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.

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

I am a self employed partner of the law firm, Moody, Whitfield, and Castellarin at 95 White Bridge Road, Suite 509, Nashville, TN 37205.

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

I was licensed to practice law in the state of Tennessee in 1983. My Board of Professional Responsibility number is 10675.

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.

I am licensed to practice law in the state of Tennessee; Tennessee Bar number is 10675. My license was issued on October 15, 1983 and is currently active. I am not licensed in any other state.

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

I have never been denied admission to, suspended or place on inactive status by any Bar of any State.

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).

After admission to the Bar, I opened my own legal practice in October 1983 and associated with W.A. Moody and his son, W.C. Moody in December 1984. Within one year I became a partner of Moody, Moody, and Whitfield. In 1986, we added Michael M. Castellarin to our partnership and became Moody, Whitfield, and Castellarin. Between college graduation and passing the Bar, I worked in the insurance industry as either an adjustor with General Adjustment Bureau, an underwriter with Continental Insurance Company, or an insurance agent with Dobson & Johnson

Insurance Agency or Mid Tenn Insurance Agency. I also leased property for Photo-Mat Corporation during that period. While studying to pass the bar, I worked for my father at John Whitfield Chevrolet in Ashland City, TN.

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.

I have been employed continuously upon admission to the practice of law.

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 have a general civil law practice including insurance defense: 30%, probate: 15%, contracts: 20%, personal injury: 15%, and general business: 20%.

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.

After completion of law school and prior to admission to the Bar, I was introduced to W.A. Moody, a well-respected, accomplished insurance defense lawyer. Mr. Moody gave me research assignments for some of his current cases. Most of these assignments were on negligence cases. After I passed the bar, Mr. Moody continued to give me research assignments and referrals on smaller cases that he thought I could handle. I believe he was testing my commitment to the law and my work habits before offering me an opportunity to work with him and his son, W.C. Moody. In December 1984, a little more than one year after I passed the Bar, I joined the Moodys and became a partner of the firm a year later. Within two years, we added another attorney to our firm, Michael M Castellarin and became Moody, Whitfield, and Castellarin practicing at the same location for twenty seven years.

I began doing insurance defense work for the Aetna Insurance Company and St. Paul Insurance Company after joining Mr. Moody. I represented insurance companies in policy disputes. I have defended insureds in all types of negligence actions in the General Sessions Courts and the Circuit Courts in Davidson County and surrounding counties. During my career I have had jury trials in the following Tennessee counties: Davidson, Robertson, Cheatham, Montgomery, Dickson, Humphreys, Benton, Madison, Hickman, Maury, Bedford, Rutherford, Williamson, Sumner, Wilson, Cannon, Coffee, Franklin, Marion, Warren, White, Smith, Putnam, McMinn, Anderson and Sevier. I represented clients in several counties adjoining those in which I had jury trials. I have had the benefit of appearing in numerous courts and seeing many judges in action.

Early in my career, while I was handling my own cases, I also attended depositions in cases for W.A. Moody. This enabled me to see the work of many of the best trial lawyers in Middle Tennessee. Mr. Moody defended insureds in many complicated cases and it was very beneficial to see these other seasoned, experienced lawyers at work. I attended depositions in product cases, medical malpractice cases and larger personal injury cases during the first few years of my association with Mr. Moody.

While handling defense cases early in my career, I represented individual clients as well. I have defended eight or ten people who were charged with misdemeanors. I represented these clients in preliminary hearings and was able to resolve the cases with the district attorney and with the Court by either dismissals or entering pleas. I then began representing plaintiffs in personal injury cases and contract disputes. I also represented clients in divorce cases early in my career. The wide variety of cases I have handled are reflected in the cases that have gone to the Court of Appeals. I have been involved in sixteen Appellate Court cases as the lead attorney or the sole attorney for my clients.

I added probate work to my practice early in my career also. I represented clients in the appointment of conservators and the probate of wills and estates and continue to do so today.

While defending Aetna insureds, I met Gene Ward, attorney for Nashville Electric Service (NES). NES hired me to represent them in several cases over a number of years, thus adding governmental tort liability to my practice.

I have represented employers and employees in workers' compensation cases and in other work related disputes such as sex, age, and race discrimination as well as retaliatory discharge.

During my years of practice, I have represented clients in copyright disputes and disputes involving the unauthorized use of photographs. I represented a greeting card company in a dispute over a copyright as well as in a dispute involving the unauthorized use of photographs. I also represented an entertainment group in a dispute over the unauthorized use of photographs.

I have had numerous contract cases. I represented contractors and filed materialmen's liens for my clients. Many of those cases lead to lawsuits and I was involved in other types of contract disputes involving construction. I have business clients that I have represented in collections and defended in lawsuits over the sale of products. I have represented clients in personal injury suits

involving automobile negligence, medical malpractice, and products liability.

I have represented landlords in collection cases against tenants and defended tenants in suits as well.

I have defended realtors, real estate companies, and real estate closing companies in lawsuits involving the sale of real property. St. Paul Fire & Marine, now Travelers, wrote Errors and Omissions policies for real estate agents. I was able to defend those agents in Middle Tennessee in disputes involving the size of lots, the acreage sold, allegations of misrepresentation in the contract, allegations of misrepresentation in the property disclosure forms, and other allegations regarding the breach of contract in the sale of the property.

I have had jury trials on will contests and in all of the other areas of the law stated above. All of these trials in these various areas of the law have enabled me to have a good working knowledge of the Rules of Evidence and the statutory law in all of the fields in which I have worked.

I have had a transactional practice throughout my career. I started that practice by writing simple wills for clients. I formed business organizations, filing corporate charters and providing clients with advice on the formation of corporations and LLCs. Later I would represent those same clients in contract disputes. I reviewed and edited contracts for these clients and others. I often represented these same businesses in lawsuits that would sometimes follow from their business activities. I also prepared leases for commercial and residential property for various clients.

From the beginning of my career, I worked primarily on my own. I did attend depositions for W.A. Moody, but I handled lawsuits and other cases strictly on my own, although it was beneficial to have other attorneys in my office with whom to discuss cases. I was the lead attorney for my clients in the lawsuits that I have referenced above. I was the only attorney that did the preparatory work in all of the lawsuits noted above, in that I attended all the depositions and all of the motion hearings on all of my cases. In the past few years I have handled some cases in association with other attorneys and some with my partners. I handled medical malpractice cases representing plaintiffs with my partner, William C. Moody, and have handled probate matters that have gone to trial with my partner, Michael M. Castellarin. I have also been associated by other attorneys to handle the cases at trial, doing 100% of the trial work.

In 1994 specialization was approved in Tennessee. At that time, eleven years after passing the Bar, I had tried enough jury trials to become certified by the National Board of Trial Advocacy as a specialist in civil trial advocacy. I was recognized by the State of Tennessee as a civil litigation specialist, at the same time. I have maintained these designations throughout my career.

When I began my career and for many years following, no one ever mediated a case. Since mediation has become prevalent, I have been involved in more mediations than trials for my insurance clients.

The nature of my cases that have gone to the Court of Appeals are a good indication of the various type of cases that I have handled. I was the sole attorney, preparing 100% of the work in

all these cases unless noted otherwise:

Riley v. Aetna Casualty & Surety, 729 S.W.2d 81 (Tenn. 1987) was a worker's compensation case. I was the attorney that tried the case although my name and W.A. Moody's name appear on it. I represented the employer and the issues were notice, the time of maximum medical improvement and the award of permanent partial disability.

Lovell v. Nashville Electric Service, 733 S.W.2d 876 (Tenn. 1987) was a case I defended Nashville Electric Service in a worker's compensation type claim and the issue was whether the employer was entitled to setoffs for employer funded benefits. I was the sole attorney for my client.

Allstate Insurance Co. v. Brooks and Merritt, unreported. *See* 1988 WL 60495(Tenn.Ct.App.) involved questions of insurance coverage after a homeowner shot a garbage man. I represented the Aetna Insurance Company. Some of the issues were the death of a party before final judgment and the timing of an appeal.

Bartley v Bartley, unreported. *See* 1988 WL 136674 (Tenn.Ct.App. 1988). I represented a husband in a divorce action that was tried in Wilson County. It was appealed by the other party on the issue of the property divison. I was the sole attorney for my client.

Goodman v Phythyon, M.D., 803 S.W.2d 697 (Tenn.App.1990) was a medical malpractice case. I was the lead attorney representing the plaintiff. The issue on appeal was a question of the expert's ability to give testimony regarding the standard of care.

Howell v The Metropolitan Government of Nashville and Davidson County through the Electric Power Board, unreported. *See* 1991 WL 66432 (Tenn.Ct.App.). I was the sole attorney representing Nashville Electric Company. This was a governmental tort liability case appealed on numerous issues of duty and evidence.

Gentry v Walls, unreported case at 1991 WL 254561 (Tenn.Ct.App.). This was an automobile injury case. As the sole attorney, I successfully appealed the case on an improper jury charge.

Killebrew v Killebrew, unreported at 1994 WL 176926 (Tenn.Ct.App.). This case involved a divorce decree and other domestic matters. I appealed seeking a modification of a final decree.

Frank Collier Auction & Realty Co. v. Rice and Holland, unreported case 1997 WL 71817 (Tenn.Ct.App.) I handled the case for the insurance company at the appellate level. The issues involved real estate contracts and real estate law.

Carver Plumbing Co., Inc. v Beck, unreported 1998 WL 161112 (Tenn.Ct.App.). I represented the plaintiff in a dispute with his prior attorney over malpractice involving the statute of limitations and summary judgment.

Holt v Holt, 995 S.W.2d 68 (Tenn.1999). I represented Vicky Lewis as the administrator of the estate for the deceased plaintiff. The case involved a divorce decree and an insurance contract

for the proceeds of the life insurance policy.

First Deposit National Bank v Quach, unreported 1999 WL 371287. I represented a Cambodian client and attacked the service of process by which a default judgment was granted.

Tinkham v Beasley, unreported 2000 WL 1727780 (Tenn.Ct.App.). I represented the plaintiff in a real estate property contract dispute. While I lost the case in the Court of Appeals, Judge Koch wrote a dissenting opinion agreeing with my position.

Wright v Quillen, 75 S.W.3d 413 (Tenn.App. 2001) was a dispute over the distribution of marital property and the time within which one could bring such an action. I handled the initial hearing, but not the appeal.

Vanderbilt University v Kafiristan Blokes Partnership, unreported 2009 WL 2957927 (Tenn.Ct.App.) involved the lease of property and a countersuit for breach of contract and landlord and tenant law. I was the lead attorney and the attorney on the appeal.

Grimes v Cornell, unreported 2011 WL 2015519 (Tenn.Ct.App.) was a will dispute and the issues on appeal involved evidentiary matters. I was the lead attorney.

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

This question is included word for word in question #8, so I answered it above.

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 not served as a mediator, arbitrator, or judicial officer.

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

I have not acted as a guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

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

attention of the Commission.

I have described my legal experience fully in all responses in this application.

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 a judgeship to the Judicial Nominating Commission.

EDUCATION

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

University of Tennessee, Knoxville – attended September 1969-June 1970 – no degree; transferred to David Lipscomb College in order to live at home to save money because I was responsible for paying for my education.

David Lipscomb College – September 1970-June 1973 – Bachelor of Science degree in Business Management

Nashville School of Law – September 1978-June 1982 – Doctor of Jurisprudence degree.

I was employed at various jobs while acquiring my education as I was responsible for payment of my education.

PERSONAL INFORMATION

15. State your age and date of birth.

I am 60 years old and was born on July 29, 1951.

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

I have always lived in the State of Tennessee, born in Nashville, 60 continuous years.

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

I have lived in Williamson County with my wife of 26 years and children since January, 1998; 13+ years.

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

I am registered to vote in Williamson County.

19. Describe your military Service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

I have not served in the military.

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

No.

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No.

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

I have never been disciplined or cited for breach of ethics or unprofessional conduct by any court or other organization.

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.

I was a party to a divorce. My ex-wife filed for divorce in Davidson County Circuit Court, docket number 80D-2992 which was dismissed for lack of prosecution. I filed for divorce in Davidson County Circuit Court, docket number 83D-2153. The divorce was granted to me on July 15, 1983 on the grounds of irreconcilable differences.

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.

Harpeth Hills Church of Christ; Big Brothers of Nashville – board member; Lipscomb Alumni Association, University of Tennessee Parent Association, Tennessee Historical Society.

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.

Continuously for the past ten years and earlier, I have been a member of the Tennessee Bar Association and the Nashville Bar Association.

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

I was certified as a Specialist in Civil Trial Advocacy by the National Board of Trial Advocacy on June 1, 1994 and continue to hold that certification.

I was certified as a Civil Litigation Specialist by the Tennessee Commission on Continuing Education Specialization in 1994 and continue to hold that certification.

I received an AV Preeminent rating by Martindale-Hubbell in 2010.

I was named a Super Lawyer in the publication, "Super Lawyers" in 2009, 2010, 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.

None

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

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.

Please see the attached brief in support of a motion for summary judgment and two appellate briefs. The brief for the motion for summary judgment and the appellate brief on the Vanderbilt case are entirely my personal work. The appellate brief on the Nelson Estate is all my work, but I did have the benefit of some legal research prepared by my partner in filing an earlier brief in the case.

ESSAYS/PERSONAL STATEMENTS

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

The practice of law is a privilege that carries a great deal of responsibility and duty to fellow citizens. In the same regard, I view the office of a judge as a public service and believe I have the qualifications to hold such an office. I would like the opportunity to be a public servant and to give something back to the community and the law profession beyond what I have achieved thus far in the representation of private clients. The office of a judge is one of the highest callings of public service. Judges should be of the highest integrity and have a good work ethic to help insure that this country and this judicial district is a place where the law is equally applied to all persons. As a lawyer, I have helped many clients and as a judge, I would be able to help the larger community.

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 believe in equal justice under the law. I represented pro bono clients through the Nashville Pro Bono Program and on my own accord by helping clients unable to pay. I assist people of many races and religions. I represented immigrants sued over failure to pay car notes and over the interpretation of contracts. I have represented Muslims, Somalis, Egyptian Coptic Christians, Nigerians, Iranians, and African Americans. I successfully represented a gay man in a will dispute with his estranged father. I represented a Cambodian in a debt dispute that went to the Court of Appeals. While not successful in my appeal, I convinced the plaintiff that my client was in the right and the debt was forgiven. I have never refused a client due to race, gender,

ethnicity, religion or sexual orientation. I have always wanted to help and represent people in whose cases I believe.

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

The judgeship I seek covers the geographic area of Williamson County, Hickman County, Lewis County, and Perry County. The Judicial District has four judges who hear Circuit and Chancery cases. These judges share in the workload of tort cases, domestic cases, probate cases and criminal cases. Based on my experience, I would be an asset in the tort cases, contract disputes, landlord-tenant suits, real estate law and probate matters. My experience would be an asset in domestic cases also and with preparation, I can preside over criminal cases as well. During my career, I have tried jury trials in Hickman and Williamson Counties before Judges Martin and Easter. I tried two bench trials, one each before Judge Bivins and Judge Beal in Williamson County. I have had a few cases in Perry County defending the power utility company which did not go to trial.

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)***

If I were appointed to this judgeship, I would seek opportunities to speak at civic organizations and schools in an effort to help educate the public about the law and the value of lawyers to the community. I deeply regret the changes in the past few years in the amount of respect the public has for attorneys and the law. Our country was founded by lawyers. The founding documents were written primarily by lawyers. The belief that all people are subject to the law and bound by the law is one of the greatest assets of our country.

While my community service involvement in the past five years has been limited to church and neighborhood activities, I was very active in charitable organizations in the past ten years. I was a member of West Nashville Kiwanis from 1988 until 2000, serving as Secretary for two years and President for one year. I later joined the Board of Big Brothers of Nashville, one of Nashville's oldest charity and community organizations. (It is often confused with Big Brothers and Big Sisters.) I served as President of the organization from 2001-2002, later chairing the Christmas basket committee for two years and assisting for several more. I am still on the Board, but I have not been active in the organization recently.

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)***

The greatest asset that I could bring to the judgeship is my experience as an attorney. I have

been privileged to practice law for 27 years in a small office with three other attorneys. I am self motivated wanting to please my clients and be proud of my work product which leads to a good work ethic. I believe that my experiences as a husband for 26+years and father would be an asset in the judgeship. Just the experience of raising two children to adulthood and all the experiences that parenthood entails is eye-opening and would enable one to be a better judge. Being involved in West Nashville Kiwanis and Big Brothers of Nashville and a church has enabled me to experience a wide variety of situations and an assortment of individuals and their various needs beyond legal needs. All of these experiences have helped me to understand people. The ability to sympathize with and understand people would be a real asset in any judge. My legal work is done out of a desire not only to make a living but also to help my clients. I am proud of the assistance that I have provided to the people that I have represented; and I am even more proud of those who have shown their thanks by sending me letters of appreciation. I have attached a sample of those letters to this application.

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)***

It is the duty of a Circuit Court Judge to uphold the law even if he personally disagrees with the substance of the law at issue. I was deeply disappointed in two appellate rulings against my clients and my opinion of the law.

In *Tinkham v Beasley*, 2000 W.L. 1727780 (Tenn.Ct.App.), I represented the plaintiffs who sued on a real estate contract. The Court of Appeals held that my clients had not suffered any damages and reversed the Circuit Court decision. Justice Koch wrote a dissenting opinion in favor of my clients.

In *Holt v Holt*, 995 S.W.2d 68 (Tenn. 1999), I represented the named beneficiary of a life insurance policy. The deceased had been ordered to obtain life insurance to secure his child support obligations. He did not follow the Court order. He later obtained a life insurance policy and named another person as the beneficiary. In what I viewed to be a violation of the law of contracts, the Supreme Court determined that the mother and child were entitled to the proceeds of the life insurance policy.

I advised my clients in both cases that we all must abide by the Court's decision and the law.

Attorneys may soon face this conflict with the limitation of damages placed on personal injury lawsuits. In my opinion, the jury should determine the extent of damages and make any award them deem appropriate.

However, as a judge, even though I may disagree with the law, I *will* uphold 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. Lewis Moorer, Retired Human Resource Manager; 812 Sneed Rd W., Franklin, TN 37069. (615) 372-0266.
B. William F. Long, Jr., Attorney; 5214 Maryland Way, Brentwood, TN 37027. (615)376-2634.
C. Reggie Widick, Business Owner: Miracle Ear; 1022 Deep Woods Trail, Brentwood, TN 37027. (615) 790-3821.
D. Culwell E. Ward, Attorney; 1720 Parkway Towers Rd., Nashville, TN 37219. (615)244-0554
E. Scott A. Derrick, Attorney; 315 Deaderick St., Nashville, TN 37238. (615) 244-4994 x262.

AFFIRMATION CONCERNING APPLICATION

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

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

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

Dated: ~~September 15, 2011~~. Sept. 15, 2011

Signature

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

TENNESSEE JUDICIAL NOMINATING COMMISSION

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

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY

WAIVER OF CONFIDENTIALITY

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

John L Whitfield, Jr.
Type or Printed Name

Signature

September 15, 2011
Date

10675
BPR #

IN THE THIRD CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE

VANDERBILT UNIVERSITY, Plaintiff, VS. KAFIRISTAN BLOKES PARTNERSHIP d/b/a THE PRINCETON REVIEW OF TENNESSEE, and F. WADE McKINNEY, Individually and d/b/a THE PRINCETON REVIEW OF TENNESSEE, Defendants.	)	No. 05C-2025

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Comes the Plaintiff Vanderbilt University and would show unto the Court as follows for its Memorandum of Law in support of its Motion for Summary Judgment:

The parties entered into a rental agreement in 1998. According to the terms of the agreement the Defendants were to pay rent for office space provided by the Plaintiff on 21st Avenue South in Nashville, Tennessee. See, Exhibits 1, 2 and 3 of the Deposition of Wade McKinney. The Defendants wanted the office space to operate a business known as The Princeton Review of Tennessee. The Princeton Review provided educational services. According to Wade McKinney, The Princeton Review was focused on assisting students in the preparation for standardized tests. It prepares high school students for the SAT and the ACT. It prepares college students for the MCAT for medical school and the LSAT for law school. According to Mr. McKinney there is no documentation to show the sales of The Princeton Review classes to high school students as opposed to college students. See, Deposition of Wade McKinney, pages 73-74.

The agreement between the parties was amended in writing to include a term that the Landlord agreed to work with the Tenant to develop acceptable signs for the interior and exterior of the building. See, Exhibit 3 to Wade McKinney's Deposition.

During the term of the lease (from 1998 through 2005) the parties met to discuss signage and reviewed various proposed plans. See, Exhibits 4, 5 and 6 to Wade McKinney's Deposition. See, Deposition of Wade McKinney, pages 27 – 37. However, the parties did not meet to discuss signage after 2002 even though the Defendants continued to occupy the premises through 2005. See, Deposition of Wade McKinney, page 32, lines 4-8.

The Defendants failed to pay rent according to the Lease Agreement in February, March and April of 2005 leaving an arrearage, after all credits were given, of $12,692.34 in unpaid rent and related charges. See, Affidavit of Jo Anne Corbitt. The Defendants admit that it did not pay rent as set out in the lease. See, deposition of Wade McKinney, page77, line22 to page 78, line 9.

The Plaintiff originally filed an action for unpaid rent in the General Sessions Court. Now, the case is before the Circuit Court on the original Complaint for unpaid rent, fees, interest and attorney's fees according to the terms of the lease, and the Defendants' denial of any liability to the Plaintiff in a counterclaim against the Plaintiff for alleged damages from a breach of contract for the failure to provide signage. See, Answer and Counter-Claim and Amended Counter-Complaint. The Amended Counter-Complaint was filed on July 28, 2005. Later, on November 28, 2005, an Answer and Counter-Claim was filed. In both pleadings the Counter-Claim is based on the alleged breach of the Plaintiff for its obligation to allow the Defendants to place signage on the premises and about the premises.

The Amended Counter-Complaint filed in July alleged damages as a result of the Plaintiff's breach of contract regarding signage in the amount of $100,400.00. In his Answers to Interrogatories, Wade McKinney alleged damages to the defendants in the amount of $126,000.00.

In Wade McKinney's Amended Counter-Complaint, he alleged in paragraph 14 an apparent basis for his damage claim. The Defendant alleged an overall lost opportunity case based on losing one enrollment per month during the seven-year term of the lease. The Defendants then alleged that one advertisement per week in the school newspaper, *The Vanderbilt Hustler*, would have cost $142,800.00. Yet, the Amended Counter-Complaint sought damages of $100,400.00. See, Amended Counter-Complaint. However, the defendants did not actually pay this amount for advertising. See, Exhibits 8-12 to McKinney Deposition—Tax Returns.

In Wade McKinney's Responses to the Plaintiff's First Set of Interrogatories, Mr. McKinney answered as follows on how he computed his loss of income, "Damages were calculated on the basis of obtaining substitute advertising to replace the signage that Vanderbilt never provided. This was computed by multiplying the cost of advertising in *The Hustler* by the number of weeks during which Vanderbilt was required but failed to provide such signage."

It is Vanderbilt University's position that it was not "required" to provide signage or to agree to whatever signage the Defendants desired. Rather, the terms of the agreement are that the parties would work together to arrive at acceptable signage. However, for this motion the defendants' allegations can be considered true.

From the pleadings, the Responses to Interrogatories, and the Deposition of Wade McKinney, it is clear that the Defendants cannot prove any damages as a result of a lack of signage on the premises leased by the Defendants. Additionally, it is undisputed that the Defendants failed to pay rent according to the terms of the lease. For both of these reasons, the Plaintiff is entitled to summary judgment in this case. This is true even if it is assumed that Vanderbilt University breached the contract by failing to allow signage as alleged by the Defendants for the purposes of this motion. In *Overstreet vs. Shoney's, Inc.*, 4 SW3d 694, 703 (Tenn. App. 1999), the Middle Section of the Court of Appeals stated: "Damages cannot be based on conjecture or speculation. Speculative damages are prohibited when the existence of damages is uncertain." So, it is not a question of the amount of damages being uncertain, but whether or not the fact of damages is speculative that is determinative.

In 25 U.S.C.S. §26 Damages it is stated, "The rule applicable in actions of contract or in actions of tort, is that uncertain, contingent, or speculative damages may not be recovered."

In *Baker v. Riverside Church of God,* 453 SW2d 801, the Court of Appeals held that if a party failed to fulfill a contract it cannot be held liable for remote, contingent and uncertain consequences or for speculative or possible results which may have ensued from his breach." The Court of Appeals cited this same rule in *Maple Manor Hotel, Inc. vs. Metro Gov't., etc.*, 543 SW2d 593 (Tenn. App. 1975).

In the present case, the damages claimed by the Defendants are uncertain, remote, and speculative. The Defendants have no proof of actual damages. The Defendants cannot state or prove how many students they did not get because of a lack of signage nor can they state how many students they would have had if the signs had been to their satisfaction.

The Defendants basis for the computation of damages is faulty as well. The Defendants did not pay for advertising in the amount of $126,000.00 or $100,400.00. In fact, the tax returns provided by the Defendants and made an exhibit to his deposition (see, Exhibits 8-12), show the actual advertising expenses incurred by the Defendants. These advertising costs were not paid to a particular advertiser. In fact, in many of the years the tax returns show that the less spent on advertising the greater the gross receipts. This fact was discussed in the Deposition of Wade McKinney on pages 99 – 110.

Moreover, the Defendants do not have any records to show how many students they had during the terms of the lease. The Defendants do not have any records to reflect what subjects were taken by the students. The Defendants do not have any records to reflect from where the students came. The Defendants do not have any records to reflect how the student learned of the Defendants' business. The Defendants do not have proof that they lost students from a lack of having signage about the building.

The claim for damages by the Defendants is pure speculation. It is not grounded in any fact whatsoever. There is absolutely no proof of actual damages suffered by the Defendants and any claim of damages in this case by the Defendants is pure speculation.

Damages are an essential element of the Defendants' claim. Vanderbilt has affirmatively negated this essential element of the Defendants' claim and is entitled to summary judgment. See, *Staples vs. CBL & Assocs.,* 15 SW3d 83 (Tenn. 2000). Vanderbilt is entitled to judgment as a matter of law since it has shown that the Defendant cannot establish this essential element of its case. See, *Brown v. JC Penney Life Ins. Co.,* 861 SW2d 834 (Tenn. App. 1992).

For all of these reasons, the Plaintiff is entitled to summary judgment in this matter.

Respectfully submitted,

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IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION

VANDERBILT UNIVERSITY, Plaintiff/Appellee, vs. KAFIRISTAN BLOKES PARTNERSHIP d/b/a THE PRINCETON REVIEW OF TENNESSEE, and F. WADE McKINNEY, Individually and d/b/a THE PRINCETON REVIEW OF TENNESSEE, Defendants/Appellants.	)	COA NO. M2008-01568-COA-R3-CV

BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF CONTENTS..... I

TABLE OF AUTHORITIES II

STATEMENT OF THE FACTS 1

LAW AND ARGUMENT 4

CONCLUSION 13

CERTIFICATE OF SERVICE 14

TABLE OF AUTHORITIES

Cases

Baker v. Riverside Church of God, 453 S.W.2d 801 (Tenn. App. 1970)..... 10

Brown v. JC Penney Life Ins., Co., 861 S.W.2d 834 (Tenn. App. 1992) 10

Byrd v. Hall, 847 S.W.2d 208 (Tenn. 1993) 4

Conaster v. Clarksville Coca Cola Bottling Co., 920 S.W.2d 646, 647 (Tenn. 1995) 12

Cummings v. McCoy, 22 Tenn. App. 681, 691, 125 S.W.2d, 509 (Tenn. App. 1938)..... 7

Godfrey v. Ruiz, 90 S.W.3d 692, 695 (Tenn. 2002) 12

Hannan, et al. v. Alltell Publishing Co., No. E2006-01353-SC-R11-CV January 8, 2008 session 10

Maple Manor Hotel, Inc. vs. Metro Gov't, etc., 543 S.W.2d 593, 598 (Tenn. App. 1975) 10

McCain v. Kimbrough Construction Co., Inc., 806 S.W.2d 194 (Tenn. Ct. App. 1990) 7

Overstreet v. Shoney's, Inc., 4 S.W.3d 694, 702 (Tenn. App. 1999) 10

Roy McAmis Disposal Service, Inc. v. Hiwassee Systems, Inc., 613 S.W.2d 226, 228 (Tenn. Ct. App. 1979) 7

Treatises

Tennessee Rules of Civil Procedure, Rule 56.04..... 4

Volume 7, *Tennessee Jurisprudence*, Contracts..... 6

Volume 22 *Tennessee Practice* – Contract Law and Practices 4

Volume 54 A.L.R. 4th, 591 § 21 Breaches Related to Signs and Advertising 7

I. STATEMENT OF THE FACTS

The parties entered into a lease for the first time on April 8, 1998. See Vol. I, Designated Record, page 108, ¶ 2, Second Amended Complaint. Later, the parties entered an agreement to lease additional space on or about April 1, 2000. See Vol. I, Designated Record, page 108, ¶ 2, Second Amended Complaint. Both leases were written so that both would terminate on April 14, 2005. See Vol. I, Designated Record, page 108, ¶ 3, Second Amended Complaint. Both leases required monthly payments of rent and other charges that were subject to adjustment pursuant to the terms of the lease. See Vol. I, Designated Record, page 108, ¶ 4, Second Amended Complaint.

On one of the leases, the parties caused the following term to be handwritten on the document:

> "48. Signage. Landlord agrees to work with tenant to develop acceptable interior (lobby) and exterior (front of bldg. on 21st Ave.) signage."
>
> See Vol. I, Designated Record, page 119, Second Amended Complaint.

The second lease contained the following handwritten term:

> "48. Signage. Landlord agrees to work with tenant to develop acceptable interior (lobby) and exterior signage."
>
> See Vol. I, Designated Record, page 131, Second Amended Complaint.

The record does not reflect who actually wrote the handwritten term regarding signage on either of the leases. See Vol. II, Designated Record, page 176, Deposition of Wade McKinney, page 25, lines 9-10.

The parties met together on three occasions where Mr. McKinney (the Appellant) presented proposals for signage that he desired to place outside the building. See Vol. II, Designated Record, page 176; Deposition of Wade McKinney, lines 17-21, page 27. The first meeting to develop signage occurred sometime in 1998. See Vol. II, Designated Record, page 176, Deposition of Wade McKinney, page 27, line 17 to page 28, line 9. Vanderbilt was not willing to agree to the first proposal because of the suggested color. See Vol. II, Designated Record, page 180, Deposition of Wade McKinney, page 41, line 4 to page 49, line 17.

The second meeting where Mr. McKinney presented a proposal for exterior signage to Vanderbilt occurred on April 5, 2000. Vanderbilt rejected that proposal because the proposed signage was not properly secured. See Vol. II, Designated Record, pages 181-182, Deposition of Wade McKinney, page 47, line 21 to page 51, line 1.

The third and final meeting between the parties to develop agreeable signage occurred in October 2002. See Vol. II, Designated Record, page 177 Deposition of Wade McKinney, page 32, lines 4-28. Vanderbilt turned that proposal down. Mr. McKinney stated in his deposition that he did not know the reason for the rejection of his proposal on that date. See Vol. II, Designated Record, page 185, Deposition of Wade McKinney, page 61, line 10 to page 62, line 7. Mr. McKinney testified in his deposition that at some stage of the dealings between the parties, Vanderbilt offered to approve a plan if Mr. McKinney purchased the entire awning for the front of the building. See Vol. II, Designated Record, page 178, Deposition of Wade McKinney, page33, line 4 to page 35, line 20.

Mr. McKinney continued to lease office space from Vanderbilt until April 2005. Mr. McKinney stopped paying the rent that was due or failed to pay the rent that was due for

February, March and April of 2005. See Vol. II, Designated Record, page 168, Affidavit of JoAnne Corbitt. Mr. McKinney's right to operate the franchise, Princeton Review, was terminated in late 2005 according to his deposition testimony and Mr. McKinney and the franchisor became involved in a lawsuit about the termination and other matters having to do with withholding payments. See Vol. II, Designated Record, pages 186-187, Deposition of Wade McKinney, page 66, line 19 to page 72, line 16.

II. LAW AND ARGUMENT

Summary judgment is appropriate when the moving party can show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. See Tenn. R. Civ. P., Rule 56.04; Byrd v. Hall, 847 S.W.2d 208 (Tenn. 1993). In this case the trial court determined that the defendants (hereinafter referred to as "Mr. McKinney") breached the lease with the plaintiff (hereinafter referred to as "Vanderbilt") and failed to pay the rent as required in the lease. The fact that the parties never agreed on acceptable signage did not constitute a breach of the lease on the part of Vanderbilt. The damages claimed by Mr. McKinney are uncertain, remote and speculative. The court granted summary judgment to Vanderbilt on its case against Mr. McKinney and in Vanderbilt's favor on Mr. McKinney's countersuit. See Order Granting Summary Judgment, Vol. II, Designated Record, page 238.

1. The trial court was correct in determining as a matter of law that Mr. McKinney breached the lease with Vanderbilt. Vanderbilt did not cause the first material breach of the agreement relating to signage. Vanderbilt's failure to agree on signage did not constitute a material breach of the lease. Vanderbilt negotiated in good faith concerning the signage. See Statement of Issues on Appeal, Nos. 1 and 2, Vol. II, Designated Record, page 249.

The failure of Vanderbilt to agree on signage did not constitute a material breach of the contract. The object of the parties making the contract was for Mr. McKinney to lease office space from Vanderbilt to operate his business, The Princeton Review. Vanderbilt substantially complied with the contract and provided the space for which Mr. McKinney bargained. Volume 22 Tennessee Practice - Contract Law and Practice, § 11:12 (2008), states as follows:

> A material breach depends on the gravity of the infraction and the general rule is that rescission is not appropriate for slight or casual breaches. The concept applies to breaches so substantial and fundamental as to defeat the object of the parties making the agreement. Material breach and substantial performance are frequently opposite sides of the same coin; if a party has substantially performed, any breach by the party will be immaterial and conversely if a party has committed material breach any performance by that party cannot be substantial.

Vanderbilt substantially complied with the contract and was not in breach of the contract for its inability to agree with Mr. McKinney on acceptable exterior signage.

The contract did not require Vanderbilt to agree with any proposal submitted by Mr. McKinney, rather the agreement was to work with each other to develop acceptable signage. See Vol. II, Designated Record, page 119 and 131. Vanderbilt fulfilled those terms. Vanderbilt met with Mr. McKinney on the three occasions in the record where Mr. McKinney actually presented proposals for exterior signage. The first meeting was in 1998. Mr. McKinney's proposal was rejected on that occasion because his proposal for exterior signage was the wrong color. The second meeting occurred in April of 2000. Mr. McKinney's proposal was rejected on that occasion for safety reasons because his proposed exterior signage could not be properly secured to the building. See Vol. II, Designated Record, pages 176-182, Deposition of Wade McKinney. The third meeting between the parties happened in October 2002. While the record is not clear on the reason for Vanderbilt's rejection of the proposal, the record does show that it made suggestions for acceptable signage that were declined by Mr. McKinney. For example, Vanderbilt offered to approve a plan if the defendant purchased the awning. See Vol. II, Designated Record, page 178; Deposition of Wade McKinney, page 33, line 4 to page 35, line 20. Moreover, Mr. McKinney's Affidavit makes reference to Vanderbilt's suggestion that Mr. McKinney accept

the use of vinyl letters on the window of his space for exterior signage. Mr. McKinney rejected that proposal. See Vol. II, Designated Record, page 227, ¶ 3.

It is undisputed that Mr. McKinney made no further attempt to meet with Vanderbilt to develop acceptable exterior signage after October 2002. However, Mr. McKinney continued to lease the premises until the end of the term of the leases in April 2005. In fact, Mr. McKinney paid rent for the term of April 2002 through April 2003, April 2003 through April 2004 and he only failed to pay the rent for February, March and April of 2005 when the lease terminated. See Vol. II, Designated Record, page 168, Affidavit of JoAnne Corbitt.

Mr. McKinney cannot complain that Vanderbilt's failure to agree with him on acceptable signage constituted a material breach of the lease. "The acceptance of a benefit under a contract with knowledge of a breach thereof ordinarily constitutes a waiver of wrong," See Vol. 7, Tenn. Juris, Contracts, § 77. Mr. McKinney made no effort after October 2002 to meet with Vanderbilt with proposals on outside signage yet he continued to pay the rent. He has waived any complaint of a breach, if any existed. Vanderbilt submits that it did not breach the contract because it made efforts to work with the defendant whenever he submitted proposals. Mr. McKinney's proposals were not acceptable and he was not willing to follow the proposals of Vanderbilt. Vanderbilt substantially performed its duties under the contract and any complaint that Mr. McKinney had regarding its failure to develop acceptable signage fails to constitute a material breach of the contract.

Mr. McKinney has argued that his failure to pay rent was justified because Vanderbilt breached the contract since it failed to agree with him on acceptable outdoor signage. Neither the facts nor the law support Mr. McKinney's contention.

In his brief, Mr. McKinney cited the case of Roy McAmis Disposal Service, Inc. v. Hiwassee Systems, Inc., 613 S.W.2d 226, 228 (Tenn. Ct. App. 1979). Mr. McKinney stated in his brief that McAmis supported his position that, "A party who violates a material provision of a contract will not be heard to complain of a later violation by the other party to the contract." See Defendant/Appellant F. Wade McKinney's Brief on Appeal, pages 15-16. However, the actual holding in that case was as follows:

> The party who violates a material provision of a contract will not be heard to complaint of a later violation of a similar nature (emphasis added) by the other party to the contract.
>
> Cummings v. McCoy, 22 Tenn. App. 681, 691, 125 S.W.2d 509 (Tenn. App. 1938).
>
> See Roy McAmis Disposal Service, Inc. v. Hiwassee Systems, Inc., 613 S.W.2d 226, 228 (Tenn. Ct. App. 1979)

First Vanderbilt submits that its inability to agree with Mr. McKinney on acceptable signage was not a violation of a material provision of the contract, and even if it was, it would not be a violation of a similar nature to Mr. McKinney's failure to pay rent. While no case in Tennessee could be found on this point, Vol. 54 A.L.R. 4th, 591 § 21 Breaches Related to Signs and Advertising, stated that, "Courts have ruled that breaches of lease restrictions on signs related to leased premises are of minor importance and not serious enough to cancel a lease." So Mr. McKinney's reliance on Roy McAmis Disposal Service, Inc. v. Hiwassee Systems, Inc. is misplaced.

Mr. McKinney cited the case of McCain v. Kimbrough Construction Co., Inc., 806 S.W.2d 194 (Tenn. Ct. App. 1990) for the proposition that the first breach doctrine applies even if the breach is a violation of the implied contractual duty of good faith. See Defendant/Appellant, F. Wade McKinney's Brief, page 16. The McCain case involved a

subcontractor brick mason who was not given notice when his contract was terminated, and the court ruled that a party who materially (emphasis added) breaches first is not entitled to damages stemming from the other parties later material breach. That case is not on point because Vanderbilt has not materially breached the contract with Mr. McKinney and, in fact, has not breached the contract at all. Vanderbilt fulfilled its duty to work with Mr. McKinney to develop acceptable signage. Mr. McKinney chose to cease making proposals in October 2002 and continued leasing the premises through April 2005. Mr. McKinney breached the contract when he failed to pay rent for February, March and April of 2005. See Vol. II, Designated Record, page 168, Affidavit of JoAnne Corbitt.

2. The trial court was correct in determining as a matter of law that the defendants claimed damages are uncertain, remote and speculative. Statement of Issues on Appeal No. 3. See Statement of Issues on Appeal, Vol. II, Designated Record, page 249. Mr. McKinney does not know how many students he lost.

Unless it is determined that Vanderbilt breached the lease with Mr. McKinney, no damages would be recoverable in any event. Nonetheless, Mr. McKinney's claim for damages are uncertain, remote and speculative. Mr. McKinney claimed that he suffered damages because he was unable to have exterior signage to advertise his services. In his brief, Mr. McKinney makes an unsupported claim that everyone knows that advertising increases sales and increases one's business profits. See Appellant Brief of McKinney. However, there are no citations to the record for this statement. The fact that one advertises inside or outside with a sign or otherwise is no proof that one's profit will be increased and there is nothing in the record to support that contention. In fact, Mr. McKinney was actually advertising throughout the entire term of the lease. See Vol. II, Designated Record, pages

194-197; Deposition of Wade McKinney, page 99, line 11 to page 111, line 3. Moreover, Mr. McKinney cannot show any causal connection between a lack of outdoor signage on his leased premises and a loss of business.

In Mr. McKinney's brief he has stated that he need not prove exactly how many students he lost, but only prove, with reasonable certainty, that he lost at least one. See Defendant/Appellant F. Wade McKinney's Brief and Appeal, page 12. Mr. McKinney must be able to prove that at least one person would have taken one of the offered courses if he saw the outdoor signage, and did not take any courses from Princeton Review simply because he did not see outdoor signage advertising Mr. McKinney's service. Vanderbilt submits that there is no credible evidence of that fact nor could there be. Princeton Review provided review courses for students who were preparing to take the SAT and ACT for high school students and MCAT and LSAT for college students. It is unbelievable that credible testimony could be produced from a student who would swear that he failed to take the Princeton Review for one of those tests because he did not see any outdoor signage on 21st Avenue South. This is especially so when it is not clear what the outdoor signage would say or whether or not it would attract the attention of anyone. Most importantly, Mr. McKinney admitted that he does not know how many students he lost. See Vol. II, Designated Record, pages 193-194; Deposition of Wade McKinney, page 94, line 20 to page 97, line 12.

Moreover, the fact that a student testified that he did not take the Princeton Review course because he did not see exterior signage on 21st Avenue does not equate with a loss of profits thereby making a recovery of damages possible for Mr. McKinney. There is nothing in the record to substantiate any claim for damages.

There is no causal connection between Mr. McKinney's claim that he is entitled to recover the cost of an advertisement in the school paper because of his claim that he was not allowed to have exterior signage.

In Overstreet vs. Shoney's, Inc., 4 S.W.3d 694, 702 (Tenn. App. 1999), the Middle Section of the Court of Appeals stated, "Damages cannot be based on conjecture or speculation. Speculative damages are prohibited when the existence of damages is uncertain." In the present case, the existence of damages is uncertain. That makes any claim for damages speculative and the claim should be prohibited. All of the claimed damages alleged by Mr. McKinney are based on conjecture and/or speculation.

In Baker v. Riverside Church of God, 453 S.W.2d 801, (Tenn. App. 1970) pages 809 and 810, the Court of Appeals held that, "If a party failed to fulfill a contract, it cannot be held liable for remote, contingent and uncertain consequences or for speculative or possible results which may have ensued from this breach." The Court of Appeals cited this same rule in Maple Manor Hotel, Inc. vs. Metro Gov't., etc., 543 S.W.2d 593, 598 (Tenn. App. 1975). Mr. McKinney's claim for damages are uncertain, remote and speculative. Even if Vanderbilt breached the contract (which it did not), Mr. McKinney cannot prove any damages.

Since Vanderbilt has shown that Mr. McKinney cannot establish an essential element of his case, it is entitled to judgment as a matter of law. See Brown v. J.C. Penney Life Ins. Co., 861 S.W.2d 834 (Tenn. App. 1992). Counsel is aware of the unreported decision from the Supreme Court in Hannan, et al. v. Alltell Publishing Co., No. E2006-01353-SC-R11-CV, January 8, 2008 session. The opinion has not been released for publication as of the time of writing this brief. However, it may soon be the controlling law and seems to modify

the prior understanding of the law on summary judgment where parties are challenged to, "put up or shut up". The Hannan's brought suit against Alltell Publishing Co. for Alltell's failure to publish an ad for its bed and breakfast in the telephone directory. The parties agreed that there were no undisputed facts but disagreed on the inferences to be drawn from the undisputed facts. The trial court granted Alltell's summary judgment on the basis that the Hannan's could not prove any damages. The Court of Appeals reversed the trial court and the Supreme Court affirmed the Court of Appeals. It held that the publisher did not affirmatively show that the business owners would be unable to establish damages at trial and, thus, the publisher was not entitled to summary judgment. Factually, the Hannan case is different from the current case because the undisputed facts in Hannan were that a certain number of telephone directories were to be published and distributed. In the present case, the issue revolves around outdoor signage with no proof of who or how many persons would have seen it and been affected by it. The Hannan case affirms that the moving party on a motion for summary judgment must affirmatively negate an essential element of the non-moving parties' claim. Vanderbilt has done so in the present case.

Vanderbilt would submit that it is entitled to summary judgment in conformity with the ruling of the Hannan case and those cases cited above. The defendant can not prove damages other than those that would be speculative, uncertain or remote.

3. The trial court was correct in determining that there was no issue of material fact.

There are no material issues of fact in dispute in this case. Vanderbilt substantially performed the terms of the contract. Mr. McKinney breached the contract by his failure to pay rent. If Vanderbilt's failure to reach an agreement with Mr. McKinney was a breach of

the contract, it was not a material breach. Therefore, Mr. McKinney had no right to withhold rent.

The Supreme Court for Tennessee in Conatser v. Clarksville Coca Cola Bottling Co., 920 S.W.2d 646, 647 (Tenn. 1995) stated that,

> A summary judgment is not appropriate in a case when determinative facts are in dispute. However, for a fact dispute to exist, reasonable minds must be able to differ over whether some alleged occurrence or event did or did not happen.

Reasonable minds in the current case could not differ. Vanderbilt met with Mr. McKinney when he presented proposals for exterior signage. His proposals were not acceptable. He chose not to make any more efforts after 2002 yet continued to lease the premises through April 2005.

The Supreme Court of Tennessee stated as follows in Godfrey v. Ruiz, 90 S.W.3d 692, 695 (Tenn. 2002):

> If on the other hand the evidence and the inferences reasonably drawn from the evidence would permit a reasonable person to reach only one conclusion, then there are no material factual disputes, and the question can be disposed of as a matter of law.

In the present case, a reasonable person could reach only one conclusion. Vanderbilt substantially performed the terms of the contract. Mr. McKinney breached the contract because he failed to pay rent. Mr. McKinney chose not to submit other proposals to Vanderbilt to reach an agreement on acceptable exterior signage. Vanderbilt's failure to agree with Mr. McKinney on those proposals that were submitted does not constitute a material breach of contract.

III. CONCLUSION

The trial court's decision in this case should be affirmed. Vanderbilt is entitled to summary judgment as there are no material issues in dispute. Reasonable minds could not differ over the inferences drawn from the facts.

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IN THE COURT OF APPEALS FOR THE STATE OF TENNESSEE
MIDDLE SECTION
AT NASHVILLE

THOMAS L. GRIMES, JEFF GRIMES, and MICHAEL GRIMES, Plaintiffs/Appellees, vs. HELEN CORNELL, Defendant-Counterclaimant, Appellant, vs. THOMAS L. GRIMES, JEFF GRIMES, and MICHAEL GRIMES, Counterdefendants/Appellees.	)	Davidson County Circuit Court C.A. No.: M2010-01461-COA-R3-CV

BRIEF OF APPELLEES, THOMAS L. GRIMES, JEFF GRIMES AND MICHAEL GRIMES

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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

Page Number

Table of Contents..... -i-

Table of Authorities..... -ii-

Statement of the Issues..... -1-

Statement of the Case..... -2-

Statement of the Facts..... -5-

Argument..... -8-

Conclusion..... -33-

Certificate of Service..... -33-

TABLE OF AUTHORITIES

Page Number

TENNESSEE CASES

American Trust & Banking Co. v. Williams,
32 Tenn. App. 592, 606-07, 225 SW2 79, 85 (1948) 10

Austin v. City of Memphis,
684 SW2d 624 (Tenn. App. 1984) 28

Bland v. Allstate Ins. Co.,
944 SW2d 372, 375 (Tenn. Ct. App. 1996)..... 19

Brown v. Weik,
725 SW2d 938 (Tenn. App. 1983) 10

Byrd v. Hall,
847 SW2d 208, 214 (Tenn. 1993)..... 16

Couch on Insurance,
3rd § 31:116..... 22

Crain v. Brown, ... 10
823, SW2d 187 (Tenn. App. 1991)

Estate of Depriest v. Allen,
733 SW2d 74, 78 (Tenn. App. 1986) 9, 10

Estate of Wilson v. Arlington Auto Sales v.
Western Pioneer Life Ins. Co.,
743 SW2d 923, 929 (Tenn. Ct. App. 1987)..... 17

Gambill v. Middle Tenn. Med. Ctr.,
751 SW2d at 149-50 18

Hager v. Hager,
17 Tenn. App. 143, 161, 66 SW2d 250, 260 (1933) 9, 10

Halle v. Summerfield,
199 Tenn. 445, 454, 287 SW2d 57, 61 (1956) 9, 10

Hogan v. Cooper,
619 SW2d 516 (Tenn. 1981) 10

Hooks v. Gibson,
842 SW2d 625 (Tenn. Ct. App. 1992)..... 22

In Re Elam's Estate,
738 SW2d 169, 173 (Tenn. 1987) 10

Johnson v. Woman's Hospital,
527 SW2d 133 (Tenn. App. 1975) 24

Johnston v. Cincinnati N.O. & T.P. Ry.,
146 Tenn. 135, 160, 240 SW2d at 429, 436 (1922) 18, 25

Kanipes v. North American Phillips Electronics Corporation,
825 SW2d 426 (Tenn. App. 1921) at 428-429 29

Kelley v. Johns,
96 SW3d 189 (Tenn. Ct. App. 2002) 3

Kelly v. Allen,
558 SW2d 845, 848 (Tenn. 1977) 10, 16

Lohmann v. Lohmann,
2009 WL 3163141, 5 (Tenn. Ct. App. 2009) 16

Matlock v. Simpson,
902 SW2d 384, 386 (Tenn. 1995) 10

Medlin v. Allied Investment Company,
398 SW2d 270 (1966) 24

Mitchell v. Smith,
779 SW2d 384 (Tenn. Ct. App. 1989) 11,15, 32

McIntyre v. Ballentyne,
833 SW2d 52 (Tenn.1992)..... 17

Moorehead v. JC Penney Co., Inc.,
555 SW2d 713 at 717 (Tenn. 1977) 24

Myint v. Allstate Insurance Co.,
970 SW2d 920, 925 (Tenn. 1998)..... 22

Owen v. Stanley,
739 SW2d 782 (Tenn. App. 1987) 10

Otis v. Cambridge Mutual Fire Ins. Co.,
850 SW2d 439 (Tenn. 1992) at 442 27

Patton v. Allison,
26 Tenn. (7 Hump.) 320, 333 (1846) 9

Pierce v. Tharp,
455 SW2d 145 (Tenn. 1970) 31

Reynolds v. Day,
792 SW2d 924 (Tenn. App. 1990) 10

Richmond v. Christian,
555 SW2d 105 (Tenn. 1977) 10

Smith v. Haire,
138, SW 678 (Tenn. 1917) 4, 31

Sneed v. Stovall,
22 SW3d 277 (Tenn. App. 1999) 28

Staples v. CBL & Assocs.,
15 SW3d 83, 88 (Tenn. 2000)..... 16

State v. Matthews,
888 SW2d 446, 449 (Tenn. Crim. App. 1993) 18

State v. Dishman,
915 SW2d 458 (Tenn. Crim. App. 1995) 29

Strickland v. City of Lawrenceburg,
611 SW2d 832 (Tenn. App. 1981 at 835 30

Taliaferro v. Green,
622, SW2d at 835-36 ..... 9, 10

Tip's Package Store, Inc. v. Commercial Insurance Managers, Inc.,
86 SW3d 543 (Tenn. Ct. App. 2001)..... 21

Wilson vs. Patterson,
73 SW3d 95, 103, 104 (Tenn. Ct. App. 2001) 18, 25

STATUTES

T.C.A. § 56-26-119..... 19

OTHER AUTHORITIES

19 A.L.R. 3d 575, 596 10

Tennessee Rules of Civil Procedure,
Rule 56..... 16
Rule 54.04 31

1 Pritchard on the Law of Wills and Administration of Estates
§145 (4th ed. 1983) 9, 10

25 Tenn. Juris. Wills
§24 at 127 (1985) 9, 10

Tennessee Pattern Instructions – Civil
§11.59 ..... 10, 11

Tennessee Rules of Evidence,

Rule 401 ..... **27**
Rule 607 ..... **28**
Rule 608 ..... **28**
Rule 609 ..... **29**
Rule 611 ..... **28**

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The Appellees adopt the Statement of Issues Presented for Review as set out in the Appellant's Brief, as shown below:

I. Whether the trial court erred in concluding that a confidential relationship existed between Ruth Nelson and Helen Cornell, that the 2005 Last Will and Testament was the product of undue influence, and that the signing and execution of the 2005 will was not a free and independent act on the part of Ruth Nelson.

II. Whether the trial court erred in failing to consider medical evidence in its conclusion that "Mrs. Nelson was in a state of physical and mental deterioration at the time of signing the 2005 will."

III. Whether the trial court erred in finding the 2005 will to be invalid, in finding the 2004 will to be the Last Will and Testament of Ruth Nelson and in finding "discrepancies between the 2005 will and the testator's expressed intentions."

IV. Whether the trial court erred in failing to consider Counter-claimant's medical proof, in finding that the evidence preponderated in favor of counter-defendants, and in dismissing the Counterclaim.

V. Whether the trial court erred in failing to apply certain procedural and evidentiary rules.

VI. Whether the trial court erred in awarding attorney fees to plaintiffs.

STATEMENT OF THE CASE

This is a will contest involving the Estate of Ruth Nelson. Mrs. Ruth Nelson died on October 20, 2007. Mrs. Nelson had two daughters, Mary Nelson Grimes, who died on May 2, 2005, and Helen Cornell, the defendant and counter-plaintiff in this action. Mary Nelson Grimes was survived by her three sons, Thomas L. Grimes, Jeff Grimes, and Michael Grimes. When Ruth Nelson died her heirs-at-law were Helen Cornell and her grandsons, Thomas L. Grimes, Jeff Grimes, and Michael Grimes.

The most valuable asset in Ruth Nelson's estate was her real property located at 253 Cherokee Road, Nashville, Tennessee. During Mrs. Nelson's lifetime, Mrs. Nelson made at least five (5) Wills. In four of the five Wills she devised her real property at 253 Cherokee Road to her two daughters in equal shares, per stirpes, as part of the remainder of her estate. In the Will that has been challenged in this case, dated January 20, 2005, Mrs. Nelson bequeathed her real property at 253 Cherokee Road to Helen Cornell, excluding her grandsons, the survivors of Mrs. Nelson's daughter, Mary Grimes. Mrs. Nelson was 97-years-old at the time of the execution of the January 20, 2005 Will.

The Will contest was not the first litigation involving Mrs. Nelson, Helen Cornell and the Cherokee Road property. In 2002, Helen Cornell used a Durable and General Power of Attorney to prepare a deed conveying the Cherokee Road real property to her as the sole owner without consideration. Following litigation, the property was transferred back to Mrs. Nelson from Ms. Cornell. In 2002 Helen Cornell, during the litigation between her mother and herself, petitioned the court for a conservatorship over the person and property of Mrs. Nelson. Helen Cornell asked to be appointed conservator. However, the court appointed Thomas L. Grimes, at the request of Mrs. Nelson, to serve as Ms. Nelson's conservator.

Helen Cornell filed a Petition to Probate Mrs. Nelson's Will of January 20, 2005. Mrs. Nelson's grandsons gave notice of contest and filed a Complaint to contest that Will. The grandsons alleged a lack of testamentary capacity and undue influence on the part of Helen Cornell.

Helen Cornell filed an answer that denied undue influence and denied that Ruth Nelson lacked testamentary capacity. Additionally, Helen Cornell filed a Counterclaim that alleged intentional infliction of emotional distress, assault, conversion, and breach of fiduciary duties by Thomas L. Grimes, the conservator. Helen Cornell alleged that she suffered a personal injury as a result of the emotional distress and incurred medical expenses and experienced pain and suffering as a result of the actions of Thomas L. Grimes.

The case was tried without a jury for four (4) days stretching from October 26 through December 1, 2009.

An Amended Final Order on the Will contest and Counterclaim for damages was entered on June 2, 2010. *See*, TR, Vol. III, p. 336-353.

The trial court held that,

> It is clear that the signing and execution of the 2005 Will was not a free and independent act on the part of the Mrs. Ruth Nelson.

The court found that the plaintiffs had established undue influence through suspicious circumstances in accordance with *Kelley vs. Johns*, 96 SW3d, 189 (Tenn. Ct. App. 2002). The court found that the 2004 Will (the Will prepared eleven months before the January 20, 2005 Will) was the Last Will and Testament of Ruth Nelson and admitted it to probate. Additionally, the court held that,

> Helen Cornell as a Counter-plaintiff had failed to show by preponderance of the evidence that her injuries were sustained as the proximate result of any acts due to misconduct on the part of Thomas Grimes.

The court dismissed Helen Cornell's Counter-complaint for damages.

On June 2, 2010, the Trial Court entered an order granting the plaintiffs' motion for attorney fees and expenses and held,

> It was a clear benefit to the estate to see that the valid Last Will and Testament of the decedent was offered for probate and that a later will obtained by undue influence was not admitted for probate.

The court ruled that the attorney fees for the successful Will contestants were properly payable out of the decedent's estate citing *Smith v. Haire*, 138 SW, 678 (Tenn. 1917). *See* TR, Vol. III, p. 332-335.

STATEMENT OF THE FACTS

Ruth Nelson was a 99-year-old widow at the time of her death on October 20, 2007. Ruth Nelson had two daughters, Mary Grimes and Helen Cornell. Mary Grimes died May 2, 2005. Mary Grimes was survived by her three children, Thomas L. Grimes, Jeff Grimes, and Michael Grimes. *See* TR Vol. I, p. 1-14[1]

Mrs. Nelson made several Wills during her lifetime. On March 28, 1994, Mrs. Nelson executed a Will that was prepared by her by attorney Michael Castellarin. Mrs. Nelson redid her Will on June 20, 1997 and on October 13, 1998 with the assistance of attorney Castellarin. She executed another Will in February 2004 that was prepared at her request by attorney George Cate. The Will over which the contest has been filed was executed in January 2005 at the office of attorney Tim Ferguson. *See* T.E. Vol. VI, p. 398, l. 1 – p. 406 l. 2l; T.E. Vol. IV, p. 63, l. 1 – p. 75, l. 4.; Exhibits 1, 2, 6, 28, 29, 30, 31 and 32.

Mrs. Nelson's several Wills in the decade prior to 2004 varied primarily in regard to small specific bequests, but always divided the bulk of Mrs. Nelson's estate equally between her daughters, Mary Grimes and Helen Cornell. The most significant asset in the estate was the real property located at 253 Cherokee Road, Nashville, Tennessee. In all of the Wills, except for the one that is the subject of this lawsuit, Mrs. Nelson devised her real property at Cherokee Road to her two daughters in equal shares, per stirpes, as part of the remainder of her estate. The practice of substantially dividing the estate equally between Ms. Grimes and Ms. Cornell changed only with the 2005 Will which was arranged by Helen Cornell and prepared by attorney Tim Ferguson. The primary change in the 2005 Will is that it removed Mrs. Nelson's real property

[1] Citations are to the Technical Record Vols. I – III and the appropriate page; TR
Citations to the Transcript of the Evidence Vols. IV - XI and the appropriate page; T.E.
Citations to the Trial Exhibits and the appropriate number
Depositions to the name of the Deponent, date of Deposition and the page and line

on Cherokee Road in Nashville, Tennessee from the remainder bequest and made it the subject of a specific bequest to Helen Cornell. It is this 2005 Will that the court determined to be the product of undue influence. *See* TR 1; Vol. IV, T.E., p. 63, l. 1 – p. 75, l. 4; Exhibits 1, 2 and 6.

The history of Mrs. Cornell, Ms. Nelson and this property is significant. On May 28, 2002, Helen Cornell used her Power of Attorney for Mrs. Nelson to transfer the Cherokee Road property to herself without Mrs. Nelson's knowledge or consent. Helen Cornell indicated on the deed that the actual consideration for the transfer of the property was $180,000 when in fact there was no consideration for the transfer. *See* T.E. Vol. V, p. 183, l. 5 – p. 187, l. 13; Exhibit 13.

In June 2002, Mrs. Nelson revoked Ms. Cornell's Power of Attorney when she discovered what her daughter had done regarding the transfer of the Cherokee Road property. Sometime in June 2002, Ruth Nelson filed suit against Helen Cornell to recover the Cherokee Road property. *See* T.E. Vol. V, p. 187, l. 15 – p. 201, l. 9, Exhibits 14, 15, and 16.

In March 2003, Helen Cornell filed a petition asking that she be appointed to act as conservator for Ruth Nelson. In that petition, under oath, she stated that her mother needed a conservator for both her person and her property. Helen Cornell filed this petition to be appointed conservator while the litigation to recover the Cherokee Road property was ongoing. The court appointed Thomas L. Grimes to act as Mrs. Nelson's conservator, not Helen Cornell. Additionally, the court appointed attorney Beth Boone to serve as Guardian *ad Litem* for Ruth Nelson. *See* Exhibits 20, 21 and 25.

It was during this time that Mrs. Nelson met with Laura Chastain, legal counsel for the Board of Professional Responsibility, and advised Ms. Chastain that Helen Cornell had coerced her into signing a letter asking that the lawsuit to recover the Cherokee Road property be

dropped. *See*, T.E. Vol. V, p. 264, l. 10 – p. 272, l. 10; T.E. Vol. VI, p. 345, l. 12 – p. 354, l. 10; Exhibits 18, 19, 23, 24, 26, and 27.

In February 2004, Thomas L. Grimes took Ruth Nelson to see attorney George Cate. Mrs. Nelson prepared a new Will with some minor changes, but still dividing her estate equally between her daughters. Tom Grimes mailed a copy of the Will prepared by George Cate to all interested parties, including Helen Cornell, *See* T.E. Vol. IV, p. 63, l. – p. 75, l. 4; Exhibit 22.

Because Helen Cornell raised objection to Mr. Grimes' 2004 inventory in response to Helen Cornell's motion to remove Thomas Grimes from his role as conservator, Beth Boone filed a supplemental report on January 5, 2005. She reported that she met with Ruth Nelson on November 9, 2004 and December 8, 2004 and found Mrs. Nelson's condition to be much deteriorated since their earlier meetings when the initial conservatorship proceedings were filed. *See* T.E. Vol. IV, p. 291, l. 8 – p. 314, l. 16; Exhibits 25 and 81.

On January 20, 2005, Helen Cornell and Cary Hambrick took Ruth Nelson to the Law Office of Tim Ferguson where Mrs. Nelson signed the Will that was determined to be the product of undue influence. Helen Cornell did not give anyone a copy of the Will prepared by Tim Ferguson, but rather kept it a secret. *See* T.E. Vol. V, p. 78, l. 4 – l 21. Exhibit 6.

ARGUMENT

I. Whether the Trial Court erred in concluding that a confidential relationship existed between Ruth Nelson and Helen Cornell, that the 2005 Last Will and Testament was a product of undue influence, and that the signing and execution of the 2005 Will was not a free and independent act on the part of Ruth Nelson.

Ruth B. Nelson had two daughters, Helen Cornell and Mary Grimes. Mary Grimes died on May 2, 2005. Thomas L. Grimes, Jeff Grimes and Michael Grimes are the three children of Mary Grimes.

Ruth B. Nelson died on October 20, 2007. The two Wills that are currently before the court were executed by Ruth B. Nelson on February 19, 2004 and on January 20, 2005. The 2004 Will was prepared for Mrs. Nelson by attorney George Cate. The 2004 Will contained cash bequests of $500 to two local churches, it made cash bequests of $5,000 to $10,000.00 to each of Mrs. Nelson's four grandchildren, it contained specific bequests of several items of personal property and it divided the rest and remainder of Mrs. Nelson's estate equally between her daughters, Helen Cornell and Mary Grimes, as did several prior Wills. *See* TR Vol. I, p. 1, 18; T.E. Vol. IV, p. 63- p. 90; p. 99, l. 21 – p. 118, l. 1; Exhibits 1 and 6.

Mrs. Nelson had made several Wills in the decade prior to 2004 which varied in regard to small specific bequests but always divided the bulk of Mrs. Nelson's estate equally between her daughters, Helen Cornell and Mary Grimes. These prior Wills show Mrs. Nelson's prior stated intent. This practice of substantially dividing the estate equally between Ms. Grimes and Ms. Cornell changed only with the 2005 Will which was arranged by Helen Cornell and prepared by attorney Timothy Ferguson. The primary change in the 2005 Will is that it removed Mrs. Nelson's real property on Cherokee Road in Nashville, Tennessee from the remainder bequest

and made it the subject of a specific bequest to Helen Cornell. *See* T.E. Vol. VI, p. 398, l. 11 – p. 448, l. 12; Exhibits 1, 2, 6, 28 and 29.

In January 2005, the home at Cherokee Road was being managed as rental property. Mrs. Nelson's cash and investment assets were being liquidated to pay her living expenses in an assisted living facility and Mrs. Nelson's condition was deteriorating to the point that she would soon need nursing home care. The real property at Cherokee Road was the only asset of Mrs. Nelson that was not being depleted to pay Mrs. Nelson's living expenses.

The Courts have been called on many times to determine whether a Will was obtained as a result of undue influence. The standards for determining undue influence are well established and include the following:

> Invalidating a will because of undue influence is generally not a simple undertaking. While undue influence can be proved either by direct or by circumstantial evidence, *In re Depriest's Estate*, 733 SW2d 74, 78 (Tenn. Ct. App.1986) (direct evidence); *Patton v. Allison*, 26 Tenn. (7 Humph.) 320, 333 (1846) (circumstantial evidence), direct evidence is rarely available. *Hager v. Hager*, 17 Tenn. App. 143, 161, 66 SW2d 250, 260 (1933). Thus, in most cases, the contestants establish undue influence by proving the existence of suspicious circumstances warranting the conclusion that the will was not the testator's free and independent act.
>
> *Taliaferro v. Green*, 622 SW2d 829, 835-36 (Tenn. Ct. App.1981).
>
> The courts have refrained from prescribing the type or number of suspicious circumstances that will warrant invalidating a will on the grounds of undue influence. Instead, they have pointed out that the undue influence issue should "be decided by the application of sound principles and good sense to the facts of each case."
>
> *Halle v. Summerfield*, 199 Tenn. 445, 454, 287 SW2d 57, 61 (1956).
>
> The scope of the proof regarding undue influence is quite broad. *See* 1 Pritchard on the Law of Wills and Administration of Estates § 145 (4th ed. 1983); 25 *Tenn. Juris.* Wills § 24, at 127 (1985). Over sixty years ago, Judge DeWitt, writing for this Court, stated:

It is generally held that upon such issues every fact and circumstance, no matter how little its probative value, which throws light upon these issues, is admissible. The range of inquiry may cover, not only the provisions of the will itself, and the circumstances surrounding its execution, but also the mental condition of the testator, the motive and opportunity of others to influence him unduly, his relations with persons benefited by or excluded from the will, and the acts and declarations of such persons. Although none of these matters standing alone may be sufficient to establish the issues, yet taken together they may have that effect.

Hager v. Hager, 17 Tenn. App. at 161, 66 SW2d at 260.

The suspicious circumstances most frequently relied upon to establish undue influence are: (1) the existence of a confidential relationship between the testator and the beneficiary; (2) the testator's physical or mental deterioration; (3) the beneficiary's active involvement in procuring the will. *In re Elam's Estate*, 738 S.W.2d 169, 173 (Tenn.1987); *Kelly v. Allen*, 558 SW2d 845, 848 (Tenn.1977); *Taliaferro v. Green*, 622 SW2d at 835-36.

Other recognized suspicious circumstances include: (1) secrecy concerning the will's existence; (2) the testator's advanced age; (3) the lack of independent advice in preparing the will; (4) the testator's illiteracy or blindness; (5) the unjust or unnatural nature of the will's terms; (6) the testator being in an emotionally distraught state; (7) discrepancies between the will and the testator's expressed intentions; and (8) fraud or duress directed toward the testator. *See Halle v. Summerfield*, 199 Tenn. at 454-57, 287 SW2d at 61-62; *American Trust & Banking Co. v. Williams*, 32 Tenn. App. 592, 606-07, 225 SW2d 79, 85 (1948); *See also* 1 Pritchard on the Law of Wills and Administration of Estates § 145 (4th ed. 1983); 25 *Tenn. Juris.* Wills § 24 (1985); *Tennessee Pattern Instructions-Civil* § 11.59.

The dominant rule in Tennessee and elsewhere is that the existence of a confidential relationship, followed by a transaction wherein the dominant party receives a benefit from the other party, a presumption of undue influence arises, that may be rebutted only by clear and convincing evidence of the fairness of the transaction. *Roberts v. Chase, supra; Richmond v. Christian,* 555 SW2d 105 (Tenn.1977); *Hogan v. Cooper,* 619 SW2d 516 (Tenn.1981); *Brown v. Weik,* 725 SW2d 938 (Tenn.App.1983); *Estate of Depriest v. Allen,* 733 SW2d 74 (Tenn.App.1986); 19 A.L.R.3d 575, 596.

Matlock v. Simpson 902 SW2d 384, 386 (Tenn.,1995)

The following Tennessee cases have applied the preponderance of the evidence standard as the requirement to overcome presumption of undue influence arising out of confidential and fiduciary relationships: *Taliaferro v. Green,* 622 SW2d 829 (Tenn.App.1981); *Owen v. Stanley,* 739 SW2d 782 (Tenn.App.1987); *Reynolds v. Day,* 792 SW2d 924 (Tenn.App.1990); *Crain v. Brown,* 823 SW2d

187 (Tenn.App.1991). These cases rely principally on *Tennessee Pattern Jury Instruction-Civil* 11.60. That is not the correct standard of proof and the cases applying the preponderance standard are overruled in that regard.

Id. at 386

A list of suspicious factors is also included in the *Tennessee Pattern Jury Instructions-Civil* :

T.P.I.—CIVIL 11.38 Circumstances Probative of Undue Influence
In determining the issue of undue influence, you may consider, among other things, the following:

1. Do the provisions of the will favor people who have no blood relationship to the maker of the will over people who have a blood relationship?

2. Do the terms of the will unduly benefit the chief beneficiary of the will?

3. Are the terms of the will different from the expressed intentions of the maker of the will?

4. Did the chief beneficiary's relationship to the person making the will give the beneficiary an opportunity to influence the terms of the will?

5. Did the mental and physical condition of the maker of the will allow the maker's freedom of choice to be overcome by the actions of others?

6. Did the chief beneficiary of the will actively take part in determining the provisions of the will or in causing it to be executed?

As noted by the court in *Mitchell v. Smith*, *Id.* at 390, "where...the contestant shows the existence of suspicious circumstances...there arises the presumption of fraud and undue influence which the proponent of the Will must overcome by a preponderance of the evidence." In other words, if these suspicious circumstances are present, the proponent of the Will has the burden of proving that undue influence was *not* present instead of the contestant having the burden of proving that undue influence was present.

In regard to the six factors listed in the *Pattern Jury Instructions*, four of those questions may be answered in the affirmative, indicating the presence of undue influence. Those factors are:

2. *Do the terms of the will unduly benefit the chief beneficiary of the will?*

The answer to this question is "Yes." Under the terms of the 2005 Will, Helen Cornell would inherit the vast majority of Ms. Nelson's estate. *See* T.E. Vol. IV, p. 99, l. 21 – p. 119, l. 1; Exhibit 6.

3. *Are the terms of the will different from the expressed intentions of the maker of the will?*

The answer to this question is "Yes." The terms of the 2005 Will differ from all of the Wills made by Mrs. Nelson in the prior ten years in that her most valuable asset, her home, was left to Helen Cornell instead of being a part of the remainder of the estate to be divided equally between Mrs. Nelson's children.

4. *Did the chief beneficiaries' relationship to the person making the will give the beneficiary an opportunity to influence the terms of the will?*

The answer to this question is "Yes." Ms. Cornell was Mrs. Nelson's daughter. At the time this Will was made, Mrs. Nelson's conservator and grandson, Thomas Grimes, had moved from Hendersonville, Tennessee to Virginia. Ms. Cornell was Mrs. Nelson's only relative who lived in close physical proximity to her. *See* T.E. Vol. IV, p. 143, l. 16 – p. 165, l. 13; T.E. Vol. V, p. 174, l. 21 – p. 179, l. 16; p. 264, l. 11 – p. 272, l. 9; T.E. Vol. VI, p. 437, l. 7 - p. 443, l. 14; p. 345, l. 3 – p. 354, l. 10; T.E. Vol. XI, p. 1140, l. 1 – l. 20; Exhibits 24 and 27.

5. *Did the mental and physical condition of the maker of the will allow the maker's freedom of choice to be overcome by the actions of others?*

The answer to this question is "Yes." Mrs. Nelson was born on October 8, 1908. She was 97 years old at the time the 2005 Will was executed. She had been confined to a wheelchair

since 2001. She lived in an assisted living facility and was soon to move to a nursing home. In fact, several years before this Will was executed, Ms. Cornell had filed a petition asking that she be appointed to act as conservator for her mother. Ms. Cornell alleged on March 26, 2003, under oath, in paragraph 6 of her petition that:

> The respondent, Ruth B. Nelson, suffered multiple hip fractures on December 19, 2001, and she is unable to walk without assistance. The respondent suffers from osteoarthritis. The respondent suffers gout. The respondent has a substantial hearing impairment, a hearing loss of 63% in one ear and 75% in the other ear. The respondent has suffered confusion since her hip fractures. The respondent was hospitalized at the Parthenon Pavilion Mental Hospital in May 2002 where she was diagnosed with paranoia, fixed illusions, personality disorders and senile dementia.
>
> Respondent is unable because of her disability to care for her property or to take responsibility for her finances, and she is subject to the undue influence of these large domineering relatives, Mary Grimes and Mary's son, Thomas L. Grimes.

Mrs. Nelson was 94 years old at the time the above referenced petition was filed in the Davidson County Probate Court under Docket No. 03P-576. When the petition was filed, a lawsuit was pending against Ms. Cornell by Mrs. Nelson to recover possession of the very home that was the subject of the specific bequest to Ms. Cornell in the 2005 Will. The Court appointed Thomas L. Grimes to serve as Mrs. Nelson's conservator, not Ms. Cornell.

Ms. Cornell's petition to appoint a conservator for her mother was supported by a report of physician prepared by James R. Hart, M.D., a local psychiatrist. He found Mrs. Nelson's physical and mental condition at that time to be fair and recommended that she have a conservator or guardian for her physical wellbeing, to handle her financial affairs, to consent to medical treatment and to consent to relocation. *See* T.E. Vol. V, p. 199, l. 3 – p. 240, l. 23. Exhibits 20 and 25, including deposition exhibits.

The court appointed attorney Beth Boone to serve as Guardian *ad Litem* for Mrs. Nelson. Ms. Boone reported that Mrs. Nelson was in need of protection, supervision and assistance and recommended that Thomas Grimes was the most likely candidate for appointment.

Ms. Boone was brought back into this matter a second time as the result of Ms. Cornell's objections to Mr. Grimes' 2004 inventory and in response to Ms. Cornell's motion to remove Thomas Grimes from his role as conservator. She filed a supplemental report on January 5, 2005. Ms. Boone reported that she met with Ruth Nelson on November 9, 2004 and December 8, 2004 to discuss the pending conservatorship issues. She found Mrs. Nelson's condition "to be much deteriorated since her earlier meetings when initial conservatorship proceedings were filed." She reported that Mrs. Nelson was confused about the nature of the pending proceedings. Ms. Boone reported that when she explained the nature of the proceedings to Mrs. Nelson, Mrs. Nelson initially had concerns about where her money had gone but then stated she did not remember ever seeing an annual accounting. At the next meeting, she said that she thought Thomas Grimes was very reliable but had concerns about his wife, but could not articulate any specific concerns. Ms. Boone reported that Mrs. Nelson stated to her that she had no problem with Helen Cornell serving as conservator and indicated that Helen Cornell had recently taken her to a doctor's appointment. When asked by Ms. Boone whether she had any concerns about her previous transactions with her daughter, Helen Cornell, "Mrs. Nelson could not recall any of the specifics about previous transactions with her daughter." *See* T.E. Vol. V, p. 291, l. 13 – p. 322, l. 5; Exhibit 25. Ms. Nelson did not recall the prior lawsuit she filed against Ms. Cornell.

6. Did the chief beneficiary of the will actively take part in determining the provisions of the will or in causing it to be executed?

The answer to this question is "Yes." Ms. Cornell has admitted that she took Ms. Nelson to meet with attorney Tim Ferguson for the execution of this Will. In other words, we know Ms.

Cornell took part in causing the Will to be executed and, given the nature of the substantial change in this Will versus all prior Wills and the presence of many other factors indicating undue influence, there is circumstantial evidence to indicate that Ms. Cornell participated in determining the provisions of the Will and exercised undue influence in doing so.

There is evidence to indicate that Ms. Cornell previously influenced Mrs. Nelson's actions. During the pendency of the initial litigation brought by Mrs. Nelson against Ms. Cornell for the recovery of the house on Cherokee Road, Mrs. Nelson and one of her sitters, Rochelle Brown, provided affidavits saying that Ms. Cornell forced Mrs. Nelson to sign a document directing her counsel, Michael Castellarin, to dismiss the litigation pending against her. Ms. Nelson immediately recanted the document that she was forced to sign and explained in an affidavit filed with the court that the prior affidavit was made under duress from Ms. Cornell and her daughter. *See* T.E. Vol. V, p. 264, l. 11 – p. 273, l. 15; T.E. Vol. VII, p. 432, l. 8 – p. 443, l. 18; Exhibit 24.

Laura Chastain with the Tennessee Board of Professional Responsibility testified that Mrs. Nelson came to her for help. Mrs. Nelson told Laura Chastain that Helen Cornell had forced her to sign a document that would dismiss her lawsuit against Helen Cornell for the recovery of her Cherokee Road property. *See* T.E. Vol. VII, p. 345, l. 13 – p. 354, l. 10; Exhibit 27.

Other factors outlined in *Mitchell v. Smith* which are present in this case are as follows:

1. Confidential Relationship Between Testator and Beneficiary.

This condition existed. While it is true that the mere relationship of parent and child does not create a confidential relationship, there was much more to this relationship. Here we have a report from Beth Boone indicating that Ms. Cornell had taken Mrs. Nelson to a physician just before her meetings in November and December 2004 and we know that Ms. Cornell took Mrs.

Nelson to Tim Ferguson for the preparation of the 2005 Will. Ms. Cornell was the only relative living in close proximity to Mrs. Nelson at the time the 2005 Will was executed. Ms. Cornell filed several affidavits signed by Mrs. Nelson with the court and filed multiple pleadings in the Conservatorship action in which she purported to act for Mrs. Nelson. In short, Ms. Cornell sought to act as Mrs. Nelson's attorney even after her power of attorney was revoked by Mrs. Nelson and the court. This is sufficient evidence to prove the existence of a confidential relationship between Ms. Cornell and Mrs. Nelson. *See* T.E. Vol. V, p. 180, l. 12 – p. 181, l. 23; Exhibit 12.

The Tennessee Court of Appeals has recently released an opinion approving the Trial Court's finding of a confidential relationship between family members where no fiduciary relationship then existed.

> The Trial Court concluded that no such legal confidential relationship had been established at the time the bank accounts were changed, but that a "family or other" type of confidential relationship did exist. While an ordinary parent/adult child relationship is not *per se* confidential, it can be if there is a showing that circumstances existed that could have destroyed the free will of the donor, such as where there are elements of dominion or control, where there is a showing of senility or physical/mental debility, or duress/fraud, etc. *Kelly v. Allen,* 558 SW2d 845 (Tenn.1977).
>
> *Lohmann v. Lohmann* 2009 WL 3163141, 5 (Tenn. Ct. App. 2009). Copy attached.

2. Testator's Physical or Mental Deterioration.

This factor is present and is evidenced by Mrs. Nelson's age, by Ms. Cornell's own testimony in the petition to appoint herself as conservator and by the testimony from Beth Boone, the Guardian *ad Litem* charged by the court to investigate Mrs. Nelson's physical and mental condition. *See* T.E. Vol. V, p. 295, l. 1 – p. 319, l. 5; Exhibit 25.

Ms. Cornell has filed affidavits or letters signed by Drs. David Newsome, Robert Snyder and William Serafin. These physicians were deposed two times.[2]

Dr. Snyder testified that he had no opinion as to whether Mrs. Nelson was mentally competent when she executed the Will offered by Ms. Cornell on January 20, 2005. Dr. Snyder Deposition of Nov. 19, 2008, p. 19, l. 18 – 20, p. 27, l. 10 – 15. His records indicated Mrs. Nelson was confined to a wheelchair in 2003 and 2005. Dr. Snyder Deposition of Nov. 19, 2008, p. 13, l. 20 – p. 15, l. 16.

Dr. Newsome stated in his affidavit that "I would anticipate that on January 20, 2005, Mrs. Ruth Nelson would have been mentally alert and competent." When asked about this statement in his deposition, he said, "there's no way I can tell you absolutely one way or the other." Dr. Newsome Deposition of Nov. 20, 2008, p. 10, l. 2 – l. 21. He explained that he spent a brief period of time with Mrs. Nelson while performing an eye exam and that "you can't talk to somebody for two or three minutes and get a really firm opinion..." Dr. Newsome Deposition of Nov. 20, 2008, p. 11, l. 19 – p. 12, l. 19.

The affidavit prepared by Ms. Cornell and signed by Dr. Serafin states that on January 5, 2005 Mrs. Nelson "walked in the hall without difficulty, she got herself on and off the exam table without difficulty..." Dr. Serafin admitted in his deposition that this was not a correct statement. This language was used in his records automatically unless he physically pressed a button on his computer to delete this entry. Dr. Serafin Deposition of Dec. 4, 2008, p. 48, l. 2 – p. 53, l. 6. Other records, not entered automatically show that Mrs. Nelson was, in August of 2002, "an elderly, frail appearing white female who is using a wheelchair..." and that she used a wheelchair after fracturing her hip in 2001. Dr. Serafin Deposition of Dec. 4, 2008, p. 40, l. 1 –

[2] Doctors Snyder and Newsome were deposed twice. Our citations are to their earliest depositions with the date given in the citation.

p. 45, l. 15. Dr. Serafin also testified that at times when he saw her she was confused and suffered dementia. Dr. Serafin Deposition of Dec. 4, 2008, p. 58, l. 23 – p. 61, l. 6. When he reviewed his affidavit during his deposition he thought that the reference to his opinion that Mrs. Nelson was competent on January 20 based on his seeing her on January 5 was a typo and that he couldn't say what her condition was "the minute she left his office." Dr. Serafin Deposition. of Dec. 4, 2008, p. 61, l. 18 – p. 62, l. 5, p. 76, l. 5 – p. 77, l. 2.

The testimony of these physicians is contradictory and self-canceling and is no evidence at all. *See Wilson v. Patterson* 73 S.W.3d 95, 103, 104 (Tenn. Ct. App. 2001) *State v. Matthews,* 888 S.W.2d 446, 449 (Tenn.Crim.App.1993), *Gambill v. Middle Tenn. Med. Ctr.,* 751 S.W.2d at 149-50; *Johnston v. Cincinnati N.O. & T.P. Ry.,* 146 Tenn. 135, 160, 240 S.W.2d 429, 436 (1922).

3. The Beneficiaries' Active Involvement in Procuring the Will.

This factor is clearly present. *See* T.E. Vol. V, p. 174, l. 1 – p. 180, l. 11.

4. Secrecy Concerning the Will's Existence.

Neither Tom Grimes, Michael Grimes nor Jeff Grimes were aware of the existence of the 2005 Will. Helen Cornell did not provide a copy of the Will to the other interested parties. This contrasts sharply to Tom Grimes' actions after the 2004 Will prepared by George Cate when a copy of that Will was mailed to Helen Cornell. *See* T.E. Vol. V, p. 174, l. 1 – p. 180, l. 11., Exhibit 22.

5. Unjust or Unnatural Nature of the Will's Terms.

This factor is present. This Will differed sharply from all prior Wills in that it leaves the majority of Mrs. Nelson's estate to Ms. Cornell rather than dividing the estate between her two daughters. *See* T.E. Vol. VI. p. 398, l. 1 – p. 449, l. 1; Exhibits 1, 2, 6, 28, 29, 30, 32 and 34.

6. Discrepancies Between the Will and the Testator's Expressed Intentions.

This factor is present. This Will differs sharply from all prior Wills with only Mrs. Nelson's circumstances being that this Will was procured with the assistance of Ms. Cornell. *See* T.E. Vol. IV, p. 63, l. 1 – p. 75, l. 2; T.E. Vol. VI. p. 398, l. 1 – p. 449, l. 1; Exhibits 1, 2, 6, 28, 29, 30, 32 and 34.

7. Fraud or Duress Directed Toward the Testator.

This factor is also present. This is evidenced by the complaint filed by Mrs. Nelson to recover the same home from Ms. Cornell several years earlier and the affidavit of Mrs. Nelson filed in the initial litigation concerning this home. *See* T.E. Vol. V, p. 174, l. 1 – p. 244, l. 3; p. 264, l. 11 – p. 273, l. 16; T.E. Vol. VI, p. 345, l.13 - p. 354, l. 11; p. 418, l. 20 – p. 444, l. 16; Exhibits 19, 20, 24 and 27.

In summary, there is ample evidence indicating the existence of a confidential relationship between Ms. Cornell and Mrs. Nelson at the time of the 2005 Will, undue influence on the part of Ms. Cornell and the diminished capacity of Ms. Nelson. Plaintiffs submit that the 2005 Will was clearly obtained by the undue influence of Ms. Cornell.

II. Whether the trial court erred in failing to consider medical evidence in its conclusion that "Mrs. Nelson was in a state of physical and mental deterioration at the time of signing the 2005 will."

The plaintiffs believe that they have addressed this issue above in the discussion of suspicious circumstances. The trial court considered the medical evidence. *See* T.E. Vol. XI p.1166, l.4-l.16

III. Whether the trial court erred in finding the 2005 will to be invalid, in finding the 2004 will to be the Last Will and Testament of Ruth Nelson and in finding "discrepancies between the 2005 will and the testator's expressed intentions."

The plaintiffs believe that they have addressed this issue above in the discussion of suspicious circumstances. The trial court did not err in its finding.

IV. Whether the trial court erred in failing to consider Counter-claimant's medical proof, in finding that the evidence preponderated in favor of counter-defendants, and in dismissing the Counterclaim.

The Trial Court properly dismissed the defendant's counter-claim for conversion, breach of fiduciary duty, assault, and intentional infliction of emotional distress.

The allegations regarding conversion and breach of fiduciary duty was against Thomas L. Grimes as the conservator of the estate and person of Ruth Nelson. *See* Exhibit 25, Deposition of Beth Boone and Deposition Exhibits, TR, Vol. I, P. 24 –27, p. 90A – 90E. Helen Cornell was a party to the original conservatorship action for her mother. *See* Exhibits 20 and 25. Thomas L. Grimes reported his expenditures as a conservator in that action and those expenditures were listed in various accountings that were approved by the court. Helen Cornell objected to at least one accounting and her objections were not found to have merit. *See* Exhibits 21 and 25. Ms. Cornell filed exceptions and objections to the accounting on August 23, 2004 and a hearing was held in regard to her exceptions to that accounting and in regard to her Petition to remove Thomas L. Grimes as conservator on January 10, 2005. After a hearing on these objections and her motions, Helen Cornell's motions were denied and the accounting was approved. The conservatorship was then closed. The decisions in that case are final and all attempts to address those issues in this case should be barred by the doctrine of *res judicata.* *See* T.E., Vol. XI, p. 1137, l. 2 – l. 11. *See* Exhibit 25, Deposition of Beth Boone and Deposition Exhibits.

The Grandfather clock was the subject of a specific bequest in Mrs. Nelson's Wills of 2004 and 2005. In the 2004 Will, the clock was specifically bequeathed to Tom Grimes. In the 2005 Will, the clock was specifically bequeathed to Helen Cornell. Thomas L. Grimes has been in possession of the clock since several years prior to Mrs. Nelson's death when Mrs. Nelson moved into an assisted living facility in Hendersonville and the clock simply would not

physically fit into her apartment. Thomas L. Grimes testified that Mrs. Nelson gave him the clock at that point and told him to put it in his home, which he did. This was a completed gift prior to Mrs. Nelson's death. *See* T.E., Vol. XI, p. 1144, l. 7 – p. 1148, l. 1.

The Trial Court correctly dismissed Helen Cornell's counter-claim for the intentional infliction of emotional distress and assault. Helen Cornell complains that the Trial Court made no mention of her medical evidence in the court's final order, but that is not proof that the court failed to read the depositions and consider that evidence. In fact, the Trial Court specifically stated that it would read the depositions that were submitted by the parties as evidence in the case. Dr. Wheatley's deposition was filed with the court. There is no reason to believe that the Trial Court did not read the deposition as promised. *See* T.E., Vol. XI, p. 1166, l.4 – l. 25.

Helen Cornell alleged that Thomas L. Grimes engaged in outrageous conduct and that he brought a revolver to Mrs. Nelson's hospital room and was, "hostile, refused to talk, and refused to eat with the family." Mr. Grimes denied that he brought a revolver to the hospital. He further testified that he had just flown into Nashville and that he did not even own a revolver. Helen Cornell cites no case law to show that the mere possession of a revolver in or out of a hospital room, or having it in your pocket, constitutes the tort of outrageous conduct. *See* TR, Vol. 1, p. 38, 45, 49 and 90F. *See* T.E., Vol. XI, p. 1127, l. 18 – p. 1130, l. 16

Helen Cornell has not shown that the act of carrying a revolver (which is adamantly denied) fulfills the three essential elements to a cause of action for outrageous conduct. *See* T.E., Vol. XI, p. 1120, l. 18 – p. 1125, l. 11. While carrying a revolver may be intentional, it cannot be held to be reckless where the law allows it. There is no showing that the possession of a revolver even if it showed in your pocket is so outrageous that it is not tolerated by civilized society, and there is no proof that the possession or carrying of a revolver in a hospital room resulted in a

serious mental injury. *See Medlin v. Allied Investment Company*, 398 SW2d 270 (1966); *Moorehead v. JC Penney Co., Inc.*, 555 SW2d 713 at 717 (Tenn. 1977); and *Johnson v. Woman's Hospital*, 527 SW2d 133 (Tenn. App. 1975).

Helen Cornell has not shown that the possession of a revolver that is visible in your pocket in a hospital room constitutes an assault to justify an award for damages for either medical expenses or pain and suffering. First, there was no testimony presented in the court to show any actions of Thomas L. Grimes constituted an assault directed towards Helen Cornell. Second, the testimony of Helen Cornell's treating physicians do not support her claim that she suffered any physical or mental injury or incurred medical expenses as a result of this alleged event.

Dr. Wheatley gave an affidavit that Helen Cornell came to his office on December 2, 2005 with symptoms of recurring chest pain and arm pain beginning on November 14, 2005. He admitted Helen Cornell to St. Thomas Hospital for an anteriorgram and angioplasty and a stent was placed in her coronary artery during the hospitalization. Dr. Wheatley stated in his affidavit, which was prepared by Helen Cornell, that, "I feel that increased stress from her family events and discord may (emphasis added) have played a role in her coronary artery disease."

However, in his deposition Dr. Wheatley testified that Helen Cornell's diagnosis was unstable angina and coronary disease, and that coronary disease is a narrowing of the arteries typically due to plaque buildup, cholesterol, and fibrous tissue. [3]*See* Deposition of Dr. Wheatley on Nov. 19, 2009, p. 9, l. 5-21. Dr. Wheatley testified that it generally takes ten years for the blockage of a coronary artery to progress to the point that it causes symptoms of pain. *See* Deposition of Dr. Wheatley on Nov. 19, 2009, p. 14, l. 14 – p. 15, l. 2. Dr. Wheatley testified that his notes did not reflect any statements from Helen Cornell at or near the time of her

treatment to indicate that she suffered any increased stress from family event and that he could not say that family discord played any role in Helen Cornell's problem. *See* Dr. Deposition of Dr. Wheatley on Nov. 19, 2009, p. 19, l. 20 – p. 21, l. 23. Dr. Wheatley did not provide any testimony to indicate that Helen Cornell's chest pain was causally related to any conduct by any of the respondents.

To the degree that the treating doctors gave contradictory statements, those statements cancel each other out and there is no proof. *See Wilson v. Patterson*, 73 SW3d 95, 103, 104 (Tenn. Ct. App. 2001). The Tennessee Supreme Court has characterized mutually contradictory statements by the same witness as "no evidence" of the facts sought to be proved. *See Johnston v. Cincinnati N.O.T.P. Ry.*, 240 SW 429, 436 (1922).

There is no competent medical evidence to support Helen Cornell's claim that she suffered an injury by any conduct of Thomas L. Grimes.

[3] Dr. Wheatley was deposed twice. Our citations are to his earliest deposition taken on November 19, 2009.

V. The Trial Court did not err in its application of procedural and evidentiary rules.

This case was tried without a jury for four days stretching from October 26, 2009 through December 1, 2009.

The plaintiffs' complied with Local Rule 29.01 of the Davidson County Local Rules of Court. Those rules require that at least 72 hours before the trial of a case opposing counsel shall hold a telephone conference to exchange names of witnesses and to make available for viewing and to discuss proposed exhibits.

Helen Cornell admitted in her brief that a telephone conference was held approximately 72 hours before trial (excluding weekend). *See* Brief of Appellant Helen Cornell, p.33. The Local Rule does not require that exhibits be made available for viewing before the conference. During the conference Helen Cornell was asked if she wanted to come and view the exhibits. She chose not to exercise her right.

However, she was notified of the exhibits in writing in addition to the telephone conference and the certificate of service shows that it was mailed six days before the trial. *See* TR, Vol. I, p. 100-102. The listed potential exhibits were all documents with which Helen Cornell was familiar from the Ruth Nelson conservatorship case, the suit filed by Mrs. Nelson against her daughter Helen Cornell in the Circuit Court, and documents filed with the Board of Professional Responsibility for the State of Tennessee concerning guilty pleas entered by Helen Cornell for disciplinary findings against her on matters reflecting on her credibility. So most of the potential exhibits were either in the possession of Helen Cornell or documents with which she was aware. The previous Wills executed by Ruth Nelson and notes and instructions given to attorney Michael Castellarin regarding the preparation of those documents were made available

for Helen Cornell's viewing at the time of the telephone conference. She chose not to avail herself the opportunity to see those documents.

The missing witness rule has no application in this case. Helen Cornell has identified the plaintiffs Jeff Grimes and Michael Grimes as missing witnesses, yet they were at counsel table throughout the trial. As a tactical matter, the plaintiffs choose not to present evidence through those two parties as it would be cumulative, redundant, and duplicative. Helen Cornell did not avail herself to either of those parties to the witness stand even though they were in court and available.

Likewise, Karen Grimes was outside of the courtroom in the hallway for most of the days of the trial and was certainly present and subject to a call to the stand if Helen Cornell chose to call her as a witness. The plaintiffs chose not to present her testimony as it too would be cumulative to the testimony elicited from Thomas L. Grimes and others. The plaintiffs presented enough evidence to present the trier of fact that undue influence had been exerted on Mrs. Nelson to procure the January 2005 Will.

> The *Tennessee Rules of Evidence*, Rule 401 defines relevant evidence as evidence,
>
> Having any tendency to make the existence of any fact that is of consequence tot he determination of the action more probable or less probable than it would be without the evidence.
>
> Admissibility of evidence is within the sound discretion of the trial judge when arriving at a determination to admit or exclude even that evidence which is considered relevant. Trial Courts are generally accorded a wide degree of latitude and will only be overturned on appeal where there is a showing of abuse of discretion.
>
> > *See Otis vs. Cambridge Mutual Fire Ins. Co.*, 850 SW2d 439 (Tenn. 1992) at 442.

The Court of Appeals in *Austin vs. City of Memphis*, 684 SW2d 624 (Tenn. App. 1984) at 631 held that the determination of the propriety of questions on cross-examination are within the sound discretion of the Trial Court.

The *Tennessee Rules of Evidence*, Rule 607 says that the credibility of a witness may be attacked by any party including the party calling the witness. *Tennessee Rules of Evidence*, Rule 611 holds that the court shall exercise appropriate control over the presentation of evidence and conduct of the trial when necessary to avoid abuse by counsel. That rule allows a party in a civil action to call an adverse party.

The plaintiffs called Helen Cornell to testify and attacked her credibility by questioning her about a guilty plea entered with the Board of Professional Responsibility that was probative of her truthfulness. *See* T.E., Vol. V, p. 244, l. 8 – p. 255, l. 5, Exhibit 23. This evidence was both relevant and admissible under the Rules of Evidence. Obviously, there was no reason for an out of jury hearing since it was a bench trial. This was legitimate impeachment of credibility under Rule 607. *See* T.E. Vol. IV, p. 25, l. 8 – p. 34, l. 6.

In the malpractice action of *Sneed v. Stovall*, 22 SW3d 277 (Tenn. App. 1999), the Trial Court allowed defendants to present proof of an expert past conduct to attack his credibility. The court held that there was more to consider than the *Tennessee Rules of Evidence*, Rule 608 and that the appropriate rules were rather Rule 402 - Relevant Evidence Generally Admissible and Rule 403 – Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion or Waste of Time. The court ruled in that case that the doctor had answered untruthfully in his discovery deposition and that the defendants could question him concerning the inconsistencies. The court held that the probative value of the evidence of truthfulness was not substantially outweighed by its prejudicial effect and the truthfulness of a witness is a matter of grave concern in making a

determination. In making its ruling, the court reasoned that the expert, Dr. Swan, was bound by the ethical rules of his profession, and yet he had engaged in the practice of deception for a number of years even though he knew that his acts could constitute grounds for revocation of his license. The court ruled that his veracity as a witness should be questioned by virtue of his conduct and that a jury should have the benefit of the evidence concerning the expert's veracity and character in order to give proper weight to his testimony.

In the case of *Kanipes vs. North America Phillips Electronics Corporation*, 825 SW2d 426 (Tenn. App. 1921) at 428-429 the court held,

> Asking whether the plaintiff had pled guilty to charges of theft and burglary on cross-examination was a legitimate way to question his credibility.

Tennessee Rules of Evidence, Rule 609 allows for impeachment by evidence of conviction of a crime. While Helen Cornell's entry of a guilty plea and suspension of her law license may not constitute a crime, it was a state action of such nature that impeachment by evidence of her actions especially as they relate to truthfulness should be admissible. "Rules of Evidence do not bar defendant's use of a prior bad act to impeach a victim's testimony so long as probative value on credibility outweighs any unfair prejudice." *See State vs. Dishman*, 915 SW2d 458 (Tenn. Crim. App. 1995). This is different from asking another witness about Helen Cornell's character or an opinion about her character for truthfulness. *See* T.E., Vol. 6, p. 347, l. 13 – p. 356, l. 18.

The evidence regarding this suit by Mrs. Nelson against her daughter Helen Cornell was admissible. First, the suit is public record. Next, it tended to prove Mrs. Nelson's state of mind and her stated intentions. Allowing testimony about these facts was not an abuse of discretion by the court. "Evidence is admissible if it tends to prove the issue and whether it should be

admitted rests in the sound discretion of the Trial Court." *See Strickland vs. City of Lawrenceburg,* 611 SW2d 832 (Tenn. App. 1981) 835.

VI. The Trial Court did not err in awarding attorney fees to the plaintiffs.

On June 10, 2002, the Trial Court entered an Order that granted the plaintiffs' motion for attorney fees and expenses. The Court awarded discretionary costs pursuant to Rule 54.04 of the *Tennessee Rules of Civil Procedure* ruling that since the plaintiffs were the prevailing party they were entitled to recover the costs included in the Bill of Costs prepared by the clerk and discretionary costs for court reporter expenses that were reasonable and necessary for depositions and trial. See TR, Vol. I, p. 210, 332, 336, and 355.

The Trial Court specifically found that the attorney fees incurred by the plaintiffs were a benefit to the estate. The Trial Court stated in its Order,

> It was a clear benefit to the estate to see that the valid Last Will and Testament of the decedent was offered for probate and that a later Will obtained by undue influence was not admitted for probate.

The court ruled that the attorney fees for the successful Will contestants were properly payable out of the decedent's estate. The court cited the case of *Smith v. Haire*, 138 SW 255 (Tenn. 1917).

The Trial Court held that the services of the plaintiffs' attorneys, even though they were not employed by the personal representative, should be paid out of the assets of the decedent's estate since those services inured to the benefit of the estate. The court cited the case of *Pierce vs. Tharp*, 455 SW2d 145 (Tenn. 1970). The test set out by the court in the *Pierce* case being whether the services inured to the benefit of the entire estate or if the services benefited individuals claiming an interest in the estate. See *Id.* at 148.

The plaintiffs' attorneys were the proponents of the Will that was held to be valid, and those proponents who undertake the probate of a Will in good faith are generally entitled to have

their attorney fees paid from the assets of the estate. *See Mitchell vs. Smith*, 779 SW2d 384, (Tenn. Ct. App. 1989).

In fact, as stated in the *Mitchell* case cited above, a party that is the proponent of a Will that is procured through undue influence could be held responsible individually for the costs. See *Mitchell, supra.*

The appellant's statement in her brief that the estate of the defendant's mother, Ruth Nelson has paid the plaintiffs' attorney fees of $46,968.10 is factually incorrect. The attorney fees awarded remain unpaid pending this appeal.

The attorney's fees incurred by the Appellees for this appeal should also be taxed to the estate.

CONCLUSION

The plaintiffs submit that the 2005 Will was clearly obtained by the undue influence of Helen Cornell. The trial court was given ample evidence to show the existence of the confidential relationship between Ms. Cornell and Mrs. Nelson at the time of the 2005 Will, undue influence on the part of Ms. Cornell and the diminished capacity of Mrs. Nelson. The trial court was presented with evidence of suspicious circumstances surrounding the execution of the 2005 Will.

The trial court did not fail to consider medical depositions. The Trial Court did not fail to apply proper evidentiary and procedural rules. The trial court did not err in awarding attorney fees to the plaintiffs. There was no abuse by the trial court in the exercise of its discretion.

Pursuant to Rule 13(d), the findings of fact of the trial court are accompanied by a presumption of correctness unless the preponderance of the evidence is otherwise.

The decision of the trial court should be affirmed.

Respectfully submitted,

By: _____

John L. Whitfield, Jr., No: 10675
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Nashville, TN 37205-1427
(615) 356-8130
(615) 356-8138 (Fax)
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been mailed on the _____ day of _____, 2010 to:

Helen Loftin Cornell, Esq.
3635 Woodmont Blvd.
Nashville, TN 37215

_____
John L. Whitfield, Jr.

Nashville Pro Bono Program

Nashville Bar Association

211 Union Street
800 Stahlman Building
Nashville, TN 37201-1593
(615)242-8749 Fax (615)244-6186

April 1, 2003

John L. Whitfield
Moody, Whitfield & Castellarin
95 White Bridge Road
Suite 509
Nashville TN 37205

Dear Mr. Whitfield: John

Thank you for providing services to Mr. [redacted]

Your willingness to volunteer to help people who cannot afford representation fulfills one of the legal profession's highest ethical obligations.

We appreciate your cooperation with the NBA Pro Bono Program to make legal services available to indigent and low-income people in Nashville. We look forward to working with you in the future.

Sincerely yours,

Victoria

Victoria Webb
Coordinator

PB#: 02 05 313

John: please let us know IF you are contacted by client on the opposing insurance co. again, OK? Thanks again!

11/6/01

Nashville Pro Bono Program

...and Justice for All

211 Union Street
800 Stahlman Building
Nashville, Tennessee 37201-1593
(615) 242- 8749 Fax (615) 244-6186

October 26, 2001

Bertha Vaughn
310 McMillan St.
Nashville TN 37203

Dear Ms. Vaughn:

~~The lawyer, **John L. Whitfield,** who volunteers with the Pro Bono Program of the Nashville Bar~~ Association, has completed work on your legal problem and hopefully your problem is resolved. To help us keep track of clients' needs, we would appreciate your answering a few questions. There is a stamped envelope enclosed for your use.

How do you feel about the help you received from your lawyer?
It was excellent - he was very professional and polite, he was on top of things

How did you feel about service you received from the ***Pro Bono*** Program staff?
Very very Good, Service was super and timely. you are good caring people helping others that need professional help.

Are there any ways we could improve our services?
If the Program Staff operates like atty. John L. Whitfield you are the best professionally.

We may want to use any nice things you said to get publicity for our Program.
Is this OK with you? ✓ yes ____ no

May we use your name? ✓ yes ____ no

Check here if you would like to be on the Legal Aid Society mailing list ✓.

Thank you for your assistance and good luck in the future.

Sincerely yours,

Victoria Webb

Victoria Webb
Coordinator

P.S. I love the Staff (all) even I have not met everyone

"May God" continue to "Bless you"
Love Bertha Vaughn

PB#: 01 06 361 **P Code:** 94 **AN:** 671

JUL 16 1996

Nashville Pr

211 UNION STREET, SUITE 800 • NASHVILLE,

John —
...when these are returned to our office, we like to share them with you...

your work is appreciated

THANK YOU THANK YOU THANK YOU THANK YOU THANK YOU THANK YOU THANK YOU THANK YOU THANK YOU THANK YOU THANK YOU THANK YOU THANK YOU THANK YOU THANK YOU THANK YOU THANK YOU THANK YOU THANK YOU THANK YOU

Nashville Bar Association

Victoria Webb Victoria

Pro Bono Program

(615) 242-8

Stahlman Bldg.

July 8, 1996

Dear Ms.

The lawyer, John L. Whitfie[illegible] Bono Program of the Nashville Bar Association, has completed work on your legal problem and has hopefully helped you in resolving it. To help us keep track of our clients' needs, we ask that you answer a few questions about your legal representation and return the answers to us. There is a stamped envelope enclosed for your use. We appreciate your time and value your opinion.

How do you feel about the help you received from the lawyer?

Mr. Whitfield was very concerned about our complaint. He informed me by letter on all new information he received concerning our claim, and resolved our problem completely.

How did you feel about the service you received from our staff?

The staff was very prompt at assigning me a lawyer to help with my Complaint.

Are there any ways we could improve our services?

No suggestions

Thank you for your assistance and good luck in the future.

Sincerely yours,

Victoria Webb

Victoria Webb, Coordinator
NBA Pro Bono Program

Pro Bono Case Number: 95-05-371
#671 / S:R#6467 / pcode: 3
VCLCL.wpf

95/04/18

Nashville Bar Association

Pro Bono Program

E, TENNESSEE 37201-1593 • TELEPHONE 615-242-8749 • FAX 615-244-4920

Better late than never - but?

Thanks!

April 5, 1995

The lawyer, **John L. Whitfield**, who volunteers with the Pro Bono Program of the Nashville Bar Association, has completed work on your legal problem and has hopefully helped you in resolving it. To help us keep track of our clients' needs, we would appreciate your answering a few questions and returning the answers to us. There is a stamped envelope enclosed for your use.

How do you feel about the help you received from the lawyer?
Mr. Whitfield was very understanding and helpful. C MAC can recall more (or less) when their Credit is involved. He got the situation straightened out and explained the problem to him.

How did you feel about service you received from the **Pro Bono staff**? Language
The staff was quick and efficient in getting me signed up and in contact with Mr. Whitfield. I was pleased that I was contacted so soon.

Are there any ways we could improve our services?
You have a great staff and good lawyers really willing to assist. Keep up the good work. Thanks for Everything!

Thank you for your assistance and good luck in the future.

Sincerely yours,

Victoria Webb

Victoria Webb, Coordinator
NBA Pro Bono Program
Pro Bono Case Number: 94-11-932
AN: 671 / S:R# 6005 / pcode: 9 / VCLCL.ltr

Nashville School of Law

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615/256-3684
FAX 615/244-2383

May 2, 2002

John L. Whitfield, Jr., Esquire
95 White Bridge Road, Suite 509
Nashville, Tennessee 37205

Dear Mr. Whitfield:

Thank you for acting as a class chair for the 2002 Nashville School of Law Recognition Dinner. The interest and suggestions contributed by you helped make the dinner a tremendous success.

You are greatly valued as a Nashville School of Law supporter and your loyalty is appreciated. Again, thank you for all you have done to help keep NSL moving in the right direction.

With warm wishes, I am

Very truly yours,

Joe C. Loser, Jr.

JCL,Jr./dk

1998 Campaign
Legal Aid Society of Middle Tennessee and
Nashville Bar Association Pro Bono Program
800 Stahlman Building, 211 Union Street
Nashville, Tennessee 37201
(615) 244-6610

April 20, 1998

Mr. John L. Whitfield, Jr.
Moody, Whitfield & Castellarin
95 White Bridge Rd., Suite 509
Nashville, TN 37205

Dear John:

Thank you very much for your great help with our Campaign phonathon. You and the 30 other callers raised a total of $22,000 from 230 pledges.

Beyond the monetary success, seeing so many of our colleagues coming in to make calls on our behalf was tremendously encouraging to everyone here.

We are deeply grateful for your wonderful support.

With best wishes,

Sincerely yours,

Ashley T. Wiltshire, Jr.
Executive Director