IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

LARRY SNEED,

Plaintiff/Appellant,

v.

Case No. E2012-02112-SC-R11-CV
(Hamilton County Circuit No. 12C1164)

THE CITY OF RED BANK, TENNESSEE,
a municipality,

Defendant/Appellee.

BRIEF OF AMICUS CURIAE TENNESSEE EMPLOYMENT LAWYERS ASSOCIATION

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FOR THE TENNESSEE EMPLOYMENT LAWYERS ASSOCIATION

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I. INTEREST OF AMICUS CURIAE

The Tennessee Employment Lawyers Association (TENNELA)[1] is an affiliate chapter of the National Employment Lawyers Association (NELA).[2] NELA is the country's largest professional membership organization that is exclusively comprised of lawyers who represent individual employees in cases involving employment discrimination and other employment-related matters. Together, NELA and its affiliates have more than 3,000 members nationwide. NELA and TENNELA members are committed to representing those who have been treated illegally in the workplace. They strive to protect individual workplace rights and support precedent-setting litigation affecting those rights. TENNELA maintains an active listserv, holds regular meetings, and conducts continuing legal education programs for employment law practitioners across the state. TENNELA lawyers litigate regularly in all courts across the state of Tennessee, as well as federal district and appellate courts, and the United States Supreme Court (where seminal employment cases such as *Crawford v. Metro. Govt. of Nashville and Davidson County, Tenn.*, 555 U.S. 271, 129 S. Ct. 846 (2009); *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 126 S. Ct. 2405 (2006); and *Harris v. Forklift Systems, Inc*., 510 U.S. 17, 114 S. Ct. 367 (1993), have been successfully litigated by TENNELA lawyers).

As part of fulfilling its mission to protect the interests of individual employees and assisting the lawyers who represent them, TENNELA has requested leave to file this amicus curiae brief urging the Court to reverse the decision of the Court of Appeals. This Court has permitted TENNELA to file amicus briefs in the following recent cases: *Perkins v. Metro. Gov't of Nashville*, 380 S.W.3d 73 (Tenn. 2012); *Webb v. Nashville Area Habitat for Humanity, Inc*., 346 S.W.3d 422 (Tenn. 2011); *Sykes v. Chattanooga Housing Auth.*, 343 S.W.3d 18 (Tenn.

[1] www.tennela.org
[2] www.nela.org

2011); and *Kinsler v. Berkline, LLC*, 320 S.W.3d 796 (Tenn. 2010). The Sixth Circuit Court of Appeals has also permitted TENNELA to file an amicus brief. *See Bobo v. United Parcel Service, Inc*., 665 F.3d 741 (6th Cir. 2012).

In this case, the Court is being asked to consider whether the Tennessee Court of Appeals erred in holding that the Governmental Tort Liability Act, Tenn. Code Ann. § 29-20-101, *et seq*. (GTLA), applies to claims brought against municipalities pursuant to the Tennessee Human Rights Act, Tenn. Code Ann. § 4-21-101, *et seq*. (THRA), thereby restricting those claims to non-jury trials in circuit court. Resolution of this issue is critically important to TENNELA lawyers and individuals engaged in employment litigation against governmental employers because the current decision imposes major changes while lacking clarity. These changes include such elemental aspects of litigation as the proper venue for bringing claims, the identity of the ultimate decision-maker, the amount in controversy, and the availability of attorneys' fees and other types of damages. Without this Court's definitive resolution of this case, it is unclear what law applies to THRA claims, and potentially other statutory claims, brought against governmental employers. As such, the resolution of the legal issues in this case will have a significant impact on governmental employees in Tennessee and the practices of TENNELA members who represent them.

II. ISSUE PRESENTED FOR REVIEW

Does the Governmental Tort Liability Act (GTLA) apply to claims brought under the Tennessee Human Rights Act (THRA)?

III. SUMMARY OF ARGUMENT

In holding that provisions of the Governmental Tort Liability Act apply to cases brought against municipalities under the Tennessee Human Rights Act, the Court of Appeals reached a conclusion that runs counter to statutory intent and decades of case law both within and outside of Tennessee. THRA claims are not the sort of negligent tort claims to which the Legislature intended the GTLA to apply. THRA claims are not "brought under" the GTLA; rather the THRA is an independent statutory waiver of governmental immunity separate from, and not tethered to, the GTLA.

In ruling that the GTLA is generally applicable to any claim brought against a governmental entity, the Court of Appeals' decision has created much uncertainty concerning important questions of employment law. These include fundamental issues of jurisdiction, whether the right to trial by jury exists, and whether the THRA and other statutes are subordinate to, or separate from, the GTLA. The Court of Appeals' holding is exceptionally broad but unsupported by any substantial or appropriate legal analysis. It was reached through a misconstruction of case law and was largely based on an unpublished opinion that is itself clearly erroneous.

The THRA grants an independent right to file a civil action with a jury trial in chancery or circuit Court. The GTLA's provisions restricting cases to non-jury trials in circuit court simply do not apply to cases brought under the THRA. For these reasons, TENNELA requests

that this Court overturn the decision of the Court of Appeals and preserve the THRA's status as an independent body of law.

IV. ARGUMENT

A. The THRA's Immunity Waiver is Independent of, and Separate from, the GTLA

1. THRA claims are not "brought under" the GTLA.

The GTLA provision at issue in this case states that "[t]he circuit courts shall have exclusive original jurisdiction over any action ***brought under this chapter*** and shall hear and decide such suits without the intervention of a jury . . . ." Tenn. Code Ann. § 29-20-307 (emphasis added). As shown below, the Court of Appeals erred in holding that a claim enabled by and brought under the THRA was "brought under" the GTLA.

The GTLA was enacted in 1973, five years before the THRA was passed. It codified the general principle of sovereign immunity but enumerated specific types of claims for which it was waiving the immunity of governmental entities. *Cruse v. City of Columbia*, 922 S.W.2d 492, 496 (Tenn. 1996). In particular, the GTLA addresses specifically enumerated *negligent* acts and omissions of governmental employees. *See* Tenn. Code Ann. §§ 29-20-202-205.[3] The GTLA enumerated other types of claims for which it did *not* waive immunity, including "civil rights" claims. *See* Tenn. Code Ann. § 29-20-205.[4]

[3] Claims allowed under the GTLA are categorized into four narrow groups that cover injuries to person or property caused by such things as negligent operation of motor vehicles, defective or unsafe public streets and structures, and negligent acts of employees within the scope of their employment. Tenn. Code Ann. §§ 29-20-202-205

[4] "Immunity from suit of all governmental entities is removed for injury proximately caused by a negligent act or omission of any employee within the scope of his employment *except if the injury arises out of* . . . (2) False imprisonment . . . false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of

When a claimant asserts one of the GTLA's enumerated claims against a governmental entity, the statute details the procedure to be followed. Tenn. Code Ann. §§ 29-20-304-313. It is only when a plaintiff proceeds under these enumerated tort categories that he or she must do so "in strict compliance" with the GTLA. *See* Tenn. Code Ann. § 29-20-201(c) ("When immunity is removed *by this chapter* any claim for damages must be brought in strict compliance with the terms of this chapter.") (emphasis added); *Flowers v. Dyer County*, 830 S.W.2d 51, 53 (Tenn. 1992).

Although the GTLA has been described as providing "a comprehensive scheme for tort actions against governmental entities," courts have held that the GTLA does not apply to all claims against governmental entities. *Cruse,* 22 S.W.2d at 496. In other words, not all claims against governmental entities must be "brought under" the GTLA. *See J.S. Haren Co. v. City of Cleveland*, E2002-01327-COA-R3CV, 2003 WL 2127662 (Tenn. Ct. App. May 30, 2003) (no application to appeal filed) ("It is clear that not all claims against governmental entities are covered by the GTLA."). In particular, the GTLA "leaves significant areas of activities either protected by immunity or subject to *independent* bodies of law." *Jenkins v. Loudon County*, 73 S.W.2d 603, 608 (Tenn. 1987) (emphasis added).

The Tennessee Human Rights Act is one such "independent body of law" that exists outside the GTLA universe. *See Eason v. Memphis Light, Gas & Water Div.*, 866 S.W.2d 952, 955-56 (Tenn. Ct. App. 1993), *perm. app. denied* Oct. 25, 1993. ("The clear language from the Tennessee Human Rights Act evinces an unmistakable legislative intent to remove whatever

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mental anguish, invasion of right of privacy, or *civil rights*." *Id*. (emphasis added). Although the Legislature refused to remove immunity for injuries arising from civil rights claims at the time of the GTLA's passage, the GTLA clarifies that "[n]othing in this chapter shall be deemed to deprive any person of any cause of action or damages to which they are otherwise entitled arising under the federal Civil Rights Acts. . ." Tenn. Code Ann. § 29-20-103(c).

immunity a governmental entity may have under the Governmental Tort Liability Act."); *Rooks v. Chattanooga Elec. Power Bd.*, 738 F.Supp. 1163 (E.D. Tenn. 1990) ("[I]t appears that the Governmental Tort Liability Act does not immunize governmental entities from THRA claims in the first instance."). The THRA was enacted in 1978 to achieve the important public policy of "assur[ing] that Tennessee has appropriate legislation prohibiting discrimination in employment, public accommodations and housing" and "to provide for execution within Tennessee of the policies embodied in the federal Civil Rights Act of 1964, 1968 and 1972" and other federal civil rights acts. *Bredesen v. Tennessee Judicial Selection Comm'n*, 214 S.W.3d 419, 430 (Tenn. 2007). The THRA is a "comprehensive statutory scheme defining rights of persons protected, enumerating violations, and prescribing extensive remedies dealing with violations of the Act." *Roberson v. Univ. of Tennessee,* 1988 WL 74236, at *754 (Tenn. Ct. App. July 19, 1988) (no application to appeal filed).

The Legislature defined the term "employer" in the THRA to include "the state, or any political or civil subdivision thereof, and persons employing eight (8) or more persons within the state, or any person acting as an agent of an employer, directly or indirectly." Tenn. Code Ann. § 4-21-102(5). In so doing, it expressly waived the sovereign immunity that would have otherwise insulated governmental entities from defending against discrimination claims in court under state law. *Johnson v. S. Cent. Human Res. Agency*, 926 S.W.2d 951, 953 (Tenn. Ct. App. 1996); *see* Tenn. Const. Art. I, § 17 (Under Tennessee law, "[s]uits may be brought against the state in such manner and in such courts as the Legislature may by law direct.") Accordingly, this Court determined long ago that governmental entities are subject to suit under the THRA. *Sanders v. Lanier*, 968 S.W.2d 787 (Tenn. 1998) ("The THRA explicitly provides that the State may be liable for employment-related discrimination against an individual.")

It was not until after the Legislature passed the THRA that it waived immunity for discrimination claims under state law, thereby expressly allowing citizens to sue governmental entities for such claims. Tenn. Code Ann. § 4-21-102(4). Case law correctly recognizes that discrimination and tort claims are different types of legal claims. The GTLA has been held to apply only to certain types of negligent tort cases, while statutory discrimination claims, which are not otherwise actionable under common law, are excluded. In *Rooks*, for example, the federal district court held that GTLA immunity does not extend to governmental entities sued under the THRA because "[r]ace and age discrimination, which are actionable only by virtue of statutory fiat, are not really *torts qua torts.*" *Rooks*, 738 F.Supp. at 1163; *see also Hays v. Patton-Tully Transp*. Co., 844 F. Supp. 1221 (W.D. Tenn. 1993) (noting that "[s]exual harassment has never been a common law tort; as a cause of action, it is a statutory creation.")

Moreover, non-statutory claims that do not fall within the GTLA's negligent tort categories are not considered "brought under" the GTLA either. For example, in *Simpson v. Sumner County*, 669 S.W.2d 657 (Tenn. Ct. App. 1983), the court held that the GTLA applies only to tort claims and, thus, did not apply to a claim that was better classified as a claim for breach of contract. Indeed, not even all common law torts are encompassed by the GTLA, as courts have held that the Act generally only applies to *negligent* torts. *See Jenkins*, 736 S.W.2d at 608-09 ("the general scope of the GTLA does not by its express terms encompass every tortuous act or omission by governmental entities or employees.") Of particular significance, Tennessee courts have held that common law retaliatory discharge claims are not claims for "negligent acts or omissions," and, therefore, the government has not waived its immunity for injuries resulting from these claims under the GTLA. *Baines v. Wilson Cnty.*, 86 S.W.3d 575, 579-80 (Tenn. Ct. App. 2002) (citing *Montgomery v. Mayor of the City of Covington*, 778

S.W.2d 444, 445 (Tenn. Ct. App. 1989), and *Williams v. Williamson County Bd. of Educ.*, 890 S.W.2d 788, 790 (Tenn.Ct.App.1994)). THRA discrimination claims, like common-law retaliatory discharge claims, are not claims that stem from negligence; therefore, they are not "brought under," and are outside the scope of, the GTLA.

The words "brought under" used in the GTLA matter. Statutes are to be construed in order "'to ascertain and give effect to' the legislative purpose and intent without unduly restricting or expanding a statute's coverage beyond its scope." *Limbaugh v. Coffee Med. Ctr.*, 59 S.W.3d 73, 83 (Tenn. 2001) (quoting *Mooney v. Sneed*, 30 S.W.3d 304, 305 (Tenn. 2000)). To this end, courts must look to "the natural and ordinary meaning of the statutory language" in order to ascertain legislative intent. *Id.* Applying these principles to the present case, it is clear that discrimination claims brought under the THRA do not fit within the categories of tort claims for which the Legislature waived immunity through the GTLA. Rather, the THRA provides a separate and independent waiver of governmental immunity. In other words, a suit alleging discrimination against a municipal employer is not enabled by the GTLA; it is enabled by the THRA. *See Webster v. Tennessee Bd. of Regents*, 902 S.W.2d 412, 415 (Tenn. Ct. App. 1995) (stating that "suits against the State of Tennessee can only be brought in strict compliance with an enabling statute"). This is why, prior to the Court of Appeals' decision in this case, the courts had determined, and practitioners understood, that because the THRA is a separate statutory waiver of sovereign immunity, the GTLA was inapplicable to it. *See, e.g., Sanders*, 968 S.W.2d 787 (holding that municipality was not immune from suit under THRA and allowing case to proceed to chancery court); *Johnson*, 926 S.W.2d 951 (analyzing jurisdictional issues of GTLA claim separately from THRA claim).

A reasonable reading of both the THRA and GTLA, and case law interpreting them, does

not support the holding that a claim enabled by and brought under the THRA was brought under the GTLA,[5] and thus the Court of Appeals' decision should be reversed.

2. The procedural provisions of the GTLA do not extend to non-GTLA claims.

In a variety of cases, state and federal courts in Tennessee have held that GTLA-mandated procedures do not apply to claims which are not brought under that Act. In fact, the precise issue in this case—application of GTLA's non-jury and jurisdictional provisions to the THRA—has been rejected by the United States District Court for the Middle District of Tennessee. *Lee v. Maury County*, No. 1-10-0051, (M.D. Tenn. Mar. 29, 2011). In *Lee*, the court correctly held that THRA claims are not like the tort claims to which the GTLA applies; rather, they are claims enabled by a separate statute. *Id*.

Other courts have done likewise in other contexts. This Court refused to apply the GTLA's one-year statute of limitations to a suit brought under a different statute, holding that a property damage claim under Tenn. Code Ann. § 40-17-118 fell outside the scope of the GTLA. *Cruse,* 922 S.W.2d at 497. The Court held that the appropriate statute of limitations was the one applicable to conversion claims, not the GTLA's limitations period for negligence claims. *Id.* The Court reasoned:

> Because the defendant's immunity from suit has been removed by a statute independent of the GTLA and plaintiff's suit is based on that independent statute, we conclude that the statute of limitations provided in the GTLA for

[5] There is no conflict between the THRA and the GTLA because those two statutes involve separate waivers of sovereign immunity that apply to different types of actions. Even if there were a conflict between the two, however, Tenn. Code Ann. § 1-3-103 should be applied so that "provisions of each title or chapter shall prevail as to all matters and questions growing out of the subject matter of that title or chapter." *Id*. This would mean that, in an employment discrimination case like this one, the provisions of the THRA, which expressly deal with that subject matter, should prevail. *See also Jenkins v. Loudon Cnty.*, 736 S.W.2d 603, 607 (Tenn. 1987).

> circumstances in which immunity "has been removed as provided for in [that] chapter" does not apply.

Id. Notably, this was true even though the enabling statute itself did not specify a statute of limitations. *Id; see also J.S. Haren Co.*, 2003 WL 21276662, at *5-7 (following holding of *Cruse* to conclude that independent statutory cause of action against utilities providers, including government, that created its own remedies was not subject to GTLA statute of limitations).

Similarly, in *Best v. Blount Mem'l Hospital*, 195 F. Supp. 2d 1034 (E.D. Tenn. 2001), the court refused to apply the GTLA's cap on damages to THRA claims, citing *Rooks* for the proposition that the GTLA "does not shield covered entities from liability based on age discrimination." *Id.* at 1044-45.

In *Pate v. City of Martin*, 586 S.W.2d 834, 836 (Tenn. Ct. App. 1979), the Court of Appeals concluded that an abatement claim against a municipality fell outside the GTLA and, therefore, was not subject to the GTLA's provision of exclusive circuit court jurisdiction. *Id.*

Cases involving the Claims Commission Act, Tenn. Code Ann. § 9-9-301, *et seq*. (CCA) are also instructive. The CCA governs suits against the state generally and, similar to the GTLA, includes its own procedural and jurisdictional requirements. Nevertheless, the Tennessee Court of Appeals has held that chancery courts have subject matter jurisdiction over THRA claims against the state, despite the CCA's provision granting exclusive jurisdiction to the Tennessee Claims Commission. *Familoni v. The Univ. of Memphis*, W2004-02077-COAR-R3-CV, 2005 WL 2077660 (Tenn. Ct. App. Aug. 29, 2005) (no application to appeal filed); *Roberson*, 1988 WL 74236 (also noting that the remedies available pursuant to the THRA are broader than those available under the CCA).

The Court of Appeals' decision in the present case, holding that the procedure outlined in the GTLA applies to THRA claims brought against a municipality, is not supported by the vast

majority of case law in this state. If not reversed, it will drastically change the manner in which THRA and other statutory claims against governmental entities are litigated and will blur the lines between GTLA claims and independent statutory claims against governmental entities.

3. Other jurisdictions hold that discrimination statutes are independent of governmental tort liability statutes.

Other states have likewise refused to apply governmental tort liability restrictions to claims brought under their state human rights laws. For example, in *DeRoche v. Massachusetts Comm'n Against Discrimination,* 447 Mass 1, 848 N.E.2d 1197 (Mass. 2006), the lower court, relying on a provision of the Massachusetts Tort Claims Act, refused to grant a plaintiff interest on his award against a governmental employer in a state civil rights law action. The Supreme Judicial Court reversed, holding that, although the civil rights statute did not definitively extend its damages provision to governmental defendants, the fact that the statute includes the government as a "person" and "employer" led to the inevitable conclusion that the civil rights statute's damages provisions—which includes interest—applies to governmental defendants. *Id.* at 14, 1205-07 (noting that legislature "expressly waived sovereign immunity of the Commonwealth 'and all political subdivisions … thereof' by including them in the statutory definition of persons and employers"); *compare to Johnson*, 926 S.W.2d at 953 ("[T]he clear language from the THRA evinces an unmistakable legislative intent to remove whatever immunity a governmental entity may have under the Governmental Tort Liability Act and remove[] the immunity of the sovereign as though the sovereign was a private citizen."). *See also Bain v. Springfield*, 424 Mass. 758, 678 N.E.2d 155 (1997) (extending punitive damages to governmental defendants).

Courts elsewhere have similarly reasoned that the inclusion of the state and its subdivisions in those states' civil rights statutes constitutes a waiver of statutory immunity independent from tort liability claims acts. They thus have refused to extend provisions of their tort liability claims acts to discrimination claims. *See, e.g., Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 660 (Tex. 2008) (holding that suits under TCHRA—the Texas human rights act—are not brought under state tort claims act because the legislature separately created and consented to suit under the TCHRA); *Maggio v. Florida Dep't of Labor & Employment Sec.*, 899 So. 2d 1074, 1078 (Fla. 2005) (holding that the Florida Civil Rights Act "is a stand-alone statutory scheme specifically designed to address civil rights violations regardless of whether the State is a named defendant"); *Fuchilla v. Layman*, 109 N.J. 319 (N.J. 1988) ("Our reading of the history, purpose, and provisions of [the state tort claims act and state civil rights act] leads us to conclude that the Legislature did not intend that claims of discrimination be subjected to notice requirements of the [tort claims act].").

The court in *Luboyeski v. Hill*, 117 N.M. 380, 383-84, 872 P.2d 353, 356-57 (N.M. 1994), likewise held that the state's Tort Claims Act does not "override" the state's Human Rights Act and that governmental defendants are thus liable for damages under the Human Rights Act, including actual damages and attorney's fees. The court recognized that the language of the relevant provision of the Tort Claims Act explicitly applies only to "any tort *for which immunity has been waived under the Tort Claims Act*," and thus did not apply to Human Rights Act claims, which were brought pursuant to a separate waiver of sovereign immunity. *Id.* at 384, 872 P.2d at 357 (emphasis in original). The court also noted that "[t]he areas for which immunity is waived in the Tort Claims Act are quite specific." *Id.* at 383, 872 P.2d at 356. Similarly, in Tennessee, the areas for which immunity has been waived under the GTLA are

specific, do not include discrimination claims, and actually exclude civil rights claims. *See also City of Colorado Springs v. Conners*, 993 P.2d 1167 (Colo. 2000) (holding that that claims asserted under state civil rights statute were not tort claims pursuant to state's governmental tort liability statute, and that tort liability statute therefore neither provided immunity for those claims nor required compliance with its notice provisions).

The Oklahoma Supreme Court also distinguished between the types of claims addressed by the state's Governmental Tort Claims Act and its anti-discrimination statute, stating,

> We find it apparent … that the legislature intended the Governmental Tort Claims Act to apply to tort actions brought against the state or a political subdivision, whereas the Oklahoma Anti-Discrimination statutes were intended to provide redress for the types of discrimination embodied in the federal Civil Rights Act, even where the action is brought against the state or a political subdivision.

Duncan v. City of Nichols Hills, 913 P.2d 1303, 1308 (Okla. 1996); *see also Pellegrino v. State*, 63 P.3d 535, 538-39 (Okla. 2003) (holding that GTCA applies to a "tort claim" as defined by that Act). The court recognized the importance of upholding the purpose of the anti-discrimination law and not giving plaintiffs fewer rights under state law than they would have under federal civil rights laws. *Id.* at 1309-10.

The *Duncan* court further reasoned that the provisions of the anti-discrimination statute controlled because "[u]nder Oklahoma law, where there are two statutes, one of which is special and particular and clearly includes the matter in controversy, and where the special statute covering the subject prescribes different rules and procedures from those in the general statute, it will be held that the special statute applies to the subject matter, and the general statute does not." *Duncan*, 913 P.2d at 1310. This is consistent with prior pronouncements of this Court that "if a specific or special statute provides for a remedy and waiver of immunity for injuries that are expressly excluded from the operation of the GTLA, then those remedies would not be affected

by the GTLA...." *Jenkins v. Loudon County*, 736 S.W.2d 603, 608 (Tenn.1987) (stating also that the GTLA, by design, excludes intentional torts). The THRA is one such specific statute. *Roberson*, 1988 WL 74236, at *3 ("[I]t is clear that the Human Rights Act is a special statute with specific provisions and remedies relating to basic and fundamental rights.").

Such cases reflect a general trend in which courts treat statutory civil rights claims as separate from and untethered to governmental tort liability restrictions. This Court should embrace this trend by holding that claims brought under the THRA are not brought pursuant to the GTLA and, thus, are not subject to the procedural provisions of the GTLA.

B. The Court of Appeals Erred by Dismantling the Established Distinctions Between GTLA and non-GTLA Claims.

Unless this Court reverses the Court of Appeals' decision in this case and clarifies that THRA claims against governmental entities are not governed by the GTLA, there will be great uncertainty over how such claims are to proceed. The two statutory conflicts at issue in *Sneed*, trial by jury and jurisdiction, are just two examples of conflicts between the THRA and GTLA that will generate confusion among litigants, practitioners, and trial courts. Under the Court of Appeals' broad holding, anytime a provision of the THRA conflicts with a provision of the GTLA, the GTLA provision controls. This holding will significantly impact other procedural and substantive issues and will dismantle the way THRA claims against governments have been litigated for decades.

For example, in holding that discrimination claims under the THRA are akin to the tort claims covered under the GTLA, the Court of Appeals' ruling potentially upends prior case law holding that claims for damages under the THRA are not barred by the workers' compensation exclusive remedies provision. *Harman v. Moore's Quality Snack Foods, Inc*., 815 S.W.2d 519

(Tenn. Ct. App. 1991), *perm. app. denied* (holding workers' compensation exclusive remedy provision does not bar THRA claims or damages available thereunder); *Hays v. Patton-Tully Transp. Co.*, 844 F. Supp. 1221 (W.D. Tenn. 1993) (holding that sexual harassment is not a common law tort). This Court has previously held that "the THRA [and not the Worker's Compensation Law] is the appropriate avenue of relief for plaintiffs who suffer injuries as a result of sexual harassment." *Anderson v. Save-A-Lot, Ltd.*, 989 S.W.2d 277, 289-90 (Tenn. 1999), *reh'g denied*. The Court of Appeals' decision in the present case, however, would again blur the line between the type of harassment and discrimination that the THRA was designed to remedy and the type of tort injury that the Workers' Compensation Law was designed to remedy. This creates a quagmire of confusion despite the fact that these issues have already been litigated and seemingly determined by our courts.

Furthermore, to the extent that the lower court's decision allows for THRA claims against governmental entities, but only under the GTLA's procedural provisions, it makes unclear such elemental issues as whether the administrative process outlined in the THRA, and remedies allowed by it, would apply to claims against governmental entities. *See* Tenn. Code Ann. §§ 4-21-302 to 311 (outlining procedures for the filing of THRA claims with the Tennessee Human Rights Commission and determination of claims by the Commission). The lower court's opinion appears to preclude the Tennessee Human Rights Commission from exercising jurisdiction over any claim against a governmental entity. Also unclear would be the types of damages that would be available against a governmental employer under the THRA. The GTLA limits damages to the governmental entity's insurance coverage, Tenn. Code Ann. § 29-20-311, while the THRA allows monetary and equitable remedies, as well as injunctive relief, Tenn. Code Ann. § 4-21-306. *See Best v. Blount Mem'l Hosp*., 195 F.Supp. 2d 1034 (E.D. Tenn. 2001) (holding that the

GTLA's cap on damages does not apply to THRA claims). If not reversed by this Court, the Court of Appeals' decision will lead to increased litigation as the courts attempt, without much guidance, to answer such basic questions as what type of notice is required, whether the Human Rights Commission has any jurisdiction over governmental entities, and what types of damages are available to remedy illegal discrimination suffered by public employees.

The present case also threatens the availability of statutory attorney's fees for prevailing plaintiffs in civil rights actions against public employers. The THRA, like federal civil rights statutes, authorizes the award of reasonable attorney's fees and costs to a prevailing plaintiff. Tenn. Code Ann. § 4-21-306(a)(7). The United States Supreme Court has emphasized the importance of awarding attorney's fees to prevailing plaintiffs in civil rights cases in order to encourage attorneys to act as "private attorneys-general" vindicating the longstanding Congressional policy against discrimination. *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402, 88 S. Ct. 964, 966 (1968); *see also Riverside v. Rivera*, 477 U.S. 561, 574, 106 S.Ct. 2686, 2694, 91 L.Ed.2d 466 (1986) ("Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms.") The GTLA, however, has no provision allowing for an award of attorney's fees, and caps damages in general. Because the availability of statutory attorney's fees is essential for individual employees—who typically lack resources after having been terminated from their employment—to obtain adequate representation, governmental employees' rights are threatened by the prospect that attorney's fees will no longer be allowed in cases brought against their employers under the THRA.

Another significant issue created by the Court of Appeals' decision is whether federal courts will even continue to rule on THRA claims against governmental entities. Because

THRA claims are often brought in conjunction with federal claims, federal courts routinely exercise supplemental jurisdiction over them. The Court of Appeals' decision potentially removes THRA claims against governmental entities from the jurisdiction of federal courts, in contravention of the federal supplemental jurisdiction statute, thereby necessitating the filing of separate lawsuits in state and federal courts. In fact, TENNELA members report that governmental defendants have already mounted such challenges to federal court jurisdiction since the Court of Appeals' decision in this case. Such a result was surely never envisioned by the drafters of the THRA.

Moreover, the application of the GTLA's more restrictive provisions would contradict the THRA's stated purpose of providing for the execution of federal anti-discrimination policies, as well as safeguarding "*all* individuals within the state from discrimination because of race, creed, color, religion, sex, age or national origin in connection with employment . . . ." Tenn. Code Ann. § 4-21-101 (emphasis added). The federal statutes upon which the THRA is modeled apply equally to governmental and private actors. *Rooks*, 738 F. Supp. at 1163. Establishing two separate structures for pursuing discrimination claims in Tennessee—one for public employees and one for private employees—contradicts the spirit and intent of the THRA and the federal laws upon which it was based.

Unless the Court of Appeals' decisions is reversed, litigation will be unavoidable as courts debate whether, and to what extent, its reasoning extends to other claims against the government. In addition to THRA claims, TENNELA members are currently facing *Sneed*-related issues in cases involving the Tennessee Public Protection Act, Tenn. Code Ann. § 50-1-304, and the Public Employees Political Freedom Act, Tenn. Code Ann. § 8-50-603. Countless other statutes creating private rights of action against governmental entities, such as the

Tennessee Disability Act, Tenn. Code Ann. § 8-50-103, will also be affected.

In holding that the GTLA's procedural restrictions apply to THRA claims despite those claims not arising under the GTLA, the Court of Appeals interpreted the GTLA in a manner that is not consistent with the language or intent of either statute. This erroneous holding has broad implications affecting important legal and policy issues, while also creating confusion and uncertainty for litigants, practitioners, and courts. It strips rights away from a quarter million public employees in Tennessee.[6] Accordingly, this Court should reverse the ruling of the Court of Appeals to ensure that the standards, procedures, and substantive principles of the THRA and other independent waivers of sovereign immunity remain separate from the GTLA.

C. The Court of Appeal Misconstrued the Law and Erroneously Relied on *Young v. Davis*[7] to Hold that the GTLA is Applicable to Any Claims Against Governmental Entities

Despite its broad reach, the Court of Appeals' decision contains surprisingly little analysis. Very few of the authorities cited above were addressed by the court at all. Moreover, the cases on which it relied do not undercut the weight of authority leading to the conclusion that the GTLA is not applicable to THRA claims.[8]

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[6] The U.S. Census Bureau states that in 2011, local governments in Tennessee employed 226,444 full-time employees and 40,347 part-time employees. 2011 Public Employment and Payroll Data, Local Governments, Tennessee, *available at* http://www2.census.gov/govs/apes/11loctn.txt (last visited August 22, 2013).

[7] *See Young v. Gary Davis et al.*, No. E2008-01974-COA-R3-CV, 2009 WL 3518162 (Tenn. Ct. App. Oct. 30, 2009) (no application to appeal filed).

[8] The Court of Appeals also failed adequately to distinguish this Court's recent decision in *Cunningham v. Williamson County Hosp. Dist.*, 405 S.W.3d 41 (Tenn. 2013), which was heavily relied upon by the Appellee City of Red Bank. In *Cunningham*, this Court held that a provision in the Tennessee Medical Malpractice Act (amended in 2012 to be renamed the Healthcare Liability Act), Tenn. Code Ann. § 29-26-101 *et seq.*, extending the statute of limitations for medical malpractice claims, does not apply to claims brought against governmental entities under the GTLA. On its face, however, the *Cunningham* decision is clearly distinguishable from

1. *Young v. Davis* is not persuasive authority and should be rejected by this Court

The Court of Appeals relied on an anomalous, unpublished decision holding that claims brought against governmental entities pursuant to the Tennessee Public Protection Act (TPPA), Tenn. Code Ann. § 50-1-304, must be brought in compliance with the GTLA. *Young v. Davis*, 2009 WL 3518162, at 7 (Tenn. Ct. App. 2009) (no application to appeal filed). TENNELA respectfully suggests that the reasoning in *Young* is errant for many of the same reasons that the Court of Appeals erred in the present case.

Young involved an issue similar to that presented in this case. Instead of the THRA, however, the issue in *Young* was whether a TPPA claim against a governmental entity can be brought in chancery court when the GTLA grants exclusive jurisdiction to the circuit courts. The *Young* court concluded, incorrectly amicus submits, that the GTLA controlled and vested exclusive jurisdiction in circuit court. *Id.* at 5-6.

Just like the THRA, the TPPA contains its own waiver of sovereign immunity that makes the GTLA irrelevant. Therefore, the TPPA is not subordinate to the GTLA. Moreover, the *Young* decision was reached through a misinterpretation of case law holding that statutes permitting the re-filing or tolling of claims outside the normal statute of limitations period generally do not apply to suits against governmental entities without explicit legislative mandate

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the present case because the plaintiffs in that case indisputably brought their suit pursuant to the GTLA. Medical malpractice claims against governmental entities have *always* fallen squarely within the explicit terms of the GTLA, and it was only in 2011, after *Cunningham* was filed, that the TMMA was extended to create a private cause of action against governmental entities for medical malpractice. *Sneed*, slip copy, 2013 WL 3326133, at 4. Therefore, at the time the plaintiffs in *Cunningham* filed suit in 2010, they did so under the GTLA, not under the TMMA. Claims under the THRA, on the other hand, do not fall within the parameters of the GTLA; thus, a similar conflict does not exist in the present case, and the GTLA does not override THRA provisions.

making them applicable. In particular, the *Young* court focused on *Farmer v. Tennessee Dept. of Safety*, 228 S.W.3d 96 (Tenn. Ct. App. 2007), a case holding that TPPA claims could not be extended beyond the applicable statute of limitations by the "saving" statutes found in Tenn. Code Ann. §§ 28-1-105 or 28-1-115 (2000). From this holding, the *Young* court concluded that "sovereign immunity as codified in the GTLA sets parameters applicable to Public Protection Act claims." *Young*, 2009 WL 3518162, at 7. However, *Farmer* states no such thing. The issue in *Farmer* was not whether the GTLA applied to TPPA claims; rather, it was whether the principle of sovereign immunity permits saving statutes to be applied to governmental entities without an express mandate.

In *Webster v. Tennessee Bd. of Regents*, 902 S.W.2d 412 (Tenn. Ct. App. 1995), the Court of Appeals addressed the same issue as it relates to THRA claims. The court held that because the doctrine of sovereign immunity only permits suits against the government that are brought in strict compliance with an enabling statute, and because it was the saving statute that would enable suit to be brought against the defendant, the saving statute could not be applied to a claim against the government without an explicit mandate contained therein. *Id.* at 414-15. *Webster* does not cite to or reference the GTLA at all.

In a similar case, a different panel of the Court of Appeals further explained the reasoning behind not applying a saving statute to claims against governmental entities brought under the THRA:

> The legislature granted Plaintiff a right to sue by statute in the THRA. The THRA, as amended, specifically provides a limited time within which she must exercise that right. Plaintiff did not file her second complaint within the applicable limitations period and, as a result, lost the right to bring her action. Absent an express, clear, and unmistakable intent to the contrary, the saving statute cannot be used to extend the period within which to file suit against the County under the THRA.

Whitmore v. Shelby Cnty. Govt., No. W2010-01890-COA-R3-CV, 2011 WL 3558285, at *7 (Tenn. Ct. App. Aug. 15, 2011) (no application to appeal filed). While this may mean that governmental employers are treated differently than private employers with respect to the application of a saving statute, it in no way supports a rule that the GTLA sets the procedural parameters of non-GTLA cases involving governmental entities, as the *Young* and *Sneed* courts concluded. In fact, the *Whitmore* court expressly distinguished the plaintiff's claims under the THRA from other claims that ***did*** arise under the GTLA, stating: "Plaintiff's cause of action for discrimination in violation of the THRA, however, arose pursuant to the express provision of that statute [the THRA]. . . . We must therefore consider whether separate provisions of the THRA demonstrate an intent to waive the State's sovereign immunity as to those causes of action." *Id.* at *4. The court determined that the trial court had erred by analyzing the THRA claims as if they were GTLA claims, although the court reached the same ultimate conclusion that the saving statute did not apply. *Id.*

The GTLA's irrelevance to non-tort statutory claims is further evidenced by a look at the history of the application of saving statutes to THRA claims. Prior to the *Webster* and *Whitmore* decisions, and prior to the amendment to the THRA to include its own statute of limitations, the Court of Appeals held that the saving statute contained in Tenn. Code Ann. § 28-1-105 ***did*** apply to extend the limitations period within which to file suits against governmental entities under the THRA. *Eason v. Memphis Light, Gas & Water Div.*, 866 S.W.2d 952 (Tenn. Ct. App. 1993). That court held that because the THRA at the relevant time did not include its own statute of limitations and because courts applied the general statute of limitations found in Tenn. Code Ann. § 28-3-104 to THRA claims against the government, the generally applicable saving statute

likewise applied to THRA claims. *Id.* at 954-56.[9] The court held that this applied equally to private and public employers. *Id.* at 955.

However, as *Whitmore* explained, after the THRA was amended in 1992 to include its own "internal" statute of limitations, courts were bound, under the doctrine of sovereign immunity, to strictly construe that limitations period as it applies to governmental entities. *Whitmore,* 2011 WL 3558285, at *7. The Legislature consented to waiving its immunity through the THRA, but not through the saving statute. Because the saving statute did not expressly apply to governmental entities, the courts in *Webster* and *Whitmore* declined to imply that it did or extend its reach to do so. Again, application of the GTLA was not at issue.

This Court has addressed the issue of the applicability of saving statutes to claims against the government, but only regarding claims brought under the GTLA itself. In *Lynn v. City of Jackson*, 63 S.W.3d 332, 337 (Tenn. 2001), the Court did not allow the application of a tolling statute because strict compliance with the GTLA's statute of limitations did not permit it, and the general tolling statute did not expressly apply to the State. Again, this reasoning does not support extending the reach of the GTLA to cases brought under other enabling statutes that expressly waive sovereign immunity. Rather, as the enabling statute, it is the THRA—or, as the case may be, the TPPA—that must be strictly construed in a suit enabled by it against a governmental entity.

The cases cited by *Young* do not support extending the reach of the GTLA to cases brought under other enabling statutes that expressly waive sovereign immunity. Rather, the *Young* decision contradicts the applicable authorities cited herein, and, as demonstrated by the

[9] Notably, the *Eason* court did *not* invoke the GTLA in determining the statute of limitations for a THRA action filed against a governmental entity, even though the THRA was silent as to the applicable statute of limitations.

Court of Appeals' reliance on it in this case, creates confusion regarding the scope of the GTLA. As such, this Court should take the present opportunity to reject the reasoning and holding of *Young* and hold that the GTLA does not apply to claims brought under the THRA, the TPPA, and other statutes that independently waive sovereign immunity and are not brought under the GTLA.

2. The Court of Appeals invented a false dichotomy between statutes that create a right of action exclusively against governmental actors and statutes that create a right of action against governmental and private actors

Confusingly, the Court of Appeals in this case also attempted to distinguish between statutes that create a private right of action exclusively against the government and statutes that are applicable to private actors as well as governmental ones. Regarding the latter, the Court concluded that procedural provisions of the GTLA apply to governmental actors, citing case law that it erroneously claims supports the proposition that "differentiating between a governmental entity and a private citizen is appropriate and necessary" due to sovereign immunity. *Sneed*, slip op. at 5-6 (citing *Whitmore*, 2011 WL 3558285.)

It is true that *Whitmore* and other cases (discussed in further detail above) have held that saving statutes should not be applied to claims brought against governmental entities unless the Legislature has expressly consented to the application. *See Whitmore*, 2011 WL 3558285, at 5-6. However, these cases do not stand for the proposition that general provisions of the GTLA may be imported to cases that arise *outside* the ambit of the GTLA. Nor is there any case law that supports the Court of Appeals' distinction between statutes creating private rights of action exclusively against the government and those that apply both to governmental and private actors.

Cf. J.S. Haren Co., 2003 WL 21276662 (refusing to apply provisions of GTLA to claim arising from a separate statute that applied to both governmental and non-governmental actors).

Under the Court of Appeals' reasoning, for the Legislature to effect its intent of making governmental actors liable under the THRA in the same capacity as private actors, it must either enact a completely separate law mirroring the THRA but only applicable to governmental entities, or it must specify each and every provision of the THRA which applies equally to governmental and private actors. Requiring this type of specificity, when the THRA expressly applies to governmental actors and the GTLA itself did not waive immunity for the types of actions enabled by the THRA, simply makes no sense.

D. The THRA Includes a Right to a Jury Trial in Chancery or Circuit Court

There is no dispute that the THRA includes an express right to file a civil action in chancery or circuit court. Tenn. Code Ann. § 4-21-311. Rather, the dispute regarding jurisdiction pertains to whether this provision of the THRA conflicts with the GTLA's grant of exclusive jurisdiction to circuit court, and, if so, whether the GTLA's provision is controlling. As detailed above, there is no conflict between these two acts because they are not both applicable to the same actions. Because this case was brought pursuant to the THRA, it is outside the scope of the GTLA, and therefore, the GTLA's provision simply does not apply.

Further, even though the THRA does not expressly reference a right to a jury trial in employment discrimination cases, the right to a jury trial is included in the THRA, and this applies equally to cases involving governmental and private employers. *Univ. of Tenn. of Chattanooga v. Karen Farrow*, No. E2000-02386-COA-R9-CV, 2001 WL 935467 (Tenn. Ct. App. August 16, 2001) (no application to appeal filed) (holding, in case against state entity, that

the right to trial by jury extends to THRA cases). This is because the law in Tennessee is that a statute includes a right to a jury trial unless that right is expressly exempted. *Smith County Educ. Ass'n v. Anderson*, 676 S.W.2d 328, 336-37 (Tenn. 1984). This Court has held that this rule takes effect even in cases involving governmental entities and even when the statute under which the claim was brought does not specifically address the availability of a jury trial. *Id.* (holding that Tenn. Code Ann. § 21-1-103 provides a broad right to jury trial in chancery court in case brought against governmental entity under Open Meetings Act). Moreover, this right extends to cases for which jury trials were not available under common law. *Id.* (discussing that common law did not make juries available in cases brought in equity whereas current Tennessee law does). Because of this rule, the right to a jury trial under the THRA preceded the right to a jury trial under the federal civil rights statutes. *Hannah v. Pitney Bowes, Inc.*, 739 F. Supp. 1131, 1133 (E.D. Tenn. 1989) (analyzing Tennessee law and concluding that THRA included a broad right to a jury trial, notwithstanding unavailability of jury trials under Title VII).

Moreover, legislative history reflects an intent to extend the right of a jury trial to THRA claims. The THRA was originally passed into law in 1978 and included a right to file a direct action in chancery court. This was just two years after Tenn. Code Ann. § 21-1-103 was amended to expressly include a right to a jury trial in chancery court. *See Smith Cnty Educ. Ass'n*, 676 S.W.2d at 336-37 (discussing history of § 21-1-103 and statutory right to jury trials in Tennessee). What is more, it also included the right to recover "actual damages," well before the federal Civil Rights Act was amended in 1991 to include a right to jury trial and a right to compensatory damages. *Cripps v. United Biscuit of Great Britain*, 732 F. Supp. 844, 846-47 (E.D. Tenn. 1989); *Hannah*, 739 F. Supp. at 1133. Under Tennessee law, it was within the province of juries to decide issues of material fact as well as actual damages, and courts

interpreted the inclusion of this language in the THRA as intent for a jury to decide on the issues of liability and damages. *Hannah*, 739 F. Supp. at 1133.

Over the past three decades, the THRA has been amended multiple times, including an amendment in 1996 to add a right to bring a direct action for employment discrimination in either chancery or circuit court. 1996 Tennessee Laws Pub. Ch. 777 (H.B. 1551). Audio recordings of legislative discussions during the passage of House Bill 1551 definitively demonstrate legislative intent to make jury trials available in THRA cases.[10] Moreover, the Legislature is presumed to have been aware of the state of the law, including that parties in Tennessee have a statutory right to a jury trial absent an express intent to exclude a cause of action from that right. *State v. Mixon*, 983 S.W.2d 661, 669 (Tenn. 1999) ("the Legislature is presumed to know the state of the law at the time it passes legislation"). The GTLA does expressly exclude a right to a jury trial; the THRA, however, does not and never has. Thus, since the present case was brought pursuant to the THRA, it includes a right to a jury trial in either chancery or circuit court.[11]

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[10] In introducing his bill for passage, Representative Rigsby explains that the bill will allow for claims to be filed in circuit court in addition to chancery court. Before the vote, Representative Turner asks, "Does this mean that there will be a jury trial?" to which Rep. Rigsby responds, "That's correct." The Speaker then asks for any additional discussion or objections, to which no one responds. A vote is then taken, with the bill passing by a vote of 97 to 0. Audio tape: H-87, side B, House of Representatives Session 5/24/95 discussing H.B. 1551 (on file at Office of Legislative History, Tennessee State Library and Archives) (log sheet attached).

[11] It may be tempting to argue that, like the saving statute at issue in *Webster* and *Whitmore*, because Tenn. Code Ann § 21-1-103 does not specifically apply to governmental entities, it does not give plaintiff a right to a jury trial in the present case. However, there are several distinctions between those cases and the present one, as discussed in Section C.2 above. First, it was only after the THRA was amended to include its own specific statute of limitations that courts held that the saving statute would not apply to governmental entities. *Eason*, 866 S.W.2d 952. This is because courts then became required to strictly construe that one-year limitations period in cases involving governmental entities. *Whitmore*, 2011 WL 3558285, at *6-7. Second, in those cases, the saving statute itself could be considered the "enabling statute," because absent application of the saving statute, suit against the defendants would be barred. *Webster*, 902 S.W.2d at 414-14.

A strict construction of the THRA—which is required when it is invoked against a governmental entity—supports, rather than negates, the right to a jury trial in all cases, whether they be brought against private or public entities. The Court of Appeals in this case held that, when the defendant happens to be a governmental entity, the provisions of the GTLA, not THRA, should be applied, thereby restricting THRA claims to non-jury trials in circuit court. That holding is erroneous. Statutory language and decades of case law simply do not support the proposition that the provisions of the GTLA should govern a case not even brought under that Act. Accordingly, this Court should reverse the Court of Appeals' erroneous decision.

Respectfully submitted,

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Third, the right to a jury trial is distinct from the right to the tolling or "saving" of a claim past its limitations period. Our courts have long held there to be a presumptive right to a trial by jury in cases against private and public defendants absent an express statutory exclusion of that right, *Smith*, 676 S.W.2d at 336-37, whereas they have refused to apply general saving statutes to the State absent the legislature's clear intent to apply the statute to suits brought against the State. *Whitmore*, 2011 WL 3558285, at *3.

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CERTIFICATE OF SERVICE

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APPENDIX: Index of Unpublished Authorities Cited in Brief (cases attached)

A. *Familoni v. The Univ. of Memphis*, W2004-02077-COAR-R3-CV, 2005 WL 2077660 (Tenn. Ct. App. Aug. 29, 2005) (no application to appeal filed);

B. *J.S. Haren Co. v. City of Cleveland*, E2002-01327-COA-R3CV, 2003 WL 2127662 (Tenn. Ct. App. May 30, 2003) (no application to appeal filed);

C. *Lee v. Maury County*, No. 1-10-0051, (M.D. Tenn. Mar. 29, 2011);

D. *Roberson v. Univ. of Tennessee*, C.A. 754, 1988 WL 74236 (Tenn. Ct. App. July 19, 1988) (no application to appeal filed);

E. *Sneed v. City of Red Bank*, slip copy, 2013 WL 3326133;

F. *Univ. of Tenn. of Chattanooga v. Karen Farrow*, No. E2000-02386-COA-R9-CV, 2001 WL 935467 (Tenn. Ct. App. August 16, 2001) (no application to appeal filed);

G. *Whitmore v. Shelby Cnty. Govt.*, No. W2010-01890-COA-R3-CV, 2011 WL 3558285 (Tenn. Ct. App. Aug. 15, 2011) (no application to appeal filed);

H. *Young v. Davis et al.*, No. E2008-01974-COA-R3-CV, 2009 WL 3518162 (Tenn. Ct. App. Oct. 30, 2009) (no application to appeal filed).

I. Log sheet: Audio tape: House of Representatives Session 5/24/95 discussing H.B. 1551 (on file at Office of Legislative History, Tennessee State Library and Archives).