

Tennessee Judicial Nominating Commission
Application for Nomination to Judicial Office

Rev. 26 November 2012

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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 fourteen (14) 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.

Juvenile Court Magistrate, Hamilton County Juvenile Court. Employed June 20, 2002

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

Licensed 1998. Board of Professional Responsibility Number 0019500.

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 is the only state I am licensed in. License is active and has never been inactive.

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

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

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

2002-Present – Hamilton County Juvenile Court Magistrate. Emphasis since 2009 has been in delinquency law.

2006-2007 – Adjunct Professor, Chattanooga State Technical Community College. Taught legal research to first-year law students. Included extensive teaching on the Blue Book, a Uniform System of Citation and the ALWD Citation Manual.

2001-2003 – Adjunct Professor, Cleveland State Community College. Taught Legal Writing, including all phases of legal writing beginning with drafting pleadings, contracts and wills, and culminating in writing the appellate brief. Included extensive teaching on the Blue Book, a Uniform System of Citation.

1998-2002 Solo law practice in. During that time I accepted appointments in Juvenile, General Sessions and Chancery Courts. Areas of practice included criminal, divorce, juvenile (all aspects), tort and bankruptcy.

1985-1989 Billing Manager for HealthStream Corp. Managed the billing department of ten employees for a dental insurance company.

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 Juvenile Court Magistrate, I hear cases referred by the Presiding Judge. In all respects, my hearings are the same as any other trial court's hearings with the sole exception that appeals from my decisions are taken *de novo* to the Presiding Judge for rehearing. I began hearing all types of Juvenile Court cases with three dockets per week devoted to dependency and neglect cases, one docket per week devoted to unruly and truancy cases, and five dockets per week devoted to delinquent cases. In 2007 the case load was adjusted to give me seven delinquency dockets and one unruly/truancy docket per week. The delinquency case follows the same U.S. and State Constitutional requirements as the adult trial, in most respects, up to the disposition (sentencing) phase and therefore is on point to the work of the Court of Criminal Appeals. In my 11 years' experience, I have heard trial testimony on nearly every type of criminal act. I frequently hear cases dealing with all the assaultive offenses, all the theft offenses, all the sex offenses and all the drug offenses. I have also heard cases of murder, attempted murder, conspiracy, and a myriad of other less common cases. My practice consists of 85% delinquent and 15% unruly/truancy and dependent and neglect cases.

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

information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Commission. Please provide detailed information that will allow the Commission to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

In my solo practice, I had some trial and jury experience, with most of my work being done in General Sessions Court. I had several preliminary hearings and trials. I took appointments in Juvenile Court which resulted in numerous bench trials where I acted as defense attorney for children, Guardian ad Litem, and parent's attorney. Prior to being appointed, I had represented over 250 children or parents. I also acted as Guardian ad Litem and Attorney ad Litem for wards of guardianship petitions in Chancery Court. I had two cases which I appealed to the Court of Appeals; one the Court of Appeals ruled against my client and the Supreme Court denied certiorari, and the other was appealed to the Court of Appeals twice and the Court of Appeals ruled in my favor both times.

While on the bench as a Juvenile Court Magistrate, I apply the principles of criminal Constitutional law on a daily basis. I am careful to read the statute the defendant is alleged to have violated if there are any unusual facts or if the crime is complex or multi-part because I want to be sure, not only that I am applying the law correctly, but also that the defendant understands how I make the connection between the facts I have heard and the crime they are accused of. I issue an oral opinion that is clear and concise and, though they may not agree with the end result, they fully understand why I made the ruling. This opinion is then reduced to Findings and Recommendations which are provided to the Presiding Judge for his approval. The Presiding Judge must be able to read this statement of the important facts and understand why I came to my conclusion so he can approve my findings as the Order of the Court. Less than one percent of my trials have resulted in rehearing, only a few have been appealed to Criminal Court. None have progressed further than those two steps.

As a legal writing instructor, I taught my students to use logic, think creatively and edit critically. My definition of legal writing is, "writing that cannot be misunderstood." While I realize that this is sometimes an unattainable goal, it is very much a guiding principle in my writing style. In order to follow that principle, you must look for unintended double meanings of words, constructions that leave modifiers unclear and styles that are overly creative so as to make issues vague. I have been described as a wordsmith because of my thoughtful choice of specific words to convey the meaning I intend.

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

I was the appellant's attorney in the case of Steinbrunner v. Turner Funeral Home, E2001-00014-COA-R3-CV (Tenn. Ct. App 2001) which has been cited favorably several times.

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 as a Magistrate of the Hamilton County Juvenile Court in 2002. Specifically my duties include arraignments, detention hearings, settlement hearings including accepting pleas, bench trials and issuing dispositions. Three specific cases rise immediately to mind as cases that bear major significance. Due to the confidential nature of Juvenile Court Cases, my summary will be necessarily vague.

I had a trial of a child who was just over 13 years of age who had consensual sex with a child just under 13. Prior to the change in the law of statutory rape, this constituted the offense of statutory rape. I believe this was one of the cases I believe the legislature took under consideration when they changed the law on all forms of child rape.

I tried a case of murder involving a practice known as "hood surfing" where a person, usually a teenager, jumps on the hood of a vehicle and stands there while another person, also usually a teenager, drives the car. In this situation, the "hood surfer" fell and was killed. This case is significant because of the tough issues of applying the law to a reasonable teenager standard.

Finally, I have had several trials regarding the crime of carrying a weapon on school property which have involved variously alleged weapons ranging from a simple cap pistol which looked very much like a real weapon, to air soft pistols which are not specifically named in the statute but can do severe damage. These cases have helped to define the term "weapon" in Hamilton County Schools.

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

I have acted as guardian ad litem for nearly 200 children in Juvenile Court.

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.

Not Applicable

EDUCATION

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

University of Tennessee College of Law, J.D., 1998. Trial advocacy track. Who's Who Among American Law School Students, President American Bar Association, Law School Division University of Tennessee at Chattanooga, B.S., 1993, Major: Criminal Justice - Law and the Courts. Inducted into Golden Key National Honor Society.
Cleveland State Community College, A.A.S., 1991, Major: Legal Assistant. Who's Who Among American Junior College Students, President CSCC Paralegal Association.
Chattanooga State Technical Community College, attended 1987-1989, Major: Business Management.
Southern Adventist University, attended 1981-1983, Major: Accounting.

PERSONAL INFORMATION

15. State your age and date of birth.

49 years of age. Date of Birth September 12, 1963.

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

I have lived continuously in Tennessee since 1974.

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

I have lived continuously in Hamilton County since 1974.

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

I am registered to vote in Hamilton County, Tennessee and have been since 1983.

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.

Failure to appear on a speeding violation March 21, 1984, Hamilton County General Sessions Court, 10 days suspended, placed on probation.

Speeding 65/50 May 13, 1999, Hamilton County General Sessions Court, \$2.00 fine.

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

No.

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

No.

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

No.

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

No.

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This

question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

I was the defendant in an automobile tort action about 2000. The case was heard in Hamilton County General Sessions Court and the plaintiff was awarded \$4,500 which was paid by my insurance company. I do not recall the plaintiff's name.

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.

Bowman Hills Seventh-day Adventist Church. Elder, Board Member and Religious Liberty Leader, Treasurer 2013-2014 fiscal year.

Bowman Hills Seventh-day Adventist School. Board Member 2009-current, Assistant Treasurer 2011-current.

Southern Society of Adventist Attorneys. Member.

North American Religious Liberty Association. Member 2010-2011.

Scottish Society of Chattanooga. Registered Agent.

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

Chattanooga Bar Association. Member all 10 years.

Tennessee Council of Family and Juvenile Court Judges. Member all 10 years.

Tennessee Bar Association. Member 2012-current.

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.

None.

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

Sought appointment to the Hamilton County Juvenile Court Judge position in April, 2013 which would have been an appointment to fill the remainder of Judge Suzanne Bailey's unexpired term.

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

No.

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

See attached. All of this work is completely my own personal effort.

ESSAYS/PERSONAL STATEMENTS

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

I want to take the next step in my judicial career and I want to offer my experience and skill toward shaping the law for the future generations. I foresee the possibility of an increase in the law of Juvenile Delinquency and I want to add a Juvenile Court perspective on those cases, as well as the adult cases that will be followed in the Juvenile Court. I sincerely want to make a difference at a higher level as I have done in the last 11 years as a Magistrate.

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

I was a Guardian ad Litem for nearly 200 underprivileged, dependent and neglected children. I have supported youth programs such as Y-CAP by attending their functions and giving motivational speeches. In my position as Magistrate, I ensure that all parties have equal access to legal counsel.

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

I am seeking the appointment to the Eastern Section Court of Criminal Appeals. As a Juvenile Court Magistrate I will be a source of perspective for the growing area of Juvenile Delinquency law. I analyze the law logically, I communicate clearly in writing, and I have excellent research skills. I believe part of the role of the Court of Criminal Appeals is to resolve unsettled issues in the law and I believe that should be done with a thorough synthesis of the law.

Having been a Juvenile Court Magistrate, I have seen many different motivations for defendants to commit crime and I have heard all kinds of misleading statements witnesses make to get a finding of innocence. I am able to use logic to piece together bits of testimony into the truth and to find the conflicting statements that show falsehood.

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 would continue to work with my church as an Elder, Religious Liberty Leader and other leadership capacities, however, this appointment would also free me to become more involved in speaking about the law and in participating in organizations such as Kiwanis, Rotary Club and other benevolent service organizations which I am prohibited from doing in my current position. I would also like to increase my writing, perhaps doing a casebook on Juvenile Law.

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

I have training in accounting and computer usage. I can type at about 75 words per minute on the computer and have a very good working knowledge of Microsoft Word 10 and all previous versions. Having been a magistrate, I already have a judicial demeanor that is comfortable, yet down to business. I have good time management skills and understand deadlines. I actively listen to argument and I know how to withhold opinion until all of the argument is completed.

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)*

Absolutely. One of the qualities people note about me is my ability to make the difficult decisions in the cases I am presented. The best illustration of this principle occurred when I was appointed as Guardian ad Litem for a child who had lived with his grandparents for a number of years and did not remember who his father was. I was appointed when the Father filed a petition alleging the mother had moved and not told the father where she was going and seeking custody of the child. After the father filed his petition for custody, the grandparents also petitioned to maintain custody. The father proved at trial that he had not abandoned his child but had lost contact when the mother moved without telling him where she was moving. After talking with the child and informing him that his father was likely to gain custody, I gave my opinion that, although the grandparents had sacrificed and clearly cared for the child, the father's parental rights were superior to the claim of the grandparents.

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. Misty Harris, Attorney at Law, 200 East 8th Street, Chattanooga, TN 37402 (423) 756-5031

B. S. Bruce Owens, [REDACTED], Chattanooga, TN 37415. [REDACTED]

C. Charlie Hunt, [REDACTED] Soddy Daisy, TN 37370. [REDACTED]

D. Pastor Dwight Herod [REDACTED], Ooltewah, TN 37363. [REDACTED]

E. Richard Posey, Court Officer, Hamilton County Juvenile Court, 7 Polk Circle, Ft. Oglethorpe, GA 30742. (706) 866-8370

AFFIRMATION CONCERNING APPLICATION

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

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the [Court] Court of Criminal Appeals 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: June 11, _____, 2013 .



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

TENNESSEE BOARD OF JUDICIAL CONDUCT

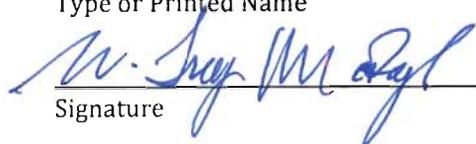
AND OTHER LICENSING BOARDS

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information which concerns me, including public discipline, private discipline, deferred discipline agreements, diversions, dismissed complaints and 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, the Tennessee Board of Judicial Conduct (previously known as the Court of the

Judiciary) and any other licensing board, whether within or outside the state of Tennessee, from which I have been issued a license that is currently active, inactive or other status. I hereby authorize a representative of the Tennessee Judicial Nominating Commission to request and receive any such information and distribute it to the membership of the Judicial Nominating Commission and to the office of the Governor.

William Troy McDougal
Type or Printed Name


Signature

June 11, 2013
Date

0019500
BPR #

Please identify other licensing boards that have issued you a license, including the state issuing the license and the license number.

The Court is required under this motion to interpret Tennessee Code Annotated ("T.C.A.") § 39-17-1309 and whether it prohibits possession of a CO₂ pellet pistol on school property. The Court found the facts presented by the parties were "relevant only to the legal question presented by the defendant's motion, not to the general issue of guilt or innocence." State v. Clark, M2007-00496-CCA-R3-CD (Tenn. Cr. App. April 10, 2008).

The child is accused of violating T.C.A. § 39-17-1309 which states, in pertinent part:

- (a) As used in this section, "weapon of like kind" includes razors and razor blades, except those used solely for personal shaving, and any sharp pointed or edged instrument, except unaltered nail files and clips and tools used solely for preparation of food, instruction and maintenance.
- (b) It is an offense for any person to possess or carry, whether openly or concealed, with the intent to go armed, any firearm, explosive, explosive weapon, bowie knife, hawk bill knife, ice pick, dagger, slingshot, leaded cane, switchblade knife, blackjack, knuckles or any other weapon of like kind not used solely for instructional or school-sanctioned ceremonial purposes, in any public or private school building or bus, on any public or private school campus, grounds, recreation area, athletic field or any other property owned, used or operated by any board of education, school, college or university board of trustees, regents or directors for the administration of any public or private educational institution.

T.C.A. § 39-17-1309 (Lexis 2006). The defense argues that the alleged pellet pistol is neither specifically prohibited by this statute nor a "weapon of like kind." The defense argues the pellet pistol is not of similar enough nature to the prohibited items in the statute to satisfy the maxim of statutory construction *ejusdem generis*. The state admits the pellet pistol is not specifically prohibited, but argues that it is a "weapon of like kind" in that it expels a projectile in a way similar to the firearm, explosive weapon and slingshot.

"The most basic principle of statutory construction is to ascertain and give effect to the legislative intent without unduly restricting or expanding a statute's coverage beyond its intended

scope. . . . [The Court] must look to the entire statutory scheme in seeking to ascertain legislative intent. . . . Statutes "in *pari materia*" - those relating to the same subject or having a common purpose - are to be construed together. . . . [The Court] must presume that the Legislature has knowledge of its prior enactments and knows the state of the law at the time it passes legislation." Owens v. State, 908 S.W.2d 923, 926 (Tenn. 1995) (Citations omitted). "Legislative intent should be gleaned from the natural and ordinary meaning of the language used, without a forced or subtle construction that would limit or extend the meaning of the language. . . . Furthermore, [the] Court should construe a statute so that its component parts are consistent and reasonable, and inconsistent parts should be harmonized where possible." State v. Clark, No. M2007-00496-CCA-R3-DC at *4-5 (Tenn. Cr. App. April 10, 2008).

The Court found, as the parties agreed, that the pellet gun is not prohibited as a named weapon by T.C.A. § 39-17-1309. The state admits for purpose of argument that CO₂ is not a poisonous gas within the meaning of T.C.A. § 39-17-1301(3)(A) nor does it qualify as an "explosive weapon" within the meaning of T.C.A. § 39-17-1301(3)(B) since CO₂ is neither a flammable liquid nor a chemically reactive substance used to cause an explosion. The pellet gun is also not a firearm. State v. McGouey, 229 S.W.3d 668, 672 (Tenn. 2007). None of the other defined weapons are similar enough in nature to warrant discussion. McGouey further holds that a pellet gun can be a dangerous weapon only in the manner it is being used, a finding specific to the facts of each case.

The Court must interpret the phrase "weapon of like kind." The defense argues the principle of statutory construction, *ejusdem generis*, "which means that where general words follow special words which limit the scope of the statute, general words will be construed as applying to those things of the same kind or class as those indicated by the preceding special words." State v. Young, 196 S.W.3d 85, 104 (Tenn 2006). The state's argument fails because the legislature limited the words "weapon of like kind" by defining that phrase in T.C.A. § 39-17-1309(a) as "including razors and razor blades, . . . and any sharp pointed or edged instrument" This addition to the statute has the effect of defining the prohibited weapons

as "any firearm, explosive, explosive weapon, bowie knife, hawk bill knife, ice pick, dagger, slingshot, leaded cane, switchblade knife, blackjack, knuckles or weapons of like kind[: razors and razor blades, except those used solely for personal shaving, and any sharp pointed or edged instrument, except unaltered nail files and clips and tools used solely for preparation of food, instruction and maintenance]." Reading this definition and strictly construing the criminal statute in favor of the defendant, Key v. State, 563 S.W.2d 184, 188 (Tenn. 1978), the pellet gun is not prohibited.

The Court also examined two other statutes in *pari materia* in this same Chapter: T.C.A. § 39-17-1302(a), prohibited weapons, and 39-17-1307, unlawful carrying or possession of a weapon. The legislature gave a comprehensive definition of a prohibited weapon in T.C.A. § 39-17-1302(a). That definition mirrors the prohibited weapons in the questioned statute in four areas: explosive, explosive weapon, switchblade knife and knuckles. Three of these four are also specifically defined in T.C.A. § 39-17-1301. The remainder of T.C.A. § 39-17-1302(a) gives a classic definition of a weapon, including the general definition "any other implement for infliction of serious bodily injury or death that has no common lawful purpose." T.C.A. § 39-11-106(a)(5) defines a deadly weapon, (a)(11) a firearm and (a)(16) a handgun. The legislature chose not to use any of these definitions, but rather chose to enumerate a separate class of weapons that are prohibited in schools. "[I]t must be presumed that the Legislature did not use three words where one would do, and that each was intended to have an individual meaning of its own different from the meaning of the other ... words." R.J. Reynolds Tobacco Co. v. Carson, 213 S.W.2d 45, 48 (Tenn. 1948).

The Court holds that possession of pellet guns on school property are not prohibited by this statute.

IN THE COURT OF APPEALS OF TENNESSEE

No. E 2001-00014-COA-R3-CV

WANDA J. STEINERUNNER,
Plaintiff/Appellant,
vs.
TURNER FUNERAL HOME, INC., and
FRANK KING, JR., M.D.,
Defendants

An appeal of the grant of Summary Judgment by
Division I of the Hamilton County Circuit Court

APPELLANT'S BRIEF

Counsel for the Plaintiff/Appellant:
W. TROY McDOUGAL, BPR#19500
P.O. Box 2251
Collegedale, TN 37315-2251
(423) 756-0444

ORAL ARGUMENT REQUESTED

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the court err in granting summary judgment to Defendant/Appellee Turner Funeral Home, Inc. as to issues of negligence per se, negligence, gross negligence and outrageous conduct?
2. Did the court err in finding “that the one year [sic] statute of limitation has expired for any cause of action arising out of the burial, disinterment and reburial of Plaintiff’s decedent”?
3. Did the court err in granting summary judgment to Defendant/Appellee Frank King, Jr., M.D. based on the Tennessee Governmental Tort Liability Act?
4. Did the court err in implicitly granting summary judgment to Defendant/Appellee Frank King, Jr., M.D. as to issues of gross negligence and outrageous conduct?

STATEMENT OF THE CASE

This case was filed May 6, 1998 in the Hamilton County Circuit Court and was assigned for all proceedings to Division I of that court. The Defendants answered, including an amended answer by Hamilton Memorial Gardens, Inc. who is not a party to this appeal. Plaintiff's original counsel was permitted to withdraw and appealing counsel entered an appearance on October 30, 1998.

Following interrogatories to all parties, the first deposition of the Plaintiff/Appellant, Wanda J. Steinbrunner ("Mrs. Steinbrunner"), and the Depositions of Steve Burchard, an employee of Hamilton Medical Gardens, Inc., Plaintiff moved the court and received an order amending the complaint. It is this amended complaint which has governed all proceedings since that date.

The parties then took the depositions of Curtis Ottinger and Larry Thomas Dowden, former employees of Defendant/Appellee Turner Funeral Homes, Inc. ("Turner"), Dr. Vijaya Appareddy, a psychiatrist who treated the Plaintiff, Defendant/Appellee Frank King, Jr., M.D. ("Dr. King"), and the second deposition of Mrs. Steinbrunner.

Turner and former defendant Hamilton Memorial Gardens, Inc. filed motions for Summary Judgment which were denied by the court. The Defendants took the deposition of William E. Cooper, a witness, and the third deposition of Mrs. Steinbrunner. The last discovery deposition was taken on February 24, 2000.

An agreement was reached with Hamilton Memorial Gardens and they were dismissed from the lawsuit by order entered May 16, 2000. Following this dismissal, Dr. King filed motions for Summary Judgment and to Sever, both of which were denied by

the court. Turner had served a subpoena upon the Plaintiff's first attorney which was quashed upon a motion by that attorney based upon the attorney-client privilege. The remaining Defendants filed motions in limine, ruling on which were reserved to trial. The parties agreed to an order bifurcating the trial as to issues of punitive damages.

Defendants renewed their motions for Summary Judgment. Following briefs and argument, the Court granted both defendants motions. The Defendants filed motions for discretionary costs which were denied. Mrs. Steinbrunner filed a Motion to Alter or Amend pursuant to Tenn. R. Civ. P. 59 requesting the court to consider the additional depositions filed by Mrs. Steinbrunner. The court denied this motion. Mrs. Steinbrunner timely filed a Notice of Appeal and Appeal Bond, thereby perfecting this appeal. Mrs. Steinbrunner also filed a request for extension of time to file her brief which was granted.

STATEMENT OF THE FACTS

On May 1, 1992, [Mrs.] Steinbrunner's husband, Alva F. Steinbrunner, died suddenly of a heart attack. He was pronounced dead at Humana Hospital, East Ridge, Tennessee at 7:04 p.m. by Dr. Thomas Klinner. Due [to] the sudden and unexpected death of Mr. Steinbrunner, the county medical examiner's office investigated the death, taking photographs of the body as it lay in the emergency room. As a result of his investigation, Mr. Winters determined that there was no criminal activity involved and he released the body for burial without requiring an autopsy. [Mrs.] Steinbrunner contacted [Turner] and made arrangements for the transportation, preparation, burial and funeral services for her husband. (R. at 155).

The funeral and burial of Mr. Steinbrunner was held on May 4, 1992 with all arrangements being conducted and performed by Turner. The funeral occurred prior to the delivery of the death certificate to [Mrs.] Steinbrunner. On May 7, 1992, [Dr. King], the Hamilton County Medical Examiner, without performing an autopsy, issued a death certificate stating the primary cause of death as "hypertensive cardiovascular disease." When [Mrs.] Steinbrunner received a copy of the death certificate, she questioned the cause of death since her husband had not experienced any cardiac symptoms during his lifetime nor did he have a history of hypertension, cardiac disease, or hypertensive cardiovascular disease. [Mrs.] Steinbrunner wanted an autopsy of her husband's body and she contacted Turner to arrange for disinterment of the body, transportation of the body to the funeral home, preparation of the body for autopsy, transportation of the body to

the forensic center, retrieval of the body from the forensic center, preparing the body for re-burial, transportation of the body back to the grave site, and re-burial of the body. (R. at 155-56).

Turner disinterred Mr. Steinbrunner's body on May 12, 1992. (R. at 156). Mr. Steinbrunner's body was taken from the cemetery to the funeral home where the body was removed from the casket (Deposition of Larry Dowden at P. 19 L. 25 to P. 20 L. 24). The body was eventually transported to the Hamilton County Forensic Center wearing only underwear. (Deposition of Frank King at P. 50 L. 11 – 23). Dr. King performed an autopsy on the body of Alva Steinbrunner, (id at P. 55 L. 6-15) which indicated that Mr. Steinbrunner had advanced coronary arteriosclerosis. (R. at 156).

After six years, Mrs. Steinbrunner was concerned about the cause of her husband's death and requested a meeting with Dr. King. The requested meeting occurred on August 19, 1997 and Mrs. Steinbrunner, Dr. King, William Cooper (a friend of Mrs. Steinbrunner) and Karen Carter (Dr. King's Secretary) were present. (Deposition of Frank King at P 63 L. 10- 19). During this meeting, Dr. King told Mrs. Steinbrunner that funeral homes use sawdust, newspapers, rags, towels and straw to fill the body where the organs have been removed. (Deposition of Frank King at P. 89 L. 54 – P. 90 L. 16. Deposition of Wanda Steinbrunner of April 13, 1999 at P. 84 L. 9 – P 85 L. 3). Dr. King also showed Mrs. Steinbrunner some photographs of the body of her deceased husband, including two photographs taken by Dr. King's assistant of Mr. Steinbrunner as he lay in the emergency room of the hospital. Dr. King did not give any additional warning about the gruesome nature of the emergency room photographs prior to showing them to Mrs. Steinbrunner. (Deposition of Frank King at P. 101 L. 4 – P 108 L. 16).

Following this meeting, Mrs. Steinbrunner inquired of Turner to find out if Turner had used newspapers, sawdust, towels or rags to fill the body, how the body was prepared for reburial and when the reburial took place. (Deposition of Wanda Steinbrunner of April 13, 1999 at P. 122 L. 25 – P. 123 L. 7). She asked for proof that her husband had been reburied, and received no documentation of that fact.

Based on her concern that her husband's body had been mistreated and otherwise filled with inappropriate filler, Mrs. Steinbrunner had the body of her late husband re-exhumed. (Deposition of Wanda Steinbrunner of April 13, 1999 at P. 257 L. 25 – P. 258 L. 11). The body was taken to Dr. Harlan's office in Nashville, where the casket was opened. It was discovered that there was no identification on the body of in the casket, the original paperwork for the casket was inside the casket, but not filled out, and the body was dressed in different clothing. (Deposition of Wanda Steinbrunner of April 13, 1999 at P. 164 L. 3 – 12 and P. 148 L. 24 – P. 149 L. 14).

This lawsuit was filed following the second disinterment of the body of Alva Steinbrunner. The body has since been re-buried.

ARGUMENT

Standard of Review

Decisions of the lower court based on motions for summary judgment are questions of law only. There is no presumption of correctness of the trial court's judgment, and this review is de novo on the record as it stands before this Court. Miller v. Willbanks, 8 S.W.3d 607, 609 (Tenn. 1999).

Summary Judgment in General

Summary Judgment is appropriate if the movants demonstrate that no genuine issues of material fact exist that that they are entitled to judgment as a matter of law. *See* Tenn. R. Civ. P. 56.04. [The Court of Appeals] must take the strongest view of the evidence in favor of the [Plaintiff] and allow all reasonable inferences in [her] favor, and discard all countervailing evidence.

Miller, 8 S.W.3d at 607 *quoting* Byrd v. Hall, 847 S.W.2d 208, 210-11 (Tenn. 1993).

The initial burden of proof in the motion for summary judgment falls on the movant. "The movant must either affirmatively negate an essential element of the non-movant's claim or conclusively establish an affirmative defense." Robinson v. Omer, 952 S.W.2d 423, 426 (Tenn. 1997). Failing to meet this threshold burden, the motion must be denied and the non-moving party need not present any evidence. Id.

Only when the movant has negated a claim or conclusively presented an affirmative defense does the burden shift to the non-moving party. Id. The court should overrule a motion for summary judgment even if the non-moving party is able to establish as much as an uncertainty that a material fact is in dispute. Dooley v. Everett, 805 S.W.2d 380, 383 (Tenn. Ct. App. 1990) *quoting* Dolan v. Cunningham, 648 S.W.2d

652 (Tenn. Ct. App. 1982). Only if there can be but one conclusion reasonably drawn from the facts and the application of the law to those facts should the court grant the motion for summary judgment. Robinson, 952 S.W.2d at 426.

Mrs. Steinbrunner contends, as will be shown throughout the remainder of this brief, that neither of the Defendants is entitled to summary judgment, but that there are material facts in dispute requiring a trial by jury.

Statute of Limitations

Tennessee Code Annotated § 28-3-104 applies as the Statute of Limitations in this case. The statute of limitations does not begin to run, according to the statute, until the cause of action has accrued. This is an action “for injuries to the person”, Id., which cannot begin running until there is a person who has been injured. McCroskey v. Bryant Air Conditioning Co., 524 S.W.2d 487, 489 (Tenn. 1975). “Before a judicial remedy exists, two elements must coalesce: (1) a breach of some legally recognized duty owed by the defendant to the plaintiff and (2) some legally cognizable damage caused to the Plaintiff by the breach of duty.” Potts v. Celotex Corp., 796 S.W.2d 678, 681 (Tenn. 1990).

In the case at bar, Dr. Appareddy listed the date the Plaintiff began having emotional problems as the date of the second exhumation of the body of Alva Steinbrunner. (Deposition of Dr. Vijaya Appareddy at P. 25, L 18-21). Mrs. Steinbrunner testified in several of her depositions that she was not having any problems prior to the visit to Dr. King’s office, and that she began having problems after that date. (Deposition of Wanda Steinbrunner, April 13, 1999 at P. 27, L. 18 – P. 29, L 2; Deposition of Wanda Steinbrunner, October 27, 1999 at P. 44, L. 24 – P. 45, L. 19). This

fact is further established by the testimony of William Cooper, a friend of Mrs. Steinbrunner, who testified in his deposition that Mrs. Steinbrunner had a complete metamorphosis in her personality after she talked with Dr. King. (Deposition of William Cooper at P. 81 L. 2 – P. 82 L. 22) Since that event occurred on March 10, 1998 and the original complaint was filed on May 6, 1998, the causes of action for negligence, gross negligence and other claims arising out of the disinterment and reinterment are not barred by the Statute of Limitations.

Outrageous Conduct in General

The tort of outrageous conduct, while originally not recognized in Tennessee, has grown a progeny of cases which have defined the tort with some particularity. The tort has

three essential elements to a cause of action: (1) the conduct complained of must be intentional or reckless; (2) the conduct must be so outrageous that it is not tolerated by civilized society; and (3) the conduct complained of must result in serious mental injury.

Bain v. Wells, 936 S.W.2d 618, 622 (Tenn. 1997). Liability for damages under outrageous conduct requires more than “mere insults, indignities, threats, annoyances, petty oppression or other trivialities.” Id. “Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, ‘Outrageous.’” Id. at 623. “[O]utrageous conduct is behavior the nature of which would produce from a reasonable person the response, ‘That’s an outrage!’” Dunn v. Moto Photo, Inc., 828 S.W.2d 747, 753 (Tenn. Ct. App. 1991). “It also appears that, if there is any evidence from which

reasonable jurors might find outrageous conduct, it is error to direct verdict for the defendant on the issue of whether the conduct was outrageous.” Id.

There have been many cases heard by the courts involving the tort of outrageous conduct or intentional infliction of emotional distress which have served as instructive factual situations for a determination of what is and what is not covered by the tort. A quick summary of those cases which have been deemed not sufficient to be deemed outrageous is in first order. The cases of Medlin v. Allied Investment Co., 398 S.W.2d 270 (Tenn. 1966) and Swallows v. Western Elec. Co., Inc., 543 S.W.2d 581 (Tenn. 1976) both held that the plaintiffs could not succeed for lack of particularity of pleading the substance and severity of the defendant’s conduct. Perhaps Bain, 936 S.W.2d 618 is the most instructive case to date heard by the Tennessee Supreme Court. In Bain, the Court held that mere failure to tell a patient that his roommate was HIV positive did not constitute outrageous conduct when there was proof that the defendant did not violate the established health care standards.

The Tennessee Court of Appeals, Western Section, has reviewed five cases which held directly on the issue of outrageous conduct. These cases are summarized as: Bingle v. Methodist Hospital, 701 S.W.2d 622 (Tenn. Ct. App. 1985) (holding the employer did nothing outrageous when employee resigned, failed to appeal her rights in the way the employer obtained her resignation and then attempted to rescind her resignation), Wood v. Woodhaven Memory Gardens, Inc., 1991 W.L. 112273 (Tenn. Ct. App. June 27, 1991) (holding that plaintiff was not entitled to recovery when she failed to prove any damage caused by the defendant’s actions), Carruth v. City of Etowah, 892 S.W.2d 833 (Tenn. Ct. App. 1994) (holding a police officer not liable for outrageous

conduct when he made a lawful arrest), Newsom v. Textron Aerostructures, 924 S.W.2d 87 (Tenn. Ct. App. 1995) (holding that requiring employee/plaintiff to put all of his personal belongings into a garbage bag and be escorted out of the building in front of his co-workers was not outrageous conduct), Lyons v. Farmers Ins. Exch., 26 S.W.3d 888 (Tenn. Ct. App. 2000) (holding enforcement of a legal right to terminate an agency agreement was not outrageous conduct).

The Middle Section of the Tennessee Court of Appeals has recently held two cases did not rise to outrageous conduct by the defendants: Clark v. Service Corp. Int'l, 1999 W.L. 1015561 (Tenn. Ct. App. Nov. 10, 1999) (holding a cemetery not liable for outrageous conduct for making a reasonable accommodation to place a casket in a vault temporarily to permit the cemetery time to resolve a situation involving a prior burial which encroached on the space the plaintiff's relative was to be buried in and which required legal action to resolve), and Lineberry v. Locke, 2000 W.L. 1050627 (Tenn. Ct. App. July 31, 2000) (holding a police officer was not liable for outrageous conduct when he showed video tape of the plaintiff engaged in sexual acts as part of an ongoing police investigation).

This Eastern Section of the Tennessee Court of Appeals has reviewed two cases on the basis of outrageous conduct: Hartsell v. Fort Sanders Reg. Med. Ctr., 905 S.W.2d 944 (Tenn. Ct. App. 1995) (holding the hospital not liable for conduct to a newborn child when the conduct was specifically authorized by the mother in writing and for which the child had no conscious memory of the acts done), and Jeffers v. Roebuck, 1900 W.L. 27341 (Tenn. Ct. App. March 16, 1990) (holding an insurance company act of erroneously informing the plaintiff driver in an automobile accident that he had run over

and killed the other driver to gain a psychological advantage in the settlement did not rise to the level of outrageous conduct).

From all but the last of these cases it can be said that the tort of outrageous conduct must be specifically plead with sufficient detail of the act done and damages received to put the defendant on notice of what is being claimed. Mrs. Steinbrunner has specifically plead these issues in her complaint (R. at 1-). The tort must also be the result of activity not specifically authorized by law or agreement. According to the holding of these cases, conduct cannot be outrageous if the plaintiff knew what the conduct would be and specifically waived damages as a result of the conduct, or if the defendant had a legal duty which *required* him or her to do the act.

The Tennessee courts have also been instructive as to what constitutes outrageous conduct. The Tennessee Supreme Court addressed the subject in the cases of Hill v. Travelers Ins. Co., 294 S.W. 1097 (Tenn. 1927) and Moorehead v. J. C. Penney Co., Inc., 555 S.W.2d 713 (Tenn. 1977). In Hill, the Tennessee Supreme Court found a doctor's actions constituted outrageous conduct when he performed an autopsy in a public place in the cemetery against the expressed wishes of the plaintiff. The Supreme Court held situations involving deceased relatives to a very high standard by saying,

Whenever the act complained of constitutes a violation of some legal right of the plaintiff, which always, in contemplation of the law, causes injury, he is entitled to recover all damages which are the proximate and natural consequences of the wrongful act. *That mental suffering and injury to the feelings would be ordinarily the natural and proximate result of*

knowledge that the remains of a deceased husband had been mutilated, is too plain to admit of argument.

Id. 294 S.W. at 1098. (Emphasis added).

Most recently, the Tennessee Supreme Court held in Moorehead that continued threats of collection efforts arose to the level of outrageous conduct because the threats continued for nearly a year after the defendant acknowledged the plaintiff did not owe the debt, and the defendant threatened to “deliberately injure the plaintiffs’ credit reputation and jeopardize their job security.” Moorehead, 555 S.W.2d at 717.

Of the cases heard in the Western Section of the Court of Appeals, only one has held a defendant had performed outrageous conduct: Johnson v. Woman’s Hospital, 527 S.W.2d 133 (Tenn. Ct. App. 1975) In Johnson, the plaintiff was a mother who had given birth to a prematurely born baby who died shortly after birth. She inquired into the treatment of her child when a question arose between her and her doctor whether the child had been buried as she requested. Taking her inquiry to the hospital, a nurse took the plaintiff to a cooler, removed the child who was preserved in a jar of formaldehyde and presented it to the plaintiff. The court found the actions of the hospital rose to outrageous conduct, while the acts of the doctor did not.

Similarly, the Tennessee Court of Appeals, Middle Section, has found outrageous conduct in only one case, but it is the landmark case in Tennessee law of Dunn, 828 S.W.2d 747. That case held that the unauthorized use of the plaintiff’s photographs of herself partially nude was sufficient to permit the plaintiff to proceed to a jury trial on the issue of outrageous conduct. The Court of Appeals, in remanding this case, stated,

[I]f there is any evidence from which reasonable jurors might find outrageous conduct, it is error to direct verdict for the defendant on the issue of whether the conduct was outrageous. . . . [I]f there is any evidence from which a jury might find *serious injury*, then the issue is for the jury and not for the trial judge by directed verdict.”

Id. at 753. (Emphasis added).

Turning now to the two cases in the Eastern Section of the Tennessee Court of Appeals finding outrageous conduct we learn the treatment of the Court at Bar to the tort. The case of Dunbar v. Strimas, 632 S.W.2d 558 (Tenn. Ct. App. 1981) gives facts where a medical examiner erroneously informed the mother of a recently deceased 19-month old girl that her girl’s death was not the result of natural causes, but that the child was sexually assaulted and suffocated. The Court held that a jury could determine the facts arose to outrageous conduct, and remanded the case for trial.

Finally, this Court reviewed Finally, this Court reviewed Satterfield v. Long, 1999 W.L. 820270 (Tenn. Ct. App. October 13, 1999). This case involved a police officer who was eventually terminated based upon erroneous documentation filed by the defendants. The Court found that the jury had sufficient evidence of the defendant’s intentional and malicious actions to uphold their verdict.

From these cases the Court can summarize certain consistent factual situations which have been held to be outrageous conduct. First, conduct that is obviously intended to cause harm should be actionable. However, intentional actions are not required for recovery. In all of the cases where outrageous conduct was found, several points stand out: 1) the alleged act involved something of a very personal nature, 2) the plaintiff

showed severe mental distress, although not always immediately, and 3)the alleged acts were completely unexpected by the plaintiff.

In summary, the tort of outrageous conduct is characterized by actions of the defendant related to a matter of personal importance to the plaintiff and not expected by the plaintiff. The defendant must not have acted out of prior duty or with prior permission of the plaintiff, and his actions must be to a degree of severity that it should not be tolerated in a civilized society.

Outrageous Conduct Claims Against Turner Funeral Home

At the outset it should be noted that Turner has never presented the requisite proof in support of their motion to negate the claims made by Mrs. Steinbrunner, nor have they presented evidence of an affirmative defense to her claims. Procedurally, the Court should reverse the trial court's decision and remand this case for trial due to the defendant's failure to meet its burden of proof in the motion.

Mrs. Steinbrunner claims outrageous conduct against Turner in several of Turner's acts. Shortly after her meeting with Dr. King, Mrs. Steinbrunner became concerned with the condition of her husband's body. She went to Turner to find out when the body of her husband was re-buried and what preparation had been done to the body prior to reburial. (Deposition of Larry Dowden at P. 27, L. 4 – 13). In that discussion, she found out that Turner had no record showing that her husband's body had actually been re-buried. (Deposition of Larry Dowden at P. 27, L. 14 – P. 29, L. 19). She also sought some written verification of how her husband's body was treated during the disinterment process, to negate the suggestion by Dr. King that his body may have inappropriate filler in it, and to find out if the body was re-buried with the dry-cleaner's

back around his waist. The lack of this information disturbed Mrs. Steinbrunner, and she inquired of the cemetery to determine if they had a record indicating that her husband had been reburied. Finding no written assurance to any of these facts, she had the body of her husband disinterred a second time.

Rather than setting her mind at ease, the second disinterment raised additional questions in her mind. Upon receipt at Dr. Harlan's office in Nashville, Tennessee, the casket was examined and Dr. Harlan discovered that the memorial record which was to have been placed in the end of the casket by Turner (see Deposition of Curtis Ottinger at P. 55, L. 15 – P. 56 L. 13) was not in the container designed for it. They opened the casket and found the body was dressed in clothing different from what Mrs. Steinbrunner had originally provided for the burial (Deposition of Wanda Steinbrunner at P. 18, L. 10 – 20). This, along with the fact that Mrs. Steinbrunner had obtained information that Curtis Ottinger, a former employee of Turner, indicated that the wrong body was disinterred (Deposition of Wanda Steinbrunner, April 13, 1999, at P. 18, L. 21 – P. 19, L. 11) caused Mrs. Steinbrunner to disbelieve that the body disinterred was that of her husband.

All of these facts caused Mrs. Steinbrunner severe emotional injury. Mrs. Steinbrunner had her first panic attack within days of her visit to Turner and she has continued to have emotional and mental injuries to this day. (Deposition of Vijaya Appareddy at P. 17, L. 20 – P. 20, L. 15. and P. 21, L. 24 – P. 22, L. 12).

Mrs. Steinbrunner argues that, in the event the Court holds the opinion that the duty has shifted to her to prove there are material facts in dispute, that the actions of Turner were those of personal importance to Mrs. Steinbrunner, being actions alleged

about the mistreatment of the body of her husband of twenty years. Mrs. Steinbrunner absolutely was surprised by the actions of Turner, in whom she had placed her trust and the care of her loved one. Not only did Turner not act out of duty, they had a duty not to act as they did. The activities of Turner are so egregious, the Tennessee Legislature has since mandated identification of the body and casket of every person now buried in this state. Tenn. Code Ann. § 62-5-313(d)(1). Failing to maintain the record of his re-burial was, at the time of the re-burial, mandated by Tenn. Code Ann. § 68-3-510, thereby obtaining the Legislature's intent to show the egregious nature of this act. Finally, the remaining allegations, including failing to re-dress the body as it had originally been dressed, were egregious admittedly by the testimony of Larry Dowden. (Deposition of Larry Dowden at P. 51, L. 14 – 21).

Mrs. Steinbrunner has met her burden, this case should be remanded for trial against Turner.

Outrageous Conduct Claims Against Dr. Frank King, Jr., M.D.

Just as the argument has been made with Turner, Dr. King has never presented the requisite proof in support of their motion to negate the claims made by Mrs. Steinbrunner, nor has he presented evidence of an affirmative defense to her claims. Procedurally, the Court should reverse the trial court's decision and remand this case for trial due to the defendant's failure to meet its burden of proof in the motion.

The claims against Dr. King are based on two very simple sets of facts, both occurring during the meeting of August 19, 1997. First, during that meeting, Dr. King, admittedly, informed Mrs. Steinbrunner that "funeral homes use newspapers, sawdust and rags to fill the body cavity." (Deposition of Frank King at P. 125, L. 3-4). Second,

during the same meeting, Dr. King showed Mrs. Steinbrunner photographs of her husband as he lay in the emergency room, shortly after his death.

In order to fully understand Mrs. Steinbrunner's claims, the Court must have some background into the meeting. Mrs. Steinbrunner had contacted Dr. King some six or so years after his death, burial, disinterment and reburial. Due to the fact that she still questioned the cause of death stated on the death certificate, she requested a meeting with Dr. King to discuss his findings. Dr. King describes Mrs. Steinbrunner during this interview:

Q. You said that Wanda Steinbrunner was emotionally upset?

A. Yes.

Q. How did she exhibit that she was emotionally upset?

A. She was anxious. She was tearful at times. She was talking loud, in an upset manner, at times. She was – had, I think, mood swings during the meeting, being friendly and nice one minute and unfriendly and upset the next minute.

And all of these emotions are – can be seen in grieving family members. And I didn't – her emotional state did not really concern me as much as her – her irrational conversation. I didn't feel that I was communicating rationally with her. I really did not know that – if she understood what are actually very simple concepts that I was presenting. I really don't know. I just know that she seemed upset.

(Deposition of Frank King at P. 66, L. 10 – P. 67 L. 5). It was to this upset, irrational misunderstanding person that Dr. King told, "They may put some sort of filler material in

the body, . . . sawdust, newspapers or sometimes towels, in the body to absorb fluids or prevent fluids from leaking out. I have heard that's done sometimes.” (Id. at P 90, L. 6 – 10).

It was also to this irrational person that Dr. King gave a general description of a series of eleven (11) photographs as “upsetting, and they’re going to have some fluid and – in some of the pictures, and that they – they’re not nice pictures to look at.” (Id. at P. 98, L. 3 – 6). He then began showing what are marked as exhibits to Dr. King’s deposition. The photographs he began with showed the cross-sections of the heart, then the embalmed body of Mr. Steinbrunner. (Deposition of Wanda Steinbrunner, October 27, 1999, at P. 35, L. 19 – P. 39, L. 18). Mrs. Steinbrunner argues that she had become accustomed to the type of photograph she was being shown, when Dr. King, without additional warning, presented photographs showing Mr. Steinbrunner before he was embalmed and prepared for burial; photographs with Mr. Steinbrunner’s eyes open and bloodshot, other visible signs of blood and a terrified look on his face. (Id. at P. 42, L. 24 – P. 43, L. 13 and Exhibits 15 and 16 to the deposition).

Mrs. Steinbrunner avers that these actions of Dr. King were not expected and very shocking to her. (Id. at P. 44, L. 24 – P. 45, L. 19.) They caused her severe emotional damage. (Id.) Dr. King had no duty to tell Mrs. Steinbrunner what the funeral home did, since that had no bearing on the autopsy or his area of expertise. Dr. King had no duty to show Mrs. Steinbrunner the photographs of her husband in the hospital, since he had already concluded describing how he had come to his diagnosis, and the photographs were not used in any way to further describe that diagnosis. He did not obtain permission to harm her, and in fact, he has taken the Hippocratic oath to do no harm. He did not

obtain informed consent to show the photographs since, according to his testimony, he gave a general description once prior to showing the photographs and did not give an additional warning for the two hospital photographs. (Deposition of Frank King at P. 96, L. 15 – 20 and P. 104 L. 13 – P. 105 L. 21).

Mrs. Steinbrunner argues that Dr. King's conduct rises to the level not tolerated by a civilized society, that she was injured by his actions, and she is entitled to a trial on the merits.

Negligence per se

Mrs. Steinbrunner claims negligence per se as to Turner. This claim is based on T.C.A. § 68-3-510. The pertinent part of the statute requires “the person in charge of the institution [to] keep a record showing the name of the deceased, date of death . . . [and,] if finally disposed of by the institution, the date, place and manner of disposition.” Turner contends that Exhibit C to its Motion for Summary Judgment (R. 149) shows compliance with that requirement. However, the necessary documentation regarding the final disposition of the body of Alva Steinbrunner, being the last block of information on that form, is not completed. It is this information which Mrs. Steinbrunner argues was necessary under the statute, which Mrs. Steinbrunner requested from Turner prior to the second exhumation, which Turner could not provide to Mrs. Steinbrunner, and which would have provided some proof as to the identity of the body in the casket exhumed on March 10, 1998. Mrs. Steinbrunner contends that Turner's negligence in this regard has been a contributing cause of her mental distress (Deposition of Vijaya Appereddy, M.D., Ph.D. at P. 22, L. 7-12). Since the fact of whether this document complies with the statutory requirement and the fact of Turner's negligence under this statute are in dispute,

summary judgment on this issue is inappropriate, and this case should be remanded for trial on this issue.

Negligence in General

Negligence has three (3) elements:

- 1) a duty of care owed by the defendant to the plaintiff; 2) a breach of that duty by the defendant and 3) an injury to the plaintiff which was proximately caused by the defendant's breach of a duty.

Dooley, 805 S.W.2d at 383.

While duty is a question of law to be determined by the court, id. at 384, there is a standard duty "to use due care under the attendant circumstances, and negligence is doing what a reasonable and prudent person would not do under the circumstances." Id.

Cause is divided into proximate cause and actual cause. Actual cause (or cause in fact) "means that the circumstances must be such that the injury would not have occurred but for the [action]." Wyatt v. Winnebago Industries, Inc., 566 S.W.2d 276, 280 (Tenn. Ct. App. 1977). Proximate cause is described in terms that "the [action] must be such that had it not happened the injury would not have been inflicted." Shouse v. Otis, 448 S.W.2d 673, 676 (Tenn. 1969).

Negligence Claims Against Turner Funeral Home

As with the other aspects of this appeal, Mrs. Steinbrunner argues that Turner has presented no evidence that it did not have a duty, that it did not breach the duty, or that Mrs. Steinbrunner's injuries were not caused by their breach. Nor has it presented any affirmative defense to the negligence claim. Therefore, procedurally, the decision awarding summary judgment to Turner is erroneous and should be reversed.

In the alternative, Mrs. Steinbrunner would argue that she has presented evidence that Turner owed a duty to treat her and the body of Alva Steinbrunner with respect, (Deposition of Curtis Ottinger at P. 84, L. 19 – P. 85, L. 6 and Deposition of Larry Dowden at P. 46, L. 20 – P. 47, L. 7), they breached that duty by not dressing the body in the proper clothing, not maintaining the appropriate paperwork, and not identifying the body, and those breaches have proximately caused part of the injuries Mrs. Steinbrunner is experiencing.

Gross Negligence in General

The Tennessee Pattern Jury Instructions defines gross negligence as “a negligent act done with utter lack of concern for the safety of others, or an act done with such reckless disregard for the rights of others that a conscious indifference to the consequences can be implied.” T.P.I.—Civil (3rd Ed.) 3.31 (The Tennessee Judicial Conference 1997). Gross negligence is also defined as “[s]uch entire want of care as would raise a presumption of a conscious indifference to consequences. . . . The mental attitude is one of indifference to injurious consequences, conscious recklessness of the rights of others.” *Craig v. Stagner*, 19 S.W.2d 234 (Tenn. 1929).

Gross Negligence Claims Against Turner Funeral Home

Mrs. Steinbrunner argues that Defendant Turner’s failure to maintain the records required by the statute and failure to treat the body with respect and dignity shows just such disregard for the rights of others that a jury could imply a conscious indifference to the consequences. Plaintiff contends that the statute sets the standard of care for the claims of failure to maintain the records, that dignity and respect are terms of common understanding, and expert witnesses will not assist the jury in making the determination

of this issue, and therefore, expert testimony is not required. T.R.Evid. 702. Since there is a genuine issue of material fact as to whether Defendant Turner's action rises to the level of gross negligence, Mrs. Steinbrunner should prevail and the summary judgment on this issue should be reversed.

Gross Negligence Claims Against Dr. Frank King, Jr., M.D.

Mrs. Steinbrunner presents the testimony of Dr. King as evidence of his conscious disregard, “[H]er emotional state did not really concern me as much as her – her irrational conversation.” (Deposition of Frank King at P. 66, L. 23 – 25). Mrs. Steinbrunner argues that a jury, hearing the statement acknowledged by Dr. King as to the filler material the funeral home may have used, and seeing the photographs without any extra warning about the extreme nature of those photographs, could find an indifference to the consequences of those actions. Mrs. Steinbrunner argues that this is a matter for the jury, and requests the Court of Appeals to reverse the summary judgment as to this claim.

Governmental Immunity

Mrs. Steinbrunner respectfully disagrees with the applicability of Tenn. Code Ann. § 38-7-112 *et seq.* cited by the trial judge as grounds for Dr. King's immunity. Mrs. Steinbrunner is not complaining, nor has she ever complained, that the autopsy performed by Dr. King caused her injuries. Mrs. Steinbrunner has always claimed that the incidents described throughout this brief, which occurred some six years or more after the autopsy was performed, caused the injuries attributable to Dr. King. Mrs. Steinbrunner further argues that the appropriate statute governing immunity in this case is Tenn. Code Ann. § 29-20-310(c).

Fann v. City of Fairview, Tenn., 905 S.W.2d 167, 174 (Tenn.App. 1994) holds that governmental immunity does not extend to the employee. In light of the fact the employee can be sued for their ordinary negligence, the legislature enacted T.C.A. § 29-20-310(c) to limit the employee's liability to the amount of liability coverage required to be maintained by the governmental entities. The exception to this cap, which covers the acts of Dr. King, is any act which is done maliciously or willfully.

The case of Erwin v. Rose, 980 S.W.2d 203 (Tenn. Ct. App. 1998), has clarified the application of Tenn. Code Ann. § 29-20-310(b) & (c). Under this statutory scheme, the legislature gave “the employee absolute immunity in cases where the municipality's immunity was removed (subsection (b)), and . . . limit[ed] the employee's immunity in cases in which the municipality was yet immune . . . unless the employee's acts were willful, malicious, criminal or performed for personal financial gain (subsection (c)).” Id. at 206.

Mrs. Steinbrunner has stated claims for gross negligence and outrageous conduct. Each of these causes of action, if proved, include elements of willfulness and/or maliciousness. While conduct constituting the tort of outrageous conduct may be either intentional or reckless, Johnson, 527 S.W.2d at 138, it is, never the less, of such higher degree of misconduct than willful and wanton misconduct, Id. at 142, as to satisfy the requirements of Tenn. Code Ann. § 29-20-301(c). Mrs. Stebinbrunner argues that Dr. King is not immune under this view of the law, and that there is no limit to his liability under the acts he has performed.

Conclusion

For the foregoing reasons, Mrs. Steinbrunner argues that the order of the trial court entering summary judgment as to both defendants should be reversed and this case should be remanded to the trial court for a trial by jury.

RESPECTFULLY SUBMITTED this 23rd day of April, 2001.

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Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing pleading was mailed with proper postage thereon fully paid, or hand delivered to:

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This the 23rd day of April, 2001

By: _____