial advocate not for one side or the other, but for justice and the rule of law. I believe that my diverse experience in both criminal and civil law will allow me to see all sides of an issue and make a decision based upon the law.

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

I have been honored to serve as part of the TBA Young Lawyers Division Board since 2006. The Young Lawyers Division is a primary public service arm of the TBA. In that capacity, I have had the opportunity to serve our communities through fund raisers, public service projects (including leading a team of lawyers on a Habitat for Humanity build), free legal clinics, and, more recently, as chair of the Wills for Heroes Committee, in an effort to improve our communities and ensure that all persons have access to justice, regardless of their economic status. We are in the process of introducing the iCivics.org program to schools throughout the state in an effort to educate our children about ethics and encourage them to be active participants in our democracy. I intend to continue this legacy of service to the public through the implementation of similar programs across the state.

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

I am seeking a judgeship in the Circuit Court for the 21<sup>st</sup> Judicial District, including Hickman, Lewis, Perry, and Williamson counties. This Court is comprised of four judges. Each judge sits as chancellor when holding Chancery Court. The Court is divided into four divisions, with one judge assigned to each division by the presiding judge. Two of the divisions handle civil matters and two divisions handle criminal matters. It is therefore vital to have a judge who is

experienced in both criminal and civil courtrooms, as I am.

This judicial district includes rural areas. My practice has allowed me to handle many matters in very rural areas, and I believe that I have the ability to ensure that each party has equal opportunity to present their side of the case, regardless of whether they retain a partner at a large firm, a small-town lawyer, or they appear pro se.

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

I have been honored to serve as a board member for the Habitat for Humanity of Wilson County, through which members of the local community come together to combat substandard housing. In that capacity I served on the Family Services Committee, which assists in the selection, education, and support of families who partner with Habitat for Humanity as future homeowners. All partner families are required to volunteer a specified amount of time with Habitat, and all must undergo financial and homeowner education. I learned much from my experience on this board, as it is an excellent example of giving persons in need the opportunity to better themselves.

I am currently a Board Member and the Secretary of Hearthside, Inc., which is a religious non-profit assisted living facility. As our population ages, it is imperative that those who are unable to care for themselves have appropriate facilities where care is provided with dignity and respect.

A judge should lead by example. Should I be appointed judge, I intend to continue to serve my community as permitted by my schedule and the Code of Judicial Conduct.

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)*

I was fortunate to be raised in a home where both parents are public servants who instilled in me the value of honest, hard work and the desire to use my abilities to improve the lives of those around me.

Though I initially planned to attend law school as a traditional student, my plans were altered when my fiancée was critically injured in an automobile accident. As a result, I postponed my entry into law school and joined the Metropolitan Nashville Police Department. My experiences as a patrol officer, legal instructor, and sergeant gave me a tremendous respect for the law and its enforcement. I have seen first hand that the violation of the law can cause immeasurable suffering. I have also seen that there is no criminal prosecution worthy of violating the rights afforded all citizens, and that the government must be held to constitutional standards when it prosecutes any of its citizens.

Since entering private practice, I have been fortunate to handle criminal defense as well as civil litigation of various kinds on behalf of plaintiffs and defendants. Many lawyers limit their representation to one area of the law, such as strictly civil or criminal. Some further limit representation to one type of litigant, such as plaintiff's personal injury or insurance defense. My diverse practice allows me to see cases from various perspectives and will allow me to rule according to law and without predisposition to favor any litigant based on their status as prosecutor, defender, plaintiff, or defendant.

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 governmental checks and balances established through the three co-equal branches of government dictate that as a circuit court judge, I would be required to uphold the law even if I disagreed with the substance of the law at issue. Personal feelings, disagreement, or prejudices cannot be allowed to sway a judge from applying the law as enacted by the legislature.

As a criminal defense lawyer who was formerly a police officer, I have had numerous occasions where I have been required to set aside personal feelings in order to fulfill my duty to my client to provide effective counsel, as required by our state and federal constitutions.

As a specific example, I recall sitting as judge for the Municipal Court of Mt. Juliet and being faced with a gentleman who possessed a commercial driver license (CDL) and had been charged with speeding while off duty in his personal vehicle. Under federal law, he was ineligible for attending traffic school in lieu of receiving a conviction because of his CDL. I personally did not agree with the substance of this law as applied to this case, as it prevented this gentleman from benefiting from a program designed to improve driver skills and avoid a traffic violation conviction simply because he had a CDL. However, the law on the matter was clear, and I did my duty as a judge based upon the legislative mandate without regard to my personal opinion of the law.

#### 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. Tommy Thompson; 15<sup>th</sup> Judicial District Attorney General, P.O. Box 178, Hartsville, Tennessee, 37074; (615) 374-2604

B. Sheriff Terry Ashe; Sheriff of Wilson County; 105 East High Street, Lebanon, Tennessee 37087; (615) 444-1412

C. Chief Steven Anderson; Chief of Police, Metropolitan Nashville Police Department; 200 James Robertson Parkway, Nashville, Tennessee 37201; (615) 862-7301

D. Tasha Blakney; Eldridge & Blakney, PC; 401 West Church Ave, Suite 101, Knoxville, Tennessee 37902; (865) 544-2010

E. Danny Van Horn; Butler, Snow, O'Mara, Stevens and Cannada, PLLC; 6075 Poplar Ave, Suite 500, Memphis, Tennessee 38119; (901) 680-7331

**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 21<sup>st</sup> 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.

  
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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

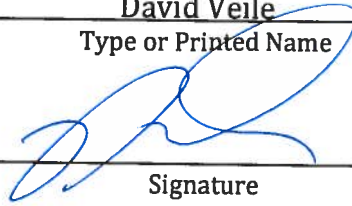
**TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY**

**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.

David Veile

Type or Printed Name



Signature

September 21, 2011

Date

023941

BPR #



IN THE COURT OF APPEALS FOR THE MIDDLE DISTRICT OF TENNESSEE

BMC ENTERPRISES, INC., d/b/a )  
BOND MEMORIAL CHAPEL, )  
 )  
Plaintiff/Appellee, )  
 )  
vs. ) Appeal No. M2007-00795-COA-R3-CV )  
 )  
CITY OF MT. JULIET, ) On appeal from the Chancery Court of )  
CITY OF MT. JULIET BOARD ) Wilson County, Tennessee )  
OF ZONING APPEALS, and the following ) Case No. 06307 )  
individuals serving in their capacity )  
as members of the Board: BRYAN )  
GRASSMEYER, JACKIE HEATHERLY, )  
ROGER MORSE, LARRY SEARCY, and )  
ALFRED H. WILLIAMS, )  
 )  
Defendants/Appellants. )

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BRIEF OF PLAINTIFF/APPELLEE

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JERE N. McCULLOCH (#2768)  
DAVID H. VEILE (#23941)  
Attorneys for Plaintiff/Appellee  
ROCHELLE, McCULLOCH & AULDS, PLLC  
109 North Castle Heights Avenue  
Lebanon, TN 37087  
(615) 443-8751

ORAL ARGUMENT REQUESTED



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### **DESIGNATION OF THE RECORD**

The record in this case consists of three volumes. Volumes I and II contain the technical record filed July 2, 2007, and will be referred to in this Brief as “V \_\_\_, p. \_\_\_.” Volume III contains the transcript of the hearing in the Chancery Court of Wilson County, Tennessee, on February 22, 2007, before the Honorable Chancellor C.K. Smith and will be referred to as “V III, p. \_\_\_.”

### **DESIGNATION OF THE PARTIES**

The Plaintiff/Appellee, BMC Enterprises, Inc., d/b/a Bond Memorial Chapel, will be referred to as “BMC” or the “Appellee.” The Defendants/Appellants will be referred to as “Appellants,” “Defendants,” “Mt. Juliet Board of Zoning Appeals,” or the “Board.”

**STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

**DEFENDANTS/APPELLANTS' ISSUES PRESENTED FOR REVIEW**

- I. WHETHER THE CITY OF MT. JULIET BOARD OF ZONING APPEALS ACTED ILLEGALLY, ARBITRARILY, OR CAPRICIOUSLY IN INTERPRETING THE ZONING ORDINANCE TO CONCLUDE THE INTENTION OF THE CITY COMMISSIONERS WAS TO PLACE CREMATORIES IN AN INDUSTRIAL ZONING CLASSIFICATION.
  
- II. WHETHER THE CITY OF MY (SIC) JULIET BOARD OF ZONING APPEALS ACTED ILLEGALLY, ARBITRARILY, OR CAPRICIOUSLY IN THEREFORE INTERPRETING THE ZONING ORDINANCE TO CONCLUDE THE PETITIONER'S PROPOSED CREMATORY WAS NOT A CONTINUATION OF THE LEGAL NON-CONFORMING USE OF A FUNERAL HOME ON PROPERTY ZONED OFFICE.

## STATEMENT OF THE CASE

Appellee, BMC Enterprises, Inc., d/b/a Bond Memorial Chapel, is the owner of a tract of real property within the city limits of Mt. Juliet, Tennessee. V II, p. 268. In 1995, this property was zoned O (Office) by the City of Mt. Juliet, and “funeral home” was added as a permitted use within that zoning district. V I, p. 127; V I, p. 73. BMC began legally operating a funeral home on that property in 1997, in accordance with the zoning ordinance then in effect. V I, p. 127. In 1998, after the Appellee legally established a continuing funeral home business on the property, the zoning ordinance for the City of Mt. Juliet was revised (hereinafter, the “Revised Zoning Ordinance”), resulting in the Appellee’s property being rezoned as OPS (Office Professional) V I, p. 127. In the Revised Zoning Ordinance, “funeral home” is not included as a permitted use in any of the City’s zoning districts, including OPS. *Id.* Consequently, the Appellee continues to operate this funeral home on its property as a legal non-conforming use that was in existence prior to the revision of the zoning ordinance. V II, pp. 268-9.

As a continuation of its use as a funeral home business, BMC sought approval from the City of Mt. Juliet to install and utilize a cremation machine upon the property. Deborah Moss, the Zoning Administrator for Mt. Juliet, agreed that a crematory could be allowed as a permitted use with a funeral home; however, when the Revised Zoning Ordinance was drafted, “crematories” were listed separately as a use permitted in IS (Industry Basic), which is not being utilized anywhere within the City. Ms. Moss suggested that the matter should be submitted to the Board of Zoning Appeals. V I, p. 15.

At the Board of Zoning Appeals meeting on June 8, 2006, BMC argued that the use of a cremation machine was a permissible continuation of the property’s legal non-conforming use as

a funeral home. V I, 14. The Board of Zoning Appeals ruled that the use of a cremation machine was not a continuation of a non-conforming use. V I, p. 65.

On August 4, 2006, BMC filed a Petition in the Chancery Court of Wilson County, Tennessee, seeking a common law writ of certiorari of the Board's decision. BMC alleged that the Board's action was arbitrary and not supported by any material evidence. V I, p. 4.

The record of the proceedings before the Board was submitted to the Court, and the Petition was heard by the Honorable Chancellor C.K. Smith on February 22, 2007. V II, p. 268. BMC argued that all of the evidence presented to the Board indicated that a cremation machine operated within a funeral home was a continuation of the property's legal non-conforming use. V I, p. 132. The City argued that because the 1998 Revised Zoning Ordinance listed "crematories" in a different zoning classification than that in which funeral homes had previously been allowed, a cremation machine could not be a continuation of BMC's non-conforming funeral home use. V I, p. 119.

After reviewing the record, the Chancery Court ruled that the Board's decision was not supported by any material evidence and was therefore arbitrary, capricious, and illegal. The Court ruled that BMC was permitted to install and use a cremation machine on its property as a continuation and expansion of the property's current use as a funeral home. V II, p. 271. On March 28, 2007, a hearing was held regarding BMC's Motion for Costs and Attorneys Fees, at which time the Court awarded attorneys fees to BMC in the amount of Ten Thousand and no/100 (\$10,000.00) Dollars. V II, p. 275. The City appealed the Chancery Court's judgment by Notice of Appeal filed April 5, 2007. V II, p. 273.

## STATEMENT OF THE FACTS

BMC owns a certain tract of real property located at 1098 Weston Drive in the City of Mt. Juliet, Wilson County, Tennessee (the “Property”). V II, p. 268. Prior to 1998, the Property was zoned O (Office). By operation of Ordinance No. 95-10, which was passed by the Board of Commissioners of the City of Mt. Juliet on July 10, 1995, “funeral homes” was added as a permitted use for properties located within O zoning. V I, p. 73. The term “funeral homes” was not defined anywhere in the zoning ordinance. V I, p. 127.

BMC began operating a funeral home on the Property in 1997, in accordance with the zoning ordinance then in effect. V I, p. 127. BMC’s funeral home offers numerous products and services associated with the care and disposition of the deceased, including the sale of caskets, use of the Property for viewing and visitation, and embalming operations to prepare the bodies for burial. V I, p. 132. BMC often receives instructions to cremate remains, as opposed to embalming them; indeed, in 2005, 21.3% of all decedents whose funeral services were handled by BMC were cremated. V I, p. 23. Currently, when a request is made for the cremation of remains, BMC must arrange for the transportation to and from a third-party funeral home equipped with a cremation machine and must further coordinate all other aspects of the cremation, including selection of the urn, scheduling the cremation, etc. V I, p. 132.

In 1998, the Board of Commissioners amended the entire zoning ordinance by enacting the Revised Zoning Ordinance. V I, p. 127. The Revised Zoning Ordinance precludes “funeral homes” as a permitted use under any zoning classification. V I, p. 15. Tenn. Code Ann. § 13-7-208(b) states:

(b)(1) In the event that a zoning change occurs in any land area where such land area was not previously covered by any zoning restrictions of any governmental agency of this state or its political subdivisions, or where such land area is covered by zoning restrictions of a governmental agency of this state or its



political subdivisions, and such zoning restrictions differ from zoning restrictions imposed after the zoning change, then any industrial, commercial or business establishment in operation, permitted to operate under zoning regulations or exceptions thereto prior to the zoning change shall be allowed to continue in operation and be permitted; provided, that no change in the use of the land is undertaken by such industry or business.

BMC legally operated a funeral home on the Property prior to the enactment of the Revised Zoning Ordinance in 1998; therefore, it is undisputed that BMC has continued to operate a funeral home on the Property as a pre-existing non-conforming use since 1998, and may continue to operate the funeral home on the Property despite the change in zoning.

It is further undisputed that legal non-conforming uses are allowed to expand under both the City of Mt. Juliet Zoning Ordin. § 13-102.7, found at V I, p. 75, and Tenn. Code Ann. § 13-7-208(c), which states:

(c) Industrial, commercial or other business establishments in operation and permitted to operate under zoning regulations or exceptions thereto in effect immediately preceding a change in zoning shall be allowed to expand operations and construct additional facilities which involve an actual continuance and expansion of the activities of the industry or business which were permitted and being conducted prior to the change in zoning; provided, that there is a reasonable amount of space for such expansion on the property owned by such industry or business situated within the area which is affected by the change in zoning, so as to avoid nuisances to adjoining landowners. No building permit or like permission for construction or landscaping shall be denied to an industry or business seeking to expand and continue activities conducted by that industry or business which were permitted prior to the change in zoning; provided, that there is a reasonable amount of space for such expansion on the property owned by such industry or business situated within the area which is affected by the change in zoning, so as to avoid nuisances to adjoining landowners.

In May of 2006, representatives of BMC spoke with Deborah Moss, Zoning Administrator for the City of Mt. Juliet, regarding its intent to install and utilize a cremation machine at the funeral home. V I, p. 127. The machine itself measures five and one-half (5.5) feet by twelve and one-half (12.5) feet. V I, p. 16. Ms. Moss advised that the federal Standard

Industrial Classification Manual (SIC) is used by the City to determine uses and their classification. V I, p.15. Ms. Moss advised that the SIC manual lists crematories and funeral homes as the same service, and that crematories are therefore a permitted use; however, she indicated that the current zoning ordinance does not have a listing for funeral homes but lists crematories as permitted in Industrial Special (IS) zoning. V I, p. 15. Further, Ms. Moss noted that there is currently no land within the city limits of Mt. Juliet that is zoned IS. V I, p. 15. Ms. Moss directed BMC to seek an administrative appeal from the Board of Zoning Appeals regarding this conflict. V I, p. 15.

Although “funeral home” is not listed as an approved use in any zoning category in the Revised Zoning Ordinance, it does permit the use of “crematories” within the IS (Industrial Special) zoning district. V I, p. 88. There is, however, no indication in the Record that the “crematories” use was listed in the pre-1998 zoning ordinance; likewise, there is no indication in the Record that “crematories” and “funeral homes” ever existed simultaneously as approved uses in separate zoning categories in either the pre or post-1998 zoning ordinances. Rather, the only information in the Record is that prior to 1998, “funeral homes” were approved within O zoning, while after 1998, “crematories” were approved within IS zoning. V I, pp. 15, 74-107.

On May 8, 2006, BMC applied for an Administrative Appeal to the Board seeking permission to use a cremation machine on the Property as a continuation of the Property’s continued legal non-conforming use as a funeral home. V I, p. 14.

On May 30, 2006, Ms. Moss drafted a memorandum to the Board regarding BMC’s request, stating in part:

The Standard Industrial Classification Manual (1987) issued from the Executive Office of the President of Management and Budget lists crematories and funeral homes as the same service, therefore they are a permitted use. This manual is used to determine uses and their classification.

The funeral home is a non-conforming use and crematories could be allowed from the manual.

V I, p. 15.

On June 8, 2006, the Board held a public meeting in which this matter was discussed (“Board Meeting”). V I, pp. 68-72. At this meeting, representatives of BMC indicated that the federal SIC manual allowed crematories as part of a funeral home and indicated that the State Funeral Director Board does not require extra licensing for a crematory in conjunction with an existing funeral home; however, a licensed funeral director is required by the state for the operation of a crematory. V I, p. 69. BMC also submitted irrefuted evidence that the cremation machine produces neither smoke nor odor. V I, p. 71. In her capacity as Zoning Administrator for the City of Mt. Juliet, Ms. Moss also testified that the SIC manual classifies funeral homes and crematories under the same code. V I, p. 69.

BMC presented information to the Board concerning the utilization of cremation services within their business and the funeral home industry as a whole. In 2005, 21.3% of all decedents whose funeral services were handled by BMC were cremated. V I, p. 23. Further, the Board was advised that that the present national rate of cremation is 28% of all decedents, and that the national projection is that within the next ten (10) years, the rate of cremation in the United States will grow to between 38% and 42% of all decedents. V I, p. 28.

During the Board Meeting, there was no discussion by the members of the Board concerning whether or not the use of a cremation machine within the funeral home would be considered either an accessory use or a lawful expansion of a non-conforming use, and no information or evidence was presented before the Board that would in any way refute or contradict BMC’s position that a cremation machine is a lawful expansion of a funeral home business. V I, pp. 66-72. At the Board Meeting, Mt. Juliet City Commissioner Ed Hagerty

inaccurately stated that he was on the Mt. Juliet Board of Commissioners at the time the Revised Zoning Ordinance was adopted, and that it was the intent of the Mt. Juliet City Commission that crematories be in an industrial zone only. V I, pp. 71-72. In fact, this statement was untrue, as Mr. Hagerty was not a City Commissioner when the Revised Zoning Ordinance was adopted in 1998. V I, pp. 135,138. At the conclusion of the Board Meeting, the Board ruled that it was the intention of the City Commission to put crematories in an industrial zone and refused to allow BMC to utilize the cremation machine. V I, p 65. The Board did not make a finding of fact setting forth the reasons for its decision or explaining how it determined that the utilization of a cremation machine by an existing funeral home was not considered a continuation or expansion of a non-conforming use. V I, pp. 65, 72. Further, the record is completely devoid of any evidence presented to the Board to support its conclusion that a cremation machine would not be a continuation of the property's current use as a funeral home. V I, p. 8-107.

BMC appealed the Board's decision by filing a Petition for Writ of Certiorari in the Chancery Court for Wilson County, Tennessee, alleging that the Board's decision was arbitrary and not supported by any material evidence. VI, p. 4. The parties stipulated that the Board's decision was to be reviewed pursuant to a common law writ of certiorari. V I, pp. 115, 129. The record of the proceedings before the Board was submitted to the Court, and the Petition was heard by the Honorable Chancellor C.K. Smith on February 22, 2007. V II, p. 268. BMC argued that all of the evidence presented to the Board indicated that a cremation machine operated within a funeral home was a continuation of the property's legal non-conforming use, and that there was no material evidence to support the Board's arbitrary decision. V I, p. 132. It relied upon the record of the proceedings before the Board, as well as the definition of "funeral establishment" set forth in Tenn. Code Ann. § 62-5-101(7) as interpreted by the Tennessee

Supreme Court in State ex rel. Cunningham v. Feezell, 400 S.W. 2d 716 (Tenn. 1966). V I, pp. 132-135. The City argued that simply because the 1998 Revised Zoning Ordinance listed “crematories” in a different zoning classification than that in which funeral homes had previously been listed prior to its deletion, a cremation machine could not be continuation of BMC’s non-conforming funeral home use. V I, p. 119.

After reviewing the record and hearing arguments of counsel, the Chancery Court ruled that the Board’s decision was not supported by any material evidence and was therefore arbitrary, capricious, and illegal. Specifically, the Court made the following findings of fact:

7. Based upon a review of the entire record and evidence presented at the hearing before the Mt. Juliet Board of Zoning Appeals, crematories are clearly part of the on-going business of funeral homes.
8. Crematories fall within the statutory definition of a funeral home establishment. Tenn. Code Ann. § 62-5-101 defines funeral establishments as “any business, whether a proprietorship, partnership, firm, association or corporation, engaged in arranging, directing, or supervising funerals for profit or other benefit; or the preparing of dead human bodies for burial; or the disposition of dead human bodies;” (*emphasis added*). Crematories are utilized for the disposition of dead human bodies.
9. Tennessee case law supports the finding that the definition of “funeral directing” includes the operation of a crematory. In the case of Cunningham v. Feezell, 400 S.W. 2d 716 (Tenn. 1966), the Court found that the statutory definition of funeral directing, which included the disposition of dead human bodies, included the operation of a crematory.
10. The law is clear that the operation of a funeral home business includes the operation of a crematory.
11. It is clear that the Petitioner wished to expand its business with a use that is customarily associated with funeral homes.
12. The intent of the City Commissioners in zoning crematories within an industrial district in 1998 is irrelevant to this determination, as the funeral home was already a legal use at the time the Zoning Ordinance was amended in 1998 and has a right to continue and to expand its business under the Zoning Ordinance.

13. In making its decision to deny the Petitioner's request to use a cremation machine, the Board of Appeals improperly gave in to public pressure.

14. The operation of a crematory is a customary part of the business of funeral homes, is merely a continuation and expansion of the funeral business, and is incidental to the business of operating a funeral home.

15. The decision of the Board to deny the Petitioner's request to install and operate a cremation machine was not supported by any material or substantive evidence in the record. The Board did not give any consideration as to whether or not this was a continuation of an existing non-conforming use.

V II, pp. 268-270. The Court concluded that the Board acted arbitrarily, capriciously, and illegally, holding that its decision "... was not based on the exercise of any type of reasonable judgment, was a disregard of the facts and circumstances, and was a clear error of judgment. The Board's decision was not supported by any material or substantive evidence in the record." V II, p. 271. The Court held that BMC was permitted to use the cremation machine as a continuation and expansion of the property's current use as a funeral home. V II, p. 271.

Subsequent to the Court's ruling, BMC submitted a Motion for Costs and Attorneys Fees in accordance with Tenn. Code Ann. § 29-37-101 et. seq., referred to as the "Equal Access to Justice Act of 1984," which provides that a Court may award attorneys fees and costs to a "small business" who has brought an action for the judicial review of a municipality's actions when it has been determined by the Court that the municipality acted arbitrarily or capriciously, with such attorneys fees and costs to be paid by the municipality. V II, p. 233. Tenn. Code Ann. § 29-37-103(3)(A)(iii) defines a "small business" as:

- (iii) A partnership or corporation that meets each of the following conditions:
  - (a) Whose annual gross receipts do not exceed two million dollars (\$2,000,000) during the twelve (12) months immediately preceding the date the civil action was filed; and
  - (b) Who does not employ more than thirty (30) persons on a full-time basis on the date the civil action was filed.

V II, p. 242. BMC submitted sworn testimony through Affidavits attached to the Motion that during the twelve (12) month period immediately prior to the date of filing the Petition, the annual gross receipts of BMC did not exceed Two Million Dollars (\$2,000,000.00), and that on the date the action was filed, BMC did not employ more than thirty (30) persons. V II, p. 245, 248. On March 28, 2007, a hearing was held by the Chancery Court regarding BMC's Motion for Costs and Attorneys Fees, at which time the Court ordered that the City pay to BMC the amount of Ten Thousand and no/100 (\$10,000.00) Dollars for costs and attorneys fees incurred in this cause<sup>1</sup>. V II, p. 275.

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<sup>1</sup> The award of attorneys fees was not addressed by the Appellants in their Notice, Statement of the Issues, or their Brief; therefore, it is apparent that the Appellants have not appealed this award of attorneys fees.

## STANDARD OF REVIEW

The Trial Court's review of the actions of the Board is based upon common law writ of certiorari. McCallen v. City of Memphis, 786 S.W.2d 633, 639 (Tenn. 1990). The writ of certiorari requires the Court to determine whether the Board exceeded its jurisdiction, followed an unlawful procedure, acted illegally, arbitrarily, or fraudulently, or acted without material evidence to support its decision. Hoover v. Metro Board of Zoning Appeals, 955 S.W.2d 52, 54 (Tenn. Ct. App. 1997). If there is no material evidence in the record to support the administrative body's decision, the reviewing trial court must conclude the administrative body acted illegally. Hoover v. Metro Board of Zoning Appeals, 924 S.W.2d 900, 905 (Tenn. Ct. App. 1996). The amount of material evidence required to support a board's decision must exceed a scintilla of evidence but may be less than a preponderance of the evidence. Leonard Plating Co. v. Metropolitan Government of Nashville and Davidson County, 213 S.W.3d 898 at 903, (Tenn. Ct. App. 2006). An agency's decision not supported by substantial and material evidence in the record is arbitrary and capricious and, even where adequate evidence is found in the record, an agency's decision may still be arbitrary and capricious if caused by a clear error in judgment. Berry v. Wilson County Bd. of Zoning Appeals, 2001 WL 605098, at \*2 (Tenn. Ct. App. 2001), *citing* Jackson Mobilphone Co. v. Tennessee Public Service Commission, 876 S.W.2d 106 (Tenn. Ct. App. 1993). An arbitrary decision is one that is not based on any course of reasoning or exercise of judgment, or one that disregards the facts or circumstances of the case without some basis that would lead a reasonable person to reach the same conclusion. Id. at 3.

When a trial court reviews a local board's record under a common law writ of certiorari, it must make written findings of fact and conclusions of law supporting its decision either to grant or to deny the requested relief. B&B Enterprises of Wilson Co., LLC, et al, v. City of Lebanon,



et al, 2004 WL 2916141 at \*2, (Tenn. Ct. App. 2004), citing Tenn. Code Ann. § 27-9-111(c) (Supp.2004). The court's findings of fact must be based on the preponderance of the evidence. Id., citing Tenn. Code Ann. § 27-9-111(d). Accordingly, on appeal, the trial court's findings of fact are reviewed using the Tenn. R. App. P. 13(d) standard of review, affording deference to the trial court's findings of fact as long as the evidence does not preponderate against them while conducting a de novo review of the trial court's conclusions of law. Id., citing Southern Constructors, Inc. v. Loudon County Bd. of Education, 58 S.W.3d 706, 710 (Tenn. 2001). When the evidentiary foundation for a local zoning board decision is challenged using the common-law writ, the sufficiency of the evidence is a question of law; hence, the courts must review the record de novo without presuming that the board's finding is correct. Lafferty v. City of Winchester, 46 S.W. 3d 752, at 758 (Tenn. Ct. App. 2000), citing Wilson County Youth Emergency Shelter, Inc. v. Wilson County, 13 S.W.3d at 342 (Tenn. Ct. App. 1999).

## SUMMARY OF THE ARGUMENT

Prior to the revision of the applicable zoning ordinances, BMC began operation of a funeral home on its Property. Subsequently, the zoning ordinance was revised, and “funeral homes” are no longer a permitted use within the Property’s zoning, making it a legal non-conforming use. The same revision which removed “funeral homes” as a permitted use simultaneously created “crematories” as a permitted use within an industrial zoning district.

By statute and ordinance, a permitted use allows any activity that is customarily associated with and is appropriate, incidental, and subordinate to the permitted principal activity located on the same zone lot. Moreover, legal non-conforming uses have the right to expand their operations which involve an actual continuance and expansion of the activities of the industry or business which was established prior to the change in zoning. Cremating the dead is an activity that is legally and customarily part of the operations of a funeral home.

Here, the Board held that the use of a cremation machine within a funeral home is not a continuation of the property’s legal use as a funeral home. The record does not contain any material evidence from which the Board could rationally have reached this conclusion.

The only evidence of record cited by the Appellant in support of the Board’s decision is that in 1998, the City Commissioners opted to remove funeral homes as an approved use in any zoning classification and inserted “crematories” in another zoning classification. This is indistinguishable from removing “funeral homes” as an approved use and inserting “embalming” as a permitted use in another district. Once a funeral home begins operations, it is entitled to continue and expand those operations in accordance with activities generally performed by that business industry, regardless of the Commissioners’ intent in subsequent zoning revisions. The mere fact that crematories are also subsequently allowed in another zoning classification does

not prevent a funeral home from utilizing a single cremation machine as part of its usual and customary funeral home operations, any more than it would prevent a funeral home from installing and utilizing its embalming machine if the City Commissioners intend to locate “embalming” establishments in another zone.

## ARGUMENT

The Appellee respectfully submits that the Record in this case clearly indicates the decision of the Board of Zoning Appeals to refuse BMC's utilization of a single cremation machine within its funeral home was not supported by any material evidence and was illegal, arbitrary, and capricious.

The Chancery Court's review of the actions of the Board is based upon common law writ of certiorari. McCallen v. City of Memphis, 786 S.W.2d 633, 639 (Tenn. 1990). The writ of certiorari requires the courts to determine whether the Board exceeded its jurisdiction, followed an unlawful procedure, acted illegally, arbitrarily, or fraudulently, or acted without material evidence to support its decision. Hoover v. Metro Board of Zoning Appeals, 955 S.W.2d 52, 54 (Tenn. Ct. App. 1997). If there is no material evidence to support the Board's decision, the reviewing court must conclude the administrative body acted illegally. Hoover v. Metro Board of Zoning Appeals, 924 S.W.2d 900, 905 (Tenn. Ct. App. 1996). The amount of material evidence required to support a board's decision must exceed a scintilla of evidence but may be less than a preponderance of the evidence. Leonard Plating Co. v. Metropolitan Government of Nashville and Davidson County, 213 S.W.3d 898 at 903 (Tenn. Ct. App. 2006). If there is no evidence to support a zoning action, it is arbitrary. Wilson County Youth Emergency Shelter, Inc. v. Wilson County and Wilson County Board of Zoning Appeals 13 S.W.3d 338 (Tenn. Ct. App. 1999), citing Sexton v. Anderson County, 587 S.W.2d 663, 667 (Tenn. Ct. App. 1979). In reviewing a zoning action, an appellate court must do so with the recognition that "the discretionary authority of the government body must be exercised within existing standards and guidelines." McCallen, at 639.

Zoning laws, being in derogation of the common law and tending to deprive a property owner of a use of its property that would otherwise be lawful “are to be strictly construed by the courts in favor of the property owner.” State ex rel. Browning-Ferris Industries of Tenn., Inc. v. Board of Commissioners of Knox County, 806 S.W. 2d 181, 187 (Tenn. Ct. App. 1990).

**I. WHETHER THE CITY OF MT. JULIET BOARD OF ZONING APPEALS ACTED ILLEGALLY, ARBITRARILY, OR CAPRICIOUSLY IN INTERPRETING THE ZONING ORDINANCE TO CONCLUDE THE INTENTION OF THE CITY COMMISSIONERS WAS TO PLACE CREMATORIES IN AN INDUSTRIAL ZONING CLASSIFICATION.**

The Trial Court did not find that the Board acted illegally, arbitrarily, or capriciously in determining that the City Commissioners intended to place new crematories in an industrial zoning classification after 1998; rather, the Court ruled that the Board acted illegally, arbitrarily, capriciously, and without any supporting material evidence when it determined that the operation of a single cremation machine within BMC’s established funeral home was not a continuation of the pre-existing nonconforming use of the property as a funeral home business. As recited by the Trial Court in its ruling, the intent of the City Commissioners in 1998 is irrelevant to the determination of whether or not the use of a cremation machine within an existing funeral home is a continuation of the Property’s nonconforming use, as the funeral home was already a legal use at the time the zoning ordinance was amended and therefore has a right to continue and expand its business.

**II. WHETHER THE CITY OF MY (SIC) JULIET BOARD OF ZONING APPEALS ACTED ILLEGALLY, ARBITRARILY, OR CAPRICIOUSLY IN THEREFORE INTERPRETING THE ZONING ORDINANCE TO CONCLUDE THE PETITIONER’S PROPOSED CREMATORY WAS NOT A CONTINUATION OF**

**THE LEGAL NON-CONFORMING USE OF A FUNERAL HOME ON PROPERTY ZONED OFFICE.**

In 1998, the City chose to exclude “funeral homes” as an approved use anywhere within the City limits after BMC had already legally established their ongoing business operations.

Tenn. Code Ann. § 13-7-208(b) provides:

(b)(1) In the event that a zoning change occurs in any land area where such land area was not previously covered by any zoning restrictions of any governmental agency of this state or its political subdivisions, or where such land area is covered by zoning restrictions of a governmental agency of this state or its political subdivisions, and such zoning restrictions differ from zoning restrictions imposed after the zoning change, then any industrial, commercial or business establishment in operation, permitted to operate under zoning regulations or exceptions thereto prior to the zoning change shall be allowed to continue in operation and be permitted; provided, that no change in the use of the land is undertaken by such industry or business.

Consequently, local governments are required to permit pre-existing nonconforming uses to continue, even if they are inconsistent with the zoning classification of the surrounding property.

Lafferty v. City of Winchester, 46 S.W.3d 752, at 758 (Tenn. Ct. App. 2000). This statute is designed to protect ongoing business operations. Custom Land Development, Inc., v. Town of Coopertown, 168 S.W.3d 764, at 775 (Tenn. Ct. App. 2004). Therefore, BMC is entitled to continue its operations as a funeral home as a legal nonconforming use in operation prior to the zoning amendment.

The Revised Zoning Ordinance provides that in addition to the principal activities expressly permitted in a particular zoning district, each permitted activity type “shall be deemed to include activities customarily associated with, and appropriate, incidental, and subordinate to” the principal activity. City of Mt. Juliet Zoning Ordin. § 3-105; V II, p. 232. Likewise, the Revised Zoning Ordinance provides that any nonconforming use may be allowed to expand

operations and construct additional facilities which involve an actual continuance and expansion of the nonconforming use. City of Mt. Juliet Zoning Ordin. § 13-102.7; V I, p. 75. Tenn. Code Ann. § 13-7-208 (c) provides:

Industrial, commercial or other business establishments in operation and permitted to operate under zoning regulations or exceptions thereto in effect immediately preceding a change in zoning shall be allowed to expand operations and construct additional facilities which involve an actual continuance and expansion of the activities of the industry or business which were permitted and being conducted prior to the change in zoning; provided, that there is a reasonable amount of space for such expansion on the property owned by such industry or business situated within the area which is affected by the change in zoning, so as to avoid nuisances to adjoining landowners. No building permit or like permission for construction or landscaping shall be denied to an industry or business seeking to expand and continue activities conducted by that industry or business which were permitted prior to the change in zoning; provided, that there is a reasonable amount of space for such expansion on the property owned by such industry or business situated within the area which is affected by the change in zoning, so as to avoid nuisances to adjoining landowners. (*emphasis added*).

Property owners whose property qualifies as a nonconforming use under Tenn. Code Ann. § 13-7-208(b) may therefore expand their business operations as long as they continue to be engaged in the same business that they were engaged in when the zoning ordinance was passed. Lafferty v. City of Winchester, 46 S.W.3d 752 at 758 (Tenn. Ct. App. 2000).

BMC had already established funeral home operations on its Property prior to the enactment of the Revised Zoning Ordinance. Therefore, the law allows BMC to continue its funeral home operations, regardless of the City Commissioners' obvious intent in 1998 to preclude the operation of funeral homes within the City limits as indicated by the Revised Zoning Ordinance, which completely removed "funeral homes" as an approved use. Moreover, pursuant to City of Mt. Juliet Zoning Ordin. § 13-102.7 and Tenn. Code Ann. § 13-7-208(b), BMC is entitled to expand its business operations to include those activities generally conducted by the funeral home industry, which include cremation services. BMC contends that the

utilization of a single cremation machine is part of the general business of operating a funeral home and is an activity customarily associated with, and appropriate, incidental, and subordinate to the principal activity of funeral home operation, analogous to embalming operations.

The central issue in this case centers on whether or not there was any material evidence before the Board from which it could reasonably conclude that the use of a single cremation machine within an existing funeral home is not a continuation and appropriate expansion of the Property's current use within the funeral home business. The Trial Court appropriately reviewed the Record of the proceedings before the Board and determined that there was no material evidence in the Record upon which the Board could reasonably have determined that the Property's existing use as a funeral home business does not permit the installation of a single cremation machine as part of that business.

To have meaning, a use which is expressly permitted by a zoning provision may impliedly include those other uses which make the permitted use available in a reasonable manner. Brunetti v. Board of Zoning Appeals of Williamson County, 1999 WL 802725 at \*7 (Tenn. Ct. App.1999). The test for determining whether a use is accessory is not whether the use is essential to the permitted use but whether the use is customarily incident to the permitted use. Id. The term "funeral homes" was never specifically defined in the zoning ordinance; therefore, the Court must give the term its natural and ordinary meaning. Lions Head Homeowners' Ass'n v. Metropolitan Bd. of Zoning Appeals, 968 S.W.2d 296, 301 (Tenn. Ct. App.1997). Deborah Moss, the City Zoning Administrator, stated in a memorandum presented to the Board that BMC is a nonconforming use and is allowed to expand. She also indicated that the City utilizes the Standard Industrial Classification Manual to determine uses and their classification, and that this Manual "lists crematories and funeral homes as the same service; therefore they are a permitted



use.” She further indicated, “The funeral home is a non-conforming use and crematories could be allowed from the manual.” V I, p. 15. The record also reflects that state regulations do not require a funeral home to obtain any additional licensing to operate a cremation machine within an existing funeral home. V I, p. 69.

Under state law, the operation of a crematory falls within the legal statutory definition of a “funeral establishment.” Tenn. Code Ann. § 62-5-101 (7) defines "Funeral establishment" as:

any business, whether a proprietorship, partnership, firm, association or corporation, engaged in arranging, directing, or supervising funerals for profit or other benefit; or the preparing of dead human bodies for burial; or the disposition of dead human bodies; or the provision or maintenance of place for the preparation for disposition; or for the care or disposition of human dead bodies;

Therefore, a business engaged in funeral directing falls squarely within the statutory definition of a “funeral establishment.”

Tenn. Code Ann. § 62-5-101 (6)(A) defines "Funeral directing" as follows:

- (i) Practice of directing or supervising funerals or the practice of preparing dead human bodies for burial by any means, other than by embalming, or the disposition of dead human bodies;
- (ii) Making of arrangements to provide for funeral services and/or the selling of funeral merchandise, and/or the making of financial arrangements for the rendering of the services, and/or the sale of such merchandise;
- (iii) Provision or maintenance of a place for the preparation for disposition or for the care or disposition of dead human bodies;
- (iv) Use of the word or term "funeral director," "undertaker," "mortician," "funeral parlor," "funeral chapel" or any other word or term from which can be implied the practice of funeral directing; or
- (v) Holding out to the public that one is a funeral director or engaged in a practice herein described;

In State ex rel. Cunningham v. Feezel, 400 S.W.2d 716 at 721 (Tenn. 1966), the Tennessee Supreme Court addressed whether the operation of a crematory falls within the statutory definition of “funeral directing.” The Court listed the abbreviated statutory definition

of “funeral directing” as “the business of preparing dead human bodies for burial by means other than embalming, or the disposition of dead human bodies; or the provision or maintenance of a place for the preparation for disposition, or for the care or disposition of dead human bodies.” The Court then concluded that this definition of “funeral directing” included the operation of a crematory. Id. The current statutory definition of “funeral directing” includes everything listed by the Feezel court and has actually expanded since that 1966 decision. It is therefore evident that in accordance with statute and its interpretation by the Supreme Court, the operation of a crematory clearly falls within the definition of “funeral directing” at a funeral establishment. Given that in 2005, 21.2% of all decedents cared for by BMC were cremated, it is obvious that the utilization of a cremation machine is a necessary part of operating a funeral home, much as the utilization of an embalming machine.

The sole purported evidence relied upon by the Appellants as material evidence to support the Board’s decision is the fact that crematories were listed as a permitted use in IS zoning in the Revised Zoning Ordinance after BMC began its funeral home operations. There is no definition of “crematories” in the Zoning Ordinance, and it does not specify whether the use classification applies to human or animal remains. Section 3-103.4 (2) of the Revised Zoning Ordinance, which is relied upon by the Appellants in their assertion that crematories may only be located within IS zoning, provides the following guidance concerning its legislative intent:

This grouping is intended to include firms engaged in conversion, processing and storage of extracted or raw materials, or in the use and/or storage of flammable or explosive materials, or manufacturing processes that potentially involve hazardous or commonly recognized offensive conditions, other than those classified as Hazardous Operations.

City of Mt. Juliet Zoning Ordin. § 3-103.4 (2);V I, p. 88. This legislative intent bears no reasonable relationship to the exclusion of a cremation machine from being utilized by a funeral

home to help the survivors of a deceased family member prepare the deceased's remains according to their wishes.

The only other indication in the record concerning the legislative intent of the City Commissioners regarding the classification of "crematory" as an Industrial use in the Revised Zoning Ordinance was the testimony of Ed Hagerty, a current Mt. Juliet City Commissioner. Mr. Hagerty testified that he was a member of the Board of Commissioners when the current Zoning Ordinance was adopted, and that it was the City Commission's intention that crematories be in an industrial zone only; however, the Record reflects that Mr. Hagerty was not a City Commissioner when the Zoning Ordinance was adopted in 1998; to the contrary, Mr. Hagerty was sworn in as a new City Commissioner on November 20, 2000. V I, pp. 138-9. Therefore, the sole testimony from which the Board concluded that crematories were intended to be located only within an industrial district was clearly erroneous.

The Appellants argue that BMC is attempting to change the use of its property to a "manufacturing" use merely because it wishes to utilize a single cremation machine to assist in preparing the deceased's remains in furtherance of its existing funeral home operations. This miscategorization is analogous to one in which an established law firm attempts to install and utilize a photocopying machine upon its premises in furtherance of its law practice. Under the Revised Zoning Ordinance, "Law Offices" are listed as permitted use under OPS (Office Professional Services) zoning district, as the Property in question is currently zoned; however, "Photocopying" is listed as a Manufacturing – Limited activity, which is not permitted within the OPS zoning. see City of Mt. Juliet Zoning Ordin. §§ 3-103.3(13) and 3-103.4(1), V I, pp. 85, 87. It is without question that a law office must be allowed to have a single photocopying machine as a continuation of the property's ongoing law firm operations, despite the fact that

“Photocopying” is specifically permitted as a “Manufacturing” use; likewise, a funeral home must be allowed to utilize a single cremation machine in furtherance of its operations in preparing human remains for final disposition.

Moreover, the creation by the City Commission of a new “crematory” use in an industrial zoning district after the “funeral home” use has been removed cannot prevent BMC from operating its funeral home business, including those activities customarily associated with the industry. Were this the case, the City Commissioners could simply revise the zoning ordinance to only permit “embalming operations” in an industrial district and effectively prevent BMC from engaging in those services, as well. The City cannot subvert BMC’s rights to continued operation and expansion of its nonconforming business under Tenn. Code Ann. § 13-7-208(c) by listing an appropriate, incidental, and subordinate associated use as a permitted use in another zoning district.

The Appellants refer to Lafferty v. City of Winchester, 46 S.W. 3d 752 (Tenn. Ct. App. 2000) in support of their position that BMC should not be permitted to utilize a cremation machine as a continuation of their ongoing business; however, the facts of that case are strikingly different from those in the case at hand. In Lafferty, the property owners owned and operated a bed and breakfast inn as a nonconforming use. Lafferty at 755. The owners then sought the city's permission to construct a 20' x 20' one-story addition to provide space for an ice machine, coolers, and storage space for the beverages. The city approved the site plan for the 20' x 20' addition; however, “without the city's knowledge, the Laffertys, going way beyond the plan they had submitted to the city, constructed a two-story, 20' x 38' addition to the inn. Once the addition was completed, the Laffertys turned it into a bar called the Green Door Pub. The pub had an outside entrance which enabled its patrons to enter and leave the pub without entering the inn.”

Id. Eventually, the owners decided to build an additional 38' x 40' banquet room. They began constructing the foundation for the new addition before they obtained a building permit; however, when the building inspector discovered that they had already started construction, he directed them to stop work until they obtained the city's approval to expand their business. Despite the stop-work order, the owners did not completely stop working. Id. The owners then submitted plans for the new addition to the board of zoning appeals. After a hearing in which numerous neighbors complained about the noise and traffic congestion already caused by the Green Door Pub, the board declined to issue the building permit. Id. at 756. The owners appealed through a common law writ of certiorari, and the trial court affirmed the board's decision. The Tennessee Court of Appeals affirmed the trial court, reasoning:

The most telling material evidence supporting the Board's action are the undisputed circumstances surrounding the construction and subsequent use of the first addition to the inn. The Laffertys portrayed this addition one way in order to obtain approval for it, and then, after obtaining approval, they used the addition for something completely different. Accordingly, the Laffertys were able to transform a one-story 20' x 20' storage addition into a two-story public bar with a separate outside entrance. The Laffertys high-handedness no doubt weighed on the Board's mind in considering their request for another addition and undermined the credibility of their explanation about their plans for the 38' x 40' addition to the Green Door Pub. It seems logical to us that at some point the Board looked at what was before it, considered the track record of the property owners, remembered what had happened with the first addition, and began to think, "We've been down this road before."

Id. at 759. The Court continued

The record contains material evidence from which the Board could have rationally concluded that the proposed addition would have further expanded the Antebellum Inn into a commercial activity quite different from its original nonconforming use—a bed and breakfast that would be able to accommodate occasional small social events.

Id. Certainly, the facts of the case at bar are strikingly opposite to those in Lafferty. BMC is not attempting to covertly transform its business into a boisterous bar or anything else “quite

different” from its existing nonconforming use; to the contrary, it is attempting to expand its funeral home services by offering cremation on site, as opposed to its current practice of transporting its decedents to another funeral home which currently utilizes a cremation machine. This does not change the scope of services offered, it merely allows those services to be provided more expeditiously, under greater control by the service provider, and on a more cost-effective basis.

## CONCLUSION

In this case, the Record of the proceedings before the Board of Zoning Appeals is completely devoid of any evidence to support its conclusion that the utilization of a cremation machine within BMC's funeral home is not a continuation of its existing nonconforming use. According to the record, the Board only relied upon two (2) "Relevant points" in making the determination to refuse the BMC's request to use a cremation machine: whether this is an appropriate expansion of a non-conforming use, and whether it was the intention of the City Commission when creating the zoning ordinance to put crematories only in an industrial zoned district. V I, p. 72. The first point was never discussed by the Board, and no evidence was presented to the Board other than the testimony of the Zoning Administrator and BMC's representatives that crematories are classified as a single use with funeral homes in the federal classification manual and with the state licensing authorities. The second relevant point was based upon clearly erroneous information presented by Mr. Hagerty concerning the City Commission at a time when he was not a Commissioner. The decision by the Board in refusing to allow the use of a cremation machine on the Property was not based on any material or substantial evidence of record and was therefore arbitrary and capricious.

Based upon the foregoing arguments and law, the judgment of the Trial Court should be upheld, and the Appellee would request an award of their attorneys' fee on appeal in accordance with Tenn. Code Ann. § 29-37-104 et.seq.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this \_\_\_\_ day of \_\_\_\_\_, 2007, mailed a true and exact copy of the foregoing Brief of Plaintiff/Appellee to **William N. Bates and Beth L. Frazer**, Attorneys for Defendants/Appellants, Farrar & Bates, L.L.P., 211 Seventh Avenue North, Suite 500, Nashville, TN 37219.

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**DAVID H. VEILE**



## **APPENDIX**



IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

STATE OF TENNESSEE,

Petitioner,

vs.

SARAH MORGENSTERN,

Respondent.

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CCA No. M2010-00283-CCA-WR-CD  
DAVIDSON COUNTY

ON WRIT OF CERTIORARI FROM  
THE DAVIDSON COUNTY CRIMINAL COURT

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REPLY BRIEF OF THE RESPONDENT, SARAH MORGENSTERN

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## INTRODUCTION

This is an appeal on writ of certiorari by the state of Tennessee from the Circuit Court of Davidson County, Tennessee. Ms. Morganstern was indicted by the state of Tennessee with misdemeanor possession of a controlled substance and felony tampering with evidence as part of a multi-count and multi-defendant indictment. Ultimately, she entered a guilty plea to misdemeanor possession of controlled substance, and the felony charge of tampering with evidence was dismissed.

Ms. Morganstern subsequently filed a motion to expunge the felony tampering with evidence charge from her record. The trial court took the matter under advisement after a hearing and ultimately granted the Respondent's motion. It is from this determination that the State seeks review through a writ of certiorari.

### **DESIGNATION OF THE RECORD**

The Technical Record in this matter is 26 pages in length and is contained in one volume. References to the technical record will be by the abbreviation "T.R." There is one transcript of testimony currently on file with the Appellate Court. All references to the record of testimony will be by the abbreviation "Vol. II" (reflecting the Roman numeral as placed thereon by the Clerk of this Court when receiving said record) and then by page number.

### **DESIGNATION OF THE PARTIES**

Ms. Morganstern will be referred to by her name or "Respondent." The state will be referred to as the State of Tennessee or the "Petitioner."



## ARGUMENT

### **MORGANSTERN IS ENTITLED TO EXPUNCTION OF THE RECORDS OF HER ARREST<sup>1</sup> FOR TAMPERING WITH EVIDENCE**

There is one maxim under our criminal justice system that supersedes all others, to wit: a person is presumed innocent unless and until a jury finds guilt beyond a reasonable doubt. The burden of proof necessary for the state to initiate criminal prosecution for any offense is relatively low. As such, the law provides for a citizen to demand the expungement of public records relating to an arrest or prosecution when the state fails to meet its burden of proof or abandons prosecution, so long as the citizen has not been convicted of a lesser-included offense. Here, the Respondent was indicted for a misdemeanor charge of simple possession and the felony charge of tampering with evidence. The Respondent accepted responsibility for the misdemeanor charge and fully complied with the terms of her probated sentence. The state dismissed the felony charge; however, the Respondent's public record, which is easily accessible by any person or potential employer with internet access, still reflects that she was arrested and prosecuted for a felony offense. Upon motion and hearing thereon, the trial court ordered the expungement of the felony charge from the Respondent's record based upon the applicable statutes and case law. The state sought review of this decision through writ of certiorari, which requires that the state prove that the trial court acted without legal authority. Under the limited standard of review in writ of certiorari proceedings, courts review a lower tribunal's decision only to determine whether that decision-maker

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<sup>1</sup> In the Petitioner's brief, it incorrectly refers to a "conviction" for tampering with evidence; however, it is undisputed that the tampering with evidence charge was dismissed. This matter involves the public records related to her *arrest* for that felony charge.

exceeded its jurisdiction, followed an unlawful procedure, acted illegally, arbitrarily, or fraudulently, or acted without material evidence to support its decision. Petition of Gant, 937 S.W.2d 842, 844-45 (Tenn. 1996) (quoting McCallen v. City of Memphis, 786 S.W. 2d 633, 638 (Tenn. 1990); Fallin v. Knox County Bd. Of Com'rs, 656 S.W.2d 338, 342-43 (Tenn. 1983); Hoover Motor Exp. Co. v. Railroad & Pub. Util. Comm'n., 195 Tenn. 593, 604, 261 S.W.2d 233, 238 (1953); Lafferty v. City of Winchester, 46 S.W.3d 752, 758-59 (Tenn. Ct. App. 1997); Hoover, Inc. v. Metropolitan Bd. of Zoning Appeals, 955 S.W.2d 52, 54 (Tenn. Ct. App. 1997); Hemontolor v. Wilson Co. Bd. Of Zoning Appeals, 883 S.W.2d 613, 616 (Tenn. Ct. App. 1994).

Under the certiorari standard, courts may not (1) inquire into the intrinsic correctness of the lower tribunal's decision, (2) re-weigh the evidence; or (3) substitute their judgement for that of the lower tribunal. Arnold v. Tennessee Bd. Of Paroles, 956 S.W.2d 478, 480 (Tenn. 1997); Powell v. Parole Eligibility Rev. Bd., 879 S.W.2d 871, 873 (Tenn. Ct. App. 1994); Watts v. Civil Serv. Bd. for Colum., 606 S.W.2d 274, 277 (Tenn. 1980); Hoover, Inc. v. Metro Bd. of Zoning App., 924 S.W.2d 900, 904 (Tenn. Ct. App. 1996); 421 Corp.v. Metropolitan Gov't of Nashville, 36 S.W.3d 469, 474 (Tenn. Ct. App. 2000).

The Respondent submits that the trial court's decision was proper and fully supported by Tennessee law.

The expungement statute provides that "[a]ll public records of a person who has been charged with a misdemeanor or a felony shall, upon petition by that person to the court having jurisdiction in the previous action, be removed and destroyed without cost to the person, if... (i) The charge has been dismissed." T.C.A. § 40-32-101(2006).

Therefore, the general rule of law is that a citizen who has been subjected by the state to criminal prosecution is entitled to have all public records destroyed if the charge has been dismissed.

An exception to this rule was added by the legislature effective May 2003, providing that “[a] person shall not be entitled to the expunction of such person’s records in a particular case if the person charged is convicted of any offense or charge, including a lesser included offense or charge.” T.C.A. § 40-32-101(a)(1)(E)(2006). The Petitioner suggests that this should be construed to include all charges within a single indictment; however, based upon the law dictating the interpretation of statutory provisions, this argument is incorrect.

A court’s primary goal in interpreting a statute is “to ascertain and give effect to the intention and purpose of the legislature.” Stewart v. State, 33 S.W.3d 785, 791 (Tenn.2000) (internal citation omitted). The best expression of legislative intent is the natural and ordinary meaning of the language used by the General Assembly in the statute. See Lipscomb v. Doe, 32 S.W.3d 840, 845 (Tenn.2000). As a general rule of statutory construction, any ambiguity in a criminal statute is construed in favor of the defendant. State v. Blouvet, 904 S.W.2d 111, 113 (Tenn.1995) (citing Key v. State, 563 S.W.2d 184, 188 (Tenn.1978)).

Our Supreme Court has held that the purpose of the expungement statute is “to prevent a citizen from bearing the stigma of having been charged with a criminal offense, where he was acquitted of the charge or prosecution of the charge was abandoned.” State v. Adler, 92 S.W.3d 397, 402 (Tenn.2002) (citing State v. Doe, 588 S.W.2d 549, 552

(Tenn.1979)) (emphasis added). Merely charging a citizen with an offense, even where no conviction results, “can have a severe impact upon his reputation.” Id.

Respondent would point to the history of the expunction statute and the amendment thereto as a clear indicator of legislative intent. Prior to the 2003 amendment, the statute did not contain the exception under subsection (a)(1)(E) that disallowed expunction if the defendant had been convicted of any charge, including a lesser-included offense. In State v. Liddle, 929 S.W.2d 415 (Tenn.Crim.App.1996), a case directly on point with our issue, the defendant was indicted on six counts of aggravated sexual battery. Liddle at 415. After consummating a negotiated plea agreement wherein he entered a guilty plea to one count of the indictment, the subsequent counts were dismissed. Id. The defendant then moved to have the dismissed counts expunged, but the trial court refused. This Court reversed, holding that the defendant was entitled to have the dismissed counts expunged. Id. Likewise, in Eslick v. State, 942 S.W.2d 559 (Tenn.Crim.App.1996), the jury acquitted the defendant of several charges but convicted him of another charge contained within the same indictment. This Court noted that it had “...previously ordered the expunction of public records of dismissed counts even though a conviction was obtained for one count in a multi-count indictment, noting that the state could not prohibit expunction by claiming that the records for the dismissed and convicting counts are intertwined when it is in the state's power to decide if multiple charges are to be brought in a single indictment.” Eslick at 560, citing Liddle. It must be noted that there were no amendments to the statute resulting from this line of cases.

In 2002, the Tennessee Supreme Court addressed a separate issue involving the expungement of lesser-included offenses. In Adler, cited supra, the defendant was indicted for aggravated child neglect. He was acquitted of the indicted offense, but was convicted of the lesser-included offense of reckless endangerment. The Supreme Court ruled that the defendant was entitled to have the records relating to the acquitted offense expunged, despite the fact that he had been convicted of a lesser included offense.

The 2003 amendment was a direct response by the legislature to Adler, as noted by this Court in State v. Gifford, 2008 WL 1813105 (Tenn.Crim.App., April 23, 2008)(perm. app. denied). “It is undisputed that the 2003 Amendment was enacted in response to the Adler decision. As noted supra, Adler addressed expungement only in the context of when a defendant is convicted of a lesser-included offense.” Gifford at \*4. Clearly, it was the expungement of the originally indicted offense after conviction its lesser-included offense that the legislature sought to remedy through its 2003 amendment. The amendment bears no relation to the expungement of dismissed counts contained within a single indictment when the defendant is convicted of a separate count therein.

Additionally, when interpreting statutes, the Supreme Court “has routinely followed the Latin maxim of *expressio unius est exclusio alterius*, meaning ‘the expression of one thing implies the exclusion of all things not mentioned.’” Adler, at 400 (citing Limbaugh v. Coffee Medical Center, 59 S.W.3d 73, 84 (Tenn.2001)); When the statute was amended in 2003, the General Assembly specifically elected to define the limitation by reference to “a particular case,” and made no reference to all cases or counts within a single indictment or other charging instrument. While the General Assembly

certainly could have specified “indictment” in the statute, they elected not to do so. This must therefore be interpreted to mean that the legislature intentionally refused to specify that the exception referenced above applies to all cases within a single indictment; rather, it applies to any charge resulting in a conviction, including any lesser included offense of any particular charge.

The Petitioner argues that the terms “case” and “indictment” must be treated as identical terms, and cites as authority a wholly unrelated statute which addresses caseload statistic reporting. It must be noted that this unrelated statute (T.C.A. § 16-1-117) is exactly the same today as it was in 2003 when the Tennessee Supreme Court decided Adler, and when this Court decided Gifford and Smith (discussed below) in 2008 and 2010, respectively. Moreover, the Petitioner cites several cases wherein courts have used the term “case” to collectively refer to all indicted offenses; however, none of the cases cited involve expungement with the exception of Steven L. Crawley v. State, an order that does not appear of record in Westlaw or Fastcase databases, which gives an indication of its lack of authority. Actually, our jurisprudence denotes a clear demarcation between the various charges within a single indictment and the indictment as a whole. An indictment may have numerous counts; however, each count of an indictment is regarded as containing the charge of a distinct and substantive offense. Esmon v. State, 31 Tenn. 14 (Tenn. 1851). As stated by our Supreme Court, “...the rule is well settled in Tennessee that each count is, in legal contemplation, a separate indictment and must contain all the averments necessary to constitute the offense sought to be charged in such count.” Usary v. State, 8 Beeler 305, 112 S.W.2d 7, 8 (Tenn. 1938) (emphasis added).

In order to prevail on this writ, the Petitioner must demonstrate that the trial court acted illegally and without legal authority when it granted the Respondent's motion for expungement; however, this simply is not the case. The Respondent would point to two recent appellate court decisions in which this Court interpreted the relevant statute and reached the same conclusion as the trial court regarding the expunction of dismissed counts within a single indictment when the defendant is convicted of another count within that same indictment.

In Gifford, this Court specifically addressed the issue at hand and construed the term "case" in T.C.A. 40-32-101(a)(1) to mean each separate count of the indictment, and held that a defendant is entitled to have records associated with dismissed counts of an indictment expunged despite being convicted of other counts contained within that indictment. Gifford at \*5. In Gifford, the defendant sought to expunge records relating to three counts of reckless endangerment which had been dismissed after the completion of judicial diversion; however, the trial court refused to expunge those records because the defendant had been convicted of DUI which was "permissibly joined" with the reckless endangerment counts in a single indictment. Id. at \*1. This Court noted that the joinder of a speeding violation, which resulted in a conviction, would prevent expungement for charges of murder, rape, robbery, kidnapping, and burglary, although the defendant is acquitted of those charges. Id. at \*5. "Joinder of offenses within a single indictment, as a general matter, is determined by the practice of the local district attorney general, and this policy varies from district to district. As such, under these circumstances, the entitlement to expungement would rest, not through the application of a uniform statute, but, rather at the discretion of the district attorney in the drafting of the

indictment. We do not believe the legislature intended this result.” Id. In Gifford, this Court examined the history and purpose of the expunction statute and correctly determined that the state’s ability to join numerous offenses within a single indictment cannot defeat a citizen’s right to have public records relating to a charge expunged when the citizen is not guilty of that charge or a related lesser-included offense. It would appear that the Supreme Court concurred in this result, as it denied the state’s application for permission to appeal.

While the Petitioner argues that the state does not have unfettered discretion in joining cases in an indictment, it seemingly ignores the impact of the permissive joinder provision of Tenn.R.Crim.P. Rule 8(b) which allows the district attorney to make the determination that offenses are “parts of a common scheme or plan” or are “of the same or similar character.” Moreover, the inclusion of multiple defendants within a single indictment is at the sole discretion of the prosecutor within the parameters of Tenn.R.Crim.P. Rule 8(c), which is extremely important in this equation because it was the inclusion of the various co-defendants in this indictment that was a chief complaint of the clerk’s office in completing the expungement. (See Vol. II, p. 8, lines 5-19, in which the clerk testifies that this expungement would involve altering the original documents instead of deleting them due to there being other co-defendants within the indictment.) As previously stated by this Court, “[t]o accept the State’s argument is to allow the district attorney general to control a defendant’s right to expungement by indicting on multiple charges by separate counts in a single indictment.” Liddle, at 415.

In a more recent decision, this Court again reached the same conclusion. In Smith v. State, 2010 WL 681412 (Tenn.Crim.App., February 25, 2010), this Court squarely



addressed this issue and cited Gifford as authority in its holding that the term “case” did not include an indictment as a whole, “but that it is fundamental that each count of an indictment represents a separate criminal charge, or case, and that a conviction under each count of the indictment requires a separate judgment of conviction. We concluded that ‘a multi-count indictment represents multiple criminal cases.’” Smith at \*5, citing Gifford. As such, the trial court’s decision in the case at bar is clearly supported by legal authority and should not be overturned by this Court.

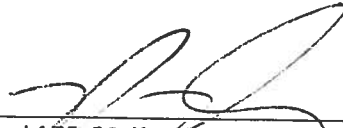
Through the innovation of the internet, any person with a credit card has the ability to obtain an official detailed background check on the Respondent directly from the Tennessee Bureau of Investigation. See <https://www.tbibackgrounds.com/toris/>. In today’s economy, gainful employment is a high commodity which must be sought and fought for by many of our state’s citizens, including the Respondent. The existence of a criminal record reflecting a felony arrest is devastating to anyone seeking a competitive professional job. “It is common knowledge that the preferment of charges against a citizen can have a severe impact upon his reputation, regardless of whether or not a conviction results.” State v. Hanners, 235 S.W.3d 609, 614 (Tenn.Crim.App.2007)(citing State v. Doe, 588 S.W.2d 549 at 552 (Tenn.1979). Here, the State of Tennessee charged the Respondent with a felony offense; however, she was and is innocent of this charge. It defies logic that the state would have the ability to permanently mar her public record by precluding her ability to expunge this charge merely by attaching it to another much less serious charge of which she was admittedly guilty. Unfortunately, her criminal record now shows an arrest for a class C felony, which any potential employer will have instant access to review and utilize when making a decision concerning her employment.

## CONCLUSION

The purpose of the expungement statute is to prevent the very outcome sought by the state; that is, to permanently stain the record of the Respondent with public records of her arrest and prosecution for a felony offense which she did not commit. It was the state that elected to prosecute the Respondent and the co-defendants on multiple charges within a single indictment, and it is disingenuous for the state to now complain that removing the dismissed offenses would be burdensome. Any ambiguity in the statute regarding “case” versus “indictment” must be construed in favor of the Respondent. In light of Gifford and Smith, and of the purpose and history of the expunction statute taken as a whole, the trial court was well within its authority to grant expungement of the records relating to the dismissed felony charge which the Respondent did not commit. As such, the Petitioner cannot meet its burden of demonstrating that the trial court acted illegally, and the trial court’s order should be affirmed.

Respectfully submitted,

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#### CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief has been forwarded by U.S. Mail, postage prepaid, to Mark A. Fulks, Assistant Attorney General, P.O. Box 20207, Nashville, Tennessee 37202, and Roger Moore, Assistant District Attorney General, Washington Square Building, Suite 500, 222<sup>nd</sup> Avenue North, Nashville, Tennessee, 37201, this the 23<sup>rd</sup> day of June, 2010.

  
David H. Veile

## **APPENDIX**