Tennessee Judicial Nominating Commission

Application for Nomination to Judicial Office

Rev.14 September 2011

Name: John Richard Manson

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(including county)
Nashville, Davidson County, TN 37201

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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.

Currently I serve as the Special Master for 8th Circuit Court in the 20th Judicial District (Davidson County, TN). I was appointed to this position by the Honorable Carol Soloman more than five years ago. In my capacity as Special Master, I preside as Judge on certain classes of cases pursuant to T.C.A. § 17-2-123. When not hearing classes, I fulfill the duties of a Senior Law Clerk for 8th Circuit Court.

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 2006. My BPR number is 025025.

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

Tennessee, BPR no. 025025

2006, Active

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

No.

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

I was an associate with Manson, Jones & Associates from August 2005 – July 2007. Manson, Jones & Associates is a general civil practice, including real estate, probate, family law, medical malpractice, personal injury, and matters in general sessions court. I was a salaried employee. As discussed in response to question 8, I litigated and/or researched each practice area in which the firm engaged.

Currently I am employed by The Metropolitan Government of Nashville and Davidson County, namely the 8th Circuit Court, 20th Judicial District, Nashville, Davidson County, Tennessee were I have worked since July 2006. As Manson, Jones & Associates, is a boutique law firm, I continued to work for the firm concurrent with working for 8th Circuit Court until July 2007.

Initially, I worked during the day as a law clerk, and in the evenings at the firm. I limited my work load at the firm to existing cases, research and writing projects. Additionally, I made very few court appearances. Instead I focused my energy on supporting Judge Soloman and honing my knowledge base of the types of cases assigned to 8th Circuit Court.

In July of 2007, I was appointed as Special Master for 8th Circuit Court. No new law clerk was immediately hired, so I performed both jobs, with help from the court officers. I remain the Special Master, and that position is detailed below in questions 7 and 10.

Prior to joining the practice of law, I was a Classical Music Diversity Initiative Fellow with National Public Radio. I worked first at Georgia Public Radio, learning the basic operations of a public radio station. I then transferred to the national office in Washington, DC, where I served as a production assistant for the national show "Performance Today."

I have also worked professionally as a musician, primarily in churches. During College, I worked at First Presbyterian Church as a paid member of their choir, and as the first violist in their orchestra. I also had a string quartet that played events around the Atlanta area.

I continued to work as a church musician once I moved to Washington, DC, working at Plymouth Congregational United Church of Christ and volunteering part time at Zion Baptist Church.

Once I entered law school, I did temporary work with a legal staffing agency, Law Resources. I was placed with Arnold & Porter, handling document review for a large products liability case.

During the summer of my second year, I was an intern for Three Keys Music, an independent record label based out of DC. I also worked part time during my third year as an intern with the American Federation of Television and Radio Artists, specifically helping represent the members in disputes with their employers.

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

Not Applicable.

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

As a Special Master, for 8th Circuit Court I am charged with the duty to hear and research family law cases. 8th Circuit Court is in the process of returning to the civil rotation, but despite having been designated as a family court for a number of years, 8th Circuit has always dealt with issues consistent with any civil court. For example, many divorces often involve complex issues involving considerable assets, such as tax consequence, the election of certain types of trust or how to divide retirement benefits. Further, property law is also frequently discussed, as the court is forced to determine how to divide the marital estate. Contract law becomes important when determining the validity of a Marital Dissolution Agreement, or a Prenuptial Agreement. Therefore, while family law might be considered 100% of the area of law I deal with, in actuality, it would be more like 60%, with contract law being 20%, and any other areas of law constituting the remaining 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.

I began my legal career as an associate at Manson, Jones & Associates (now Manson, Johnson, Stewart, & Associates). Manson Jones & Associates is a small, general practice law firm, handling many types of cases, including but not limited to, medical malpractice, probate, real estate, domestic, personal injury, entertainment, corporate, and patent and trademark. I have been either lead or second-chair on every type of case listed above. At the time I was employed there, there were 5 attorneys, and one paralegal who primarily handled probate and personal injury. I was, therefore, required to handle every aspect of most of my cases, from the initial meeting with the clients, to research, drafting documents, filing document, drafting and mailing correspondence, etc. When handling a trademark filing, I prepared the application in its entirety and was the sole person in the office responsible for making sure the application was processed. My work in entertainment law consisted of major contract review, redlining, assisting on phone calls with opposing counsel, and corresponding with our clients. When working on medical malpractice cases, I drafted the initial complaint, met with the client to ensure the details were correct, determined the proper person to serve, and conducted research on the Governmental Tort Liability Act. My probate experience includes, drafting powers of attorney and securing

signatures, and handling motions in court. My family law experience includes being the sole attorney on a contested adoption, second chair on multiple contested divorces, participating in client meetings and drafting documents. In the Corporate area, I set up several corporations, including drafting and filing the necessary paperwork with the Secretary of State, and preparing the corporate book for the initial meeting.

I was hired as Law Clerk for the 8th Circuit Court in July of 2006. In this position, I was responsible for reviewing and summarizing all contested cases, including divorces, Orders of Protection, Child Support matters, Modifications, Contempts, and motions. In addition, I, along with the rest of the court staff, act as the public contact to the Court by telephone or in person. In this capacity, I answered many questions from attorneys and litigants, mainly involving procedural issues. As the only person in the office with a law degree besides the Judge, I was responsible for handling any legal questions that might have been posed, either from attorneys through their pleadings, or directly from the Judge. I had to quickly become completely familiar with the area of family law in a very short amount of time, as the Judge relied heavily on me during hearings to know the answers to certain questions. I also was able to introduce several new procedures to help streamline the office. As a former computer instructor for the Georgia Department of Revenue, I have a working knowledge of computers that allowed me to solve technology issues without the need to call tech support. I also was instrumental in making the Orders of Protection a type-able form. This allowed me to quickly enter the Judge's rulings during the hearings, make any changes with ease, and simply print the document for her signature.

When appointed as Special Master, I continued to also serve as Law Clerk, and I went to the Police Academy to be trained as a Court Officer. I now regularly wear multiple hats, depending on the day. If a court officer is out, I may take their place in the Courtroom. I continue to serve as Law Clerk when the judge is sitting. And, as stated in question #7, I sit as Special Master. This role has changed over the years, based upon case law and the amendment of the statute. At first, I acted more as a substitute judge, sitting for the judge as needed, and hearing every kind of case in her absence. The statute was amended, as discussed in question #10, and I currently hear specific classes of cases exclusively.

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

The cornerstone of any prospective judge is versatility and a demonstrated ability to apply various areas of the law. While, my tenure as a Special Master might suggest my legal experience is singularly focused, an examination of my broader background reveals that I have not only practiced civil law, but I have excelled in the practice.

As stated in my response to question 5, I began my legal career as an associate for Manson, Jones & Associates. While I worked on numerous cases, I am particularly proud of The Angus case. In Wade Phelps/Phelps Harrington Construction Co. Inc. v. C&C Construction Co., LLC., et. al., I represented one of the Respondents in a civil cause of action filed by Mr. Phelps. The brief facts are that the Petitioner, Mr. Phelps sued three Respondents alleging that each owed him money on a construction loan. After lengthy discovery and years of preliminary hearings, my

firm filed a motion for summary judgment, which was granted. Mr. Phelps appealed the decision. While no longer a member of the firm, I was asked to work on the case pro bono, as none of the attorneys that worked the case previously were associated with the firm. I have attached both my appellate brief, which was written solely by me and edited by the other named attorneys, and the Court of appeals opinion affirming the trial court.

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 was appointed special master in July of 2007 by the judge of the 8th Circuit Court. My duties are statutory, under TCA section 17-2-123. In 2010 the statute was updated to clarify the duties of a special master, and I am extremely proud to share that I assisted in the redrafting of the statute. The new statute sets specific classes of cases that I can hear. They are: Orders of Protection, Motions to alter or amend Orders of Protection, Child Support Petitions, Signing appearance orders for child support cases, signing and hearing show cause orders for temporary support and parenting time, signing attachment orders, and temporary parenting plans. The statute also sets out the procedure for a party to request a de novo hearing before the judge in the event they are unsatisfied with the ruling of the special master.

During the four years in which I have presided as special master, I have heard over one thousand cases. Of those, only three litigants have requested de novo hearings. One case has not yet been heard; one case was heard by the judge, who affirmed my ruling upon hearing the proof; and one request was withdrawn and subsequently appealed to the Tennessee Court of Appeals.

The case on appeal was State of TN ex rel. Frances Creighton v. Foster Creighton. In the original case, the Issue before me was whether the Respondent was guilty of criminal contempt for failure to pay child support. Upon hearing the proof, I found the Respondent in contempt and sentenced him to 180 days in jail.

There were three issues on appeal and the Court put forth a lengthy analysis in fully affirming my ruling. I have attached the Court of Appeals opinion.

Finally, pursuant to Rule 53 of the Tennessee Rules of Civil Procedure, which is referenced in TCA section 17-2-123, I hear settlement conferences on complex cases. This allows me to try and settle the entire case, if possible, or at least narrow the issues for trial. This helps the court limit cases that may be tried for an extended period of time, which allows the court to hear more cases. This is greatly needed, as the domestic courts in Davidson County hear more trials than all of the other circuit courts combined.

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

None.

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

None.

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.

None.

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.

1996-2000: Morehouse College, Atlanta, GA. I received a Bachelor of Arts degree in Music Performance in May of 2000. I received a four year merit scholarship, and graduated magna cum laude, with membership in Pi Delta Phi, the French Honor Society, and with Departmental Honors from the Music Department. I was a member of the Morehouse College Glee Club throughout my college career. The Glee Club is an internationally renowned organization that travels frequently throughout the school year, as well as during the summer. I served as public relations manager for 2 years, and as tour manager my senior year. I joined Phi Mu Alpha Sinfonia, Inc., a professional music fraternity, and served as chapter president my senior year.

2002-2005: Howard University School of Law, Washington, D.C. I received a Juris Doctor degree in May of 2005. Upon my acceptance to the law school, I was awarded a Merit Scholarship. I had the opportunity to study abroad after my first year, traveling to rural Jamaica to study environmental law. During my third year of law school, I had an externship with the American Federation of Television and Radio Artists (AFTRA), primarily on the radio side, due to my previous employment at National Public Radio in DC. In addition to my studies, I also served as co-director of the Law School Gospel Choir, a group comprised of law students, faculty, and staff.

PERSONAL INFORMATION

15. State your age and date of birth.

33. My date of birth is April 22, 1978.

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

From birth to age 18, then I returned after graduating from law school in 2005, and have lived here continuously since that time.

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

6 years since returning to Nashville.

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

Davidson 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.

Not applicable.

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

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.

Not Applicable.

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

See question 25 below.

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.

08GC8648, LVNV Funding v. John Manson. Filed April 9, 2008. Nonsuited. This was a collection proceeding. I was unaware of it until served by alias summons, at which time the creditor and I resolved the matter, and it was nonsuited.

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.

Nashville Symphony Chorus – Jan 2006 – Present Chamber Chorus – Sept 2006 – Present Section Leader – Aug 2010 – Aug 2011 President-Elect – Aug 2011 – August 2013 President (future) – August 2013 – August 2015 Kappa Alpha Psi Fraternity, Inc. - July, 2011 – Present

27. Have you ever belonged to any organization, association, club or society which limits its membership to those of any particular race, religion, or gender? Do not include in your

answer those organizations specifically formed for a religious purpose, such as churches or synagogues.

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

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

No.

ACHIEVEMENTS

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

Tennessee Bar Association 2005-2009

Nashville Bar Association 2005 – 2009, 2011 – present

Napier-Looby Bar Association, 2005-present, Treasurer, 2011, Representative, Bench & Bar Committee, 2010-Present.

National Council of Juvenile and Family Court Judges, 2011-Present

Tennessee Coalition Against Domestic and Sexual Violence, 2011-Present

Tennessee Domestic Violence State Coordinating Council – Order of Protection sub-committee, 2010-Present

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.

None.

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.

I am a current faculty member for the National Judicial Institute on Domestic Violence. This institute partners with the National Council of Juvenile and Family Court Judges to train judges across the country on domestic violence issues. I was invited to be a faculty member in April of 2009, and have participated in three trainings since that time. They are

Enhancing Judicial Skills in Elder Abuse Cases – October 24– October 27, 2010, Phoenix, AZ

Enhancing Judicial Skills in Domestic Violence Cases – February 13 – 16, 2011, Hollywood, FL

Enhancing Judicial Skills in Domestic Violence Cases – August 28 – 30, 2011, Columbus, OH

I have also participated twice in the annual Family Law Institute hosted every October by Drescher & Sharp, PC. Both times I was a member of the judicial panel discussion that takes place during the last hour of the CLE. I participated in 2009 and 2010.

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.

Special Master, 8th Circuit Court – Appointed July 2006 - Present

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.

As mentioned above in question 9, I drafted an appellate brief in the case Wade Phelps/Phelps Construction v. C&C Construction, et. al. I drafted the entire brief, which was subsequently edited by the attorneys that argued the case in front of the Court of Appeals. The brief is attached.

My second writing sample is a memo regarding attorney's fees in contempt cases. It is a good example of legal research done in my role as Senior Law Clerk for the 8th Circuit Court. I performed all of the research and writing for this memorandum.

ESSAYS/PERSONAL STATEMENTS

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

I am seeking to be the third circuit judge because I want to continue to provide a service to the community. I have been serving for four and a half years now, and believe that I am the best person for the job. I enjoy sitting as judge, I have the patience and temperament to effectively administer justice without any appearance of bias or impropriety. As an experienced judge, I believe that I can make a seamless transition into this role.

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)***

For the last 5 years, I have been actively involved with Operation Stand Down, a nonprofit organization that assists veterans in middle Tennessee with various social services, including legal services. I participate in their annual event, during which all of the resources they provide are presented in one location over the course of a weekend. My participation includes recruiting attorneys to volunteer their services and helping to make sure the veterans see the correct person to get the help they need. I also participate in Napier-Looby Bar Association's annual Street Law Clinic at Temple Church, where anyone from the community can come and ask legal questions to members of the bar.

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 3rd Circuit Court is one of eight circuit courts in Davidson County. It is a civil court of general jurisdiction, serving a population of over 600,000.

My selection to this judgeship would allow a seamless transition from the current judge. I have been doing substantially the work of this job for over 4 years. I know every single person in the clerk's office, and constantly work very closely with them. I have first-hand knowledge of the inner workings of the courthouse itself, and would need virtually no training to begin working on day one. I am an experienced judge, with an excellent demeanor, and I have the desire to serve this county. I also have experience with the organization of a court's chambers. I know what I need in a staff, and how to use that staff to efficiently administer justice.

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

I have always believed that serving the community was important. As stated in question #36, I

am actively involved with Operation Stand Down. I am also very involved in helping to guide new lawyers, as the coordinator of the Napier-Looby Bar Association's mentoring program. I currently mentor two students, one at Vanderbilt, and one at American University. I plan to continue to be involved with both organizations and continue to mentor students if I am appointed.

Additionally, I have been a volunteer member of the Nashville Symphony Chorus since January 2007, and I have recently been elected as the President-Elect. I have a passion for music, and despite the large commitment of my time, I will participate with the organization as long as I am physically able, and as time permits.

I am a member of Kappa Alpha Psi Fraternity, Inc. The fraternity is a strong supporter of Big Brothers Big Sisters, and is also dedicated to supporting and encouraging young men as they move towards their college years. I believe my involvement in this organization is worthwhile and beneficial to the community, so I will continue my involvement if I am appointed judge.

Finally, I am a registered volunteer with Hands on Nashville, and have worked at various projects, including Habitat for Humanity, Mobile Loaves and Fishes, and Second Harvest Food Bank. I will continue to volunteer as often as my schedule allows.

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)***

Throughout my life I have always had a passion for music and an admiration for the law, growing up as the child of two attorneys. Initially, I focused on developing my passion. I worked hard at it through high school, made first chair violist in the Nashville Youth Symphony, and then graduated college with a music degree in viola performance with the ultimate goal of becoming a symphony conductor.

Although my parents always encouraged and supported my musical dreams, I was inspired by my father's tales about his courtroom experiences and legal battles. As if destiny were calling, I attended law school and began working as an attorney upon graduation. Shortly thereafter, I was honored to be selected to serve as Special Master in 2007.

Now, being a public servant has become a passion for me, much like music. Presiding over a case is like conducting a symphony. You have statutes, case law, and courtroom procedure all written down like sheet music. But the judge has to guide all the players, just as a conductor must lead the orchestra. Someone may not know the music (like a pro se litigant), someone may want to argue with the conductor as to what the notes are (like an attorney who disagrees with the rules), and someone may simply not like the piece that's being played (like the losing side in a case). In the end, the goal of each is the same; the conductor's goal to achieve a harmonious balance of sound and while the judge must achieve harmony between the ruling and his application of the law.

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

Yes, I will absolutely uphold the law, regardless of my beliefs on the issue at hand. I am a strong believer in the constitutional separation of powers. It is the Judiciary's job to interpret the law, but not to rewrite it.

The Child Support Docket is a docket that sometimes results in rulings that seem unfair to litigants, such as a person who is supposed to receive support. Sometimes the state cannot meet its burden to prove the payor is in contempt. However, the law is clear and while my heart may go out to payee, I cannot substitute my feelings for the law. Exceptions cannot be made simply because the result is unfavorable. It is never the Judge's role to "legislate" the case, or to go to extreme measures to read a statute in such a way that allows him to rule the way that it fits his personal interests.

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. Andrea P. Perry
Member, Bone McAllester Norton, PLLC
Nashville City Center, Suite 1600
511 Union Street
Nashville, TN 37219

B. Rev. Edwin C. Sanders II
Senior Servant, Metropolitan Interdenominational Church
2128 11th Avenue North
Nashville, TN 37208

C. Ted Welch
President, Ted Welch Investments
611 Commerce St, Suite 3102

Nashville, TN 37203
D. Kamie Hefner Hefner & Hefner 7110 Town Center Way, Ste. 2 Brentwood, TN 37027
E. Anne Russell Fifth Third Center 424 Church Street, Suite 2700 Nashville, TN 37219

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 __Third Circuit Court, 20th 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: ___October 30___, 20_11__.

_____
Signature

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

TENNESSEE JUDICIAL NOMINATING COMMISSION
511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY

WAIVER OF CONFIDENTIALITY

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

John Richard Manson
Type or Printed Name

Signature

October 30, 2011
Date

025025
BPR #

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

WADE PHELPS/PHELPS HARRINGTON CONSTRUCTION CO., INC. Plaintiff/Appellant vs. C & C CONSTRUCTION CO. LLC WILLIAM I. CHURCH, JR; JOSEPH L. ANGUS and BANK OF AMERICA Respondent/Appellee	)	C.A. NO. 2010-00228-COA-R3-CV Davidson County Chancery Court 04-3567-III

BRIEF ON BEHALF OF APPELLEE, JOSEPH L. ANGUS

Richard Manson, BPR #4351
John Richard Manson, BPR #025025
Isaac I. Conner, BPR #022736
MANSON, JOHNSON, STEWART & ASSOC.
1223 5th Avenue North
Nashville, Tennessee 37208
615-254-1600

Attorney for Appellee
Joseph L. Angus

ORAL ARGUMENT REQUESTED

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TABLE OF AUTHORITIES

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STATEMENT OF THE ISSUES

I. **Whether the trial court erred in granting the Motion for Summary Judgment to Joseph L. Angus.**

II. **Whether or not the Court of Appeals opinion issued in this matter in the case of Bank of America precludes a cause of action against Joseph L. Angus.**

III. **Whether this Court should grant Appellee Joseph L. Angus attorney fees in regards to this appeal.**

STATEMENT OF THE CASE

This case stems from a joint venture. Plaintiff Wade Phelps ("Phelps") and Defendant William I. Church, along with his construction company ("Church"), entered into a joint venture to build a house on Fourth Avenue North in Nashville for Defendant Joseph Angus ("Angus"). Church was to perform the work and Phelps was to fund the construction. After completion of construction, the profits were to be split equally.

Angus applied and was approved for a loan to be made by Bank of America ("BOA"). BOA would not loan Angus construction financing for the house, but would loan him 80% of the value of the property upon completion of construction. The property was to be collateral for the loan.

After construction, the property appraised at an amount lower that previously expected. The loan Angus received from BOA was, therefore, not enough to cover his duty to repay the construction financing. Angus brought the balance due to the closing.

The closing was held, and Angus was present, as was Church. Phelps did not attend. BOA then paid the balance of the construction costs to Church. Church did not give Phelps any of the monies he received at closing. Church justified this by contending that Phelps owed Church on other jobs that they had worked on together.

Phelps filed this suit against Church, Angus, and BOA to recover funds provided by him to improve the real property. Answers and cross-claims were filed by BOA and Angus, however, Angus and BOA voluntarily dismissed any cross-claims against each other. BOA filed a Motion for Summary Judgment in the lower court, arguing that Phelps and Church created a joint venture, and thus payment to one was payment to both. Summary Judgment was granted in the lower court, and affirmed in this Court on appeal. Following that opinion, Angus filed his motion for Summary Judgment. The only new proof submitted in this case were affidavits filed by both Angus and Phelps. Angus' Motion for

Summary Judgment was also granted, based upon the ruling of this Court in affirming Summary Judgment against BOA. Phelps is again here on appeal of the lower court's granting of Summary Judgment.

STATEMENT OF THE FACTS

This case was before the Tennessee Court of Appeals on Phelps' appeal of the lower court's granting of Bank of America's motion for summary judgment. This Court's Opinion affirming that summary judgment provides the best statement of facts in this matter. This Court stated:

> Joseph Angus owned property in Davidson County on which he wanted to construct a duplex. He approached Bank of America ("BOA") to obtain financing and was told that BOA could not finance the construction, but would extend a loan once the property was improved. Mr. Angus engaged William Church, d/b/a C&C Construction ("C&C"), to perform the construction. To assist Mr. Angus in getting the construction funded, Mr. Church contacted Wade Phelps, a former business partner, to provide the construction funding. Mr. Phelps agreed.
>
> A contract was entered into between Mr. Angus, as owner, and Mr. Church, on behalf of C&C Construction Co., as contractor, on June 13, 2004, for the construction of the duplex at a cost of $137,000.00; the cost was adjusted upward to $141,000.00 by addendum signed by Mr. Angus and Mr. Church, on behalf of C&C. A second addendum dated June 16, 2004, was added stating: "Wade Phelps owner of Phelps/Harrington Construction will be supplying the construction finance [sic] of $137,000.00 to complete this project at 10% interest payable by owner at closing at a fee of $1,370.00 total for use of money during construction." This addendum was signed by Mr. Phelps, Mr. Church, on behalf of C&C, and Mr. Angus.
>
> Mr. Church and Mr. Phelps entered into a separate agreement dated June 16, 2004, which provided in pertinent part as follows:
>
> > This agreement is between Wade Phelps owner of Phelps/Harrington Construction Co. and William Church, owner of C&C Construction Co. This 16th Day of June 2004. The two companies listed above has [sic] come to agreement to do a joint venture to construct a new (2) story approx 2,500 sq. foot dwelling located at ____ Hume St. Nashville, TN in Davidson County 37208.
> >
> > * * *
> >
> > 5) At time of closing all profit remaining will be divided in 50% by Wade Phelps of Phelps/Harrington Construction Co and William Church owner o C&C Construction Co.
>
> During construction, Mr. Phelps made payments to Mr. Church or paid bills incurred in the construction. As construction neared completion, Mr. Angus and Mr. Church agreed upon the final amounts due for the construction of the project of $151,110.00. Included within that final amount was the sum of $1,370.00, the amount to be paid to Mr. Phelps for providing the construction financing.

A loan closing date was set, however, the loan closing was later rescheduled because the duplex was not complete and an as-built appraisal had not been obtained. The appraisal was subsequently performed, but the property appraised for less that initially anticipated. Based on the appraisal figure of $165,000.00, BOA limited its load to $132,000.00. At closing, the loan proceeds were disbursed and Mr. Angus paid the additional $24,342.22 necessary to pay off the construction costs. The closing attorney issued a check in the amount of $151,110.00 to Mr. Church, on behalf of C&C, for the construction costs; Mr. Church retained the entire proceeds and did not pay Mr. Phelps. BOA received a deed of trust securing the note of Mr. and Ms. Angus. Mr. Phelps contended that he was not advised of the closing date and, thus, did not attend the closing. Mr. Church acknowledged receipt of the construction payoff at closing and asserted that he did not pay Mr. Phelps because Mr. Phelps owed him money from prior dealings.

Phelps v. Bank of America, 2009 WL 690695 (Tenn.Ct.App.)

ARGUMENT

I. SUMMARY OF THE ARGUMENT

The ruling of this Court does indeed preclude a cause of action against Joseph L. Angus. This Court has already made the affirmative finding that both the cause in fact and the proximate cause of Phelps' failure to be paid was the action of Church not paying him. Further, Phelps argues that he signed a separate agreement with Angus regarding financing. However, the agreement is an addendum to the construction agreement, and not separate at all. It is, therefore, impossible for this Court to also find that Angus is somehow separately liable for Phelps not being paid.

In light of this Court's previous ruling, this appeal should be dismissed. It is a frivolous appeal, devoid of merit, and with no chance of success.

II. STANDARD OF REVIEW

The factual findings of the Trial Court are accorded a presumption of correctness, and the Appellate Courts will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R.App. P. 13(d); *Bogan* v. *Bogan,* 60 S.W.3d 721,727 (Tenn.2001). With respect to legal issues, the Appellate Court's review is conducted "under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts." *Southern Constructors, Inc. v. Loudon County Bd. Of Educ.,* 58 S.W.3d 706, 710 (Tenn.2001). As the Courts have noted "Since this case was tried by the court sitting without a jury, we review the case *de novo* upon the record with a presumption of correctness of the findings of fact by the trial court." *Martin v. Coleman,* 19 S.W.3d 757, 760 (Tenn.2000); Tenn. R.App. P. 13(d) (2003).

III. THE TRIAL COURT WAS CORRECT IN GRANTING THE MOTION FOR SUMMARY JUDGMENT BASED ON THE RULING OF THIS COURT IN THE BANK OF AMERICA MATTER.

The Summary Judgment standard has recently been clarified by the Tennessee Supreme Court. In *Martin v. Norfolk Southern Railway Co.*, 271 S.W.3d 76 (Tenn. 2008), the court lays out the standard as follows:

> The moving party is entitled to summary judgment only if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits...show that there is not genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04: *accord Penley v. Honda Mother Co.*, 31 S.W.3d 181, 183 (Tenn. 2000). The moving party has the ultimate burden of persuading the court that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn. 1993). Accordingly, a properly supported motion for summary judgment must show that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *See Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83, 88 (Tenn. 2000); *McCarley v. W. Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998). If the moving party fails to make this showing, then "The non-movant's burden to produce either supporting affidavits or discovery materials is not triggered and the motion for summary judgment fails." *McCarley*, 960 S.W.2d at 588; *accord. Staples*, 15 S.W.3d at 88.
>
> The moving party may make the required showing and therefore shift the burden of production to the nonmoving party by either: (1) affirmatively negating an essential element of the nonmoving party's claim; or (2) showing that the nonmoving party cannot prove an essential element of the claim at trial. *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1, 5 (Tenn. 2008); *see also McCarley*, 960 S.W.2d at 588; *Byrd*, 847 S.W.2d at 215 n.5. Both methods require something more than an assertion that the nonmoving party has no evidence. *Byrd*, 847 S.W.2d at 215. Similarly, the presentation of evidence that raises doubts about the nonmoving party's ability to prove his or her claim is also insufficient. *McCarley*, 960 S.W.2d at 588. The moving party must either produce evidence or refer to evidence previously submitted by the nonmoving party that negates an essential element of the nonmoving party's claim or shows that the nonmoving party cannot prove an essential element of the claim at trial. *Hannan*, 270 S.W.3d at 5. We have held that to negate an essential element of the claim, the moving party must point to evidence that tends to disprove an essential factual claim made by the nonmoving party. *See Blair v. W. Town Mall*, 130 S.W.3d 761, 768 (Tenn. 2004). If the moving party is unable to make the required showing, then its motion for summary judgment will fail. *Byrd*, 847 S.W.2d at 215. If the moving party makes a properly supported motion, then the nonmoving party is required to produce evidence of specific facts establishing that the genuine issues of material fact

exist. *McCarley*, 960 S.W.2d at 588, *Byrd*, 847 S.W.2d at 215. The nonmoving party may satisfy its burden of production by:

> (1) pointing to evidence establishing material factual disputes that were over-looked or ignored by the moving party; (2) rehabilitating the evidence attacked by the moving party; (3) producing additional evidence establishing the existence of a genuine issue for trial; or (4) submitting an affidavit explaining the necessity for further discovery pursuant to Tenn. R. Civ. P., Rule 56.06.

McCarley, 960 S.W.2d at 588; *accord. Byrd*, 847 S.W.2d at 215 n.6. The nonmoving party's evidence must be accepted as true, and any doubts concerning the existence of a genuine issue of material fact shall be resolved in favor of the nonmoving party. *McCarley*, 960 S.W.2d at 588. "A disputed fact is material if it must be decided in order to resolve the substantive claim or defense at which the motion is directed." *Byrd*, 847 S.W.2d at 215. A disputed fact presents a genuine issue if "a reasonable jury could legitimately resolve that fact in favor of one side or the other." *Id.*

Martin v. Norfolk Southern Railway Co, 271 S.W.3d 76, 83-84.

In this case, there are no disputed facts. As shown in the record, all parties agree as to the material facts of the case, and have specifically cited the facts as stated by this Court. In addition, this Court has already made a finding as to the substantive law in this matter. *See Phelps v. Bank of America,* 2009 WL 690695 (Tenn.Ct.App.). In his brief, the Appellant suggests that, despite this Court's finding that Phelps created a joint venture with Church for the purpose of financing the property owned by Angus, that Phelps also somehow created an independent agreement with Angus to provide the same financing for the same property. *See Id.* It is impossible for Appellee to somehow repay the joint venture created by Phelps and Church and, at the same closing, repay Phelps individually.

Phelps contends that Angus and BOA are not equally situated. However, this Court, in finding no negligence on the part of BOA stated that "any claim of negligence against BOA by Phelps would fail because of the uncontroverted proof that the cause in fact and proximate cause of Phelps' failure to be paid was the action of Church in not paying him. *Id.* at 9. Despite this Court not specifically addressing Angus, it is clear that this Court intended to find that the only person that owes any money to Phelps is Church.

Phelps also contends that this Court did not intend to hold that there cannot be a joint venture between Phelps and Church and also a separate agreement between Phelps and Angus. We contend that that is exactly the intention of this Court. It is clear from the record that Angus never dealt directly with Phelps, and only with Church. This further shows that all parties were operating under the belief that a joint venture existed between Phelps and Church. This Court found that Bank of America did not err when it delivered the check at closing to Church, thus paying the joint venture. It would be wholly inconsistent for this Court to, in the instant appeal, and then find that Appellee still somehow owes the entire amount to Phelps individually. The only proper party that Phelps has any claim against is Church, the person that received the check at closing, and his partner in the joint venture.

Phelps, in his affidavit, argues that he believed that by signing the second addendum, he was somehow separating the financing from the construction. (Tec. Rec. p. 93) However, this addendum is *an addendum to the construction contract*, and was signed either at the same time or immediately before the agreement between Phelps and Church to create the joint venture. As stated in the Brief of the Appellant, Black's Law Dictionary defines "addendum" as "something to be added, esp. to a document; a supplement." *Black's Law Dictionary* (8th ed. 2004). The second addendum was an added portion of the construction agreement, not a separate agreement. Had Phelps wanted to separate the construction contract from the financing contract, he could have easily drafted a separate agreement and asked Angus to sign. It would not have changed the fact that the joint venture was created, but it might bring credence to Phelps' argument that he intended the agreements were separate. Additionally, all three parties (Phelps, Church, and Angus) signed the second addendum regarding financing. (Tec. Rec. p. 100) This further shows that the financing was not at all separate from the construction. There was no need for Church to sign the addendum at all, except that he was in a joint venture with Phelps.

There is no basis for the argument that Phelps and Angus signed a "separate" agreement. The agreement signed was an addendum to the original agreement between Church and Angus, not a separate agreement at all.

IV. WHETHER THIS COURT SHOULD GRANT APPELLEE ANGUS ATTORNEY FEES IN REGARDS TO THIS APPEAL.

This court has noted for a long time that parties should not be forced to bear the cost and vexation of baseless appeals. *Davis v. Gulf Ins. Group,* 546 S.W.2d 583,586 (Tenn. 1977); *Jackson v. Aldridge,* 6 S.W.3d 501,504 *(Tenn.* Ct. App. 1999); *McDonald v. Onoh,* 772 S.W.2d 913,914 *(Tenn.* Ct. App. 1989). Accordingly, in 1975, the General Assembly enacted Tennessee Code Annotated § 27-1-122 (2000) to enable appellate courts to award damages against parties whose appeals are frivolous or are brought solely for the purpose of delay. Determining whether to award these damages is a discretionary decision. *Banks v. St. Francis Hosp.,* 697 S.W.2d 340 343 *(Tenn.* 1985). While it is customary for the Appellee to request damages under T.C.A. § 27-1-122, appellate courts may determine that an appeal is frivolous on their own motion. However, appellate courts should be careful not to discourage legitimate appeals. *Wakefield v. Longmire,* 54 S.W.3d 300, 304 (Tenn. Ct. App. 2001); *Knowles v. State,* 49 S.W.3d 330, 341 (Tenn. Ct. App. 2001).

A frivolous appeal is one that is devoid of merit or that has no reasonable chance of success. *Combustion Eng'g, Inc. v. Kennedy,* 562 S.W.2d 202, 205 (Tenn. 1978); *Wakefield v. Longmire,* 54 S.W.3d at 304; *Jackson v. Aldridge,* 6 S.W.3d at 504; *Industrial Dev. Bd.* v. *Hancock,* 901 S.W.2d 382, 385 (Tenn. Ct. App. 1995). The appellant's inability to cite any evidence or legal principle that would warrant granting relief on appeal is a sign of frivolity. *Wells v. Sentry Ins. Co.,* 834 S.W.2d 935, 938-39 *(Tenn.* 1992); *Jackson v. Aldridge,* 6 S.W.3d at 504.

In this case, because of this Court's previous ruling, there is no merit to this appeal, nor does the appellant have any reasonable chance of success.

CONCLUSION

Because of the foregoing, the Appellee respectfully requests that the Court approve the ruling of the trial court and award attorneys fees for the pursuit of this matter.

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Attorney for Appellee
Joseph L. Angus

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief has been forwarded to the following by US Mail on the_____ day of July, 2010:

Dan R. Alexander
2016 Eighth Avenue South
Nashville, TN 37204

_____
John Richard Manson

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
SEPTEMBER 9, 2010 Session

WADE PHELPS/PHELPS HARRINGTON CONSTRUCTION CO., INC. v. C & C CONSTRUCTION CO., LLC, ET AL.

Direct Appeal from the Chancery Court for Davidson County
No. 04-3567 III Ellen Hobbs Lyle, Chancellor

No. M2010-00228-COA-R3-CV - Filed November 9, 2010

Contractor agreed to build duplex for property owner, with plaintiff providing construction financing. At closing, contractor was paid, but contractor did not pay plaintiff as agreed. Plaintiff sued property owner, contractor, and bank. We previously affirmed the trial court's grant of summary judgment to the bank, finding that contractor and plaintiff were in a joint venture, such that payment to contractor was payment to plaintiff. Property owner then moved for summary judgment, which the trial court granted. Because we find no separate agreement between property owner and plaintiff requiring repayment directly to plaintiff, plaintiff's cause of action against property owner is precluded, and the trial court's grant of summary judgment is affirmed.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Chancery Court Affirmed

ALAN E. HIGHERS, P.J., W.S., delivered the opinion of the Court, in which DAVID R. FARMER, J., and J. STEVEN STAFFORD, J., joined.

Dan R. Alexander, Nashville, Tennessee, for the appellant, Wade Phelps

Richard Manson, John Richard Manson, Isaac I. Conner, Nashville, Tennessee, for the appellee, Joseph L. Angus

OPINION

I. FACTS & PROCEDURAL HISTORY

A portion of the pertinent facts of this case have been previously set forth in the opinion of this Court issued on March 13, 2009:

> Joseph Angus owned property in Davidson County on which he wanted to construct a duplex. He approached Bank of America ("BOA") to obtain financing but was told that BOA could not finance the construction, but would extend a loan once the property was improved. Mr. Angus engaged William Church, d/b/a C & C Construction ("C & C"), to perform the construction. To assist Mr. Angus in getting the construction funded, Mr. Church contacted Wade Phelps, a former business partner, to provide the construction funding. Mr. Phelps agreed.
>
> A contract was entered into between Mr. Angus, as owner, and Mr. Church, on behalf of C& C Construction Co., as contractor, on June 13, 2004, for the construction of the duplex at a cost of $137,000.00; the cost was adjusted upward to $141,000.00 by addendum signed by Mr. Angus and Mr. Church, on behalf of C & C. *A second addendum dated June 16, 2004, was added stating: "Wade Phelps owner of Phelps/Harrington Construction will be supplying the construction finance [sic] of $137,000.00 to complete this project at 10% interest payable by owner at closing at a fee of $1,370.00 total for use of money during construction." This addendum was signed by Mr. Phelps, Mr. Church, on behalf of C & C, and Mr. Angus.*
>
> Mr. Church and Mr. Phelps entered into a separate agreement dated June 16, 2004, which provided in pertinent part as follows:
>
> > This agreement is between Wade Phelps owner of Phelps/Harrington Construction Co. and William Church, owner of C & C Construction Co. [t]his 16th [d]ay of June 2004. The two companies listed above has [sic] come to [an] agreement to do a joint venture to construct a new (2) story approx 2,500 sq. foot dwelling located at --- Hume St. Nashville, TN in Davidson County 37208
> >
> > * * *

> 5) At time of closing all profit remaining will be divided in 50% by Wade Phelps of Phelps/Harrington Construction Co[.] and William Church owner of C & C Construction Co.
>
> During construction, Mr. Phelps made payments to Mr. Church or paid bills incurred in the construction. As construction neared completion, Mr. Angus and Mr. Church agreed upon the final amounts due for the construction of the project of $151,110.00. Included within that final amount was the sum of $1,370.00, the amount to be paid Mr. Phelps for providing the construction financing.
>
> A loan closing date was set, however, the loan closing was later rescheduled because the duplex was not complete and an as-built appraisal had not been obtained. The appraisal was subsequently performed, but the property appraised for less than initially anticipated. Based on the appraisal figure of $165,000.00, BOA limited its loan to $132,000.00. At closing, the loan proceeds were disbursed and Mr. Angus paid the additional $24,342.22 necessary to pay off the construction costs. The closing attorney issued a check in the amount of $151,110.00 to Mr. Church, on behalf of C & C, for the construction costs; Mr. Church retained the entire proceeds and did not pay Mr. Phelps. BOA received a deed of trust securing the note of Mr. and Mrs. Angus. Mr. Phelps contended that he was not advised of the closing date and, thus, did not attend the closing. Mr. Church acknowledged receipt of the construction payoff at closing and asserted that he did not pay Mr. Phelps because Mr. Phelps owed him money from prior dealings.

Phelps v. Bank of America, No. M2007-02135-COA-R3-CV, 2009 WL 690695, at *1 (Tenn. Ct. App. Mar. 13, 2009) (emphasis added) (footnote omitted).

Wade Phelps/Phelps Harrington Construction Co., Inc. ("Mr. Phelps") filed suit against Bank of America, Mr. Angus, Mr. Church, and C & C Construction Co. Mr. Phelps' complaint alleged breach of contract against Mr. Angus, Mr. Church, and C & C; negligence against BOA; fraud against Mr. Church and C & C; and unjust enrichment as well as fraudulent conveyance of the Deed of Trust against all defendants. BOA filed a motion for summary judgment, claiming that Mr. Phelps and Mr. Church had entered into a joint venture for the construction of the duplex, that it had fulfilled its only obligation to loan Mr. Angus $132,000.00, and that Mr. Angus' payment to Mr. Church at closing constituted payment to the joint venture. ***Id.*** at *2. The trial court granted BOA's motion for summary judgment and dismissed Mr. Phelps' claims against it, finding that Mr. Church and Mr. Phelps had entered into a joint venture for the construction of the duplex and that payment to Mr. Church

at closing was payment to the joint venture. ***Id.***

On appeal, we found "[t]he record and material filed in support of [BOA's] motion for summary judgment support[ed] a finding of a joint venture between Mr. Church and Mr. Phelps[,]" and that Mr. Phelps had submitted insufficient proof to negate this contention. ***Id.*** at *4, 6. Specifically, we noted that Mr. Phelps and Mr. Church had executed a document acknowledging that they had come to an "agreement to do a joint venture to construct a new . . . dwelling[,]" outlining their separate responsibilities relative to the construction project, and agreeing to equally divide the profits at closing. ***Id.*** at *4. We agreed that "payment to Mr. Church was payment to the joint venture[,]" and found that such payment effectively negated an essential element of Mr. Phelps' breach of contract claim. ***Id.*** at *4, 6 (citing *Fain v. McConnell*, 909 S.W.2d 790 (Tenn. 1995); *Spencer Kellogg & Sons, Inc. v. Lobban*, 315 S.W.2d 514 (Tenn. 1958)).

Following our affirmance of summary judgment to BOA, Mr. Angus filed a motion for summary judgment, which the trial court granted. In its "Memorandum and Order," the trial court stated in part:

> [T]he Court of Appeals determined that the legal significance of the second addendum signed by the parties concerning financing was that [Mr. Phelps] and Mr. Church had divided responsibilities with respect to their joint venture. The Court of Appeals held that the second addendum signified that [Mr. Phelps'] responsibility under the joint venture was to furnish financing; whereas defendant Church's responsibility was the construction of the duplex.
>
> [Mr. Phelps'] theory of liability against defendant Angus is that the second addendum and other conversations and actions of the parties signify that defendant Angus had an obligation/agreement relative to financing with [Mr. Phelps], separate and apart from the joint venture [Mr. Phelps] had with defendant Church. That theory of liability is inconsistent with and cannot be reconciled with the holding of the Court of Appeals that the second addendum is a statement of [Mr. Phelps'] responsibilities under the joint venture. [Mr. Phelps'] theory of liability against defendant Angus, then, cannot be sustained in light of the ruling of the Court of Appeals on the summary judgment as to Bank of America. Accordingly, the breach of contract claim alleged by [Mr. Phelps] against defendant Angus is dismissed with prejudice.[1]

---

[1]The trial court also dismissed Mr. Phelps' unjust enrichment claim based upon the existence of a contract governing repayment to Mr. Phelps and upon the absence of an unjust benefit. The dismissal of this (continued...)

Mr. Phelps timely appealed.

II. ISSUES PRESENTED

Mr. Phelps presents the following issues for review:

1. Whether the trial court erred in granting summary judgment to Mr. Angus; and

2. Whether this Court's previous opinion precludes a cause of action against Mr. Angus.

Additionally, Mr. Angus presents the following issue:

3. Whether Mr. Angus should be awarded attorney fees for frivolous appeal.

For the following reasons, we affirm the trial court's grant of summary judgment to Mr. Angus. However, we decline to award attorney fees to Mr. Angus.

III. STANDARD OF REVIEW

A motion for summary judgment should be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." **Tenn. R. Civ. P. 56.04.** "The party seeking the summary judgment has the burden of demonstrating that no genuine disputes of material fact exist and that it is entitled to a judgment as a matter of law." ***Green v. Green,*** 293 S.W.3d 493, 513 (Tenn. 2009) (citing *Martin v. Norfolk S. Ry.,* 271 S.W.3d 76, 83 (Tenn. 2008); *Amos v. Metro. Gov't of Nashville & Davidson County,* 259 S.W.3d 705, 710 (Tenn. 2008)). "When ascertaining whether a genuine dispute of material fact exists in a particular case, the courts must focus on (1) whether the evidence establishing the facts is admissible, (2) whether a factual dispute actually exists, and, if a factual dispute exists, (3) whether the factual dispute is material to the grounds of the summary judgment." ***Id.*** Not every factual dispute requires the denial of a motion for summary judgment. ***Id.*** at 514. To warrant denial of a motion for summary judgment, the factual dispute must be material, meaning "germane to the claim or defense on which the summary judgment is predicated." ***Id.*** (citing *Eskin v. Bartee,* 262

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[1](...continued)
claim is not challenged on appeal.

S.W.3d 727, 732 (Tenn. 2008); *Luther v. Compton,* 5 S.W.3d 635, 639 (Tenn. 1999)).

When the party moving for summary judgment is a defendant asserting an affirmative defense, he or she may shift the burden of production by alleging undisputed facts that show the existence of the affirmative defense. ***Hannan v. Alltel Publ'g Co.,*** 270 S.W.3d 1, 9 n.6 (Tenn. 2008). "If the moving party makes a properly supported motion, then the nonmoving party is required to produce evidence of specific facts establishing that genuine issues of material fact exist." ***Martin,*** 271 S.W.3d at 84 (citing *McCarley v. W. Quality Food Serv.,* 960 S.W.2d 585, 588 (Tenn. 1998); *Byrd v. Hall,* 847 S.W.2d 208, 215 (Tenn. 1993)). The nonmoving party may satisfy its burden of production by:

> (1) pointing to evidence establishing material factual disputes that were overlooked or ignored by the moving party; (2) rehabilitating the evidence attacked by the moving party; (3) producing additional evidence establishing the existence of a genuine issue for trial; or (4) submitting an affidavit explaining the necessity for further discovery pursuant to Tenn. R. Civ. P., Rule 56.06.

Id. (citing *McCarley,* 960 S.W.2d at 588; *Byrd,* 847 S.W .2d at 215 n. 6).

The resolution of a motion for summary judgment is a matter of law, which we review de novo with no presumption of correctness. ***Martin,*** 271 S.W.3d at 84. However, "we are required to review the evidence in the light most favorable to the nonmoving party and to draw all reasonable inferences favoring the nonmoving party." ***Id.*** (citing *Staples v. CBL & Assocs., Inc.,* 15 S.W.3d 83, 89 (Tenn. 2000)). Summary judgment is appropriate "when the undisputed facts, as well as the inferences reasonably drawn from the undisputed facts, support only one conclusion--that the moving party is entitled to a judgment as a matter of law." *Green,* 293 S.W.3d at 513 (citing *Griffis v. Davidson County Metro. Gov't,* 164 S.W.3d 267, 283-84 (Tenn. 2005); *Pero's Steak & Spaghetti House v. Lee,* 90 S.W.3d 614, 620 (Tenn. 2002)).

IV. DISCUSSION

A. Cause of Action Against Mr. Angus

On appeal, Mr. Phelps does not challenge the finding of a joint venture between himself and Mr. Church. Instead, he argues that payment to Mr. Church does not entitle Mr. Angus to summary judgment as it did BOA, because unlike BOA, Mr. Angus entered into a "separate contract agreement" with Mr. Phelps in which he agreed to directly repay Mr. Phelps at closing. This separate financing agreement, Mr. Phelps maintains, is found in the

second addendum to the construction contract signed by himself, Mr. Angus and Mr. Church:

> Wade Phelps owner of Phelps/Harrington Construction will be supplying the construction finance [sic] of $137,000.00 to complete this project at 10% interest payable by owner at closing at a fee of $1,370.00 total for use of money during construction.

According to Mr. Phelps, this agreement established a duty by Mr. Angus to directly repay him the money at closing, and his failure to do so resulted in a breach of contract.

In his affidavit, submitted in opposition to summary judgment, Mr. Phelps described the execution of the second addendum as follows:

> I specifically and expressly only agreed to provide the financing for Mr. Angus's building after I spoke with Mr. Angus and after he agreed to sign the agreement that I would be paid the money back by him at the closing.
>
> . . . .
>
> I did not agree to provide the financing to enable Mr. Angus to get his loan from Bank of America until he and I spoke and he signed the attached agreement that the money I advanced, the $137,000 together with the interest, would be paid to me directly, up front and separate at the closing. . . . It was my intention and agreement to loan that money to Mr. Angus only if it was separated out from the construction and repaid with interest directly to me at closing.

We cannot agree with Mr. Phelps' assertion that the second addendum operates as a separate repayment agreement between himself and Mr. Angus. As the trial court correctly stated, in our prior opinion we characterized the second addendum as a statement of Mr. Phelps' responsibilities under the joint venture. ***Phelps***, 2009 WL 690695, at *4. The addendum simply cannot support both the finding of a joint venture–where payment to one joint venturer is payment to all–and a duty by Mr. Angus to pay the entire amount to Mr. Phelps. ***See* Tenn. Code Ann § 61-1-301(1); *Fed. Stores Realty, Inc. v. Huddleston***, 852 S.W.2d 206, 212 (Tenn. 1992). Moreover, we find that Mr. Phelps' affidavit does not create a genuine issue of material fact as to the second addendum's operation. By its plain language, the addendum states only Mr. Phelps' agreement to finance the project and Mr. Angus' agreement to repay the loan. Contrary to Mr. Phelps' assertion, it simply does not provide that repayment shall be made to Mr. Phelps "directly, up front and separate at the

closing[,]" as opposed to either joint venturer who executed the addendum.

Based on our prior opinion, we conclude that no separate agreement regarding repayment existed between Mr. Angus and Mr. Phelps, and therefore that the finding of a joint venture between Mr. Church and Mr. Phelps precludes a cause of action against Mr. Angus. This finding is further supported by our previous statement that "any claim of negligence against BOA by Mr. Phelps would fail because of the uncontroverted proof that the cause in fact and proximate cause of Mr. Phelps' failure to be paid was the action of Mr. Church in not paying him." ***Phelps***, 2009 WL 690695, at *7. Because there exists no genuine issue as to any material fact and Mr. Angus is entitled to a judgment as a matter of law, we affirm the trial court's grant of summary judgment to Mr. Angus.

B. Attorney Fees

Mr. Angus seeks to recoup his appellate attorney fees based on a frivolous appeal. Tennessee Code Annotated section 27-1-122 provides:

> When it appears to any reviewing court that the appeal from any court of record was frivolous or taken solely for delay, the court may, either upon motion of a party or of its own motion, award just damages against the appellant, which may include but need not be limited to, costs, interest on the judgment, and expenses incurred by the appellee as a result of the appeal.

The decision to award damages for the filing of a frivolous appeal rests solely in the discretion of this Court. ***Whalum v. Marshall***, 224 S.W.3d 169, 180-81 (Tenn. Ct. App. 2006) (citing *Banks v. St. Francis Hosp.*, 697 S.W.2d 340, 343 (Tenn. 1985)). "Successful litigants should not have to bear the expense and vexation of groundless appeals." ***Id.*** (quoting *Davis v. Gulf Ins. Group*, 546 S.W.2d 583, 586 (Tenn. 1977)). An appeal is frivolous when it has "no reasonable chance of success," or is "so utterly devoid of merit as to justify the imposition of a penalty." ***Id.*** (citing *Combustion Eng'g, Inc. v. Kennedy*, 562 S.W.2d 202, 205 (Tenn. 1978); ***Jackson v. Aldridge***, 6 S.W.3d 501, 504 (Tenn. Ct. App. 1999)). We exercise our discretion under this statute sparingly so as not to discourage legitimate appeals. ***Id.*** In this case, we find it equitable to decline to award attorney fees.

V. CONCLUSION

For the aforementioned reasons, we affirm the trial court's grant of summary judgment to Mr. Angus. However, we decline to award attorney fees to Mr. Angus. Costs of this appeal are taxed to Appellant, Wade Phelps/Phelps Harrington Construction Co., Inc., and his surety, for which execution may issue if necessary.

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ALAN E. HIGHERS, P.J., W.S.

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 15, 2011 Session

STATE OF TENNESSEE, EX REL. FRANCES CRAIG CREIGHTON
v.
WILBUR FOSTER CREIGHTON

Direct Appeal from the Circuit Court for Davidson County
No. 95D-3220 Carol Soloman, Judge

No. M2010-01171-COA-R3-CV - Filed April 7, 2011

This is an appeal from the trial court's order, finding Appellant in criminal contempt of court for willful failure to pay his ordered child support. Appellant appeals, alleging that the trial court erred in: (1) denying Appellant a full transcript of the hearing at the State's expense; (2) giving little or no credence to the evidence offered by Appellant's witness; and (3) finding Appellant in criminal contempt for willful failure to pay child support. Discerning no error, we affirm.

Tenn. R. App. P. 3. Appeal as of Right; Judgment of the Circuit Court Affirmed

J. STEVEN STAFFORD, J., delivered the opinion of the Court, in which ALAN E. HIGHERS, P.J., W.S., and DAVID R. FARMER, J., joined.

Edward J. Gross, Nashville, Tennessee, for the appellant, Wilbur Foster Creighton.

Robert E. Cooper, Jr., Attorney General and Reporter; Joe Whalen, Associate Solicitor General; Warren Jasper, Senior Counsel, for appellee, State of Tennessee, ex rel. Frances Craig Creighton.

Opinion

Appellant Wilbur Foster Creighton and Francis Craig Creighton were divorced on June 25, 1996, by order of the Davidson County Circuit Court. The final decree of divorce required Mr. Creighton to pay $1,000 per month in child support for the three minor children that were born to the marriage. Mr. Creighton was also ordered to provide medical insurance for the children. The order on child support was amended several times. The latest order, entered on September 23, 2008, requires Mr. Creighton to pay $1,320 per month in child

support.

On March 2, 2010, the State of Tennessee *ex rel.* Francis Craig Creighton (the "State," or "Appellee") filed a petition for criminal contempt and failure to provide medical insurance against Mr. Creighton.[1] The petition, brought under Tennessee Code Annotated Section 29-9-101 *et seq.*, alleges that Mr. Creighton had an accumulated child support arrearage in the amount of $22,400 as of February 24, 2010. The petition further states that Mr. Creighton is able bodied and capable of pursuing gainful employment. A notice that he was charged with criminal contempt, as well as a show cause order requiring Mr. Creighton to appear in court on March 31, 2010, was filed contemporaneously with the contempt petition. Mr. Creighton filed an affidavit of indigency on March 11, 2010. By order of March 11, 2010, the trial court found Mr. Creighton indigent, and appointed an attorney to represent him at the hearing.[2] On April 5, 2010, Mr. Creighton filed an answer to the petition, in which he states that he is medically and mentally unable to work; consequently, Mr. Creighton avers that he is not in willful contempt of court.

The hearing on contempt was held on May 19, 2010, before John Manson, sitting as a Substitute Judge in Judge Carol Soloman's court.[3] Immediately before the hearing began, Mr. Creighton's counsel made an oral motion that he be provided a verbatim transcript of the evidence at the State's expense. As grounds for his motion, Mr. Creighton alleged that the proceeding involved "[a] criminal offense wherein the State was seeking incarceration of up to 180 days." Because Mr. Creighton was proceeding as an indigent person, he argued that he was entitled to a full transcription of the evidence at the State's expense. In preparing a full record for this Court's review, the trial court, upon Mr. Creighton's motion to supplement the appellate record, entered an order on December 9, 2010. This order provides that Judge Manson denied Mr. Creighton's request for a full transcript "because the court has

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[1] This is a Title IV-D case. Because Ms. Creighton was receiving Title IV-D services, the State was authorized to proceed on her behalf. Tenn. Code Ann. § 71-3-124(c) (2004); 42 U.S.C. § 654(4) (2010); 45 C.F.R. § 302.33 (2010).

[2] Tennessee Code Annotated Section 8-14-201 defines an "indigent person," in relevant part, as:

> [O]ne who does not possess sufficient means to pay reasonable compensation for the services of a competent attorney:
> (1) In any criminal prosecution or juvenile delinquency proceeding involving a possible deprivation of liberty...

[3] Although the orders entered by Substitute Judge Manson indicate that he is a "Substitute Judge," from the record we conclude that he is, in fact, a Special Master, appointed under Tennessee Code Annotated §17-2-124. Consequently, the requirements of Tenn. Code Ann. §17-2-118(a) through (e) for appointment of a substitute judge are not triggered in this case. *See* Tenn. Code Ann. §17-2-118(f).

no authority, nor was one cited, to appoint a court reporter on a misdemeanor case." Consequently, there is no transcript of the hearing on the petition for criminal contempt.

Although there is no transcript of the hearing, pursuant to Tennessee Rule of Appellate Procedure 24(c), the appellate record contains a statement of the evidence adduced at the hearing. In addition, the State submitted an affidavit of direct payments (Trial Exhibit 1), showing that Mr. Creighton had paid no child support from September 2008 to the date of the hearing. According to the statement of evidence, Ms. Creighton testified that she and Mr. Creighton were married for thirteen years and that, during that time, Mr. Creighton had not been diagnosed with a mental health disorder, though he had seen a doctor for a mood disorder. Ms. Creighton also testified that Mr. Creighton owned and operated his own tree trimming business.

Mr. Creighton's mother, Donnie Creighton, also testified at the hearing. In relevant part, she stated that her son was a graduate of Belmont College and that she did not know of any mental or physical disabilities he had. Donnie Creighton testified that she did not know where her son lived and that she was not sure how he worked or supported himself. However, upon cross examination, Donnie Creighton testified that she had given Mr. Creighton approximately $20,000.00 in 2009 to help support him.

Mr. Forest Osborne testified for Mr. Creighton. He stated that he had worked as a mental health counselor for twenty-seven years. According to the testimony, Mr. Osborne holds a Bachelor's degree in Education, but does not have a degree in mental health, guidance, or counseling. Mr. Osborne testified that he meets with clients, reviews their medical background, and counsels them. Concerning his relationship with Mr. Creighton, Mr. Osborne testified that he had "been assigned to Mr. Creighton when Mr. Creighton came to [Mr. Osborne's] facility." Mr. Osborne met with Mr. Creighton approximately two months prior to the hearing, when he observed Mr. Creighton and reviewed his medical history.[4] Mr. Osborne stated that Mr. Creighton's diagnosis was anxiety disorder, mood disorder, and attention deficit disorder. Although Mr. Osborne ultimately opined that Mr. Creighton was unemployable, he did admit that, with consistent medication, a person with Mr. Creighton's diagnosis could be stabilized.

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[4] The statement of the evidence does not mention medical records, which were provided to this Court under seal, except to say that Mr. Osborne testified that he reviewed them. This Court has reviewed the sealed records, and we note that most of these records are dated from mid to late 2010. As noted above, the hearing on contempt was held on May 19, 2010; therefore, it appears that most of these medical records were unavailable at the time of the hearing and, consequently were not considered by the trial court and have no bearing on this appeal. However, even if this Court allows, *arguendo*, that the medical records are properly before it, we nonetheless conclude that they contain nothing to change our analysis.

Following the hearing, Judge Manson found Mr. Creighton in contempt of court on eighteen separate occasions, and sentenced him to ten days in jail for each offense, for a total of 180 days. The order is a form order, on which Judge Manson checked certain items. As is relevant to this appeal, Judge Manson checked that "Respondent is guilty of criminal contempt pursuant to T.C.A. Section 20-9-101 and has violated the court's order on 18 occasion."[5] Under the heading "Sentencing," Judge Manson checked that "Respondent shall be sentenced to 10 days per offense for a total of 180 days," and specified that "[s]aid sentence is to be served day for day." Judge Manson's order also includes a written finding, namely:

> [Mr. Creighton] was clearly aware of the child support order and willfully disobeyed it. The court finds [Mr. Creighton] ab[le] to work and that no medical proof was presented to prove a medical diagnosis of inability to work. The court finds [Mr. Creighton] had money to pay child support but failed to make any payments.

Mr. Creighton was found to owe $35,208 in back child support, and was ordered to pay $257 per month in current child support, plus $216.66 per month toward his arrearage. Judge Manson also modified the support order to reflect that two of the parties' children are emancipated. Following the hearing, Mr. Creighton was immediately remanded to the custody of the Davidson County Sheriff. By Order of May 28, 2010, Judge Carol Soloman confirmed and adopted the ruling of Judge Manson.[6]

On June 11, 2010, the court entered an amended performance bond, requiring Mr. Creighton to pay $7,500 to secure his performance in payment of $307 per week in child support. Mr. Creighton posted a performance bond in the amount of $7,500 on June 18, 2010, and was released from jail. Mr. Creighton appeals and raises four issues for review; however, we conclude that there are only three issues, which we state as follows:

> 1. Whether the trial court was required to provide a transcript of the proceedings in this matter, at its expense or at the State's expense?

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[5] Underlined sections in this sentence and the next were written in by Judge Manson.

[6] The record indicates that Judge Manson's order was not entered in the record until June 23, 2010. Apparently Judge Soloman reviewed Judge Manson's findings and approved same prior to the entry of Judge Manson's order.

2. Whether the court was within its discretion to disregard the expert testimony proffered by Mr. Creighton?

3. Whether the trial court's finding of contempt is supported by the evidence?

Before reaching the issues, we pause to review the relevant law on contempt. An act of contempt is a willful or intentional act that offends the court and its administration of justice. Tenn. Code Ann. § 29-9-102; *see also* ***Graham v. Williamson***, 164 S.W. 781, 782 (Tenn. 1914). Traditionally, contempt has been classified as civil or criminal depending upon the action taken by the court to address the contempt. Title 29, Chapter 9 of the Tennessee Code on Remedies and Special Proceedings provides the grounds for contempt and the remedies available to the court. Tenn. Code Ann. §§ 29-9-102 through 104. As is relevant to the instant case, Tennessee Code Annotated Section 29-9-102 provides:

> The power of the several courts to issue attachments, and inflict punishments for contempts of court, shall not be construed to extend to any except the following cases:
>
> * * *
>
> (3) The willful disobedience or resistance of any officer of the said courts, party, juror, witness, or any other person, to any lawful writ, process, order, rule, decree, or command of said courts.

In order to find contempt under this statute, a court must find the misbehavior, disobedience, resistance, or interference to be willful.

Following a finding of contempt, courts have several remedies available depending upon the facts of the case. A court can imprison an individual to compel performance of a court order. This is typically referred to as "civil contempt." This remedy is available only when the individual has the ability to comply with the order at the time of the contempt hearing. Tenn. Code Ann. § 29-9-104;[7] *see also* ***Garrett v. Forest Lawn Memorial Gardens***,

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[7] Tennessee Code Annotated § 29-9-104 provides:

> **Omission to perform act.**-(a) If the contempt consists in an omission to perform an act which it is yet in the power of the person to perform, he may

(continued...)

588 S.W.2d 309, 315 (Tenn. Ct. App.1979). Thus, with civil contempt, the one in contempt has the "keys to the jail" and can purge the contempt by complying with the court's order. Tenn. Code Ann. § 29-9-104; ***Garrett***, 588 S.W.2d at 315. In civil contempt, the imprisonment is meted out for the benefit of a party litigant. *See* ***Shiflet v. State***, 400 S.W.2d 542, 543 (Tenn. 1966).

A court may also imprison and/or fine an individual simply as punishment for the contempt. This remedy is commonly referred to as "criminal contempt." Unless otherwise provided, the circuit, chancery, and appellate courts are limited to imposing a fine of $50.00 and to imprisoning an individual for not more than ten days. Tenn. Code Ann. § 29-9-103.[8] A party who is in criminal contempt cannot be freed by eventual compliance. *See* ***Shiflet***, 400 S.W.2d at 543. In the instant case, it is undisputed that Mr. Creighton was found guilty of criminal contempt.

Transcript

From his appellate brief, Mr. Creighton seems to first argue that the trial court denied him the right to have a verbatim transcript of the evidence. However, there is no evidence in this record to suggest that the trial court actually denied Mr. Creighton the opportunity to have the hearing transcribed; rather, Mr. Creighton was only denied a transcript at the State's expense. Having narrowed the issue, we turn to the record.

As discussed above, Mr. Creighton is an indigent person. As such, he is entitled to help from the court in order to satisfy the requirements of due process. Tennessee Supreme Court Rule 13 requires that an attorney be appointed, at the State's expense, to represent an indigent party:

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[7](...continued)

> be imprisoned until he performs it.
> (b) The person or if same be a corporation, then such person or corporation can be separately fined, as authorized by law, for each day it is in contempt until it performs the act ordered by the court.

[8] Tennessee Code Annotated § 29-9-103 provides:

> Punishment.-(a) The punishment for contempt may be by fine or by imprisonment, or both.
> (b) Where not otherwise specially provided, the circuit, chancery, and appellate courts are limited to a fine of fifty dollars ($50.00), and imprisonment not exceeding ten (10) days, and, except as provided in § 29-9-108, all other courts are limited to a fine of ten dollars ($10.00).

> (c) All general sessions, juvenile, trial, and appellate courts shall appoint counsel to represent indigent defendants and other parties who have a constitutional or statutory right to representation (herein "indigent party" or "defendant") according to the procedures and standards set forth in this rule.
>
> (d)(1) In the following cases, and in all other cases required by law, the court or appointing authority shall advise any party without counsel of the right to be represented throughout the case by counsel and that counsel will be appointed if the party is indigent and requests appointment of counsel.
> (A) Cases in which an adult is charged with a felony or a misdemeanor and is in jeopardy of incarceration;
> (B) Contempt of court proceedings in which the defendant is in jeopardy of incarceration...

Tennessee Supreme Court Rule 13, which encompasses indigent defendants in both criminal and civil matters, does not, however, mandate that all indigent parties are entitled to a full transcript of the proceedings at the State's expense. However, Tennessee Criminal Procedure Rule 37(c) not only gives an indigent criminal defendant the right to have an attorney appointed, but also gives that defendant the right to have a transcript or statement of evidence furnished by the State:

> If the defendant is indigent, the court shall advise the defendant that, if he or she has not already retained appellate counsel or if counsel has not previously been appointed, the court will appoint appellate counsel and that a transcript or statement of the evidence will be furnished at state expense.

Tenn. R. Crim P. 37(c)(2).

In order to secure a criminal defendant's right to a transcript at the State's expense, Tennessee Code Annotated Section 40-14-307(a) provides:

> A designated reporter shall attend every stage of each criminal case before the court and shall record verbatim, by a method prescribed or approved by the administrative director, all proceedings had in open court and other proceedings as the judge may direct. The reporter shall attach the reporter's official certificate to the records so taken and promptly file them with

> the clerk of the court, who shall preserve them as a part of the records of the trial.

Both Tennessee Rule of Criminal Procedure 37(c) and Tennessee Code Annotated Section 40-14-307(a) deal with the rights of criminal defendants in criminal cases. Tennessee Code Annotated Section 40-14-301(3) defines a "criminal case" as:

> [T]he trial of any criminal offense which is punishable by confinement in the state penitentiary and any proceeding for the writ of habeas corpus wherein the unlawful confinement is alleged to be in a state, county or municipal institution...

In support of his argument that he is entitled to a full transcript of these proceedings at the State's expense, Mr. Creighton relies upon the case of ***State v. Draper***, 800 S.W.2d 489 (Tenn. Crim. App. 1990). The ***Draper*** case involved a criminal defendant's appeal to the Court of Criminal Appeals. It appears, from our reading of his argument, that Mr. Creighton considers himself to be a criminal defendant because of the court's finding of criminal contempt. The first question we must address, therefore, is whether a hearing on criminal contempt arising out of a civil matter is, in fact, a criminal proceeding so as to trigger the requirements for a State-funded court reporter under Tennessee Code Annotated Section 40-14-307(a) and Tennessee Rule of Criminal Procedure 37(c)(2).

The Tennessee Attorney General has addressed the question of whether criminal contempt proceedings constitute criminal proceedings in the context of whether district public defenders are prohibited from representing indigent persons in child support or other contempt of court proceedings. In opining that public defenders are statutorily prohibited from representing indigents charged under Tenn. Code Ann. § 29-9-102, the Attorney General specifically concluded that it is likely courts would hold that criminal contempt cases, brought under the general criminal contempt statute, Tenn. Code Ann. § 29-9-102, are not "criminal prosecution[s]". In reaching this conclusion, the Attorney General reasoned, in relevant part, as follows:

> Prior to its amendment in 1991, the statutory definition of "indigent person" encompassed those charged in "any criminal prosecution or other proceeding involving a possible deprivation of liberty." Tenn. Code Ann. § 8-14-201(1)(repealed)(emphasis added). However, in 1991, the Legislature amended the definition in Tenn. Code Ann. § 8-14-201(1) to provide that public defenders shall represent those who do not possess sufficient means to pay reasonable

compensation for the services of a competent attorney in "any criminal prosecution or juvenile delinquency proceeding involving a possible deprivation of liberty."

* * *

We...first examine whether criminal contempt proceedings constitute a "criminal prosecution", within the meaning of Tenn. Code Ann. § 8-14-201(1). We note that the answer is not entirely clear. Our research has revealed no Tennessee decisions which have considered the specific question.

If, on the one hand, a court were to construe Section 8-14-201(1)'s language according to "plain language" principles, it could find that criminal contempt proceedings constitute a "criminal prosecution." Criminal contempt is generally regarded as a crime, and is thus "criminal" in nature. *See,* ***Bloom v. Illinois***, 391 U.S. 194, 201, 88 S. Ct. 1477, 1481, 20 L. Ed.2d 522 (1968); ***Black v. Blount***, 938 S.W.2d 394, 398, 402 (Tenn. 1996). Furthermore, Rule 42 of the Tennessee Rules of Criminal Procedure, entitled "Criminal Contempt", uses the term "prosecuted" in prescribing required procedure. Rule 42(b), Tenn. R. Crim. Proc.

On the other hand, recent decisions of the lower appellate courts have continued to cite with approval prior holdings that a criminal contempt proceeding is not a criminal prosecution. *See, e.g.,* ***Wilson v. Wilson***, No. 01A01-9704-CV-00152, 1998 WL 122720 (Tenn. App. 1998)(citing ***State v. Sammons***, 656 S.W.2d 862, 867 (Tenn. Crim. App. 1982)). In Wilson v. Wilson, the Court of Appeals examined whether private counsel who represented a party to an action should be disqualified from prosecuting a petition for criminal contempt against the other party. In considering whether due process considerations were implicated by the practice, the Court stated, in dictum:

> The ***Sammons*** court [***State v. Sammons***, 656 S.W.2d 862, 867 (Tenn. Crim. App. 1982)] noted that, contrary to the safeguards in the federal

> system, a defendant in a criminal contempt action in this state is not afforded a jury trial. ***Sammons***, 656 S.W.2d at 867. Furthermore, a criminal contempt proceeding is not even considered a criminal prosecution. ***Id.*** Because of its minor nature, criminal contempt in Tennessee has a statutory maximum fine of fifty ($50) dollars and ten (10) days imprisonment which may be ordered in circumstances other than nonpayment of child support. T.C.A. § 29-9-103 (Supp. 1997).

Wilson v. Wilson, *supra*, 1998 WL 122720 at p. 3...

In ***State v. Sammons***, 656 S.W.2d 862 (Tenn. Crim. App. 1982), the Court held that defendant's contempt citations for kidnapping? his child did not bar subsequent prosecution under double jeopardy principles. 656 S.W.2d at 866-869. In distinguishing a contrary decision by the Illinois Supreme Court, the Court of Criminal Appeals stated:

> In terms of both its purpose...and its substantive provisions, T.C.A. § 29-9-102 can hardly be interpreted as creating the same kind of "serious contempt" of quasi-crime that is contemplated under the Illinois scheme. This is manifestly true despite the fact that for some purposes the contempt procedure is treated under Tennessee law as being criminal in nature. *See, e.g.*, ***Strunk v. Lewis Coal Co.***, 547 S.W.2d 252, 253 (Tenn. Cr. App. 1976) (standard of proof for "criminal contempt" is guilt beyond a reasonable doubt). In contrast to the Illinois cases, for example, there is no requirement in Tennessee that a person sentenced under T.C.A. § 29-9-102 be afforded a jury trial. [Citation omitted]. <u>And it has been explicitly held that a Tennessee contempt proceeding is not a criminal prosecution</u>. ***Bowdon v. Bowdon***, 198 Tenn. 143, 278 S.W.2d 670, 672

(1955).[9]

656 S.W.2d at 867 (emphasis added). Such decisions continue to recognize that while criminal contempt is generally regarded as a crime, prosecutions of criminal contempt:

> are not intended to punish conduct proscribed as harmful by the general criminal laws. Rather, they are designed to serve the limited purpose of vindicating the authority of the court. In punishing contempt, the Judiciary is sanctioning conduct that violates specific duties imposed by the court itself, arising directly from the parties' participation in judicial proceedings.

Young v. U.S. ex rel. Vuitton et Fils S.A., 481 U.S. 787, 800, 107 S.Ct. 2124, 2134, 95 L. Ed.2d 740 (1987). While contempt proceedings are sufficiently criminal in nature to warrant the imposition of many procedural protections, their fundamental purpose is to preserve respect for the judicial system itself. ***Id.***

Moreover, we believe it is likely that a court, in construing Tenn. Code Ann. § 8-14-201(1), would look to precedents which have construed analogous language contained within the statutes establishing the prosecutorial duties of district attorneys general. Such precedents have construed the statutory language imposing a duty upon district attorneys general "[t]o attend the circuit courts in his district, and every other court therein having criminal jurisdiction, and prosecute on behalf of the state in every case is which the state is a party, or in anywise interested", Tenn. Code Ann. § 8-7-103(1), and have held that district attorneys general have neither an affirmative duty to prosecute criminal contempts, nor are they

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[9] The ***Bowdon*** Court specifically held that "[c]ontempt proceedings are *sui generis*, and are neither civil actions nor criminal prosecutions as ordinarily understood within sixth amendment to United States Constitution. U.S.C.A.Const. Amend. 6." ***Bowdon***, 278 S.W.2d 670, 672 (Tenn. 1955).

> prohibited from doing so. In ***Miller v. Washington County***, 143 Tenn. 488, 497, 226 S.W.2d 199, 205 (1920), the Supreme Court held that the statutory duty of district attorneys general refers only to "criminal prosecutions." In ***Black v. Blount***, 938 S.W.2d 394 (Tenn. 1996), the Supreme Court noted the differences between prosecutions of general crimes and those of contempt; it concluded that district attorneys general have no mandatory statutory duty to prosecute criminal contempts, but emphasized that they are not prohibited from prosecuting such cases [emphasis in original]. ***Id.*** at 402-403.
>
> Based upon all of the above, we conclude that it is likely that a court would hold that criminal contempt cases are not "criminal prosecution[s]", for purposes of determining the scope of public defenders' representation under Tenn. Code Ann. §§ 8-14-201(1), *et seq*.

98 Tenn. Op. Att'y Gen. 092, 1998 WL 227262 (Tenn. A.G. April 15, 1998) (footnote omitted).

In a case issued prior to the Attorney General's Opinion, ***Perkinson v. Perkinson***, No. 01A-01-9602-CV-00059, 1996 WL 426807 (Tenn. Ct. App. July 31, 1996), *perm. app. denied* (Tenn. Nov. 25, 1996), this Court discussed the question of whether a party charged with criminal contempt should be treated as a criminal defendant for purposes of his right to a jury. In concluding that criminal contempt is not a criminal offense, we reasoned:

> Admittedly, criminal contempt is a crime in the ordinary sense, and certain constitutional provisions apply to the punishment proceeding. ***Bloom v. Illinois***, 391 U.S. 94, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968); ***Strunk v. Lewis Coal Co.***, 547 S.W.2d 252 (Tenn. Crim. App.1976). And we have held that the Rules of Criminal Procedure must be followed. ***Storey v. Storey***, 835 S.W.2d 593 (Tenn. App.1992). Since Rule 23, Tenn. R. Crim. Proc. requires a written waiver of the jury in all cases except small offenses, and a small criminal offense in Tennessee is defined as one that does not impose any incarceration as punishment, *see* ***State v. Dusina***, 764 S.W.2d 766 (Tenn.1989), we must decide if a charge of criminal contempt under Tenn. Code Ann. § 29-9-103 (maximum punishment of a fifty dollar fine and/or ten days in jail) is a major criminal offense to which

the right to a trial by jury attaches.

> In ***Brown v. Latham***, 914 S.W.2d 887 (Tenn.1995), the Supreme Court decided that an accused did have the right to a jury trial in a prosecution for violating Tenn. Code Ann. § 36-5-104(a) which carried a possible sentence of six months in jail. But the court recognized the right to a jury because Tenn. Code Ann. § 36-5-104 is a "general criminal statute." The court reserved judgment on "the constitutional limitations on a court's authority to punish for contempt" and "the distinction between a criminal offense and a criminal contempt." 914 S.W.2d at 889.
>
> In this court's opinion in ***Brown v. Latham***, we said:
>
> > Although criminal contempt is a crime, for constitutional purposes, it is not the same as a violation of the criminal law.... "The proceeding in contempt is for an offense against the court as an organ of public justice, and not for a violation of the criminal law." ***State v. Howell***, 80 Conn. 668 at ----, 69 A. 1057 at 1058 (1908). "Contempt proceedings are sui generis-neither a civil action nor a criminal prosecution as ordinarily understood." ***Bowdon v. Bowdon***, 198 Tenn. 143 at 146, 278 S.W.2d 670 at 672 (1955). Thus, a defendant may be jailed for criminal contempt without a trial by jury, but the same defendant may demand a jury trial in a charge of violating a criminal statute if the statute provides that incarceration is one of the choices for punishment.
>
> Appeal No. 01-A-01-9401-CV-00008 (Filed in Nashville, October 19, 1994).

Perkinson, 1996 WL 426807, at *2-3.

Here, the State's petition was brought under Tennessee Code Annotated Section 29-9-101, *et seq*. Moreover, Judge Manson's order indicates that Mr. Creighton is found guilty of criminal contempt "pursuant to T.C.A. Section 29-9-101." We adhere to the principle

stated in the foregoing cases and hold that the violation of a court order, punishable by a fifty dollar fine and/or ten days in jail under Tennessee Code Annotated Section 29-9-101, is not a "criminal case," as defined in Tennessee Code Annotated Section 40-14-301(3), *supra*. Consequently, cases brought under Tennessee Code Annotated Section 29-9-101 do not trigger the due process mandates of Tenn. R. Crim P. 37(c)(2) or Tennessee Code Annotated Section 40-14-307(a) to provide the indigent defendant with a verbatim transcript at the State's expense.

However, even if this Court were to assume, *arguendo*, that Mr. Creighton is a criminal defendant, this fact does not automatically entitle him to a verbatim transcript of the evidence at the State's expense. In the first instance, Tennessee Rule of Criminal Procedure 37(c), *supra*, requires *either* a transcript *or* a statement of the evidence. Therefore, in approving the statement of the evidence, the trial court complied with the requirements of this rule. Moreover, in ***Bell v. State***, No. 03C019712CR00541, 1999 WL 436432 (Tenn. Crim. App. June 29, 1999), the Court of Criminal Appeals addressed the question of whether an indigent defendant, charged with a misdemeanor offense, was entitled to a verbatim transcript of the proceedings at the State's expense. In relevant part, the ***Bell*** Court held:

> An indigent defendant "must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." ***Griffin v. Illinois***, 351 U.S. 12, 19, 76 S. Ct. 585, 591, 100 L.Ed. 891 (1956). Indigent defendants in both felony and misdemeanor cases have the right to adequate appellate review. ***Mayer v. City of Chicago***, 404 U.S. 189, 195-96, 92 S. Ct. 410, 415, 30 L.Ed.2d 372 (1971) (citing ***Williams v. Oklahoma City***, 395 U.S. 458, 459, 89 S. Ct. 1818, 1819, 23 L.Ed.2d 440 (1969)). The state must provide an indigent defendant with a " 'record of sufficient completeness' to permit proper consideration of (his) claims." ***Draper v. Washington***, 372 U.S. 487, 499, 83 S. Ct. 774, 781, 9 L.Ed.2d 899 (1963) (quoting ***Coppedge v. United States***, 369 U.S. 438, 446, 82 S. Ct. 917, 921, 8 L.Ed.2d 21 (1962)).

Bell, 1999 WL 436432, at *2.

In addressing what constitutes a "record of sufficient completeness," our Supreme Court, in ***State v. Gallagher***, 738 S.W.2d 624 (Tenn. 1987), stated:

> A "record of sufficient completeness" does not translate automatically into a complete verbatim transcript.... a State "may

> find other means [than providing stenographic transcripts] for affording adequate and effective appellate review to indigent defendants" ... "alternative methods of reporting trial proceedings are permissible if they place before the appellate court an equivalent report of the events at trial from which the appellant's contentions arise." [Citations omitted.] ***Mayer v. City of Chicago***, 404 U.S. at 194, 92 S. Ct. at 414.

Gallagher, 738 S.W.2d at 625.

In ***State v. Draper,*** 800 S.W.2d 489 (Tenn. Crim. App. 1990), upon which Mr. Creighton relies for his argument, the Court of Criminal Appeals held, in relevant part, as follows:

> When the issues "make out a colorable need for a complete record", the State is required to provide the defendant with a complete verbatim transcript of the evidence and proceedings. If the State contends that a verbatim transcript of only a portion of the proceedings, or, in the alternative, a statement of the evidence will suffice, the State has the burden or onus of showing that a partial transcript or a statement of the evidence is sufficient for the defendant to effectively present the issues and have them determined by the appellate court on the merits.

Draper 800 S.W.2d at 494 (citations omitted).

In the instant case, Mr. Creighton's motion for a verbatim transcript at the State's expense was denied. However, as noted above, the record does contain a Tennessee Rule of Appellate Procedure 24 statement of the evidence. Based upon the foregoing discussion, we must review the sufficiency of the statement of the evidence in order to ensure that Mr. Creighton's issues may be properly adjudicated on appeal. *See* ***State v. Gallagher***, 738 S.W.2d at 626. It is well settled that, when a verbatim transcript is unavailable, a party may prepare a statement of the evidence. Tenn. R. App. P. 24(c). If the other party files an objection to the statement of the evidence, then the trial court shall decide what should properly be included in the statement of the evidence. Tenn. R. App. P. 24(c), (e).

Turning to the record, Mr. Creighton asserts that the statement of the evidence was provided by the State and that it is insufficient insofar as it allegedly excludes "the specific findings and language, [and] the specific hypothetical questions and responses" adduced at the hearing. Before addressing the sufficiency of the statement of the evidence, we first note

that the record does not indicate that Mr. Creighton lodged any objection, at the trial level, to the statement of the evidence proferred by the State. As noted above, Tennessee Rule of Appellate Procedure 24 provides that the party opposing the statement of the evidence may object thereto, thus requiring the trial court to decide what should be included in the statement of the evidence. It does not appear that Mr. Creighton availed himself of this procedure. Moreover, there is no indication in the record that Mr. Creighton offered his own statement of the evidence. Consequently, this Court cannot compare his proposed statement with the statement approved by the trial court.

Nonetheless, we note that the statement of the evidence contained in the record provides a very detailed account of the trial proceedings. The State and the trial judge approved the statement of the evidence. However, Mr. Creighton now contends that a verbatim transcript is necessary in order to portray the nuances and details of the witnesses' testimony and the rulings of the trial judge. Again, there is no indication that Mr. Creighton was prevented from including any information in the statement of the evidence due to the State or the trial court's objection. We find that the statement of the evidence sufficiently describes the witnesses' testimonies and the trial judge's rulings upon which this appeal is based. Consequently, we conclude that the trial court did not err by denying Mr. Creighton's motion for a verbatim transcript of the evidence at the State's expense.

Expert Testimony

Mr. Creighton next asserts that the trial court abused its discretion in "completely disregarding a highly qualified vocational expert [i.e., Mr. Forest Osborne]." However, from our review of the record, and particularly the statement of the evidence, it appears that the trial court did, in fact, consider Mr. Osborne's testimony. The statement of the evidence contains a detailed description of both Mr. Osborne's direct and cross examination testimony. Consequently, Mr. Osborne's testimony was not disregarded as Mr. Creighton asserts. Concerning the weight to be given to that testimony, this decision rests with the trier of fact, who has the opportunity to observe the witnesses and to assess the witnesses' credibility. ***In re Estate of Walton***, 950 S.W.2d 956, 959 (Tenn. 1997); ***Fell v. Rambo***, 36 S.W.3d 837, 846 (Tenn. Ct. App. 2000). This Court accords great weight to the trial court's findings that are based on a determination of the witnesses' credibility. ***Estate of Walton***, 950 S.W.2d 959. From our review of the record, no evidence has been provided indicating that the trial court disregarded Mr. Osborne's testimony. Furthermore, this Court has been provided with no basis that would allow it to disturb the weight the trial court placed on Mr. Osborne's testimony.

Whether the Record Supports a Finding of Contempt

Mr. Creighton was found guilty of criminal contempt for willful failure to pay child support. In order to find contempt under Tennessee Code Annotated Section 29-9-102, a court must find the misbehavior, disobedience, resistance, or interference to be willful.

A defendant accused of criminal contempt is presumed to be innocent. ***Shiflet v. State***, 400 S.W.2d 542, 544 (Tenn. 1966). The party seeking a finding of contempt, therefore, bears the burden of proving guilt beyond a reasonable doubt. ***Id.*** Necessarily, the State's burden in the instant case was to establish, beyond a reasonable doubt, that Mr. Creighton willfully disobeyed the court's order on child support. *See* ***State ex rel. Cottingham v. Cottingham***, 193 S.W.3d 531, 538 (Tenn. 2006), *rev'd on other grounds*; ***Ahern v. Ahern***, 15 S.W.3d at 79 (Tenn. 2000). In ***Writesman v. Writesman***, No. M1999-00726-COA-R3-CV, 2000 WL 1367965 (Tenn. Ct. App. Sept. 22, 2000), this Court said:

> In the trial of a criminal contempt case, the defendant is presumed to be innocent until he is found guilty beyond a reasonable doubt. But once the defendant is found guilty and the case is appealed, he is burdened with the presumption of guilt, and in order to obtain a reversal, he must overturn this presumption by showing that the evidence preponderates in favor of his innocence.

Id. at *5 (citing ***Robinson v. Air Hydraulics Eng'g Co.***, 377 S.W.2d 908, 912 (Tenn. 1964)) (citations omitted). The Tennessee Court of Criminal Appeals has stated the standard of review as follows:

> When an accused challenges the sufficiency of the convicting evidence, this Court must review the record to determine if the proof adduced at the trial is sufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt. T.R.A.P. 13(e). We do not re-weigh or re-evaluate the evidence and are required to afford the State the strongest legitimate view of the proof contained in the record as well as all reasonable and legitimate inferences which may be drawn therefrom.

State v. Creasy, 885 S.W.2d 829, 831 (Tenn. Crim. App. 1994) (citations omitted).

With the foregoing in mind, we must determine whether the evidence supports the court's finding that Mr. Creighton's failure to pay child support was willful. According to the statement of the evidence, the trial court relied upon the testimony of Donnie Creighton

in determining that Mr. Creighton's failure to pay was willful. In relevant part, Donnie Creighton testified that she had seen Mr. Creighton working at his tree trimming business during 2009. In addition, Donnie Creighton testified that she had given Mr. Creighton approximately $20,000 in 2009 to assist with his financial needs. Despite receiving this assistance in addition to his normal income from his business, there is no indication that Mr. Creighton made any effort to pay any portion of his mounting child support arrearage during the relevant period, nor is there any evidence as to why Mr. Creighton failed to comply with his obligation to provide health insurance for his children. Instead, Ms. Creighton testified that, in 2010, when his child support arrearage was in excess of $23,000, Mr. Creighton chose to pay his adult son $20 to $30 per day to work for him, even on days when the adult son did not come to work.

Concerning Mr. Creighton's alleged mental condition(s), the statement of the evidence indicates that Mr. Osborne testified that he is neither a psychologist nor psychiatrist; moreover, Mr. Osborne does not have a degree in the field of mental health, guidance, or counseling. Furthermore, Mr. Osborne admitted that he cannot diagnose his clients, but rather relies upon the diagnosis of medical experts. Based upon these admissions, it is difficult to find credence in Mr. Osborne's opinion that Mr. Creighton suffers from anxiety, mood, and attention deficit disorders so severe that he cannot hold a job. From the totality of the evidence, we cannot conclude that the trial court erred in finding that there was no support in the record for Mr. Creighton's argument that he was unable to work. From the record, we conclude that, despite having some income and resources, Mr. Creighton chose not to pay his ordered child support. There is no evidence in the record to indicate that Mr. Creighton's decision to ignore his obligation was anything but willful.

For the foregoing reasons, we affirm the order of the trial court. It appearing that the Appellant is indigent, the costs of this appeal are taxed to the State.

_____

J. STEVEN STAFFORD, JUDGE

MEMORANDUM

TO: 8th Circuit Court

FROM: John Manson, Special Master

RE: Criminal Contempt and attorney's fees

DATE: 8/4/10

ISSUE

Can a Judge grant attorney's fees to the Petitioner in a Criminal Contempt matter when the Respondent is found in Contempt?

ANSWER

Yes and no. Yes, when the contempt was based on failure to pay child support or to adhere to any order regarding parenting time (custody). No in any other instance, except where it is a contractual obligation, such as an MDA.

ANALYSIS

The powers of contempt granted to a Court are enumerated in Chapter 9 of Section 29 of the Tennessee Code Annotated. TCA §29-9-103 gives the specific punishment:

> (a) The punishment for contempt may be by fine or by imprisonment, or both
> (b) Where not otherwise specially provided, the circuit, chancery, and appellate courts are limited to a fine of fifty dollars ($50.00), and imprisonment not exceeding ten (10) days, and, except as provided in § 29-9-108, all other courts are limited to a fine of ten dollars ($10.00).
>
> TCA § 29-9-103 (2000).

This statute makes no mention of attorney's fees. In the case of *Butler v. Butler*, 1995 WL 695123 (Tenn.Ct.App.), the issue of attorney's fees was further clarified. The

case stemmed from a conviction of criminal contempt for violation of a permanent injunction. The Defendant agreed to stay away from the Plaintiff. He was found to have disobeyed the order, and the trial court granted attorney's fees along with the contempt. At appeal, the Court state that "[i]t has long been the law that a fifty-dollar fine and ten days' imprisonment are all that a chancery court may impose for criminal contempt. *Butler v. Butler*, 1995 WL 695123 (Tenn.Ct.App.) (*citing Weidner v. Friedman*, 151 S.W. 56 (Tenn. 1912)). The Butler Court went on to say that were not "aware of any such case law" that stands for the proposition that it is permissible for a court to exceed the statutorily-defined limits for punishment for criminal contempt by awarding attorney's fees. *See Butler* at 2. A footnote then points to the case of *Sherrod v. Wix*, 849 S.W.2d 780 (Tenn.App. 1992).

Sherrod v. Wix is a case involving a request to increase his parenting time and for custody of the parties' son. The only relevance is the mention of TCA § 36-5-103(c), which provides:

> The plaintiff spouse may recover from the defendant spouse, and the spouse or the other person to whom the custody of the child, or children, is awarded may recover from the other spouse reasonable attorney fees incurred in enforcing *any* decree for alimony and/or child support, or in regard to *any* suit or action concerning the adjudication of the custody or the change of custody of any child, or children, of the parties, both upon the original divorce hearing and at any subsequent hearing, which fees mayb e fixed and allowed by the court, before whom such action or proceeding is pending, in the discretion of such court. (emphasis added)
>
> *Sherrod* at 784-5 (citing TCA § 36-5-103(c) (1991)).

The Court went on to say that "[a]s a result of this statute, the Tennessee Supreme Court has noted that awards for legal expenses in custody or support proceedings are 'familiar

and almost commonplace.'" *Sherrod* at 785, c*iting Deas v. Deas*, 774 S.W.2d 167,170 (Tenn. 1989).

The importance of the footnote mentioning *Sherrod* in the *Butler* case becomes clear when the court follows it by saying "the general rule is that absent a statute, contract, or recognized ground of equity, there is no inherent right to have attorneys' fees paid by the opposing party." *Butler* at 3. The Court of Appeals has also stated in another case that "[r]easonable attorney fees incurred in enforcing support or custody or change of custody may be awarded in the court's discretion. *Jones v. McMeen*, 2009 WL 2632772 (Tenn.Ct.App.), *citing Huntley v. Huntley*, 61 S.W.3d 329, 341 (Tenn.Ct.App. 2001); TCA § 36-5-103(c). Thus, it is clear that, in cases involving enforcement of child custody or child support, or change of custody, attorney's fees may be awarded, and, in fact, have been awarded.

The *Butler* case also makes mention of contractual obligations to pay attorney's fees. *Butler* at 3. This becomes relevant because of our dealings with Marital Dissolution Agreements, and their incorporation into Final Decrees. The Court of Appeals addressed this issue in *Clarkson v. Clarkson*, though this case is not reported. The Court of Appeals then dealt with the issue in *Pruitt v. Pruitt*, 293 S.W.3d 537 (Tenn.Ct.App. 2008). The case, which was originally heard in Fourth Circuit by Judge Muriel Robinson, deals with the enforcement of an MDA, specifically portions related to the qualified domestic relations order (QDRO). A contempt petition was also filed, as the Husband failed to name the Wife as a beneficiary. Judge Robinson found the Husband in contempt, and awarded attorney's fees pursuant to paragraph 30 of the MDA, which stated as follows:

> The parties agree that if either party breaches this Agreement or fails to perform the terms and conditions of this Agreement, resulting in the necessity to

> file suit in any Court to enforce any provision of this Agreement, the prevailing party shall be entitled, in addition to any judgment rendered, to an award of reasonable attorney fees plus the costs of said cause.

The Court of Appeals found that there was not enough evidence to find the Husband in Contempt, however they maintained the award of attorney's fees, because the Wife still prevailed in proving that Husband breached the contractual obligations of the MDA.

The *Clarkson* case, though not reported, is important to note here, because it limited the award of attorney's fees. The court found in the Wife's favor, but only granted her attorney's fees as to the portions of her petition that dealt with the violations of the MDA. *Clarkson* at 10. This suggests that, while attorney's fees can be granted due to contractual obligations, it only applies to those violations of the MDA directly, and not any other issues of contempt that may lie outside the MDA.

CONCLUSION

It appears then, that, attorney's fees may be awarded in any matter dealing with the enforcement of child support or child custody, or the modification of child custody, as well as those instances where the MDA has been violated and the parties have contractually agreed that the prevailing party shall be awarded attorney's fees, but only as to the specific violations of the MDA. In all other instances of contempt, the award of attorney's fees is improper.